

IN ARBITRATION

JOE M. HARRIS, JR., ARBITRATOR

THE CITY OF TAMPA, FLORIDA, )  
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)  
EMPLOYER, ) FMCS File No. 05 – 52253  
)  
)  
and ) Issue: Discharge – Travis E. Maus  
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)  
WEST CENTRAL FLORIDA POLICE )  
BENEVOLENT ASSOCIATION, )  
)  
)  
UNION. )

**OPINION AND AWARD**

**APPEARANCES**

FOR THE EMPLOYER:

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## HEARING

At the request of the parties the undersigned arbitrator was appointed by the Federal Mediation and Conciliation Service to hear and decide the above matter, initiated by a grievance dated October 13, 2004<sup>1</sup>, Joint Exhibit 3, in which Police Officer Travis E. Maus, the Grievant, complained of the City's decision to terminate his employment effective October 7, 2004. A hearing was duly convened on December 15, 2005 in a conference room at Tampa City Hall in Tampa, Florida, where sworn testimony was taken and transcribed.

A transcript of the testimony was provided to the Arbitrator, and four joint exhibits were tendered: the parties' collective bargaining agreement as Joint Exhibit 1 ("Joint Exhibit 1" or "the CBA"), the "Notice of Disciplinary Action" dated August 16, 2004 and approved by the Chief of Police on October 7, 2004, as Joint Exhibit 2, the "P.B.A. Grievance" form dated October 13, 2004, with the City's responses thereto as Joint Exhibit 3, and a videotape of the incident in question as Joint Exhibit 4.

In addition, both parties separately submitted a number of documents in evidence, and both called several witnesses. At the conclusion of the hearing, the parties elected to submit post-hearing briefs, and both parties submitted written briefs in a timely manner. The briefs were received on March 22, 2006, and the hearing was declared closed on that date.

## BACKGROUND

The City of Tampa, Florida ("the City") provides police services through the "Tampa Police Department" (sometimes referred to herein as the "TPD"), where the

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<sup>1</sup> The grievance, Joint Exhibit 3, bears the date "10/13/04" under "Date Filed" on page 1, but the signature line on page 2, bears the date "10/19/04."

Grievant Travis E. Maus (“the Grievant” or “Officer Maus”) was employed as a police officer from the date he was sworn in on May 1, 2000 to the date of his discharge on October 7, 2004. As a sworn police officer for the City, Officer Maus was a member of a bargaining unit represented by the “West Central Florida Police Benevolent Association” (“the Union”), who represented him in this matter.

On February 20, 2004, Officer Maus was involved in the pursuit of a stolen vehicle in the City, part of which was recorded on videotape taken from a police helicopter.<sup>2</sup> The chase ended when driver of the stolen vehicle lost control and crashed into a light pole with a concrete base in the parking lot of a convenience store.<sup>3</sup> Almost immediately after the stolen vehicle came to a stop, the driver (“the First Suspect” or sometimes for ease of reference, “the Suspect”) climbed over his companion, scrambled out of the vehicle through the passenger door, and began to run across the parking lot, away from the officers.

Several officers arrived on the scene at about the same time as the stolen vehicle. Hillsborough County Deputy Sheriff Gary Hermann was already in the area on foot, and was the first officer to reach the Suspect. Holding his dog on a leash with his left hand, Deputy Herman reached the Suspect from behind and struck him in the upper back and shoulders, with his right forearm<sup>4</sup>, causing the Suspect to lose his balance and fall to his hands and knees to his right, while Deputy Hermann stumbled to his left, away from the falling Suspect.

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<sup>2</sup> The videotape of the chase and the ensuing arrest lasted two minutes and forty seconds.

<sup>3</sup> The chase, and the events which ensued thereafter, were recorded on video tape taken from a police helicopter which appeared to be about two or three hundred feet in the air.

<sup>4</sup> Deputy Hermann had drawn his service weapon and was holding it in his right hand at the time he struck the First Suspect with his right forearm.

As the Suspect fell, Hillsborough County Deputy Sheriff Danny Johnson tackled him from behind, landing on his back and rolling over, then crawling on the Suspect's upper back to pin him down. At this point the Suspect was still struggling and apparently trying to get up and get away; Deputy Johnson testified that he was still "resisting arrest."

Almost as soon as Deputy Johnson and the Suspect hit the ground, two City police officers (Charles George and Thomas Jammes) converged on them. The Suspect was lying prone on the ground, but still struggling and moving around, with Deputy Johnson holding him down. Officer George straddled the Suspect's legs to help hold him down, while Deputy Johnson and Officer Jammes each grabbed an arm and attempted to pull his arms out from under him. In an effort to assist the officers pull the Suspect's arms out, Officer George struck the Suspect in the small of his back with his fist. When asked how hard he hit the man in the back, Officer George said, "pretty hard."

