BEFORE ARBITRATOR STANLEY H. MICHELSTETTER

In the Matter of the Arbitration of a Dispute Between

CITY OF SEATTLE,

And

SEATTLE POLICE OFFICERS' GUILD,

Appearances:

Vick, Julius, McClure. PS, Attorneys at Law, by Erica Shelley Nelson, appeared on behalf of the Guild.

Summit Law Group, PLLC, Attorneys at Law, by Michael Bolasina, appeared on behalf of the City.

ARBITRATION AWARD

Seattle Police Officers' Guild (herein "Guild") and the City of Seattle (herein "City") jointly requested the appointment of an arbitrator by the Washington Public Relations Commission (herein "PERC") from its panel of police arbitrators pursuant to RCW 41.58.070 to hear and decide the dispute specified below. PERC appointed the undersigned on May 19, 2022, as the arbitrator in this dispute. I held a hearing on May 15-19 and June 14-16, 2023, in Seattle, Washington. The parties each filed post-hearing briefs, the last of which was received October 7, 2023. The record was closed as of that date.

ISSUES

Did the City have just cause to terminate the employment of Officer M and Officer S? If not, what is the appropriate remedy?

FACTS

The City operates the largest police department in the Pacific Northwest. It has about 1,000 sworn police officers and 600 civilian employees. The Guild is the collective bargaining representative of the sworn police officers. The bargaining unit includes Officers M and S.

The City hired Officer S in December 2007. It hired Officer M in March 2015. Neither had prior relevant experience. Both officers were terminated for their use of lethal force that the City deemed outside of its policy in connection with an incident which occurred on October 8, 2017.

Both officers received their police training at the Washington State Criminal Justice Training Center. Their training included training about the Constitutional limits on the use of deadly force, the need to know and follow their departments' policies, and the proper handling of

various situations involving the potential use of force. That training and subsequent City-provided training involved "de-escalation" tactics to reduce the need for force when safe and feasible to use, by slowing down the tempo of confrontation, keeping their distance from suspects and cover (remaining shielded). Both were trained to handle "high-risk vehicle" stops. High-risk vehicle stops are conducted for fleeing vehicles, stolen vehicles, or occupants who had committed felonies. The high-risk vehicle stop training involved scenarios which were designed for the most common situations. The training for a high-risk vehicle stop involves using 4-6 officers to conduct the stop. The first squad on the scene conducts the stop. The passenger officer of that vehicle is ordinarily the officer in charge of the scene unless a senior officer decides to take command. The driver is ordinarily assigned to be the back-up officer. The first squad positions itself to provide the best view from behind of the stopped vehicle. The subjects of the training stop are all in the vehicle although not all may be visible to the officers of the first squad. One officer is assigned to use a long gun and all officers who arrive have their weapons drawn and at the ready. The officer in charge gives commands to the occupants first identifying themselves as police and to shut off the vehicle, etc. In each of the scenarios in the training they always successfully gained voluntary compliance from the subjects. The second squad provides back-up and suspect handling.[1]

The City is operating under a consent decree with U.S. Department of Justice which was entered July 27, 2012. That is discussed more below. The City has adopted policies more stringent than most departments' limiting the use of force, lethal force, and vehicle pursuits. The City provides initial and on-going training as to those policies and de-escalation, among other things.

As of 2017, the City viewed Officer S as a good, if not outstanding, experienced police officer with much advanced training. She had no prior discipline.

As of 2017, the City recognized that Officer M was a good, but largely minimally experienced officer. He had no discipline for anything occurring prior to October 2017, but did have discipline for an incident occurring shortly before the incident in dispute, as discussed more below.

Officers M and V were assigned to a two-person squad car. They had worked together for about two years. The two had a good working relationship. They had planned and pre-

[1] References to hearing exhibit are marked either "City" or "Guild." Guild Ex. 11, p. 15959, et. seq,

assigned their roles in many situations for which they had been trained, including the high-risk vehicle stop. They were assigned to be relief squad for King and Queen Sectors.

Officers S and R had been assigned to the same squad. They had worked together for about six months. They worked well together.

Officers M and V were involved in an incident early morning on October 7th with the vehicle involved in the October 8th incident, a stolen 2017 Subaru Impreza (herein "Subaru"). Officer V was driving their squad car in the early morning hours of October 7th. They spotted the Subaru with a man standing next to it. It was parked near a Washington State facility where road maintenance equipment was stored. The man quickly entered the Subaru as they approached and drove off. They gave chase to the Subaru with lights and siren long enough to get the license plate number. They learned that the vehicle was stolen. They also returned to the scene and discovered damage to the fencing protecting the facility where the Subaru had been.

Both officers were disciplined by suspension for engaging in a pursuit but not reporting it in the Blue Team reporting system and for conducting an out-of-policy pursuit. Officer M's discipline was enhanced by an additional suspension day because his description of the incident was viewed as disingenuously minimizing the extent of the pursuit.

Turning to the incident which is the subject of this dispute, Citizen TM called the police department on October 8th at 7:28 p.m. to report suspicious activity in the alley behind his residence. He would remain on the line for most of the incident. He made the following relevant reports which were transmitted to officers enroute:

> 7:32 p.m.: There is a car parked in the alley facing the alley. Two males (one in front passenger seat and another in the rear were smoking from a glass pipe. The front passenger appeared to be loading or unloading a pistol.
>
> 7:33p.m.: The vehicle parked in the alley twenty minutes ago. After parking the vehicle, the driver left the alley. One of the passengers exited the vehicle with either a screwdriver or a knife.
>
> 7:37 p.m.: The caller said he hasn't seen the gun in 15 minutes and is not certain it was a gun. The passengers were wiping down the inside of the vehicle, pulled out, then backed into the same parking space.
>
> 7:39 p.m.: Dispatch identified the vehicle as having been stolen and having the license number of the Subaru chased the shift before.

7:40 p.m: Female under the hood working on the vehicle and driver smoking from a glass pipe.[2]

The four involved officers arrived at the start of their shift at 7:00 p.m. on October 8th. The shift started with roll call. The pursuit with the stolen Subaru the evening before was one topic.

Officers M and V left the roll call and went to their squad. Dispatch immediately contacted them as they left the station with the information from TM as of 7:32 p.m. The call was the highest priority call (priority 1) requiring driving to the scene with lights and sirens on. The dispatch was to a location in a sector neither officer had worked in or were familiar with. Officer V drove while Officer M used the squad's GPS to direct Officer V. The GPS did not provide voice commands or directions.

Officers S and R went to their squad car after roll call as well. As they were leaving the station they were dispatched to back up Officers M and [REDACTED]. Officers M and V heard the radio dispatch for the other two to back them up. Neither of them was familiar with the location in David Sector. Officer S drove while Officer [REDACTED] monitored the computer and navigated.

As noted, dispatch effectively informed all the officers that the vehicle was the Subaru stolen the night before. Officers M and V received that information with some surprise.

One of the elements of the high-risk traffic stop procedure is that officers engage in "hasty planning" to identify and plan for potential risks and includes communication among all officers to plan tactics. Officer M and V had a long-standing understanding that the driver would be the cover officer and the passenger would be the officer who had contact with the subjects. Officer M spent most of the time assisting Officer V in navigating. He may not have seen some of the dispatch updates on his computer screen. They decided to do a high-risk vehicle stop and Officer M stated he was going to use his rifle. Officers S and R had little discussion. Officer S considered taking her rifle but decided to use her hand-gun first. There was no discussion among the four officers about planning or tactics.

Officer M's squad entered the alley about two blocks away from the stolen car at about 7:40 p.m. Officer S pulled in behind him momentarily. They all turned off their red and blue lights. Officer M directed Officer V to go "lights up" which meant to activate a roof bright-light

[2] City Ex. 22

bar. That would light the scene and would prevent the suspects from seeing the officers as they stood by their squad doors. They did this as they arrived at the scene.

There was a third squad nearby that radioed they were available to help as they started moving in the alley. Officer S radioed that they were looking for the subject vehicle. They had no further communication.

Officers M and V reached the suspect's vehicle at about 7:42 pm. The entire incident lasted less than a minute. The firing of rounds being fired from first to last was about 8.4 seconds.[3] There were vehicles parked on both sides of the alley facing or backed in toward the sides. This narrowed the scene so that a second vehicle could only park behind the first squad. Officer S and Officer R arrived shortly thereafter. Officer R's door was blocked. She only could participate as a distant back up by the time she freed herself.

As they reached the scene, there was a pedestrian walking on the side opposite the Subaru. Officer V told him to: "Get out of the way, sir." As they arrived, they saw the Subaru backed into the stall. Its back was toward a wall behind the line of parked cars. The wall was about waist high. The vehicle to the driver's side of the Subaru was a Blue Mazda pick-up truck with a windowed bedcap facing toward the wall. The back of the Mazda extended slightly past the front of the Subaru. A woman was standing in front of the Subaru with its hood up. The Subaru gave the appearance of being immobilized.

Officer V parked back from the Subaru, canted about 20 degrees from the center line of the alley toward the vehicle. This was about all the passageway allowed. It blocked other vehicles from transiting the alley. Officers V and M exited their vehicle and positioned themselves behind their respective doors for cover with firearms at the ready. As they were doing so, the woman glanced in their direction and walked along the driver's side of the vehicle. She left the hood open. A man ran up from the driver's side and slammed the hood shut and ran back along the driver's side.

Both Officers were apparently positioned by their respective doors at that time. They both shouted to the effect; "Seattle Police, get on the ground." Officer M testified that he was concerned about a potential ambush. Officer M moved from behind his door toward the back of the row of parked cars with his rifle ready. He shouted to Officer [REDACTED] twice: "Pull the car." Officer M ran along the back of the row the of the parked cars and, again, shouted

[3] City ex. 34, p. 19

"Seattle Police." He did not directly look between the parked cars. He stopped and appeared to "pie" around corner of the Mazda next to the Subaru.[4] He quickly moved in front of the Subaru at the driver's side front fender. He pointed his rifle directly at the driver.

