

BEFORE NAJEEB N. KHOURY
IN THE MATTER OF ARBITRATION BETWEEN

KING COUNTY
EMPLOYER,
&
KING COUNTY POLICE OFFICERS GUILD
UNION.

ARBITRATOR'S OPINION
AND BINDING AWARD:

re: Termination of
[REDACTED]

APPEARANCES

For the Union:

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BACKGROUND AND PROCEDURAL HISTORY

The question that arises in this arbitration is whether King County and its Sheriff's Office ("KCSO"), pursuant to the relevant collective bargaining agreement between it and the King County Police Officers Guild, had just cause to terminate Grievant [REDACTED], a longtime deputy, for performing below the standards of his unit after Grievant failed to utilize de-escalation tactics in an encounter with suspect [REDACTED]. Grievant's encounter with the suspect ultimately resulted in the use of deadly force. As will be discussed below, the question before me is not whether the use of force which led to the suspect's death was warranted (as KING COUNTY AND KCPOG ([REDACTED] TERMINATION)

KCSO has already deemed it warranted). Rather, the question is whether Grievant's tactical decisions before the deadly use of force were of such an egregious nature as to provide just cause for terminating him on the basis that he performed at a level significantly below the standard achieved by others in his work unit.

The evidentiary hearings in this matter occurred on January 10-13 and January 27, 2023. Certified Shorthand Reporters attended the hearings to record the proceedings and testimony, and the reporters subsequently produced verbatim transcripts thereof. Each party had a full and adequate opportunity to call, examine, and cross-examine witnesses and to introduce relevant evidence. All witnesses testified under oath. The parties submitted post-hearing briefs on April 14, 2023, completing the record herein.

ISSUES

The parties stipulated to the following issue:

Was there just cause to terminate Grievant [REDACTED]; if not, what is the appropriate remedy?

RELEVANT CONTRACTUAL PROVISIONS¹ AND PROVISIONS OF THE GENERAL ORDERS MANUAL²

Article 12: Grievance Procedure

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Section 12.2. Procedure

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¹ The operative CBA is King County Exhibit (KC EX) 1.
² The General Orders Manual (GOM) is KC EX 2.
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Step 3 --- Request for Arbitration

...

The arbitrator, who shall conduct the arbitration procedurally in accordance with the Voluntary Rules For Labor Arbitration, shall be asked to render a decision in accordance with those rules and the decision of the arbitrator shall be final and binding on both parties.

The arbitrator shall have no power to change, alter, detract from or add to, the provisions of this Agreement, but shall have the power only to apply and interpret the provisions of this Agreement in reaching a decision.

...

Section 12.4. Just Cause Standard. No employee may be discharged, suspended without pay or disciplined in any way except for just cause. The County will employ the concept of progressive discipline. In cases where discipline is imposed, the Sheriff shall provide the employee and the Guild with written notice of the sustained findings and the factual basis on which the findings rest.

General Orders Manual Section 3.00.020: Performance Standards

1. All members must perform their assigned duties in a satisfactory and efficient manner. Unsatisfactory performance of duty shall be grounds for non-disciplinary action or disciplinary action up to and including discharge. "Unsatisfactory Performance" may be established when a member:
 - a. ...
 - b. ...
 - c. Performs at a level significantly below the standard achieved by others in the work unit.
 - d. Acts in violation of Sherriff's Office directives, rules, policies or procedures as set out in this manual, or elsewhere.
 - e. ...
 - f. ...

General Orders Manual Section 3.03.180: Standards of Proof

1. The standard of proof, in most cases, for an administrative investigation is generally "a preponderance of evidence."

2. The standard of proof in cases in which criminal or serious misconduct is alleged, and there is a likelihood of suspension, demotion, or termination, the standard of proof is “clear and convincing” which is a higher standard than “a preponderance of evidence.”

General Orders Manual Section 3.03.200: Discipline Recommendations:

1. Recommendations of discipline on sustained complaints will be made in writing by the Undersheriff.
2. Discipline should be corrective and not punitive in nature and will be based on the:
 - a. Seriousness of misconduct.
 - b. Member’s complaint history.
 - c. Likelihood that the member’s actions will be repeated.
3. Recommendation of discipline made by the Undersheriff may be changed by the Sheriff.