The Grievant arrived at the melee at about this same time, and almost as soon as he arrived, delivered two swift kicks at the Suspect with his left foot; the kicks were in the direction of the Suspect's upper body near the right upper arm area. However, the evidence did not establish whether either of the kicks struck the Suspect, and apparently at least one kick hit Deputy Johnson, who turned to the Grievant and said, "Hey bro, you're kicking me."

In any event, almost immediately after the punch in the back and the two kicks, the Suspect either complied or his arms were forcibly removed by the officers. Officer George testified that the Suspect's left arm was pulled out first, and handcuffed, and then

the right arm was handcuffed.<sup>5</sup> At about this same time, the Grievant stepped back briefly, stood for a moment, and then ran over to the stolen vehicle, where the passenger (“the Second Suspect”) was being pulled from the stolen vehicle to the ground. As the Grievant arrived, he placed his right foot on the back of the Second Suspect (to either hold him down or ensure he didn’t try to get up).

Following an internal investigation, the City issued a “Notice of Disciplinary Action” proposing to terminate the Grievant’s employment for using “unreasonable” and “unnecessary” force, a “violation of Manual Of Regulations # 1602 – Use of Force.” Joint Exhibit 2. On October 7, 2004, Chief of Police Steve Hogue signed the dismissal document, thereby terminating Officer Maus’s employment effective that day. The instant grievance followed, and was not resolved through the parties’ internal grievance procedure, so it has now been presented to this Arbitrator for review and resolution. The issue is whether the City had just cause to terminate the Grievant’s employment, and if not, what shall the remedy be?

### **DISCUSSION**

Although the incident at issue here was captured on video tape, the tape was taken at night,<sup>6</sup> from a police helicopter which, judging from the tape, appeared to be about two or three hundred feet in the air, and although the tape was certainly helpful, it did not yield a very clear or definitive depiction of the events on the ground. Although the general picture of what happened is clear and not in dispute, there remains quite a lot of

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<sup>5</sup> The City’s Brief states that “immediately after Officer George delivered the punch, the [First Suspect] complied and he was handcuffed.” City Brief, p. 6.

<sup>6</sup> As Sergeant Diaz commented, you couldn’t really identify the participants from the videotape: “I knew they were officers, but – you can see, in the dark, it was hard to even see the green uniforms or the dark uniforms.” T-159.

dispute over many of the details of what exactly happened. Even more importantly, in my view of the evidence in this case, there is still a significant, even heated, dispute within the Police Department as to what *should* have happened, i.e., whether Officer Maus was wrong in his actions, and whether he violated Police Department policy concerning the use of force. It was clear to me from the testimony and the demeanor of the witnesses at the hearing that some peoples' emotions ran high over this incident, and still do, to the point that even at the arbitration hearing, convened over fourteen months later, tempers and emotions occasionally flared and passionately held convictions were revealed.

### **1. The Burden Of Proof And Weighing The Evidence**

The City argues that many arbitrators adhere to the principle that “once proof of the offense has been established, the determination as to the appropriate penalty lies within the discretion of the employer”, City Brief, p. 21, and that management’s decision to fix a penalty should not be disturbed unless “discrimination, unfairness, or capricious and arbitrary action are proved – in other words, where there has been an abuse of discretion.” City Brief, p. 21. Although this is not a universally accepted view (*see* the lengthy discussion in *Elkouri and Elkouri, How Arbitration Works* (6<sup>th</sup> Ed.), Chapter 15, “Discipline and Discharge”, Part 2E: “Review of Penalties Imposed By Management”), I am willing to accept the City’s position that in this case I must defer to management’s judgment concerning the “appropriate penalty” once “proof of the offense has been established.”

But as the *Elkouri* text also recognizes, an arbitrator owes no such deference to management’s assessment of the underlying *facts* leading to discipline, i.e., the

evaluation and assessment of the testimony and evidence in the case. In fact, it is my own view that at the bottom of the entire process lies the most fundamental of all principles in labor arbitration, that arbitrators should enter an arbitration hearing as completely neutral as possible, with no preconceived notions as to who is right or wrong, and no deference or bias toward either side of the dispute.

Many collective bargaining agreements require this, the parties rightfully expect it, and the entire arbitrator selection process found in the parties' CBA and the FMCS Rules is designed to produce it.<sup>7</sup> As the well known labor arbitrator Harry Shulman noted, an arbitrator "should be employed only so long as he renders decisions on the basis of his best and honest judgment on the merits of the controversies presented, and only so long as both parties believe that he does so." *Elkouri and Elkouri, How Arbitration Works* (6<sup>th</sup> Ed.), pp. 150-151.

