AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration	:	AAA Case No.
	:	01-17-0005-9703
between	:	
	:	Opinion & Award
FRATERNAL ORDER OF POLICE, LODGE NO. 5,	:	
	:	Re
"Union"	:	Discharge
	:	
- and -	:	Hearing: February 8, 2024
	:	
	:	
CITY OF PHILADELPHIA,	:	
	:	
"City"	:	

APPEARANCES

For the Union

WILLIG, WILLIAMS & DAVIDSON
Richard G. Poulson, Esq.

For the City

CITY OF PHILADELPHIA LAW DEPARTMENT
Lisa A. Swiatek, Esq., Deputy City Solicitor

BEFORE: David J. Reilly, Esq., Arbitrator

BACKGROUND

The City discharged Police Officer , effective October 5, 2017. It took this action upon finding that he had violated Section 6-§008-10 of the Police Department's Disciplinary Code, by discharging his firearm in a manner contrary to Department policy. (Joint Exhibits 1, 1A & 3.)[1]

The Union contends the City lacked just cause to discharge . It asks that he be reinstated to his former position with the Department and be made whole for all pay and benefits lost due to his discharge. It also requests that the City be directed to revise his personnel records to expunge all reference to his discharge to the extent consistent with governing law.

The basic facts of this case, including the areas of dispute, may be set forth succinctly.

Employment History

At the time of his discharge l had been employed by the Department for approximately ten years. His annual evaluations consistently rate his performance as satisfactory and include positive comments from his supervisors. (Joint Exhibit 5.) During his tenure, the Department issued him multiple commendations, including ten for merit and one for bravery. (Joint Exhibit 5.) Further, his record reflects no prior

[1] The Department's Disciplinary Code, which is annexed to the parties' collective bargaining agreement, defines the charged offense as: Article VI – Disobedience, "6-§008-10 – Discharging, using, displaying or improper handling of a firearm while not in accordance to Departmental Policy." (Joint Exhibits 1 & 1A.) As of the date of the incident for which the Department charged Pownall with violating Disciplinary Code 6-§008-10 (i.e., June 8, 2017), the collective bargaining agreement then in effect was the 2014 – 2017 agreement. (Joint Exhibit 1.) Four months later when the Department discharged Pownall, the 2014- 2017 agreement had been superseded by the parties' 2017 – 2020 agreement. It is acknowledged, however, that the relevant section of the Disciplinary Code and the applicable standard for disciplining or discharging an officer (i.e., just cause) remained unchanged from the 2014 – 2017 to the 2017 – 2020 agreement. (Joint Exhibits 1 & 1A.)

discipline.

In testifying, Sergeant Robert Auman, Pownall's immediate supervisor from 2016-2017, described him as "a very active officer." (Tr. 116.)[2] He noted further, "If I had ten more like him or a million more I would really appreciate that in my squad.... He was an exceptional officer, always on the ball." (Tr. 116.)[3]

Firearms Training

Captain Nicholas Brown, the Commanding Officer of the Department's Training Bureau since on or about mid-2020, testified that all officers receive regular firearms training. According to Captain Brown, the Department provides officers with their first such training while assigned to the Police Academy as recruits. (Tr. 87.) After completing the Academy and becoming sworn members of the Department, all officers, he said, attend an annual in-service training, which addresses proper use of firearms, through both classroom instruction and in field exercises. (Tr. 87-88.)

Referencing lesson plans for recruit and in-service training, Captain Brown averred that officers are instructed on various techniques for remedying the malfunctioning or stoppage of their firearm and perform related drills. (Tr. 88-89; City Exhibits 3 – 4.) One such method for removing or clearing a jammed round from the weapon's magazine, he said, is referred to as "tap – tilt – rack – ready." (Tr. 89; City Exhibits 3 – 4.) This process, he related, can typically be completed in two – five

---

[2] References to the transcript of the February 8, 2024 hearing in this case will be identified as "Tr." followed by the applicable page number(s).

[3] In Pownall's Annual Evaluation, dated June 1, 2017, Sergeant Auman, as the rating officer, commented, "You have a very good work ethic. Your knowledge and experience on the job make your peers look up to you and you are always willing to help your fellow officers on difficult assignments. Your constant heads up on assignments keeps you alert and you are a valuable asset to 1 Squad. You maintain a professional demeanor and appearance when you are on duty. Keep up the good work." (Joint Exhibit 5.)

seconds. (Tr. 89.)

He continued that officers are instructed that when taking such corrective action, to seek cover and concealment, if feasible, and maintain eye contact with the suspect. (Tr. 89-90.) Once the stoppage is cleared, he said, officers are trained to return to the ready position and scan to see if a threat to life remains imminent. (Tr. 90.) If so, they may engage the threat; if not, they must "stand down." (Tr. 90; City Exhibits 3 – 4.)[4] In layman's terms, he related, this instruction means that "officers are supposed to reassess the situation before they fire their weapon." (Tr. 92.)