General Orders Manual Section 6.06.000: Use of Force:

...

General Orders Manual Section 6.06.200: De-Escalation:

1. When safe under the totality of the circumstance and time and circumstances permit, deputies shall use de-escalation tactics in order to reduce the need for force.
2. ...
3. When time and circumstances reasonably permit, deputies shall attempt to de-escalate use of force situations by:
 - a. Moving from a position that exposes deputies to potential threats to a safer position.
 - b. Decreasing the exposure to potential threats by using:
 - i. Distance.
 - ii. Cover.
 - iii. Concealment.
 - c. Communicating from a safe position with the intention to gain the subject’s compliance, using:
 - i. Verbal techniques such as Listen and Explain with Equity and Dignity (LEED) Training, to calm an agitated subject and promote rational decision making.
 - ii. Advisements.

- iii. Warnings.
- d. Calling extra deputies or specialty units to assist.

SUMMARY OF RELEVANT FACTS

In November 2019, Grievant [REDACTED] had twenty-two years of service and had recently been transferred to a police unit that operated as a plainclothes unit. Whenever possible, plainclothes officers, who are not readily identifiable as law enforcement, are meant to observe and stand back until marked police officers arrive to make arrests. In 2017, the King County Council directed KCSO to emphasize de-escalation tactics. By early 2018, [REDACTED] had received de-escalation training. Per the training and KCSO policy, officers must create “time, distance, and shielding” in volatile encounters when it is safe to do so under the totality of the circumstances and when time and circumstances permit.³

On November 24, 2019, the City of Black Diamond Police Department put out a “Be On The Lookout” (“BOLO”) for suspect [REDACTED]. Per the BOLO, on November 22, 2019, [REDACTED] had stolen a 2018 Ford Raptor with the vehicle owner’s dog in it. The incident garnered a great deal of local attention due to the dog having been stolen along with the vehicle. Per the BOLO, [REDACTED] had previously reacted violently toward law enforcement and a caution warning was included in the BOLO.

On the morning of November 25, 2019, Grievant [REDACTED] and fellow deputy, Detective [REDACTED], who also worked as a plainclothes detective, notified their supervisor

³ The de-escalation training power-point is at KC Ex. 10.
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that they would be looking for the Raptor and would call marked patrol cars if they located the Raptor. While [REDACTED] and [REDACTED] were in the field, a KCSO deputy, Deputy [REDACTED], encountered [REDACTED] and attempted to arrest him by, in part, using his marked vehicle to block the Raptor. However, [REDACTED] used the Raptor to push Deputy [REDACTED]'s police vehicle out of the way.

After that incident, Sergeant [REDACTED] put out a call on the radio that KCSO units could help other agencies pursue and/or box in the Raptor, but that they could not themselves pursue the suspect per KCSO policy. He also noted that the Raptor had not rammed into [REDACTED]'s vehicle but had made incidental contact with it.

At 11:51 am, [REDACTED] and [REDACTED] spotted the Raptor, and they put a call out on the radio that they were following the vehicle. At the time, [REDACTED] was driving an unmarked GMC Yukon and [REDACTED] was in the passenger seat. Additionally, a Washington State Trooper [WST] was in the vicinity, and Sergeant [REDACTED] was nearby.

Shortly after placing the call on the radio, [REDACTED] observed the Raptor stopped on the side of the road near a powerplant. Some civilians, including children, were on the opposite side of the road. Within seconds, [REDACTED], without verbally communicating his plan to [REDACTED], pulled the Yukon up to the Raptor at an angle in an attempt to prevent the Raptor from leaving. When Grievant did this, [REDACTED] was placed directly in front of the Raptor. [REDACTED] immediately reacted by ramming the Raptor into the Yukon. [REDACTED] then was able to use the Yukon to pin the Raptor on some rocks on the other side of the street. [REDACTED] and [REDACTED] subsequently exited their vehicle, announced themselves as

police, and ordered [REDACTED] to surrender. In response, [REDACTED] aggressively attempted to reverse the Raptor. [REDACTED] and [REDACTED] then attempted to break the Raptor's windows which resulted in a struggle between [REDACTED], [REDACTED] and [REDACTED]. In connection with this physical struggle, [REDACTED] and [REDACTED] eventually discharged their weapons, killing [REDACTED].