When Officer M shouted to Officer V to "pull the car" Officer V turned back toward the squad. Officer S had left her car and came up as he did this. He told her to cover Officer M. Eventually Officer V changed his mind and turned back toward Officer M a few steps behind Officer S.

Officer M could not see the driver's hands even though he was in front of the Subaru. He side-stepped to his left to get in moved toward the center of the front of the Subaru. He testified that he then heard the driver start the vehicle. He shouted, "Seattle police."

The driver put the car in gear and lurched straight forward. The driver then accelerated at full speed while turning fully hard right. Officer M put his left hand on the hood with the rifle aimed at the driver. He backstepped. Officer S reached the driver's side of the Subaru at the same time. Officer V was directly behind Officer S. Officer M stepped back from the accelerating Subaru to about a third of the way toward the row of parked cars on the other side. Both began firing at this time.[5] Office S may have been first. Her first round went into the driver's side window or mirror at about a 50-degree angle. Officer M's first round went into the driver's side mirror. The grouping of the rounds suggests that Officer S fired five rounds in the first volley. The effect of turning caused rounds successively being fired from beside the Subaru at the driver until the last were toward its back. The first volley lasted 2.432 seconds.[6] The Subaru kept turning to the right toward leaving the alley. However, the driver turned too far to the right and struck the building to the right making about a 20-degree angle with the building. Both Officers stopped shooting shortly before it hit the wall.

Officer S's stated reason for firing at the Subaru was that she believed Officer M had been run over by the Subaru and was either under it or was seriously injured and immobilized on the ground. She did not perceive seeing him again until after all firing ceased.

The Subaru struck the wall with its right front fender at a 20-degree angle. Officer M was three-fourths the way to the other side of the alley at a 45-degree angle to the driver's side

[4] Officers facing a potential threat around a corner protect themselves by moving around the corner a few degrees at a time until it is safe to go around the corner. This is called "pieing."
[5] The firing breaks into two separate volleys of fire. This volley is termed "Volley 1" for convenience.
[6] City ex. 34, p. 19

door. He was moving toward being parallel with the driver's side door. Officer S was directly behind the Subaru's passenger side taillight and about 15 feet behind. Officer M shouted: "get on the ground" just before it hit the wall. It moved back slightly. Officer M continued to move toward being parallel with the driver's side door. Officer S sidestepped to being under the cover of the wall and adjusted her position to move up to being covered at the corner of the wall. The Subaru's break lights appeared to come on and then it drove forward at full acceleration, first veering to its left near the line of parked cars across the alley and then driving out the alley turning right on to Lynn Street.

Each officer began firing the second volley. It lasted for 2.209 seconds. All rounds were effectively fired toward the rear of the Subaru. Officer M testified that he believed he was behind the Subaru and in the line of its rearward travel should it have continued and that he feared for his life and that of others. He, also, testified that he continued firing because the escaping Subaru was an imminent danger to others in and around the alley and other officers and the public in general. He believed he had the driver in his sights and stopped firing when he no longer had a safe backdrop for firing. Officer S testified that she fired out of fear for her own life, her fear for Officer M whom she believed was either still underneath the Subaru or disabled on the ground in the rearward path of the Subaru. She also testified that the departing Subaru was an imminent threat to others nearby and also to the public at large. She testified she had a line of sight directly to the driver and that she stopped firing when she no longer had a proper backdrop. Officer M fired his rifle 15-16 times for both volleys. Officer S fired her handgun 11 times.

As of the time of this dispute, the City following the requirements of the consent decree adopted policies emphasizing de-escalation of situations to avoid the use of force, and policies as to the use of force, particularly lethal force, which were more restrictive than the Constitutional limits on use of force. It had implemented extensive training and re-training as to those policies. The City was required to establish effective police accountability mechanisms. One of the major changes that occurred over the years was in the way the City investigated, evaluated, and enforced discipline in use-of-force situations. The investigation system also created a system of process improvement such that it not only avoided future occurrences but pro-actively implemented changes. There processes are over seen by the Office of Police Accountability (herein "OPA").

The City's investigation system uses two expert teams to investigate officer-involved deadly force. All four officers returned to the scene to assist the Crime Scene Investigation unit (herein "CSI") to assist in locating physical evidence. Officers S and M were segregated from other officers and instructed not to communicate with any other officer about this incident per protocol. A second team of experienced investigators, the Force Investigation Team (herein "FIT"), also began a detailed investigation. OPA opened its investigation on October 10, 2017. The OPA's initial assessment was that the disputed actions were likely to be out of policy and possibly a criminal violation. OPA referred the matter to the District Attorney as to potential criminality. OPA formerly classified this as an investigation on November 8, 2017.

The occupants abandoned the Subaru. It was recovered by investigators. On October 13, 2017, the driver and his mother were arrested. On October 16, 2017, CSI issued its report. Investigators also referred both officers for potential criminal prosecution. On October 19, 2017, the District Attorney declined to prosecute.

On December 5, 2017, the driver was interviewed. He stated in relevant part that he was preparing to leave the alley when his mother, who had been the rear seat passenger, told him that one headlight was out. She went out to fix it. The police arrived and shone a light on them. He told her to get back into the car. He then went out and closed the hood. He moved the car forward a short distance to get the cop to move. He then turned the wheel hard right to get away. He said he did not have any intention to hurt anyone and would not hurt an officer. As he pulled away he heard the first shot. He immediately ducked down to the right of the steering wheel. He pulled the wheel unintentionally far to the right while accelerating and struck the wall. The momentum of the vehicle hitting the wall accidentally caused his body to move the gearshift to neutral. He had his foot on the brake after impact with the wall stopping the vehicle. The car went back. The officers stopped shooting. He put it in drive and turned the wheel left accelerating to go out of the alley. Officers started shooting again. He over-corrected to the left. He explained that he never intended to comply with officers' orders. He would not unless they held a gun to his head and there was no way of escape. He and his mother had warrants and their freedom was important to them.

On March 27, 2018, Director [REDACTED] issued the OPA report. He concluded that Officer M violated Police Manual Policy 8.100 (1)[7] by failing to pre-plan before approaching the

[7] Police Manual Policies will be referred to as just "Policy" hereafter.

suspects and by failing to de-escalate the situation. He concluded that both of Officer M's volleys violated Policies 8.200 (1), (4), and 8.300 POL-4 (8). He also concluded that he derivatively violated Policy 5.001. He concluded that Officer S's in her first volley acted in defense of Officer M and did not violate any policy. He concluded that she violated Policy 8.200 (1), (4), and Policy 8.300 POL-4 (8) with respect to her second volley. He also concluded that she derivatively violated Policy 5.001 with respect to the second volley.

Then Police Chief [REDACTED] held separate *Loudermill* hearings for both officers on June 15, 2018. On July 19, 2018, Chief [REDACTED] issued her decisions with respect to both officers affirming the findings of the OPA. Both officers were terminated on July 19, 2018.

The Guild properly appealed the discharges to this proceeding. More facts are stated in the discussion section below.

RELEVANT AGREEMENT PROVISIONS

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ARTICLE 3 - DISCIPLINARY COMPLAINT HEARING AND INTERNAL INVESTIGATION PROCEDURES

3.1 The parties agree that discipline is a command function, and that the Department may institute a disciplinary procedure. So much of said procedure that relates to the right of an employee to a hearing and the mechanics thereof are outlined in this Article; provided, however, that it is understood that if deemed appropriate by the Chief of the Department, discipline or discharge may be implemented immediately consistent with the employee's constitutional rights. Disciplinary action shall be for just cause.

In the case of an officer receiving a sustained complaint involving dishonesty in the course of the officer's official duties or relating to the administration of justice, a presumption of termination shall apply. For purposes of this presumption of termination the Department must prove dishonesty by clear and convincing evidence. Dishonesty is defined as intentionally providing false information, which the officer knows to be false, or intentionally providing incomplete responses to specific questions, regarding facts that are material to the investigation. Specific questions do not include general or 'catch-all' questions. For purposes of this Section dishonesty means more than mere inaccuracy or faulty memory.

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3.5 Hearing Procedures

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H. Disciplinary Review Board.

1. If a suspension, demotion, termination, or a transfer identified by the City as disciplinary in nature is challenged, the discipline may be challenged through the

Public Safety Civil Service Commission or through the Disciplinary Review Board (DRB), but not through both. A suspension, demotion, termination, or transfer identified by the City as disciplinary in nature cannot be challenged through the grievance procedure. If the Guild believes that a transfer not identified by the City as disciplinary in nature is in fact disciplinary, the Guild's challenge to the transfer shall be handled through the grievance procedure. The DRB shall determine whether the Chiefs disciplinary decision was for just cause and in compliance with this Agreement and, if not, what the remedy should be. Any issues related to an alleged violation of the collective bargaining agreement must be identified in writing to the Assistant City Attorney assigned the case and the Department's Human Resources Director no later than forty-five (45) days prior to the first day of the DRB.

2. The Guild shall have thirty (30) days after discipline is imposed to notify the City of its decision to appeal discipline to the DRB. This timeline may be extended by mutual written agreement of the parties.

3. The DRB shall be comprised of three (3) voting members. One member of the DRB shall be appointed by the City, and one member of the DRB shall be appointed by the Guild. The Guild appointee must be a member of the Guild's bargaining unit. The City's appointee shall hold at least the rank of Lieutenant.