He confirmed that prior to June 8, 2017, Pownall completed his most recent annual firearms in-service training on June 3, 2017. (Tr. 92-93; City Exhibit 5.)

Internal Affairs Division ("IAD") Investigation of June 8, 2017 Shooting

Lieutenant Thomas McDonald, a member of the Department's Internal Affairs Division ("IAD"), testified to being assigned to IAD's shooting team since approximately 2007. (Tr. 65.) According to McDonald, in that capacity, he has responsibility for investigating all officer involved shootings from an administrative standpoint; namely, whether the officer violated any Department directives or policies. (Tr. 65-66.)

This work, he related, is bifurcated from the investigation performed by the Department's Officer Involved Shooting Investigation Unit ("OISI"), which focuses on

[4] The relevant portion of the 2016 training lesson plan reads, "With the old out and a new round in the chamber, 'cover' (demonstrate 'cover') the suspect and scan the environment for threats, unless it is necessary to shoot (i.e. - threat to life is still imminent)." (City Exhibit 4.) According to Captain Brown, during training, the instructor demonstrates verbatim this stated directive, which includes the example, "The threat to life is still imminent." (Tr. 92; City Exhibits 3 – 4.) On cross-examination, he explained, the example refers to a threat to life that is "pending." (Tr. 94, 101-102.) Presented with a scenario in which an armed suspect evades an officer's attempt to subdue him/her, he responded, "There's a possibility of imminent threat to life" being present there. (Tr. 94.) Captain Brown also confirmed having no involvement with the investigation or decision to discharge Pownall; nor personally providing firearms training to Pownall. (Tr. 95.)

whether the officer committed a crime. (Tr. 66.) He stated further that all results of the OISI investigation are shared with IAD, but the reverse does not occur. The reason for this one-way information sharing, he explained, stems from IAD's gathering of compelled statements, which potentially conflicts with the subject officer's constitutional rights. (Tr. 67.)

On June 8, 2017, he reported being assigned to investigate an officer involved shooting, in which discharged his weapon, resulting in a suspect's death. (Tr. 67.) In response, he recounted visiting and processing the scene with the Crime Scene Unit and the OISI investigator. (Tr. 68.)

The next step, he said, was to interview . (Tr. 68-69.) After doing so, he explained, the investigation continued with gathering reports (i.e., crime scene; ballistics; medical examiner) and receiving witness interview statements and other evidence taken or collected by OISI. (Tr. 69.)

In addition, he related interviewing Captain Charles Green, then the Commanding Officer of the Department's Firearms Training Unit. He averred doing so to address a possible inconsistency between a statement made by Powell and his understanding of Department firearms training. (Tr. 71.) e said, reported being trained that after clearing a weapon jam, to reengage and continue shooting without reevaluating the situation. (Tr. 71-72.) Captain Green, he recounted, disagreed with that assertion. (Tr. 71.)

Upon the concluding his investigation, he confirmed preparing a report, which summarized his factual findings and was accompanied by all the interview statements and

other evidence gathered. The report, he stated, was submitted through his chain of command and then transmitted to the Police Commissioner. (Tr. 69.)

IAD Interview

Lieutenant McDonald's interview of , which was conducted on June 12, 2017, reflects the following as to the June 8, 2017 incident, during which Pownall discharged his weapon[5]:

(1) During his shift that day (i.e., 3:45 p.m. – 12:00 a.m.), was tasked with transporting and his two children to the Department's SVU office, as one of the children had been the victim of an attempted abduction.

(2) While stopped at a traffic light at the intersection of Whitaker and East Hunting Park Avenues, observed an individual operating a dirt bike recklessly, crossing from the east to the west side of Whitaker, and then entering a restaurant parking lot, where the dirt bike stalled.

(3) decided to approach the dirt bike operator, who has since been identified as David Jones, to direct him to take the bike home and stop driving recklessly and endangering persons. In doing so, he drove his vehicle into the restaurant parking lot and stopped next to Jones, without notifying Police Radio.[6] Upon exiting his vehicle, he observed that Jones appeared extremely nervous, turning away from him and placing his right hand at his waist. As a result, concluded Jones possessed a weapon, causing him to be concerned for his safety and that of and his children.

(4) In response, he stepped toward Jones, placed his hand at Jones's waist, where he felt a gun. A struggle then ensued, during which Jones attempted to pull the gun out from under his clothes, while restrained him and gave commands not to withdraw the weapon. Failing to comply, Jones was able to escape grasp, pull out the gun and aim it at , who had drawn his gun, responded by attempting to fire a shot at Jones, but the weapon jammed.