A KCSO Critical Incident Review Board ("CIRB") was convened to review Grievant's use of force. The CIRB unanimously found that Grievant's use of the firearm and use of force with the vehicle were consistent with KCSO policies and practices. The CIRB was not charged with determining whether Grievant's initial decision to engage with [REDACTED] by trying to box in the Raptor was within policy, as that was not a use of force. However, by a vote of four to two, the CIRB found that [REDACTED]'s "choices leading up to the event" were sound.⁴

Subsequent to the CIRB report, KCSO determined that Grievant failed to utilize de-escalation tactics and thereby performed "at a level significantly below the standard achieved by others in the work unit." The then Undersheriff, who is now the Sherriff, recommended in a *Loudermill* Notice that Grievant be transferred out of the plainclothes unit and receive additional training on de-escalation. The then Sherriff, however, decided to terminate Grievant. Grievant timely appealed his termination.⁵

⁴ The CIRB report is Guild Ex. 4.

⁵ [REDACTED] was exonerated from the charge of "excessive or unnecessary use of force" and was issued

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written reprimand for having failed to "don your marked ballistic vest when you took a series of steps, in an effort to make an arrest." See KC Ex. 25, KC_003561

RELEVANT WITNESS TESTIMONY

Captain [REDACTED] is the KCSO captain of the internal affairs investigative unit and supervises five detective sergeants who conduct internal investigations. Captain [REDACTED]'s duties also include managing a staff of deputies that are responsible for providing advanced training such as emergency vehicle operations, Taser, and defensive tactics.

Captain [REDACTED] testified that Grievant was part of the Special Investigations Team or "SET," which is an undercover unit that helps in various policing activities with a focus on narcotic violations, and that Grievant was also part of the SWAT team, which was an ancillary assignment. Grievant, as a member of the SWAT team, had received extensive training.

Per Captain [REDACTED], the King County Council, the legislative body of King County, had wanted KCSO to emphasize de-escalation techniques. Consequently, in July 2017, he and his team were tasked with developing a three-day de-escalation training, which was provided to all officers including Grievant. Grievant received the training in February 2018. The training strove "to create a shift in mind set from previously learned arrest techniques that encourage deputies to get subjects into handcuffs as quickly as possible,"⁶ and, in part, consisted of playing videos to the officers and asking officers questions including whether "de-escalation was safe and feasible."⁷

The training included one video from National Geographic in which an Alaska State Trooper attempted to apprehend a potentially armed suspect alone although backup was

⁶ See KC Ex. 8, KC_005345.

⁷ See KC Ex. 10, KC_008970.

nearby. Another video involved an officer involved shooting in which an officer followed a suspect to the suspect's vehicle, which resulted in the need for the deadly use of force. A third video involved a situation where two police officers, instead of waiting for backup, entered a closed car dealership where an unstable individual was trespassing. The officers engaged with the suspect in the car dealership and eventually had to use deadly force. Per Captain [REDACTED], the purpose of the training videos was not to tell officers that they were doing anything wrong but to allow them to slow down and ask important questions before engaging:

So these are questions that we would put out there to engage a response, to get people to answer up, because we would get varying responses. Some people would say, yes, I would have felt comfortable going up there with him to handle that problem. Other people would have said I would have stayed back in my car.

Because throughout the years, trainings change and evolve, and people get different experiences through the police academy and through working on the street. And their comfortability level, I guess, changes. So there's no -- we never say that we're giving you the correct answer to solve these problems. We never say that. This is only to encourage thought and people to think about their actions.⁸

Specifically, Captain [REDACTED] asked the officers to consider whether the officers in the videos had legal authority or a lawful purpose to be where they were; whether immediate action was necessary; and whether de-escalation was safe and feasible. Captain [REDACTED] also included provisions of KCSO's General Orders Manual ("GOM") in his training materials. A mandatory section of the GOM that he included states "when safe under the totality of the circumstances and time and circumstances permit, deputies shall use de-escalation tactics in

⁸ See Transcript (Tr.) Volume (Vol) 1, pg. 90, lns. 9-21.
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order to reduce the need for force.”⁹ [REDACTED] stated that this totality of the circumstances test requires deputies to determine whether there is the ability to create “time, distance, and shielding” in a volatile encounter. KCSO had also provided training on obtaining compliance through verbal techniques and on calming an agitated suspect.