4. The Chairperson of the DRB shall be selected from a pool of arbitrators agreed upon by the parties within 30 days after execution of the agreement. If the parties cannot agree on a pool of arbitrators, the chairperson shall be selected through the arbitrator selection process in the grievance procedure. By mutual agreement, the parties may make changes in the pool of arbitrators. While the chairperson does not have a continuous appointment, the chairperson may be selected by the parties to preside over more than one DRB appeal. The expenses of the Chairperson of the DRB shall be borne evenly by the parties.

5. Guild appointees to the DRB shall be on on-duty status during meetings of the Board and during necessary preparation for Board activities. Board members shall be assigned special duty status to perform necessary preparation for Board meetings. Guild members shall account for their time on a Departmental time sheet. Disputes as to compensation for Guild members serving on the Board shall be resolved by the Chairperson.

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9. The hearing before the DRB shall be recorded. If a transcript is requested by either party, that party shall bear the costs of producing the transcript for the Board Chairperson unless both parties wish to have a copy, in which case the costs of the transcription shall be evenly split by the parties. If neither party wishes that a transcript be prepared, but the Chairperson does, the parties shall evenly split the cost of the preparation of a transcript.

10. DRBs are not judicial tribunals, and any evidence pertinent to the issue may be presented. The Chairperson shall decide any question of procedure or acceptability of evidence, accepting any evidence which is reasonably relevant to the present charges. The Legal Advisor may be present. The DRB will consider the

investigation reports, statements and other documents, testimony of witnesses, and such other evidence as it deems appropriate. The Chairperson, at his/her discretion, may order the employee or any other member of the Department to appear, and shall issue subpoenas as necessary. The DRB may only consider evidence which was introduced during the hearing.

11. The decision of the DRB shall be rendered in writing no later than thirty (30) days following the conclusion of the hearing. The DRB's decision shall be final and binding, and additional appeals through the grievance process, or the Public Safety Civil Service Commission shall be foreclosed.

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APPENDIX A - GRIEVANCE PROCEDURE

A.1 Any dispute between the Employer and the Guild concerning the interpretation or claim of breach or violation of the express terms of this Agreement shall be deemed a grievance. Such a dispute shall be processed in accordance with this Article; provided that discipline in the form of a suspension, demotion, termination or transfer identified by the Employer as disciplinary in nature shall be subject to challenge through the process provided at Section 3.5 above. There shall be no change in the nature of any grievance after it is submitted at step 2 or above. Any disputes involving Public Safety Civil Service Commission Rules or Regulation shall not be subject to this Article unless covered by an express provision of this Agreement.

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RELEVANT DEPARTMENT POLICIES

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5.001 STANDARDS AND DUITES

5.001 POL

This policy is intended to provide the philosophy for employee conduct and professionalism. It is not the Departments intent to interfere with or constrain the freedoms, privacy, and liberties of employees; discipline will only be imposed where there is a connection between the conduct and the duties, rank, assignment, or responsibilities of the employee.

The Department encourages all employees to treat all people with dignity: remember that community care-taking is at times the focus, not always command and control; and that the guiding principle is to treat everyone with respect and courtesy, guarding against employing an officious or overbearing attitude and

refraining from language, demeanor, and actions that may result in the individual feeling belittled, ridiculed, or intimidated.

This section applies to all Department employees. The content is not all-inclusive. Employees must also comply with conduct expectations set forth in other manual sections pertaining to them.

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5. Employees May Use Discretion

Employees are authorized and expected to use discretion in a reasonable manner consistent with the mission of the Department and duties of their office and assignment.

The scope of discretion is proportional to the severity of the crime or public safety issue being addressed.

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8:100 – DE-ESCALATION

. When Safe under the Totality of the Circumstances and Time and Circumstances Permit, Officers Shall Use De-Escalation Tactics in Order to Reduce the Need for Force

De-escalation tactics and techniques are actions used by officers, when safe and without compromising law enforcement priorities. that seek to minimize the likelihood of the need to use force during an incident and increase the likelihood of voluntary compliance. (See Section 8.050.)

When safe and feasible under the totality of circumstances. officers shall attempt to slow down or stabilize the situation so that more time, options and resources are available for incident resolution. When time and circumstances reasonably permit, officers shall consider whether a subject's lack of compliance is a deliberate attempt to resist or an inability to comply based on factors including. but not limited to:

. . .

An officer's awareness of these possibilities, when time and circumstances reasonably permit, shall then be balanced against the facts of the incident facing

the offcer when deciding which tactical options are the most appropriate to bring the situation to a safe resolution.

Mitigating the immediacy of threat gives officers time to utilize extra resources, and increases time available to call more officers or specialty units.

The number of officers on scene may increase the available force options and may increase the ability to reduce the overall force used.

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8.200 – Using Force

1. Use of Force – When Authorized

An officer shall use only the force reasonable, necessary, and proportionate to effectively bring an incident or person under control, while protecting the lives of the officer or others.

in other words, Officers shall only use objectively reasonable force, proportional to the threat or urgency of the situation, when necessary, to achieve a law-enforcement objective. The force used must comply with federal and state law and Seattle Police Department policies, training, and rules for specific instruments and devices. Once it is safe to do so and the threat is contained, the force must stop.

When determining if the force was objectively reasonable, necessary and proportionate, and therefore authorized, the following guidelines will be applied:

Reasonable: The reasonableness of a particular use of force is based on the totality of circumstances known by the officer at the time of the use of force and weighs the actions of the officer against the rights of the subject, in light of the circumstances surrounding the event. It must be judged from the perspective of a reasonable offcer on the scene, rather than with the 20/20 vision of hindsight. Factors to be considered in determining the objective reasonableness of force include, but are not limited to:

- The seriousness of the crime or suspected offense;
- The level of threat or resistance presented by the subject;
- Whether the subject was posing an immediate threat to officers or a danger to the community;

- The potential for injury to citizens, officers or subjects;
- The risk or apparent attempt by the subject to escape;
- The conduct of the subject being confronted (as reasonably perceived by the offcer at the time);
- The time available to an officer to make a decision;
- The availability of other resources;
- The training and experience of the oficer:
- The proximity or access of weapons to tie subject;
- Officer versus subject factors such as age, size, relative strength, skill level. injury/exhaustion and number of officers versus subjects: and
- The environmental factors and/or other exigent circumstances.
- Whether the subject has any physical disability.

The assessment of reasonableness must allow for the fact that police offcers are often forced to make split-second decisions—in circumstances that are tense. uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation. The reasonableness inquiry in an excessive-force case is an objective one: whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.

Necessary: Officers will use physical force only when no reasonably effective altemative appears to exist, and only then to the degree which is reasonable to effect a lawful purpose,

Proportional: To be proportional, the level of force applied must reflect the totality of circumstances surrounding the situation at hand, including the nature and immediacy of any threats posed to offcers and others.. Officers must rely on training, experience, and assessment of the situation to decide an appropriate level of force to be applied. Reasonable and sound judgment will dictate the force option to be employed. Proportional force does not require oficers to use the same type or amount of force as the subject. The more immediate the threat and the more likely that the threat will result in death or serious physical injury, the greater the level of force that may be proportional, objectively reasonable, and necessary to counter it.

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4. **Use of Deadly Force**

officer or others is imminent A danger is imminent when an objectively reasonable officer would believe that:

- A suspect is acting or threatening to cause death or serious physical injury to the officer or others, and
- The suspect has the means or instrumentalities to do so, and
- The suspect has the opportunity and ability to use the means or instrumentalities to cause death or serious physical injury

See also Section 8.050 — Deadly Force

5. Deadly Force May Be Used to Prevent the Escape of a Fleeing Suspect Only When an Objectively Reasonable Officer Would Believe That it Is Necessary and That There is Probable Cause That:

- The suspect has committed or is in the process of committing a felony involving the infliction or threatened infliction of serious physical Injury or death; and
- The escape of the suspect would pose an imminent danger of death or serious physical injury to the officer or to another person unless the suspect is apprehended without delay; and
- The officer has given a verbal warning to the suspect, if time, safety, and circumstances permit.

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8.300 – USE OF FORCE TOOLS

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8.300-POL-4 Use of Force – FIREARMS

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8. Officers Shall Not Fire at or From a Moving Vehicle

Firearms shall not be discharged at a moving vehicle unless a person in the vehicle is immediately threatening the offcer or another person with deadly force by means other than the vehicle. The moving vehicle itself shall not presumptively constitute a threat that justifies an officer's use of deadly force.

An officer threatened by an oncoming vehicle shall, if feasible, move out of its path instead of discharging a firearm at it or any of its occupants.
Officers shall not discharge a firearm from a moving vehicle unless a person is immediately threatening the officer or another person with deadly force.
Note: It is understood that the policy in regards to discharging a firearm at or from a moving vehicle may not cover every situation that may arise. In all situations, Department members are expected to act with intelligence and exercise sound judgment, attending to the spirit of this policy and to the Department's use-of-force principles. Any deviations from the provisions of this policy shall be examined rigorously on a case-by-case basis. The involved officers must be able to articulate clearly the reasons for the use of deadly force.
Factors that may be considered include:

- Whether the officers life or the lives of others were in immediate peril
- And if there was no reasonable or apparent mean of escape

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POSITIONS OF THE PARTIES

City:

The City had just cause to discharge Officers M and S. The Agreement is silent on the burden of proof in most termination cases. The Agreement specifies a heightened burden of proof in cases involving dishonesty of clear and convincing. That the parties expressly bargained for a higher burden of proof in specific cases should be viewed as indicating that the ordinary "preponderance of the evidence" standard should apply in other cases. The rule of contract construction that the expression of one is the exclusion of the other should be applied to conclude that the burden of proof is the "preponderance" standard.