---

[5] At the outset of the interview, Lieutenant McDonald informed Pownall that he was compelled to give a statement, explaining, "Pursuant to Philadelphia Police Department Disciplinary Code, Article 1-008-10 and 1-009-10, you as a police officer are required to cooperate and provide a truthful statement to the Internal Affairs Division in order to avoid job sanctions or dismissal." (Joint Exhibit 4A.)

[6] Explaining this failure to notify Police Radio, Pownall stated he does not do so for "mere encounters," as opposed to a vehicle stop. (Joint Exhibit 4A.)

(5) Following his training to get the gun operational, he employed the "tap-tilt-rack-ready" method to clear the jam. As soon as he had done so, he fired at Jones approximately three times, as he ran towards a parked car in front of the restaurant. Explaining this action, he stated, "I thought he was going to take cover and try to fire shots at me. I needed to eliminate the threat for my sake and the civilians." When Jones fell next to the parked car, he immediately approached and reported by Police Radio shots fired and requested medics be dispatched to his location.

(6) Upon searching Jones, he did not find the gun. A short time later, after other officers had arrived, Jones's gun was discovered on the ground approximately twenty feet from his dirt bike.

(Joint Exhibit 4A.)

Thomas Freeman's Testimony

In testifying at the hearing in this case recounted his observations of the June 8, 2017 incident. Similar to 's interview statement, he also recalled observing Jones driving his dirt bike across traffic on Whitaker Avenue and entering the restaurant parking lot, to which responded by following him there. (Tr. 51-52.) After exiting the vehicle and approaching Jones, Pownall, he related, placed his hand on Jones, who, in turn, attempted to break loose, while fidgeting with the front of his "hoody." (Tr. 52-53.)

At this point, he described and Jones as being in a "tussle." As it continued, Jones, he averred, looked at him, to which he reacted by stating, "Don't do it, don't do it." (Tr. 53.)

According to Jones broke free and fired his taser, at which time he ducked down with his children. (Tr. 54.)[7] Upon looking up again, he observed Jones running and pulling out his weapon. (Tr. 54.) He and his children then once

[7] Contrary to Freeman's account, the IAD investigation confirmed that Pownall did not possess a taser at the time of the June 8, 2017 incident. (City Exhibit 4.)

more dropped down in the vehicle, whereupon he heard several shots fired. (Tr. 54.) On the cessation of the shooting, he raised himself again and noticed Jones's weapon on the ground. (Tr. 54.)[8]

Security Camera Video of June 8, 2017 Incident

The City introduced at the hearing in this case a video of the June 8, 2017 shooting at issue, which was recorded by one of the external security cameras at the restaurant where the incident occurred. (City Exhibit 2.)[9] The video, which captures only a portion of the encounter between Jones and , depicts, in relevant part:

> (1) Jones enters the parking lot at the north side of the restaurant and then walks his dirt bike out of camera view.
>
> (2) drives his patrol car to the edge of the parking lot, exits the vehicle and then proceeds off camera in the direction that Jones had walked.
>
> (3) Jones returns to camera view from the north side of the restaurant and then runs south bound on the sidewalk alongside Whitaker Avenue.
>
> (4) reappears from the same side of the restaurant and facing Jones fires his weapon, after which Jones falls to the ground.
>
> (5) approaches Jones, pats his clothing and then utilizes his police radio

(City Exhibit 2.)

The video reflects that the elapsed time from when exited his vehicle and approached Jones until he patted down Jones after he fell near the parked car was forty seconds. It also indicates that four seconds elapsed from when Jones reappeared from the parking lot until he fell to the ground. (City Exhibit 2.)

---

[8] On cross-examination, Freeman confirmed that he did not see Jones toss or discard the weapon. Instead, he saw it on the ground for the first time after the incident concluded. (Tr. 61.)

[9] The video does not contain an audio track. (City Exhibit 2.)

Use of Force Review Board Decision

Under Department Policy, all police involved shootings are reviewed by a five-member Use of Force Review Board ("UFRB"). (City Exhibit 6.)[10] The UFRB functions to evaluate objectively the appropriateness or reasonableness of the force used. It does so by deliberating on the evidence presented and issuing one of five findings, by majority vote: (1) Administrative Approval; (2) Improve Tactics and/or Decision Making; (3) No Use of Force Violations, but Other Departmental Violations Discovered; (4) Policy or Departmental Training Issues; and (5) Administrative Disapproval/Policy Violations. (City Exhibit 6.) In the case of (3) and (5), the UFRB notifies the Police Commissioner in writing of its finding and forwards the case to the Charging Unit for appropriate disciplinary charges to be filed against the officer. (City Exhibit 6.)

In this instance, Lieutenant McDonald averred presenting the evidence regarding the June 8, 2017 incident to the UFRB at an August 7, 2017 hearing. (Tr. 70; City Exhibit 1.)