On cross-examination, Captain [REDACTED] acknowledged that there could be differences of opinion on whether de-escalation is possible in specific situations; that de-escalation is not always possible; and that the de-escalation policy and training were new in 2017.

Captain [REDACTED] was a sergeant in the special enforcement team (SET) in November 2019, and was [REDACTED]’s direct supervisor at the time. SET is a plainclothes unit, and the SET officers normally drive unmarked vehicles. Per Captain [REDACTED], SET officers are able to “get in tight because we didn't look like the police. We didn't drive police vehicles. We could get in, see what was going on, vector in marked units so that it was more advantageous for us to effect an arrest.”¹⁰ He testified that the goal for SET officers would be to call in marked units to effectuate arrests, as the SET officers were not in uniform or marked vehicles, meaning they were not easily identifiable as police officers.

Captain [REDACTED] noted that there were times when SET officers would not wait for marked vehicles such as when there was an immediate threat of violence or other exigent circumstance requiring immediate action. He also acknowledged that the SET team’s Standard

⁹ See KC Ex. 8, KC_008973.

¹⁰ Tr. Vol 1., pg. 119, lns. 9-12.

Operating Procedures Manual required detectives to have “ready access to KCSO-approved sheriff or police raid jackets or hidden agenda jackets,” and that when SET “detectives make arrests or assist in an investigation, they should display appropriate uniform with sheriff/police-marked clothing.”¹¹ When [REDACTED] joined the SET team, Captain [REDACTED] had [REDACTED] read the Standard Operating Procedure Manual and spoke to [REDACTED] about the importance of making oneself visible as a police officer when making an arrest.

Captain [REDACTED] also testified that he saw [REDACTED] and [REDACTED] on the morning of November 25, 2019; that [REDACTED] and [REDACTED] indicated that they were going to look for the stolen Ford Raptor; and that [REDACTED] and [REDACTED] indicated they would call for marked patrol cars if they found the Raptor.

On cross-examination, Captain [REDACTED] also testified that on November 12, 2019, he was part of a preplanned arrest team in which [REDACTED] placed his vehicle at an angle in order to block in the suspect’s vehicle; that the pre-planned arrest involved five to six officers; and that [REDACTED]’s blocking technique was accompanied by a patrol car that helped box in the suspect’s vehicle.¹²

Captain [REDACTED] finally testified that he did not believe [REDACTED] ever performed below “the standard of his work unit;” that [REDACTED] was a top performer; that [REDACTED] gave [REDACTED] glowing performance evaluations; and that [REDACTED] would have no issue working with [REDACTED] again were he to be reinstated.

¹¹ See KC Ex. 30, KC_007284.

¹² See Guild Ex. 15 for an explanation of the November 12, 2019 incident.
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[REDACTED] is a sergeant with KCSO who in 2019 and 2020 was in the internal investigations unit, which is the unit in charge of investigating officer misconduct and policy violations. She was assigned to investigate [REDACTED]'s conduct on November 25, 2019. Her role was to investigate the facts of the incident, but she did not decide on or determine discipline. She testified as to the steps she took during her investigations and authenticated her report and accompanying documents.

As part of her investigation, Sergeant [REDACTED] reviewed the BOLO issued by the Black Diamond Police Department that stated there was "probable cause to arrest [REDACTED] for: Theft of Motor Vehicle, Theft 1st, Theft 2nd, Taking a Pet Animal, DWLS 3rd, and Stalking."¹³

The BOLO specifically stated the following:

On Friday November 22nd, 2019 [REDACTED] stole a Charcoal 2018 Ford Raptor . . . while it was being refueled at a gas pump. . . . A 4 year old Poodle named "Monkey" was in the truck when it was taken. . . . [REDACTED] has reacted violently toward law enforcement in the past and has a Caution notice in WACIC.

Sergeant [REDACTED] knew that before their encounter with [REDACTED], [REDACTED] and [REDACTED] had seen the BOLO, were aware that the [REDACTED]-driven Raptor had made physical contact with Deputy [REDACTED]'s marked patrol vehicle, and were told by a postal worker that the Raptor had been travelling at excessive speeds.