The City has met the seven tests for just cause. Arbitrators ordinarily apply the "Seven Tests of Just Cause" in discipline cases The City has demonstrated that both Officers had notice of the probable consequences of their conduct both from the City's policies and from their training.

Officer M was well aware of the City's de-escalation policy. The City enhanced its de-

escalation and use of force policies after the 2012 consent decree. These changes were the result of extensive work under the consent decree to reduce officer-involved violence. Every officer was aware of the techniques and that they were subject to discipline if they failed to use them when feasible. Both officers acknowledged their extensive training in the relevant policies and procedures. No one has challenged the reasonableness of the City's rules and policies.

The City adopted an extensive force review process after the consent decree, which involves extensive professional investigation and multiple levels of force review. Each officer was given multiple opportunities to explain their view of what happened. Each officer objected to the tone of the FIT and OPA interviews for the first time at the hearing.

The City has shown substantial evidence for its conclusions. Office M chose to disregard any effort to de-escalate because he was worried that following the policy would likely interfere with his intent to apprehend the driver who eluded him on the previous shift. What he should have done is remain at a distance and undercover while calling out the suspects. This caused an unnecessary deadly confrontation with the suspects.

The different determinations that Officer S was justified in using deadly force in Volley 1 while Officer M was not justified show how officers' different perceptions may lead to different conclusions. Office S believed that she was doing the only thing that would save Officer M's life, albeit she was in error. Officer M was disciplined because his reasonable perceptions were different than hers. He chose to jump out of the way and only began shooting at the Subaru when he knew he was standing beside it and then continued to do so as it was departing. Officer M's excuses of an emotional scene and delayed reaction do not carry sway. This is particularly true because of when he began to fire and the number of rounds.

Both Officers gave the same reason as their reason for firing the second volley despite having vastly different vantage points. Their stated reason that the Subaru posed a lethal threat to them while backing up was deemed not reasonable. The Subaru backed only a few inches before it drove away. Neither of them was behind the Subaru, and both were in positions where they were safe. They waited until the Subaru was driving away before they started to fire. Each switched their justification for shooting at the departing vehicle to protecting pedestrians and drivers on Seattle streets. The switch was deemed psychologically implausible given the compressed time frame. This was also inconsistent with the vehicle force policy. That only allows shooting at a departing vehicle when there is an "immediate" threat and does not allow

deadly force to be used against other potentially innocent occupants of a vehicle.

The Guild's argument in this case is the same as that it made in *Seatle v. Seattle Police Officers' Guild,* 17 Wn.App.2d 21, 484 P.3d 485 (2021). There the Guild argued that the officer therein only had two seconds to make the decision whether to use force and made the determination in a tense environment. The Court concluded the award reinstating the officer with a minor suspension was based on flawed reasoning. The officer created the two-second time window by punching the handcuffed suspect within two seconds rather than using shielding. The Court concluded that considering that circumstance as a mitigating factor in the context of using excessive force would be to condone the use of force when the job is to deal with difficult subjects without using force.

There are important distinctions. First, this case involves using deadly force and not merely punching a suspect. There were 27 shots to the side and rear of the car. The officer in the cited case knew who he was using force against. Here both officers did not know the involvement of the other people in the Subaru. Further, the officers created the circumstances that they acted on, which is the same. In that case, the Court concluded that the officer's refusal to accept responsibility could not be a mitigating factor. In this case, the City rightly considered the officers' refusal to accept responsibility as a factor in favor of termination. Without the realization that they engaged in misconduct, there is no reason to believe that they would behave differently.

There is no evidence that the City treated any other officers differently under similar circumstances. Failure to de-escalate is a more common finding against officers. It typically warrants lower-level discipline. However, here, there are other findings. It is rare for the City to find that officers have used deadly force outside policy. There is one case where an officer resigned rather than face termination. *Seattle, supra* supports that conclusion.

The discipline is consistent with the seriousness of the offense. Director [REDACTED] testified that this was the type of violation that is so severe that termination was the only appropriate remedy. Not only is this devastating for the family of the individuals, but it also tarnishes police relations with the public. While Officer M could be deemed more culpable than Officer S, Director [REDACTED] testified that Volley 2, alone, is grounds for termination. The fact that the Subaru came to a halt for four seconds was more than sufficient time to change their positions and refocus their attention. The arbitrator should defer to the extensive work of CSI,

FIT, FRB and OPA in upholding the Chief's final determination as to the penalty.

Guild:

The City did not have just cause to terminate either Officer M or Officer S. While just cause is an elastic concept, all agree it includes at least three elements. First, is that the grievant engaged in the alleged misconduct. The second is that the penalty was reasonable and appropriate under the circumstances. Third, the employer complied with all applicable procedural requirements. The City bears the burden of proof. The arbitrator should apply a heightened burden of proof of "clear and convincing."

The City has failed to prove that either officer violated the City's use of force policies or law. The use of force must be judged under the Fourth Amendment and the City's policies by the facts and circumstances from the standpoint of a reasonable police officer on the scene. The driver threatened Officer M with the Subaru when he tried to run him down. Similar to the situation in *Monzon v. City of Murieta*, 978 F.3d 1150 (9th Cir., 2020), both officers did not violate the driver's rights by using deadly force against him.

There was less than 30 seconds from the start of the incident and 8.4 seconds from firing the first round to the last round. The officers had little time to make decisions.

Officer M faced a deadly threat from the Subaru and acted to protect his own life when he fired his first volley. Both had probable cause to arrest the driver and probable cause to arrest the occupants for obstruction and accomplice liability. Both had reasonable suspicion to investigate the occupants for possession of a gun and narcotics. The driver posed an imminent danger to officers and to the general public. The suspect and occupants ignored law enforcement commands. Officer M had no alternative but to use deadly force. It was proportional to the threat of being struck by the vehicle. The City 's own witnesses were unsure if Officer M's first volley violated policy. The Guild's expert witness, Sgt. [REDACTED], testified that the time to process Officer M's decision to fire to actually executing it accounted for where his rounds actually went, and reaction time accounted for delay in stopping firing. The fact that Officer M had moved in front of the Subaru does not negate his right defend himself when the driver made his decision to try to run him down. Chief [REDACTED] testified that an officer might respond with deadly force against a vehicle with occupants if his or her life were in danger.

Officer M's second volley was also reasonable. The vehicle's back up-lights came on while imoved backwards. He reasonably feared for his own life and that of officers. If the driver had accelerated fully, he would have struck him and fellow officers. Officer M's use of deadly force was consistent with Policy 8.200(5) because the driver had committed a felony by trying to run him down, refused to obey commands, and posed an imminent danger of death or serious bodily injury if he were not apprehended. He did not violate Policy 8.300 POL 4 (8) by using force against a moving vehicle. The City's arguments that both his volleys violated that policy because it endangered the other occupants is without merit both because he aimed at the driver when he made the decision to use deadly force.

Officer S's second volley was consistent with the City's use of force policies for the following additional reasons. The City alleges there was no imminent threat to anyone. She believed that there was a high potential for injury to officers because she saw the back-up lights of the Subaru come on and feared that she was in danger from the backing Subaru and that Officer M was seriously injured and vulnerable to backing Subaru. The driver h*ad shown he would do anything to get away. He had shown that he had disregarded human life with the Subaru against Officer M. There was no other level of force that would have been effective to stop him. She did not violate Policy 8.300 POL 4 (8) because it provides the vehicle "shall not presumptively constitute a threat that justified the use of deadly force." Here it was a threat that did justify it. She did not feel that she had any other means of escape and that there was none for Officer M from the backing Subaru. She experienced tunnel vision throughout this incident. As Sgt. [REDACTED] testified all her rounds were fired within her reaction time. The City failed to adequately consider her reaction time. Officer S fired at the driver and all rounds went toward that target.

Both officers were within City policies as to the alleged lack of pre-planning. Both were unfamiliar with the location and were busy navigating to the location. This was a priority 1 call which required getting to the scene promptly. Officers M and V knew their respective roles in a high-risk vehicle stop. Officer M discussed using his rifle for this tactic. Officers S and R were comfortable with each other. They discussed the suspect vehicle on the way to the scene. Office S discussed using her rifle but decided against it when they arrived at the scene. All four officers discussed the positioning of the suspect vehicle in their respective squad cars on the way over. Lt. [REDACTED] testified that the fact that the officers did not know where the vehicle was

specifically located affected their ability to plan. Guild President [REDACTED] testified based on his SWAT team experience that the level of pre-planning was what he would expect from squad level officers.

Officer M's decision to move from the door of his squad along the back ot the line of cars toward the Subaru was an appropriate decision because he wanted to get eyes on the subjects in accordance with his training and he feared ambush. This did not violate the de-escalation policy. The fact that the woman was standing in front of the car indicated to Officer M it was disabled. He did not realize until he was in front of it that it was not. It was to late to get out of way then. Officer M was familiar with de-escalation tactics and used them frequently in other situations. It was not safe or feasible to do so here. Officer M gave verbal commands, but the suspects never complied.

The City has failed to prove that termination was reasonable and appropriate. The City's actions violated industrial due process in that the City failed to conduct a through and fair investigation. While the investigation was detailed, the City approached the investigation including the interrogation of both officers with a pre-determined outcome. The discipline imposed was punitive rather than progressive. Officer S had no prior discipline. She was viewed as a good officer. Officer M was a new police officer but had a good record prior to October 2017. The City has been inconsistent in enforcing its policies. In 2014 four officers were investigated for deadly force on a vehicle. They fired at the vehicle when they heard gunfire from the direction of the vehicle. The gun fire was from a different vehicle. They were exonerated. The Guild request that the City be directed to reinstate both officers and make them whole for all lost wages and benefits.