On August 17, 2017, the UFRB issued a finding of "Administrative Disapproval/Policy Violation – Not within Departmental Policy – Referred to Charging Unit." (City Exhibit 1.) In its related report to the Commissioner, the UFRB explained the departmental violations stemming from shooting of Jones concerned:

> Final shot not justified. No motion or threat observed at time of discharge. Officer violated policy making vehicle stop with people in car. Failed to notify radio. Did not scan and reassess as required by training.

(City Exhibit 1.)[11]

---

[10] UFRB members include the Deputy Commissioners of Organization Services, Office of Professional Responsibility, Patrol Operations and Investigations and Homeland Security, and the Executive Director of the Police Advisory Committee. (City Exhibit 6.)

[11] None of the members of the UFRB who rendered this finding testified at the hearing in this case.

Termination of Pownall's Employment

On September 7, 2017, the Department issued a Notice of Intention to Dismiss, charging him with violating Department Disciplinary Code Section 6-§008-10 (Discharging, using, displaying or improper handling of a firearm while not in accordance to Departmental Policy), based upon his actions on June 8, 2017. (Joint Exhibit 3.) In particular, the Notice cited the UFRB's determination that committed several violations of Department policy and training, including: (1) Directive 9.7, Safe Operation of Police Vehicles, by stopping to engage with Jones while transporting civilians to SVU; (2) Directive 12.8, Vehicle or Pedestrian Investigations, by neglecting to report his engagement with Jones to Police Radio; (3) Firearms Training, by failing, after clearing his weapon stoppage, to scan and reassess the threat; and (4) final shot not justified as there was no motion or threat observed at the time of discharge. (Joint Exhibit 3; City Exhibits 7 & 9.)

Subsequently, by a Commissioner's Direct Action approved by then Commissioner Richard Ross, the Department discharged effective October 5, 2017. (Joint Exhibit 3.)[12]

In testifying regarding this action, current Commissioner Kevin Bethel, related that upon reviewing the IAD investigation report and UFRB's findings, he concurred with the decision of former Commissioner Ross to discharge (Tr. 39-40.) He explained basing this conclusion on the relevant circumstances, including

[12] Subsequently, the District Attorney for the City of Philadelphia brought criminal charges against Pownall based upon the June 8, 2017 shooting, including murder and criminal homicide. Following a July 20, 2022 decision of the Pennsylvania Supreme Court denying the District Attorney's appeal of suggested jury instructions, the charges were dismissed. However, as the parties have stipulated, notwithstanding the dismissal of those charges, the District Attorney's Office has stated that it reserves the right to reinstate such charges and is contemplating doing so. (Tr. 32.)

violations of Department Directives 9.7 and 12.8, as well as his review of the video depicting the shooting. (Tr. 40.) Further, based upon the video, he considered all shots fired by be unjustified, not just the final shot as found by the UFRB. (Tr. 40-41.)[13]

Procedural History

In response to , discharge, the Union filed the instant grievance contesting that action. (Joint Exhibit 2.) When the parties were unable to resolve the matter at the lower stages of the grievance procedure, the Union demanded arbitration. (Joint Exhibit 3.) Pursuant to their contractual procedures, the parties selected me to hear and decide the case. (Joint Exhibit 1.)

I held a hearing on February 8, 2024, at the offices of American Arbitration Association in Philadelphia, Pennsylvania. At the hearing, the parties each had full opportunity to present evidence and argument in support of their respective positions. They did so. With the receipt of the hearing transcript on March 12, 2024, I declared the record closed as of that date.

DISCUSSION AND FINDINGS

The Issue:

The parties have stipulated that the issues to be decided are as follows:

1. Did the City have just cause to discharge the grievant, Police Officer effective October 5, 2017?

2. If not, what shall be the remedy?

[13] In support, Commissioner Bethel testified, "I thought that … all the shots were not appropriate. I'm not sure what the final shot meant as it relates to their determination. My decision was based on the shooting in its entirety from the first one to the last." (Tr. 40-41.)

Positions of the Parties

At the conclusion of the February 8, 2024 hearing, both parties made closing arguments. Their respective positions are summarized below.

The City's Position

The City contends that its discharge of was for just cause. It maintains that the evidence conclusively demonstrates his guilt on the Section 6-§008-10 charge of discharging a firearm contrary to Department Policy.

In support, it stresses that encounter with Jones on June 8, 2017 should never have occurred. Having been tasked with transporting a civilian and his two minor children to SVU that day, avers, should not have stopped to engage with Jones, notwithstanding his reckless operation of a dirt bike. By doing so, it points out, he violated Department Directive 9.7, Safe Operation of Police Vehicles, and placed the civilians being transported in harm's way.

It asserts further that he compounded matters by disregarding Department Directive 12.8, Vehicle or Pedestrian Investigations. In particular, it cites his failure to report the stop on Police Radio and await for the arrival of backup.