In this regard, one of the most important functions served by an arbitrator is "to determine the weight, relevancy, and authenticity of [the] evidence." *Elkouri and Elkouri, How Arbitration Works* (6<sup>th</sup> Ed.), pp. 414-415. Moreover, "widely differing versions of the facts are too frequently presented by the parties", and "where the testimony is highly contradictory, ... it becomes incumbent upon the arbitrator to sift and evaluate the testimony to the best of his ability and reach the best conclusion he can as to the actual fact situation." *Elkouri and Elkouri, How Arbitration Works* (6<sup>th</sup> Ed.), p. 415. Of course "it is also recognized that testimony may often conflict even where all witnesses have testified honestly and in good faith", and in this case I believe that principle is particularly apt; so none of the discussion which follows is intended "to cast

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<sup>7</sup> Article 4, Par. 4.4.2 of the CBA provides for striking names of arbitrators from a list provided by FMCS, like trial lawyers strike an impartial jury.

the slightest doubt on the veracity or good faith of any witness” in this case. *Elkouri and Elkouri*, How Arbitration Works (6<sup>th</sup> Ed.), pp. 415-416.

Finally, I humbly agree with the statement that “arbitrators are not equipped with any special divining rod which enables them to know who is telling the truth and who is not where a conflict in testimony develops”, *Elkouri and Elkouri*, How Arbitration Works (6<sup>th</sup> Ed.), p. 416; “[t]hey can only do what the courts have done in similar circumstances for centuries: a judgment must finally be made, ...”. *Elkouri and Elkouri*, How Arbitration Works (6<sup>th</sup> Ed.), p. 416. And that judgment is what now follows in this case.

In discipline and discharge cases, “the burden of proof is generally held to be on the employer to prove guilt of wrongdoing” and “probably always so where the agreement [as in this case] requires just cause for discipline.” *Elkouri and Elkouri*, How Arbitration Works (6<sup>th</sup> Ed.), p. 949. Here, the parties disagree as to the standard to be applied – the City says the burden is the “preponderance of the evidence” and the Union says it is “clear and convincing evidence.”

The “quantum of proof required to support a decision to discipline or discharge an employee is unsettled”, although “most arbitrators apply the ‘preponderance of the evidence’ standard to ordinary discipline and discharge cases”, *Elkouri and Elkouri*, How Arbitration Works (6<sup>th</sup> Ed.), pp. 949-951, while “in cases involving criminal conduct or stigmatizing behavior, many arbitrators apply a higher burden of proof, typically a ‘clear and convincing evidence’ standard, with some arbitrators imposing the ‘beyond a reasonable doubt’ standard.” *Elkouri and Elkouri*, How Arbitration Works (6<sup>th</sup> Ed.), pp. 950-951. But even in “cases involving potential criminal conduct, the greater weight of authority favors ‘clear and convincing evidence’ or ‘preponderance of the evidence’ as

opposed to ‘beyond a reasonable doubt.’” *Elkouri and Elkouri, How Arbitration Works* (6<sup>th</sup> Ed.), pp. 951-952.

Here the conduct of which the Grievant stands accused would certainly be “stigmatizing” for a police officer, and technically could also be termed “potentially criminal”, so the standard of “clear and convincing” evidence could be applied.

However, in my view of the evidence in this case, I think the City’s evidence failed to carry the preponderance of the evidence and therefore that standard can be applied.

With this backdrop, the evidence in this case, which is in sharp dispute in some instances, must be weighed and evaluated, and “a judgment must finally be made.” This particular assessment begins with the acknowledgement that the City undertook an unusually difficult burden, because in large part its case rests on establishing the Grievant’s “intent”, or state of mind, at the time of the events in question. Chief Hogue, the ultimate decision maker, and Sergeant Eric Diaz, TPD’s “subject matter expert” whose report seemed to carry significant weight in the disciplinary process, both testified that in their opinion the Grievant had a “predetermined” mindset as he approached the scuffle on the ground that night, that he had already made up his mind to “do something”, to “get involved” in the melee, and in fact to vent his emotions, fueled by adrenaline, to take them out on somebody.

But a person’s “mindset”, his motivation, what he was thinking, in an incident is notoriously hard to prove, in court, in arbitrations, and elsewhere, because we cannot look inside people’s minds and see what they are thinking at any given time. This problem was really well explained by Sergeant Joseph Caravella, who testified that he is an instructor on “motivation” for the Tampa Police Department, T-230, and stated (in my

opinion accurately), that “you can never, ever know somebody’s motive; you can only speculate”, T-189, and “[y]ou can’t get inside someone’s head and know what they’re doing [or thinking].” T-224.