City Reply:

The burden of proof is a preponderance of the evidence. The Agreement itself only specifies a heightened burden of proof for dishonesty cases. Using a heightened burden of proof for use-of-force cases undermines the directives of both federal and Washington State law. In *Seattle v. Seattle Police Officers' Guild*, 17 Wn. App. 2d 21, 481 P.3d 485 (2021) held that excessive force violated public policy. The Court stated that: "a municipal employer must sufficiently discipline police officers who engage in conduct that could contribute to an unlawful pattern or practice."

The Monzon case cited by the Guild is inapposite to this one. The legal standard was

different. The vehicle involved in that case was warned to stop and drove at the officers anyway. Both officers had stopped firing when the Subaru hit the wall. Both started firing as it drove away. The Subaru was not a threat to them because it was driving away. The evidence showed that neither officer was at risk from the vehicle. Neither acted as if they viewed themselves as at risk. The documentary and video evidence support FIT, CSI, and OPA investigators conclusions that neither officer's story was factually supported. They concluded that the Subaru posed no lethal threat to either officer.

The other occupants of the Subaru were not accomplices. Both officers fired rounds that put those occupants at risk. CSI's work revealed that every occupant was at risk even if the rounds were in the general direction of the driver. Officer S saw that there was a backseat passenger. Sergeant [REDACTED]'s testimony as to the occupants of the Subaru being accomplices is not credible or consistent with City policy.

Officer M failed to de-escalate the situation. There is an inconsistency in the officers' presentation. They assert the call was one in which a high-risk vehicle stop was feasible without planning. On the other hand, they contend that the situation was so fraught with complexities that the high-risk stop could not be executed. The officers knew the situation was static just before they arrived. They had learned the hood was up on the Subaru, and the driver was smoking drugs. There was no reason why they should not have taken time to communicate with each other. Officer M went up the front of the Subaru to keep them from fleeing. This was the opposite of the time, distance, and shielding de-escalation policy.

The City has just cause to discharge the officers. The comparators offered by the Guild do not show unequal treatment of these officers but show that the Chief makes careful, independent decisions. The cases cited by the Guild show that Chief [REDACTED] exercised careful judgment and over-ruled discipline thought incorrect. The *Butler and Jared* cases and Gregario cases both involved suspending those officers solely for failure to de-escalate. They show that the City views de-escalation as important. *Seattle, supra* speaks clearly to this situation.

An award of back pay is not appropriate. A prior PERC arbitrator ruled in a different case that reinstatement was appropriate, but back pay was not because of the poor judgment of that officer.

Guild Reply:

The burden of proof is clear and convincing. The City's assertion that Agreement Article 3.1 precludes the higher standard is without merit. That provision relates to dishonesty cases. Nothing in the Agreement precludes a higher standard in other cases.

The City's claim that Officer M's failure to de-escalate caused this situation is without merit. The suspects' actions dictated the officers' need to change tactics from a high-risk vehicle stop. It was nighttime; the suspects were not visible behind the hood of the Subaru, were reportedly armed, and using narcotics. It was clear when the officers set up for a high-risk vehicle stop that they would not comply.

The suspects posed an imminent threat against the officers and the public. The City concluded that Officer S was justified in firing at the driver in the Subaru. She consistently maintained that she did not see Officer M again until after the incident. The Supreme Court has held that officers who are justified in using deadly force are justified in its continued use until the threat is neutralized. The City's policies support that concept. The City's claim that the threat ended in the 8.4 seconds that elapsed in this entire incident is patently unreasonable, given Office Ss' belief that the driver had run over Officer M and potentially killed him. The suspects' actions of backing the vehicle and fleeing the officers continued the threat. The vehicle itself was the deadly weapon. The suspect gave no indication he was abandoning the vehicle. While the policy makes a presumption that a stolen vehicle is not a deadly weapon, it was one in this case. The driver used the vehicle as an actual threat against officers.

Officer M's testimony is consistent with his interviews both with FIT and OPA. Any variations were normal variations. Some of his statements were speculative because he could not know all the occupants' exact locations. Any delay in Officer M's use of force was the result of human reaction time.

The presence of passengers does not make an otherwise use of deadly force to be outside department policy. The female passenger knew the police were present and refused their order to stop. She re-entered the Subaru instead. The male suspect ran out and shut the hood when he saw officers were present. This is corroborated by the Sgt. [REDACTED]'s FIT interview of the driver. The City's claim that the mother and the passenger could not hear police commands is absurd. After acquired evidence shows what is on the video. The Subaru occupants responded to the police presence. Other witnesses stated that the police gave loud commands.

The City provided no evidence to contradict Sgt. [REDACTED]'s expert opinion that the Subaru's occupants were complicit. He also testified that even if they weren't, the officers were justified in using deadly force toward the driver because they were defending themselves.

The arbitrator should disregard the specified assertions of fact in the brief where there is no evidence in the record for them.

DISCUSSION

1. Standards

Under Article 3, the City may not discharge a police officer without just cause. As it applied here, the elements of just cause are; 1. That the employee should know what is reasonably expected of him or her and have a reasonable opportunity to comply, 2.t hat the employer prove that an employee violated those expectations, 3. That the discipline be commensurate with the seriousness of the offense taking into account both aggravating and mitigating factors and be consistent with the employer's progressive discipline policies, and 4. that the employer comply with applicable due process requirements.[8]

The gravamen of this case is whether the two grieving officer improperly used lethal force against a moving vehicle in violation of the City's policy 8:300 POL4 (8) above in relation to other use of force policies. The authority of all police officers to use lethal force is limited by the Constitution. There are two main Supreme Court cases which have expressed how those limitations apply. *Grahm v. O'Connor,* 490 U.S 386 (1989), holding that claims that police officers violated a citizen's Fourth Amendment rights by improperly using force must be viewed by an "objective reasonableness" standard. *Tennessee v. Garner*. 471 U.S.1 11-12 (1985) which held that a police officer may use lethal force under the Fourth Amendment to prevent the escape of a fleeing suspect only if the officer has probable cause to believe that the suspect presents a serious threat to the officer or others. Policy 8:200(1) and (4) above incorporate those standards.

The City and the U.S. Department of Justice entered into a consent decree on July 27, 2012, the essential purpose of which is to establish goals and mechanisms to achieve them by which the City reduced the use of violence by adopting extensive changes to its policies, training and retraining employees in those policies, thoroughly investigate each use of force to make changes to policies and procedures both to effectively enforce its policies and to engage in "process

[8] See, St. Antione, Ed., The Common Law of the Workplace: The Views of the Arbitrators, (BNA, 2nd Ed.), Sections 6.2, 6.5, and 6.7.

improvement." A main purpose of the consent decree is to improve the relationship between the City and the public by avoiding unnecessary violence. In this regard, the City's policies above are more restrictive in many respects that the minimum standards of the Constitution.

Policy 8:300 POL 4 (8) along with its Policy 8:100 de-escalation, and limits on high-speed car chases among the City's important policies which are more restrictive that minimum. The important point is that these policies anticipate situations where the City deems it more advisable that a suspect "get away" rather than to employe violence. This policy is at the core of this dispute.

In *City of Seattle Police Department vs. Seattle Police Officers' Guild,* 17 Wn. App.2d 21, 484 P.3d 485 (Ct. App., Dist. 1, 2021), the Court vacated an arbitration award on public policy grounds where an arbitrator ordered a discharge of a police officer who struck a handcuffed suspect rescinded to a suspension. The Court emphasized the need for the City to rigorously enforce discipline.

2. Failure to do Hasty Planning and Violation of De-Escalation Policy 8:100.

Officer M failed to do "hasty pre-planning" and to take appropriate steps to de-escalate the situation as required by Policy 8.100. Officer M's failure to do "hasty" pre-planning missed a key opportunity to de-escalate this situation. All of the officers were trained to do high-risk vehicle stops, and all recognized that they would be using that tactic when they were enroute. The high-risk vehicle stop contemplates that the group of officers communicate among themselves about tactical planning.[9]

Officer M explained that he had no time to engage in further planning than relying upon pre-existing understandings with Officer [REDACTED]. All of the Officers learned that the parked car was likely to be the same one that Officers M and [REDACTED] had chased on their prior shift. Officer M became personally highly motivated to be able to arrest the driver from the shift before because of his embarrassment about the evening before. Irrespective of the multi-tasking hampering them, Officer M chose not to take a key opportunity to do hasty pre-planning upon entering the staging point in the alley a block away. He knew that it was unlikely that the stolen car's driver would respond voluntarily to the high-risk stop tactic.[10] He learned as he entered the staging alley how narrow it was. The narrowness would make full tactical

[9] Guild Ex. 11, *Advanced Tactics Training: 2017 Small Team Tactics,* p. 49
[10] M First interview, City Ex. 15, p. 1325

deployment of both vehicles unlikely. Both cars were in contact with a third squad in the area which was offering to help. There were many potential actions which could conceivably have resulted in a non-violent and successful conclusion. His main reason for not doing this was for fear that the vehicle would leave.

Officer M's explanation that the call was too urgent to take the time to attempt to pre-plan is not supported by the evidence. Officers' training on high-risk vehicle stops carries with it an implicit assumption that in most cases having the vehicle leave is less important than planning. The nature of this call did not obviate the need for "hasty planning." Dispatch had maintained contact with the person who called in. The caller remained a forward observer. He was a valuable asset in maintaining control over the situation. I am satisfied that there was time to do planning even though this was a priority-one call. The most recent information had the driver smoking narcotics from a glass pipe and a female passenger tinkering under the hood. The focus of the call was the suspicious nature of the people in the out-of-place vehicle. The seen was stable. The only likely risk to others by their departure would be the risk of a driver under the influence of narcotics.