Both Directives 9.7 and 12.8, it notes, serve to protect officers, and in the case of Directive 9.7, the civilians they are transporting. Simply put, it concludes, if had complied with these directives, he and the civilians riding with him on June 8, 2017 would never have been placed in a situation where they were at risk of being shot.

Turning to the circumstances of the shooting, it highlights, no dispute exists as to two critical facts: (1) when first attempted to fire his weapon at Jones, he experienced a firearms stoppage; and (2) after clearing the jam, failed to reassess

the threat before firing his weapon at Jones, as he ran toward the front of the restaurant. By these actions, it maintains, disregarded his Department training on the proper use of a firearm, which is conducted annually, with the most recent refresher having been received by just days earlier.

In sum, it concludes, by his actions on June 8, 2017, exhibited an extreme lack of judgment that disqualifies him from continued employment with the Department. Indeed, it notes, current Commissioner Bethel confirmed that none of the shots fired by that day were justified, and an officer who reacts in that manner must be excluded from the Department.

Accordingly, for all these reasons, it submits that the City had just cause to discharge , and, as such, the grievance should be denied.

Alternatively, it argues, if the grievance is sustained, any back pay award should be limited to the period from the dismissal of the criminal charges filed against through his reinstatement.

In support, it cites the testimony of Captain Gregory Malkowski, explaining that the Department cannot retain an officer charged with murder or homicide due to the obvious conflicts arising from an officer's access to sensitive information and his/her need to testify in criminal trials. Further, it stresses, the District Attorney's Office is a separate entity over which the City does not exercise any control. As such, it states, for purposes of any remedial relief granted here, the City should not be held accountable for the effect of the District Attorney's decision to bring charges against or the time required to prosecute.

The Union's Position

The Union, on the other hand, maintains that the City lacked just cause to discharge based on the events of June 8, 2017. It submits that the City has failed to meet its burden of demonstrating that committed the charged offense; namely discharging his firearm contrary to Department Policy.

To the contrary, it argues, properly performed his duties on June 8, 2017. More specifically, it notes, with Jones having drawn a weapon, was in a "fight for his life" and acted appropriately to eliminate an imminent threat of death or grievous bodily harm faced by both him and the civilians he was transporting. As such, it concludes, he did not engage in any conduct warranting discipline, let alone discharge.

In examining the established record here, it posits that the District Attorney's actions have had a material effect on this proceeding. In particular, it notes, the now dismissed prosecution of delayed a hearing on his October 2017 discharge until February 2024. As a result, decision makers, such as former Commissioner Ross were not available to testify and be confronted on cross-examination. The testimony given by current Commissioner Bethel, who was not a member of the Department in 2017, it argues, cannot substitute for Ross's, and, as such, cannot serve to establish just cause for discharge.

Likewise, it stresses, while the UFRB found the final shot fired by was not justified, no member of the UFRB testified to explain that decision. The need for such an account, it states, was made all the more important by the implication of this finding; namely that the first two shots fired by were justified.

This defect in the City's case, it contends, was not remedied by Lieutenant

McDonald's testimony. Although his IAD investigation report identifies possible policy violations by warranting further review, it points out, he did not determine whether such violations actually occurred.

As such, it avers, given the absence of testimony from any of the decision makers relative to the charge proffered against , the record cannot support a finding that the City had just cause to discharge him.

Moreover, it argues, statement refutes the central allegation underlying the alleged violation of the Department's firearms training, as well as the other cited violations of Department Directives.

Contrary to the City's claim, it states, the requirement that allegedly disregarded (i.e., reassessing the scene after clearing the weapons stoppage) did not apply here. , it notes, confirmed that upon restoring his weapon to the ready state, the imminent threat to life remained. Further, it stresses, nothing in the video presented contradicts stated belief in this regard. As such, it concludes, per Department training, he was authorized to discharge his weapon in response to that threat.

As for the alleged violations of Directives 9.7 and 12.8, it maintains, uncontradicted statement demonstrates they were inapplicable or were not triggered.

, it notes, explained that his engagement with Jones did not constitute a vehicle or pedestrian stop, but a "mere encounter." As such, it maintains, his actions did not violate Directive 9.7's prohibition against conducting a stop when transporting civilians; nor trigger Directive 12.8's obligation to notify Police Radio.[14]

[14] Alternatively, it states, if Pownall's "mere encounter" characterization of his engagement with Jones is incorrect, the City has established, at most, technical violations of Directives 9.7 and 12.8. It stresses further that such infractions are tangential to Pownall's charged misconduct (i.e., discharging a firearm contrary to Department Policy) and are more appropriately charged as a violation of Disciplinary Code

In sum, it concludes, upon the record presented, the City has failed proved the charged misconduct as stated in the Notice of Discipline.[15]

Accordingly for all these reasons, it asks that the grievance be sustained and the requested relief awarded.