Sergeant [REDACTED] discovered that [REDACTED] and [REDACTED] first saw the Raptor as the Raptor was travelling around 50 mph and heading in the opposite direction; that

¹³ The BOLO is at KC Ex. 11, KC_001225.
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[REDACTED] waited until the Raptor was out of visual range, and then made a U-turn to follow the Raptor. She also learned that [REDACTED] never verbally discussed with [REDACTED] the plan before engaging with [REDACTED].¹⁴

During [REDACTED]'s interview of [REDACTED], [REDACTED] indicated that, after locating the Raptor on the side of the road, he only had a few seconds to determine a course of action and that [REDACTED] was concerned that [REDACTED] would reengage in excessive speeds and would potentially endanger nearby civilians, including children.¹⁵ [REDACTED] learned that [REDACTED] shared [REDACTED]'s concerns, and that [REDACTED] identified himself as a police officer to [REDACTED] immediately after [REDACTED] and [REDACTED] engaged with [REDACTED].¹⁶

[REDACTED] is a retired KCSO major. Before his retirement, he was commander of the Southeast Precinct. He was tasked with reviewing the November 25, 2019 incident and with making findings as to whether any policies were violated. As part of this assignment, he reviewed Sergeant [REDACTED]'s internal investigation report and all other documents related to the November 25, 2019 incident. He provided his findings to KCSO Chief [REDACTED] in a November 24, 2020 memorandum.¹⁷

¹⁴ [REDACTED]'s Report is at KC Ex. 18.

¹⁵ [REDACTED]'s compelled statement is at KC Ex. 14. The transcript of [REDACTED]'s interview is at KC Ex. 32.

¹⁶ [REDACTED]'s compelled statement is at KC Ex. 15. The transcript of [REDACTED]'s interview is at KC Ex. 33.

¹⁷ [REDACTED]'s Memorandum is at KC Ex. 21.

Specifically, Major [REDACTED] made findings as to three alleged policy violations: excessive or unnecessary use of force during the arrest of [REDACTED][REDACTED]; not having required uniform and equipment during the arrest of [REDACTED]; and improper decision making during the arrest of [REDACTED].¹⁸

Major [REDACTED] testified that KCSO had convened a Critical Incident Review Board (CIRB) to look at [REDACTED]'s use of the firearm and use of his vehicle to pin the Raptor after the Raptor had rammed into [REDACTED]'s vehicle. The CIRB unanimously found the uses of force to be consistent with KCSO policies and practices;¹⁹ therefore, he did not find that [REDACTED] used excessive or unnecessary force during the attempted arrest of [REDACTED]. [REDACTED], accordingly, made a recommended finding of "exoneration" as to that allegation.

Major [REDACTED] did find that [REDACTED] violated performance standards by not having required equipment during the arrest as neither [REDACTED] nor his partner "attempted to find or don their marked vests at any point during the incident."²⁰ Therefore, he recommended a finding of "sustained" as to that allegation.

Major [REDACTED] recommended a finding of "non-sustained" with regards to the charge that [REDACTED] performed "at a level significantly below standards achieved by others in the work unit." Major [REDACTED] came to this conclusion because he believed this charge

¹⁸ See [REDACTED]'s memorandum at KC Ex. 21, KC_004880-KC_004881.

¹⁹ See Guild Ex. 4, KC_007353.

²⁰ See KC Ex. 21, KV_004889.

related to tactical decision-making and that “any questions of tactics is best addressed through training.”²¹

Major [REDACTED], however, took serious issue with several of [REDACTED]’s tactical decisions.

Detective [REDACTED] alone made the decision to transition from covert surveillance to actively attempting to arrest [REDACTED]. [REDACTED] was parked at the time this decision was made. While [REDACTED] certainly presented a potential threat based on his behavior that morning, he was parked at the time of the encounter. There is no evidence of immediate exigency to life safety in that moment that would justify engaging without appropriate preparation and planning.