Irrespective of the speculative possibilities of planning, Officer M's actions in approaching and then standing in front of the stolen Subaru escalated the situation. Crediting for the sake of argument that Officer M believed the Subaru was disabled, the evidence lends little support for his need to get further "eyes on the suspects." First, the female suspect was visible as Officers M and V arrived. The Subaru was backed in at or close to a chest-high retaining wall[11] and between the Mazda truck on the side nearest the Officers. There was a dumpster between the other side and a sidewalk along the building. The driver started to run up and close the hood as Officers M and V exited their vehicle and shouted their commands.[12] Officer M was shielded by the door as the driver ran back along the driver's side. The actions of both the driver and the female were sufficiently visible through the glass windows of the cap on the Mazda truck to know that they had entered the Subaru and would show if they opened a door to leave it. This view was possible but more difficult from Officer M's view.[13] The officers did not know for sure whether there was a third passenger and, if so, where he or she was.

[11] With a fence on top. The Mazda truck faced in firmly to the wall.
[12] Time references to the various videos are simply time for the V-M car camera and relevant abbreviations for the specific videos followed by time or reference. This time-point is Synch33.
[13] See for example, Synch start to 71.

This is the time that Officer M recognized that there was very little likelihood that the driver would comply and that it was very likely he would ignore commands.[14] There was little possibility of an ambush because they had the advantage of surprise. He knew the location of two of the occupants who were in or getting into the vehicle, and the surroundings made it nearly impossible to go to an ambush firing position without observation.

Officer M's conduct leaving the squad door cover demonstrated that he recognized that ambush was unlikely from any point except immediately around the Subaru and that he recognized the driver was going to drive the Subaru off. Officer M did not look between the other parked cars until he got to the Mazda truck. Both Officers responded by shouting commands.[15] Officer M shouted: "Pull the car," as he was running. He acknowledged in his first interview that he did this in the hope that Officer V would block the Subaru from leaving.[16] The decision to leave cover tends to be inconsistent with the high-risk stop training.

In any event, the decision to step in front of the Subaru violates both the de-escalation policy 8.100 and the intent of the car shooting Policy 8.300 POL-4 (8) in that it implies that an officer should position himself or herself so that he or she can avoid being struck by a vehicle. There are two reasons why Officer M did this. First, was to have a better view of the Subaru's occupants. Second, a belief that facing the driver with a rifle pointed at him would cause him to back down. This action gave the driver bent on escape no choice but to drive the Subaru at him.

3. First Volley

Officer M acted in self-defense when he made the decision to fire his first round. Director [REDACTED] testified in support of the conclusion that the first volley was outside Policy 8:300 POL-4 (8). The policy requires" "An officer threatened by an on-coming vehicle shall, if feasible, move out of its path instead of discharging a firearm at it or any of the occupants." Director [REDACTED] considered the totality of the circumstances. As it related to the decision to fire, he offered four reasons for his position. The first is that Officer M "stepped around the car" and, therefore, was able to avoid being struck without other force.[17] The second was that he had placed himself in front of the car. The third was that when he first fired, he was

[14] He stated in his interview, City Ex. 15, p. 1342, that the recognized the driver from the night before. The totality of the actions from that time on show both officers recognizing that the driver was in the process of driving off.
[15] References to the transcript are marked for the day of hearing and page reference, 4:46-7
[16] M First interview, City Ex. 15, p 1329
[17] References to the hearing transcript are marked with the day of the hearing and page number as follows Tr. 3:315.

out of the path of the car and no longer in danger. The fourth was that the driver was a danger to the public. That reason is discussed below.

The facts do not support Director [REDACTED]'s first reason. I credit Officer M's testimony that he made the decision to fire when the car was coming at him and that he did so because he feared for his life. Officer M did not step around the Subaru. The reason he was not hit is that the driver turned hard to the right. I note that Officer M made little or no move to get out of the way of the oncoming Subaru.[18] He was maintaining his aiming position while stepping to his left before the Subaru moved. The driver lurched forward with the Subaru and then accelerated forward as fast as possible. It is the driver who decided to turn hard right. Had he not turned hard right immediately, Officer M would have been seriously injured or killed. Without hindsight, Officer M could not know whether the driver would aim at him more. If the driver had, I conclude that there was no way Officer M could have avoided being seriously injured. Under the car shooting policy, Policy 8:30 POL-4 (8)[19] he was entitled to use deadly force to protect himself because it was not feasible for him to jump out of the way.

Officer M did not lose his right to defend himself even though he made the mistake of getting in front[20] of the Subaru. It is the driver who made the decision to flee and use the vehicle as a weapon against Officer M. There have been prior cases in which officers have failed to use de-escalation techniques but have been found by the City to still have properly used deadly force to defend themselves. For example, Director [REDACTED] had found a shooting to be within policy when Officer [REDACTED] positioned himself too close to a suspect with a knife and had to use lethal force to protect himself.[21]

I have credited Officer M's testimony that he made the decision to shoot while the Subaru was coming at him. He testified all the rounds he fired in the first volley were within his reaction time. The City considered reaction time to be not significant. It did not consider it in detail. I have credited Sgt. [REDACTED]'s testimony as to the timing and dynamics of reaction time, although not all his other conclusions in this specific case. I have discussed that more below. I

[18] 4:52-4:54
[19] "An officer threatened by an oncoming vehicle shall, if feasible, move out of its path instead of discharging a firearm at it or any of its occupants. … ."
[20] See, Tr. 3:608-9, for example.
[21] Tr. 3:528-29

conclude that at least Officer M's first and possibly a few other rounds were within his reaction time.

The City treated Officer M differently from Officer S with respect to the reaction time involved in volley one. The City may have effectively concluded Officer S's first volley was within her reaction time. The essence of Director [REDACTED]'s testimony is that Officer M's rounds started when he was actually safe. Therefore, his "stop firing signal" occurred as he was making his first shot. This is far earlier than would have occurred for Officer S under the facts credited by the City. The City credited Officer S's understanding at that time that she acted because she believed Officer M was seriously injured and/or underneath the car. The earliest stop signal for her would have been seconds after Officer M's. Under that view she properly stopped shooting when she did. Officer M's stop signal occurred at 4:54, and he did not stop shooting until 4:56. This is well outside what was necessary for him to effect a decision to stop shooting. The evidence supports the City's conclusion that Officer M's later shots violated Policy 8.300 POL-4 ((8) and derivatively other policies.

4. Second Volley

A. Officer S

The evidence supports the City's conclusion that the later few rounds Officer S fired in her second volley were inconsistent with Policy 8.300 POL-4 (8) but does not support the conclusion that her first rounds were outside any policy. Officer S offered three reasons for why she fired her second volley. They applied to different parts of her second volley. The first was that she was defending herself. The second was that she was defending Officer M. The third was that the departing Subaru presented a risk to the public.

The City's reasons for concluding that Officer S's decision to fire her second volley at the Subaru and the first few rounds she did fire were out of policy are based upon an incorrect view of Officer S's situation and, therefore, what a reasonable officer would do in her situation. Director [REDACTED] provided the main testimony in support of the City's decision. Director [REDACTED]'s conclusion was based upon his view that Officer S had four seconds to recognize Officer M was not injured. This conclusion is inconsistent with the facts found by the City and otherwise inconsistent with fact.

The City's conclusion that Officer S did not violate policy with respect to the first volley was based upon the following facts that the City accepted as true. First, Officer S was being affected

by having tunnel vision. Tunnel vision causes an individual to focus on the threat and not see things in their prereferral vision or hear unrelated sounds. Second, the City accepted that Officer S honestly but mistakenly believed that Officer M had been struck by the Subaru and was either under the car as it sped away or on the ground disabled. Third, Officer S was focused on the threat posed by the Subaru.

The vast majority of Officer S's "four seconds" was spent by distractions. She was in tunnel vision adjusting her position to deal with the changing threat posed by the Subaru. Director [REDACTED] essentially minimized the nature of the situation the officers faced and how that affected Officer S's use of the "four seconds."[22] Officer M explained in his first interview the situation both officers faced as the Subaru headed toward crashing into the wall.[23] Hitting the wall could cause the Subaru to be disabled. The driver and possibly others were armed. The choices were that the occupants would surrender or, more likely, come out resisting. The Subaru could become a threat only if it backed away from the wall. The significant occurrences with the Subaru occurred at Synch 344 when the brake lights came on, possibly as the driver anticipated hitting the wall.[24] The Subaru hit the wall and came to rest Synch 354-364. It briefly rolled backward starting from Synch 364. Officer S was positioned without cover behind the passenger side taillight several feet back in a firing position and several feet back from the corner of the building. She started moving diagonally 45 degrees to her right towards the cover of the building's wall, starting at about Synch. 372. It is more likely that she started this movement when she recognized that the Subaru was heading toward the wall.

She reacted to the backward motion and the appearance of backup lights. The backup lights of the 2017 Subaru are white, surrounded by the red brake light. About Synch. 402 the Subaru

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[22]Specifically, 3.76 seconds. City Ex. 41, Sgt. [REDACTED] p.1 539 citing case reports. See, Tr. 3:506 [For an example of what the City believed Officer S believed about Officer M], Tr. 3:521 [minimizing the situation faced by the officers as the vehicle struck the wall, stopped, and backed up.], Tr. 3:522 [Not believing officers' view that the car was backing as credible.], Tr. 3:583-4 [Does not believe that either officer could justify volley two as a threat to them because it was moving forward.], Tr. 3:581 [Doesn't believe Ofc. S said she was defending Ofc. M]. Tr. 3:480-1 [Within four seconds Ofc. S learned Ofc. M was up.] Than latter view may be based upon the fact that Officer M was near Officer S and firing during the second volley. However, based upon the City's acceptance of Officer S's testimony ad about tunnel vision, she did not hear or perceive Officer [REDACTED] near her. Even if she had heard the firing from behind and to her left, she could have as easily viewed the person firing as Officer V. This seriously undermines the City's evaluation at 3:512 of a reasonable officer.