Opinion

There can be no question that the City's Police Department has a right and a duty to ensure that its officers adhere to certain standards of conduct when acting in their official capacity. The appropriate use of force, including, in particular, lethal force in the form of a firearm, is undoubtedly one area in which the enforcement of such requirements is of paramount importance. The Department's obligation to safeguard both citizens and its officers, while also maintaining the public trust that is essential to its mission, demands as much. To this end, the Department has the indisputable right to discipline an officer who discharges a firearm contrary to Department policy.

The authority granted members of law enforcement to use lethal force within specified parameters is a necessity of the job in which a police officer may be called upon to respond in instant to a threat of imminent death or grievous physical injury to a member of the public, him/herself and/or a fellow officer. Of course, with such great

---

Section 5-§011-10 – Failure to Comply with any Police Commissioner Order, Directive, Miranda regulation or any oral or written orders of Superiors. Further, under any circumstances, it avers, they cannot justify Pownall's discharge given that they carry a prescribed penalty range of reprimand to a five-day suspension for a first offense and a five day to ten-day suspension for a second offense.

[15] The Union also posits that even if the City had established the principal violation of discharging a firearm contrary to Department Policy, it would not have established just cause for his dismissal. To the contrary, citing Union Vice President John McGrody's testimony and the documentary evidence, it highlights that the Department's response to this same infraction committed by other officers under similar circumstances reflects a penalty range of reprimand to a thirty-day suspension, with one discharge that was rescinded pursuant to an arbitrator's award. (Tr. 121-124; Union Exhibit 1.) On this basis, it reasons, Pownall's discharge necessarily represents disparate treatment, and thus, cannot satisfy the just cause standard, a conclusion that is further confirmed when Pownall's exemplary and distinguished record of service is weighed appropriately.

authority comes equally great responsibility. In support of that obligation, the Department maintains a policy governing the permissible use of firearms and provides regular firearms training to each of its officers, beginning with their entrance into the Academy as recruits and continuing with an annual in-service refresher course once they become a sworn officer. In doing so, the Department instructs its officers in detail as to how and when they may safely deploy their firearms consistent with Department policy.

When, despite these efforts, an officer involved shooting results in a loss of life, it is an unquestionable tragedy. This holds true regardless of the underlying circumstances.

For this reason, the Department maintains a process by which it investigates and evaluates the appropriateness of any officer involved shooting. On the administrative side, this work begins with an IAD investigation by a member of its shooting team and concludes with the UFRB reviewing the evidence gathered by IAD and determining whether to administratively approve or disapprove the shooting, as well as to identify training issues and violations of other Department policies.

Where the UFRB disapproves a shooting and/or finds other policy violations, any resulting discipline issued to the officer involved remains subject to challenge through the grievance and arbitration procedure of the parties' Agreement. In the event such a grievance is advanced to arbitration, as has occurred here, the City carries the burden of proof. As such, it must demonstrate by a preponderance of the credible evidence that committed the charged offense. It must also establish that the level of discipline imposed is appropriate.

The Union, on the other hand, has no corresponding burden. It need not disprove the charges against . Indeed, he is entitled to the presumption of innocence.

After a careful review of the record and thorough consideration of the parties' respective arguments, I am convinced that the City has not met its burden. My reasons for this conclusion follow.

The City's proof that use of his firearm violated Department policy and warranted his discharge rests upon three pieces of evidence -- the video presented, Freeman's testimony and 's statement to IAD. The City's witnesses, including current Commissioner Bethel and Lieutenant McDonald, did not possess any first-hand knowledge of the events of June 8, 2017. Instead, Commissioner Bethel's stated conclusion regarding purported improper firearm use was made years later and comes from his review of the video, the IAD investigation report and the UFRB's findings; whereas, Lieutenant McDonald acknowledged making no such determination, but instead, his role involved gathering and presenting all the relevant evidence to the UFRB.

I recognize that City's case has likely been hobbled by the passage of time, stemming from the necessary deferral of the arbitration hearing in this case due to pendency of the related criminal charges that the District Attorney's Office brought against Indeed, such circumstances may well explain the absence of testimony from the decisionmakers in this matter, such as former Commissioner Ross and the members of the UFRB.

The effect of such delay, however, cannot alter the City's evidentiary burden. Likewise, the gravity of the underlying circumstances, Jones's tragic death, do not permit me to lower the bar. Simply put, I cannot simply credit at face value the written findings of UFRB, which Commissioner Ross apparently relied upon in discharging by a

Commissioner's Direct Action. Instead, I must weigh the evidence presented as to what transpired during the June 8, 2017 encounter between and Jones and determine whether the City has established that violated Department policy in discharging his weapon in response.

In examining the record, it is apparent that much is not in dispute. Indeed, the parties acknowledge this to be true.