Certainly this does not suggest that there was no evidence to support the opinion that the Grievant was motivated by adrenaline or an unthinking impulse to strike out or inflict harm; there was some evidence to support that view, though it was all circumstantial; and all of this will be discussed in detail in the following opinion. But it is *not* true, as Chief Hogue adamantly testified, that “[y]ou can see clearly from the video” that Officer Maus “ran out, ran right over”, and “just had a predetermination that I’m going to do something, that’s what I’m going to do, kick him”, T-175, or that he had “absolutely” had made up his mind to “inflict harm” without reason. T-175. To the contrary, this very claim is the central dispute in this case, it is the subject of a heated disagreement, and it is not absolute or clear to me at all.

Sure, the explanations given by the Grievant could have been after the fact rationalizations, decided on by him in an effort to protect his job. Chief Hogue and Sergeant Diaz obviously came to that very conclusion. But in my view the evidence does not necessarily support that conclusion, and I must respectfully disagree with Chief Hogue that “the kick administered by Officer Maus ... was absolutely an inappropriate use of force”, T-174, or that “there was absolutely no need for it.” T-175. In fact the evidence and opinions given at the arbitration hearing as to the propriety of, and the need for, the kicks, were the subject of a sharp and heated debate, and in my opinion these issues cannot be fairly described as “absolute” or “clear” one way or another.

## 2. The Grievant's State Of Mind

The primary disputed issue, described by the City in "absolute" terms, was whether Officer Maus gave any thought to his actions before delivering the kicks. Sergeant Eric Diaz, the subject matter expert who reviewed the case, testified that in his opinion, judging from the "totality of the circumstances" and "the actual approach itself", Officer Maus's kicks were "not a conscious decision", but "just more of an attempt at doing something", T-140, and "you can see, just by the video, and again it goes back to that adrenaline again, he just ran up there with the intent of doing something." T-146. In Sergeant Diaz's opinion, "you can see the way the video rolls, there's no thought of target acquisition; there's no thought of looking at anything", it was "just a kick." T-147.

As noted above, that is certainly one view of the tape; but the problem with these observations and conclusions is that they are based on a much less than conclusive videotape and seriously conflicting evidence, and in the end they are only opinions, which are strongly held, but flatly disputed by contrary opinions equally strong. And as already mentioned, nobody can really ever know for sure what was in the Grievant's mind in those few seconds. Though Sergeant Diaz decided that there was "no thought of target acquisition" and "no thought of looking at anything", the videotape is anything but conclusive on that issue.

In fact none of the evidence is all that strong on this point on way or the other. Officer Maus testified in his Internal Affairs statement that "at the time I stopped my patrol car and exited, I was already evaluating the suspect's resistance levels and preparing my response level." City Exhibit 3, p. 11. It is Sergeant Diaz's opinion that this statement is not true, and Diaz says that the Grievant's "complete misrepresentation

of what the actual use of force was” actually caused him “the most concern.” But after viewing the video tape many times, and reflecting on all of the evidence, I am not at all convinced that Officer Maus was not telling the truth, exactly as he saw it; whether his evaluation was a good one or not is another matter entirely, and was not the basis for the discipline. The City’s case rests on the premise that the Grievant kicked at the Suspect because of adrenaline, excitement or loss of control, and without a legitimate reason or defensive tactic in mind. But the evidence failed to establish that.

### **3. The Suspect Was Not “Under Control” When The Grievant Kicked At Him**

Another major point of heated dispute, having significant bearing on the reasonableness of the Grievant’s actions, is whether the First Suspect was “under control” when he was kicked. Once again the witnesses’ opinions are sharply divided on this point, and once again, the City has taken an absolute and unequivocal position. But I do not think the evidence supports that position, and indeed I think it rather strongly supports the position that the Suspect was *not* under control, and was still a threat, when he was kicked at by the Grievant.

Explaining his thinking in reaching the decision to terminate the Grievant, Chief Hogue testified emphatically that “three people had him [the Suspect] under control”, T-176-177, that “there was absolutely no need for it; there were three officers on top, you’ve heard plenty of testimony today that he was under control.” T-175. But actually nearly all of the evidence that I have before me was that the First Suspect was not under control, because his hands were hidden from view, he was clutching them underneath his body, tensing and bracing, and he was resisting the officers’ strenuous efforts to pull his arms and hands out from under his body to handcuff him.