[23] This occurs at Sych340. See, Ofc. M first FIT interview, City Ex. 15, p.1326. [Page references to Bates] See, Officer S's testimony, Tr. 5:1223.

[24] The driver, in his statement, City Ex. 20, alleged that he was ducked down to his right side with his body on the center counsel. The force of the impact caused the shift level to move into neutral.

appears to be displaying a white back up light from its right rear back up light. This is most likely a reflection from another light source. This ends at Synch. 408. Officer S was slightly outside the corner at that time. She continued to adjust her position behind the wall. She momentarily faced away from the action to deal with the obstacles in her path to move close to the wall. The brake lights of the Subaru came on at Synch. 417. Officer S's body cam and the V-M Car cam both appear to show white in the direction of Officer S even though the Subaru is beginning to move forward at Synch. 481. This is just as officer S finished re-positioning and refocused on the Subaru. Officer S fired the first shot of her second volley at Synch. 489. This is within less than a second. Officer S reasonably believed the Subaru was aggressively moving backward when she made that decision.

Officer S's decision to fire and her first rounds were what a reasonable police officer would have done under the circumstances and, therefore, within Policy 8.300 POL-4 (8). She continued to believe they were necessary to protect the life of Officer M. It was more likely that she believed Officer M to be down in the rearward path of the Subaru than under it at this time. She had a Hobson's choice that made firing necessary. If she delayed firing and the Subaru moved backward, she would not have been able fire in time to protect him. The acceleration speed of the Subaru to the wall demonstrates that it would have covered the distance from the wall to the position she perceived Officer M to be in in far less than one second. This is "immediate" within Policy 8.300 POL-4 (8).

The City already found that Officer S was justified under the policy shooting into the Subaru in the first volley. The judgment she made as to her first few rounds was within the Policy 8.300 POL-4 (8) because its direction of travel was toward Officer M.

Officer S's first few rounds were within her reaction time and, therefore, fired to protect Officer M. The City did not seriously consider reaction time. Sergeant [REDACTED] testified as an expert witness for the Guild in this case. He provided a report for the officers' Loudermill hearings. Sgt. [REDACTED] relying on the case reports concluded that the entire second volley for both officers lasted 2.2 seconds.[25] Sgt. [REDACTED] concluded that Officer S was reacting to the Subaru's backing up when she opened fire even though the vehicle was moving forward. He stated: "Given the realities of human performance and the rapid pace of the incident, it would

[25] City Ex. 41, pp. 1539-1540

be impossible for Officer S to fire at the exact moment the backup lights came on."[26] He reported on and testified about the reaction time of both officers and cited his sources.[27] Those sources support the reaction time determinations made herein.[28] The authors stated their focus as:

> What often causes controversy with officer-involved shootings is the inability of officers to immediately cease-fire at this perceived [stop-shooting] signal. … The act of stopping a continuous action such as a TP [trigger pull], consists of two processes: (1) the "go process" and (2) the "stop process." [citation omitted.] … the purpose of this study was to create a foundation of knowledge on reaction and movement time performances of officers …to both simple and complex stimuli…."[29]

Reaction time is a factor both with respect to the time to react from the "start shooting" stimulus and the separate reaction time from the "stop shooting" stimulus to effectively cease fire. Officer S's first round occurred at Synch 489 during which she began to receive a potential stop-shooting signal. This required the complex decision making discussed in the study. I apply the study's estimate that it would have taken her .56 seconds to respond to the stop shooting signal. This covers her first rounds but her remaining two to three rounds were outside that period. Therefore, her remaining rounds can only be justified by her third reason, the threat to the public.

There is no serious dispute that Officer S was acting solely in the City's interest and continued to fire because she honestly believed that the driver had intentionally used the vehicle as a dangerous weapon against Officer M and was an "immediate" threat to anyone who would impede his escape and or be in the Subaru's path.

The City would have concluded that Officer S's later rounds were outside policy if it had properly applied its own policies, but it would have had to recognize that its policies are ambiguous, and that gaps in the training of the officers were likely a significant factor in their split-second decision. Director [REDACTED] concluded that Officer S's later rounds were unreasonable because: "… any potential threat to civilians/pedestrians or other officers who

[26]City Ex. 41, p.1549. Also see, 1550
[27] City Ex. 41, p. 1430
[28] Lewinski, et al., *Police Officer Reaction time to Start and Stop Shooting: The Influence of Decision Making and Pattern Recognition,* Law Enforcement Executive Forum 2014
[29] *Ibid.* pp.3-4

might be responding but not on the scene was speculative. There was no concrete evidence that this would occur and certainly not sufficient evidence to warrant firing multiple rounds into the back of a car containing three occupants that was driving away from her." He further stated: "… Any perceived threat was unreasonable and speculative. It further did not provide a basis for [Officer S]to shoot indiscriminately into the car and put the subject and the occupants at risk of death. Moreover, the second volley of shots were fired northbound after the fleeing vehicle and directly towards the front row of homes. It was not inconceivable that each bullet could have missed the vehicle and harmed a civilian in one of those homes. This was an unacceptable risk of harm." As to the application of Policy 8:300 POL-4 (8), he stated: "The policy envisions that officers will deviate from its prohibition when there is a vehicle bearing down on them or immediately threating the life of another officer or civilian. The policy does not anticipate that officers will fire in the back of a vehicle that is driving away from them and where there is no clear risk of harm to anyone else."[30]

The policy itself requires that the City apply a different form of analysis. While the policy forbids firing into a departing vehicle, it can be read to allow firing into a departing vehicle in narrow circumstances. The policy is ambiguous and very problematic under the circumstances of Officer S's later rounds. Specifically, it states that: "The moving vehicle itself shall not presumptively constitute a threat that justifies an officer's use of force." Both officers reasonably concluded that the vehicle itself was used as a weapon against Officer M. The Charlottsville episode had occurred on August 12, 2017, only weeks before this incident. While the intentional use of a vehicle as a weapon is the worst case that can occur under the policy the policy does not give officers any direct guidance as to how to deal with it. Instead, it provides: "the policy …may not cover every situation that may arise. …[M]embers are expected to act with intelligence and exercise sound judgment, attending to the spirit of this policy …" It provides "Any deviations from the provisions of this policy shall be examined rigorously on a case-by-case basis." The factors that <u>may</u> be considered by the involved officers include whether the officer's life or the lives of others were in immediate peril. It is not necessary to get into the full range of ambiguities this policy presents. Obviously, to the extent the note could conceivably be construed to mean that the City could decide what the policy should have meant after the fact, it would violate the just cause principle. In this regard, the part of Director

[30] City Ex. 36, pp. 21-2.

[REDACTED]'s reasoning that the policy does not contemplate firing into the back of a vehicle that is driving away appears to be circular. The note envisions "deviations." Firing into the back of a vehicle is a "deviation." Both officers could reasonably conclude that the use of this vehicle as a weapon makes this situation one to which the "deviation" language potentially applies. The language then requires that the City consider the specific facts of each situation to determine if an officer acted with intelligence and sound judgment based upon what happened solely from the reasonable officer perspective.

Officer S used sound judgment as to the risk to the occupants of the vehicle in deciding to fire into the vehicle. At issue in this matter is the soundness of her decision of the necessity to do so which is discussed below. As the City found, she ceased firing toward the rear of the Subaru in her first volley as soon as her reaction time allowed her to process that it was no longer a threat. She determined in her second volley that she could target the driver of the Subaru without any apparent danger to others in the Subaru. She again ceased firing when she no longer had an appropriate backdrop. The specific evidence in this situation was that Officer S's marksmanship judgement was right. The City determined with respect to the first volley that a reasonable police officer could fire into this vehicle with potentially innocent passengers to save the life of others from the actions of the driver. A reasonable officer could deviate from the policy in this regard where the officer makes a reasoned decision that the immediate risk to others outweighs the potential risk to passengers in the vehicle. That part of her decision was within Policy 8.300 POL-4 (8).

The City disagreed with the officers that the driver presented an "immediate" risk of death or serious injury to others, but there is no serious disagreement that the driver presented that risk. By the second volley, both officers knew that it was likely the driver was the same one who had lead Officers M and V on a high speed chase the shift before. The driver had just used the Subaru as a weapon. The Subaru had a damaged fender. The driver was potentially wounded. Both situations raised risks about the ability to control the Subaru. If there were any question about the driver's intent, the City learned in its interview of the driver that he had no intention of allowing himself to be caught.

The situation was even worse for anyone in the driver's path in the alley or crossing the entrance to the alley. Even if Officer S had timely stopped firing her second volley, the driver was still going to take evasive action. As he started to drive away. He veered to the left nearly

hitting parked cars on the other side. He then sped out of the alley turning right without regard to whether pedestrians were crossing. The building at the end of the alley made the walk and alley crossing blind from the right.

The driver presented a risk also to people in the alley across Lynn Street if he made a last-minute decision to turn back to go through the other alley. Another squad had its red and blue lights activated behind a car pulled over on Lynn Street a block or two away. At M Carcam 4:26 just as officers were arriving at the Subaru, a white SUV is seen turning right from Lynn Street into the alley across Lynn Street and stopping. The vehicle appears to be having a passenger leave. It also appears from the taillights that one or two pedestrians passed behind that vehicle. The vehicle departed the alley after this incident ended. If the driver tried to go straight the driver of the SUV and his or her passenger were at immediate risk of serious injury or death. There was no way for the Subaru to completely stop or get around them.