In this regard, I take note that City does not challenge s account of the circumstances leading to the point at which Jones aimed his weapon at him, and he, in turn, responded by attempting to discharge his firearm at Jones, but it jammed. In fact, , account is supported by Freeman's testimony. Moreover, the Notice of Dismissal includes a consistent recitation of this portion of the interaction between and Jones.

Plainly then, at this stage of the encounter, no issue exists as to the propriety of conduct. Indeed, I do not understand the City to claim otherwise. Simply put, Jones's actions created a threat of imminent death or grievous bodily harm to which was authorized to respond by discharging his firearm.

Where the parties depart concerns actions once he had cleared the jam and restored his gun to the ready state. Namely, the City avers that it was at this moment, violated Department policy by deviating from its firearm training. In particular, it maintains that by own account, he failed, upon restoring his firearm to the ready state, to assess or scan the environment for threats.

On review, I am unpersuaded by the City's construction of the Department's mandate in this regard. The training materials introduced by the City reflect a critical

exception to the obligation to assess once an officer has restored his weapon to the ready state; namely, where the threat to life remains imminent.[16]

The City's witness Captain Brown, Commanding Officer of the Department's Training Bureau, confirmed this reading of the training materials. In fact, he expressly testified that the exception applies where "a threat to life is pending." (Tr. 94.) When presented on cross-examination with an example in which an armed suspect escapes the officer's control, he said, there could be the "possibility" of an imminent threat to life. (Tr. 94.)

According to account, once he had cleared and restored his firearm to the ready state, he determined that the imminent threat to his life and the lives of posed by Jones remained. More specifically, he explained, "I thought he was going to take cover and try to fire shots at me. I needed to eliminate the threat for my sake and the civilians." (Joint Exhibit 4A.)[17]

If find nothing in the record that contradicts stated belief in this regard or renders it unreasonable. Further, the City has not offered any evidence suggesting that despite such a reasonable belief, it would still have been improper for to discharge his weapon at Jones, as he ran towards the parked car on Whitaker Avenue.

Although we are now aware that Jones dropped his gun before running from the restaurant parking lot and proceeding southbound on Whitaker Avenue, the content of the

---

[16] Specifically, the in-service lesson plan for the Department's firearm training states: "With the old out and the new round in the chamber, 'cover' (demonstrate 'cover') the suspect and scan the environment for threats, ***unless it is necessary to shoot (i.e., - threat to life is still imminent).*** (City Exhibit 4 at 9 (emphasis added).)

[17] Although Pownall did not testify at the hearing in this case, I have not drawn any negative inference from that fact. In declining to do so, I have weighed that despite dismissing the criminal charges filed against Pownall, the District Attorney's Office has stated that it reserves the right to reinstate those charges and is contemplating doing so. *See* note 12, *infra.*

video does not permit me to conclude that knew or should have known this fact. To the contrary, after reviewing the video numerous times, at both normal speed and in slow motion, I saw no inconsistency between Jones's movements and conclusion that he was running for cover from which he could fire his weapon.

I note that as Jones emerged from the parking lot on the northside of the restaurant and began running along Whitaker Avenue, he does not appear to be holding a gun in either hand. I am satisfied, however, that this fact is not sufficient to rebut the threat perceived by , as it would have been reasonable for him to conclude that Jones had returned the weapon to his hoody or waist band, as he fled. In fact, consistent with that perception, the video supports statement that upon reaching the fallen Jones, he searched him for a gun.

Turning to testimony, it too offers no basis to reject 's reported belief that Jones continued to pose an imminent threat to life as he ran from the restaurant parking lot after unsuccessfully attempt to fire his gun. By his account, he dropped down in the patrol car when Jones escaped , grasp and drew his weapon and then again when pursued Jones onto Whitaker Avenue and discharged his weapon. It was only after he raised himself again upon the cessation of the shooting that he observed Jones's weapon on the ground. As such, I am compelled to find his testimony insufficient to demonstrate that knew or should have known that Jones's had discarded his weapon and was unarmed as he ran along the sidewalk on Whitaker Avenue.

This conclusion, I note, is consistent with the UFRB's implicit finding that the first two shots fired by were justified. Obviously, if the UFRB had determined

that knew or should have known that Jones's had dropped his gun before running out of the restaurant parking lot, it would certainly have found all three shots fired were not justified, as opposed to only the final shot.

Further, I find a lack of evidentiary support for the UFRB's finding that the final shot was not justified. To the extent the UFRB intended to substantiate this determination by the stating in its findings "no motion or threat observed at the time of discharge," such claim is at odds with the video.

As recounted above, the video clearly depicts Jones running towards the parked car on Whitaker Avenue, as emerges from the restaurant parking lot and discharges his weapon three times. In view of these circumstances, I unable to credit the UFRB's apparent basis for concluding the final shot was not justified. Indeed, Jones was running at the time, so there was, no doubt, motion. Likewise, in fleeing toward the parked car, Jones's actions were consistent with conclusion that he was seeking to take cover, so he could fire his weapon. As such, the video substantiates that an observable threat was present when all three shots were fired.