The City correctly made the decision that the risk to others did not meet either the "immediate" standard of Policy 8.300 POL- 4 (8) or the "imminent" standard of Policy 8.200 (5). Officers could not see around the blind corner. No pedestrians had crossed on that side from the beginning of the contact. There were no pedestrians in the relevant part of the alley. The likelihood of another incident outside the alley was questionable. Nonetheless, the situation they faced involved a decision whether the risk was "immediate" which included facts that were difficult to know at the time. This included knowing how likely a pedestrian was to cross from a blind corner. The Supreme Court has used the term "immediate" in the same sense the officers used it here.[31] This is not to suggest that the officers were right here, but that their training might have been inadequate.

The City had just cause to discipline Officer S for the firing of some of her rounds in her second volley. She violated Policy 8.300 POL-4 (8) and 8.200 to prevent the driver of the Subaru from escaping when a reasonable officer in her position would not have concluded that lethal force was necessary to protect others from the immediate risk of death or serious bodily injury within the meaning of the policy as interpreted by the City. She derivatively violated Department Manual Policy 5.001.

[31] The U.S. Supreme Court in *Scott v. Harris,* 550 U.S. 372. 384-6 (2007) held that even if officers had terminated a high-speed chase, the fleeing suspect "posed a substantial and immediate risk of serious physical injury to others." Thus, the Supreme Court applying the Fourth Amendment analysis under *Garner* concluded that circumstances such as these could be viewed as an "immediate" risk to unseen others.

B. Officer M

The evidence supports the City's conclusion that Officer M's second volley was inconsistent with Policy 8.300 POL-4 (8). As noted, Officer M explained in his first interview the situation both officers faced as the Subaru headed toward crashing into the wall. Officer M properly started heading to position himself toward controlling the exit side of the Subaru. That position would have also made him safe if the Subaru backed up. When the Subaru hit the wall, Officer M saw brief white light reflection from the rear lights of the Subaru.[32] Officer M had the right to be concerned for his own safety. The better view of his testimony is that he reacted wrong. Policy 8.300 POL-4 (8) contemplates that officers always consider positioning themselves to avoid being hit by a suspect's vehicle. Had that been in his contemplation he would have already realized he was safe. That led to a split-second mistake under Policy 8.300 POL-4 (8).[33] A reasonable police officer in his situation would have recognized he was safe. In any event, many of his rounds were outside his reaction time as the vehicle moved forward.

Officer M's second reason for deciding to fire was that he was protecting the life of Officer V. Officer M stated he did not know Officers R and S were there then.[34] It is unclear where he might have thought were Officer V was. If he believed Officer V was where Officer S actually was there was no reason to fire. If he believed Officer V was behind him coming from the squad as Officer M had previously directed, he would be behind Officer M and to his left. That was where he actually was. He was next to the cars parked on the other side of the alley. He was able to keep himself safe. The fair view is that Officer M could have been concerned about Officer V, but there was no objective reason to believe he was vulnterable. A reasonable officer in Officer M's position would not have decided to fire on this basis.

Officer M's third reason for firing was the protection of the public both in the alley and immediate area and on the main throughfare after exiting the alley and Lynn Street. This violated Policy 8.300 POL-4 (8) as interpreted by the City but may have been a decision consistent with his training.

The evidence also substantiates the City's conclusion that a major factor clouding Officer M's actions was his overall personal motivation in ensuring that the driver not escape this time.

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[32] Sych 403-408
[33] Ibid, Officer M stated he felt that he was safely positioned before the Subaru went backwards.
[34] Ibid, pp. 1326-1327, pp. 5-6

The City has just cause to discipline Officer M. He violated Department Manual Policy 8.100 (1) by failing to adequately pre-plan for the high-risk vehicle stop and by his actions leading to placing himself in front of the Subaru.

He did not violate Departmental Manual Policy 8.200, Policy 8.300 POL- 4 (8), or any other policy with respect to his first volley. All of the rounds fired in the first volley were in defense of his life.

He violated Department Manual Policy 8.300 POL-4 (8) by using lethal force in his second volley. He thereby also violated Department Manual Policy 8.200 by unreasonably using lethal force to prevent the escape of the Subaru's driver. He derivatively violated Department Manual Policy 5.001. However, as with Officer S, the decision was closer than thought by the City and may have been affected by a gap in training.

5. Public Interest

The City correctly emphasizes the Court's decision in City of Seattle. This case epitomizes the concerns underlying the consent decree and that decision. The arbitrator does not have the authority to determine the public policy of the State of Washington, but only to determine this matter under the just cause standard. Just cause is elastic concept and has been applied here by taking into account the public policy concerns.

In *City of Seattle, supra,* the Court of Appeals vacated an arbitration panel award in which it ordered that the penalty of discharge be reduced to a 15-day suspension and reinstated. The officer therein struck a handcuffed female subject in the face. The appeals Court concluded that the City's policies required non-violent alternatives and the officer had time to consider those other, less violent actions. The Court of Appeals relied upon the fact that the arbitration panel found that the officer violated clear and specific policy and had been adequately trained. It concluded that in the light of the consent order, the award was too lenient and, therefore, violated the clear and specific policy against police violence.

The City has argued that *City of Seattle* is controlling. The policy involved in this case is ambiguous and fails to provide adequate guidance. Officer S acted only in good faith in the City's interests and made an appropriate judgment under the policy in a way that was apparently consistent with her training. In short, this was a case in which Officer S was wrong but there was room for disagreement.

I note the consent decree is also concerned with having the City revise its use of force policies to reduce violence by making them clear as to what employees should do as well as what they should not. The consent order requires training employees in their implementation, and then by enforcing them. This case presents serious concerns about the policy that is the subject of this dispute. It presents a serious question about a lack of training.

6. Penalty

As noted above, the just cause provision requires that discipline be commensurate with the seriousness of the offense taking into account both aggravating and mitigating factors and be consistent with the employer's progressive discipline policies. Chief [REDACTED] provided the testimony supporting her disciplinary decisions. She stated that if there was an opportunity for corrective action short of discharge the City would take it. If mistakes can be rectified, the City would do so by discipline short of discharge.[35] She also testified that she expected that officers would show a degree of remorse or at least acknowledge that there was some possibility that they made a mistake or otherwise recognize that there was room for improvement. That decisional standard violated the just cause provision of Article 3 and the scheme of regulation. Article 3 contemplates the right of officers to vigorously defend their actions. It violates Article 3 to penalize police officers in any way for doing so. In this case both officers did not know what they did not know: they did not know that the City would apply Policy 8.300 POL-4 (8) in a way that differed from their level of training. Instead, the City must weigh mitigating and aggravating factors for each officer. I conclude that had Chief [REDACTED] properly administered Article 3 she would have upheld the discharge of Officer M but would have reduced the penalty for Officer S to a suspension commensurate with the seriousness of her actions. Both of those actions would have been for just cause.

7. Conclusions and Remedy

A. Officer M

The City had just cause to discharge Officer M. I conclude that Chief [REDACTED] would have properly discharged Officer M for this conduct. Officer M was a relatively new police officer in October 2017. The tenor of the City's position is that Officer M acted out of personal consideration in his actions. In its view, he was disingenuous in dealing with this situation. In its view, at least part of Officer M's actions was his personal motivation to not

[35] Tr. pp. 7:1475-6

allow the driver to escape a second time. Officer M was viewed as a good but inexperienced officer. He had no prior discipline until the incident in the shift before this one. Officer M was suspended not only for having failed to properly report the high-speed chase, but also for attempting to improperly minimize it. His testimony as to his prior discipline also tended to minimize that aspect. More importantly, Officer M's testimony about his decision to leave cover and the process by which he got to stand in front of the Subaru is inconsistent with the facts. This department is one which expects a higher level of restraint by officers than might exist elsewhere. Chief [REDACTED] was reasonable in her conclusion that it was unlikely that Officer M would maintain that higher level of restraint in the future and he was likely to have a better employment "fit" elsewhere. Accordingly, I conclude that the City has just cause to terminate Officer M.

B. Officer S

The City did not have just case to discharge Officer S. The arbitrator is required to fashion a remedy to try to put Officer S in the same position she would have been had she not been improperly terminated. The ordinary remedy is reinstatement and being made whole for all lost wages and benefits. The difficulty in this case is that reinstatement is not practical, nor do I view it as being seriously sought. It has been six years since this incident occurred. The City is implicitly suggesting that further litigation may occur after this award. Officer S's career is likely to have moved on. The most important part of any remedy to undo the economic damage she suffered because of her discharge. In any event, reinstatement cannot put her in the position of six years of experience in Seattle' unique policies and work environment.

I follow Chief [REDACTED]'s policy in that had she determined to retain Officer S, she would have imposed a disciplinary suspension. The length she would have imposed would have been long. I have imposed a sixty day suspension which is longer than any ordinarily used in labor relations. A suspension of that length is intended to impress as best as possible in the circumstances the pain caused by the even the honestly mistaken use of lethal force.

Accordingly, the appropriate remedy is to order the Officer S be made whole for all lost wages and benefits from sixty calendar days from the date of her termination to the date that she is so compensated. The award is less her interim earnings. Pursuant to the agreement of the parties, I will reserve jurisdiction over issues arising from the specification of the remedy if

either party requests that I do so, in writing with a copy to the opposing party, within sixty (60) days of the date of this award.

AWARD

The City had just cause to discharge officer M. The City did not have just cause to discharge Officer S. The City shall make Officer S whole for all lost wages and benefits, less interim earning, from sixty calendar days from the date of her termination until paid. I reserve jurisdiction over issues arising from the specification of the remedy if either party requests that I do so, in writing with a copy to opposing party, within sixty (60) days of the date of this award.

Dated this 29th day of November 2024.

/s/Stanley H. Michelstetter___
Stanley H. Michelstetter, Arbitrator