To determine no threat was present would necessitate examining the content of the video without considering the context provided by the portion of the encounter that occurred off camera during which Jones drew his gun and attempted to shoot Obviously, such an assessment of the video is not reasonable. Indeed, as noted above, the City does not contest account in that regard. Moreover, it is largely confirmed by estimony, and is recited in the Notice of Termination.

Finally, in analyzing the UFRB's determination that final shot was not justified, I take note that its report also references s alleged violations of

Directives 9.7 and 12.8, relating to his making a vehicle stop while transporting civilians and neglecting to notify Police Radio that he had done so. It is unclear to me, however, whether the UFRB intended to cite these violations as support for its ultimate conclusion.

In the event the UFRB so intended, I find the claim unpersuasive on the evidence before me. These purported violations bear on whether should have stopped his vehicle to encounter Jones, and if so, what actions he should have taken in doing so. They do not demonstrate that after encountering Jones and being subject to an imminent threat of death, contravened Department policy by discharging his firearm at Jones in seeking to eliminate such threat, which he believed was ongoing.[18]

In sum, judging actions in discharging his firearm on June 8, 2017, with consideration to the totality of the circumstances, I cannot find that the City has met its burden. Simply put, the evidence presented does not permit me to conclude that conduct violated Department policy governing the use of a firearm, as opposed to a justified use of force intended to eliminate an imminent threat to the life of Pownall and the citizens he was transporting. As such, it follows that the City lacked just cause to discharge him.

Accordingly, for all these reasons, the Union's grievance is granted. In regard to

---

[18] In regard to the issue of whether these alleged violations of Directives 9.7 and 12.8 could provide an independent basis for the Department to discipline , I conclude that it would be improper for me to decide that question, as the Department proffered no such charges against . Under the Department's Disciplinary Code, such alleged violations can be charged pursuant to Section 5-§011-10 – Failure to comply with any Police Commissioner's orders, directives, memorandums or regulations; or any oral or written orders of superiors. Such violations although referenced in the Notice of Dismissal cannot be deemed subsumed within the lone charge cited for Pownall's discharge – Section 6-§008-10 – Discharging, using, displaying or improper handling of a firearm while not in accordance to Departmental Policy. Further, under Section 5-§011-10, even if these violations were deemed established and found to constitute a first and second offense, the maximum penalty under the Department's Disciplinary Code would be a five-day and ten-day suspension, respectively. Accordingly for these reasons, in deciding the issue presented, I decline to address whether violated Directives 9.7 and 12.8 based upon his actions on June 8, 2017,

remedy, I direct the City to promptly reinstate to his former position within the Department without loss of seniority. In addition, I instruct the Department to revise his personnel record to delete all references to his discharge to the maximum extent permitted under the governing law.

As to the matter of make whole relief, the City is directed to make payment to for all wages and benefits lost, including overtime, as a consequence of his discharge, through the date of his reinstatement, but excluding the period during which the felony charges filed in connection with his conduct on June 8, 2017 were pending and any subsequent period when he was not available for duty relative to the disposition of those charges.[19] In declining to award back pay for this period, I am persuaded by the City's assertion that while subject to such serious felony charges, could not function as a police officer.

[19] The record does not include evidence of 's actual damages. As such, the parties will need to meet and confer to determine the amount due him or return to me for a ruling in the event they are unable to do so. In addressing the matter of lost overtime, I note that the make whole award requires proof that is more than speculative. Instead, it necessitates showing to a reasonable degree of certainty that but for discharge, overtime would have been offered to him and he would have worked such overtime.

AWARD

1. The grievance is granted.

2. The City did not have just cause to discharge [redacted]", effective October 5, 2017.

3. The City will promptly reinstate [redacted] to his former position with the Department without loss of seniority, and revise his personnel records, to the maximum extent permitted under governing law, to expunge all references to his October 5, 2017 discharge. In addition, the City will make him whole for all wages and benefits lost as a consequence of his discharge, including overtime, through the date of his reinstatement, but excluding the period during which the felony charges filed in connection with his conduct on June 8, 2017 were pending and any subsequent period when he was not available for duty due to the disposition of those charges. Such make whole relief will also be reduced by all outside wages and other earnings received by him as to the back pay period. I will retain jurisdiction of this matter to resolve any dispute as to the monies to be paid to [redacted], based on this award, including the issue of whether he satisfied his obligation to mitigate his damages.

April 25, 2024

David J. Reilly, Esq.
Arbitrator

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

I, DAVID J. REILLY, ESQ., do hereby affirm upon my oath as Arbitrator that I am the individual described herein and who executed this instrument, which is my Award.

April 25, 2024

David J. Reilly, Esq.
Arbitrator