Detective [REDACTED]’s decision to block the Ford Raptor with his vehicle was tactically questionable. The maneuver served to potentially impede the forward movement of the Raptor, but it also placed Detective [REDACTED] in an exposed position. Detective [REDACTED] is exceptionally trained in tactics, making his vehicle placement decision difficult to understand. This tactical choice runs counter to conventional tactical training and is not well justified during statements made by Detective [REDACTED].²²

Major [REDACTED] further testified that when he learned that the then Sheriff was considering terminating [REDACTED], he voiced his disagreement with his chain of command. He believed termination would not be in line with progressive discipline and that [REDACTED] violated no clear policy:

So my first concern was that there was no policy that was violated, and I spent a great deal of time looking through the manual to find a policy -- a specific clear work rule that Detective [REDACTED] violated when he engaged in the vehicle operations that began the incident, and I didn't find that there was one.

²¹ KC Ex. 21, KC_004889
²² KC Ex 21, KC_004889
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...

It's the training and tactics piece that I believe what happened occurred quickly, and these were tactical decisions made in a split second. And to be second-guessing them after knowing the outcome was unreasonable.²³

On cross-examination, Major [REDACTED] acknowledged that, under KCSO policy, he was not responsible for recommending discipline; that KCSO policy required the use of de-escalation tactics; and that even the presence of children in the vicinity of the Raptor on November 25, 2019 did not create an "immediate threat to life safety."²⁴

[REDACTED] is a Deputy at KCSO. He works in the advanced training unit and has special expertise in Taser training. He testified that he was trained as a trainer in de-escalation in 2019; that he was part of the SWAT team; that members of the SWAT team received extensive training and can use those skills even when not operating in SWAT assignments; and that the SWAT team had received training that included angling vehicles to prevent suspects from escaping. He testified that the SWAT team often acts as a mobile arrest team (MAT), and that the MAT utilizes unmarked vehicles "that look like every other vehicle that are out there, but they're also equipped with emergency lights. We have a driver and we have two occupants that sit in the back. And we utilize three cars. There's usually nine personnel total involved. Ideally, that's what we want."²⁵

²³ Tr. Vol II, pg. 303, lns 12-18 & pg. 307, lns 17-21.

²⁴ KC Ex. 21, KC_004889.

²⁵ Tr. Vol II, pg. 365, lns 6-12; the MAT training tactics can be found at Guild Ex. 22.

[REDACTED] was called as a subject matter expert witness before the CIRB. He presented a PowerPoint presentation on the use of force against [REDACTED].²⁶ [REDACTED] believed that [REDACTED] and his partner did engage in some de-escalation tactics:

The communication was established, and part of that communication that is taught is legal authority. They identified themselves and made that first verbal communication, and the decision was -- it's a two-way street. So I identify myself as the police. You're under arrest, and now you make a decision on whether or not you're going to comply with my communication, which is a form of de-escalation. To include like visibility, the officers presenting themselves as police. That portion, presence, is also a form of de-escalation, so that was the starting process for de-escalation as it occurred in that incident was that communication piece.²⁷

On cross-examination, [REDACTED] testified that he did not consider [REDACTED]'s initial engagement in which [REDACTED] angled his car in front of the Raptor to be a use of force; however, [REDACTED] did believe the subsequent ramming of the Raptor, the use of tools to break the Raptor's windows, and [REDACTED]'s use of a firearm were uses of force. He opined that these were acceptable uses of force. The CIRB did not ask [REDACTED] to assess [REDACTED]'s decision to place his vehicle in front of the Raptor or to assess whether [REDACTED] should have waited for backup before engaging with [REDACTED].

[REDACTED] is a retired KCSO deputy who was working patrol on November 25, 2019. Before his shift on November 25, 2019, [REDACTED] was aware of the stolen Raptor, and at around 11:00 a.m., he encountered the Raptor. He testified that the following occurred:

[The Raptor] was coming head on at me. I had my lights on, traffic in front of the Raptor, I think it was just one car had stopped in front of the Raptor and blocked

²⁶ The PowerPoint is at Guild Ex. 5.

²⁷ Tr. Vol II, pg. 374, lns 6-18.

its path. And I was in the other lane blocking the path, so I motioned the driver of the car in front of the Raptor to move, and he did, and then I pulled in and blocked the Raptor so it couldn't move anymore.

...

I started to get out of the vehicle. I unsnapped my gun and had my hand on the pistol. And as I got out, the Raptor pushed my vehicle aside and drove around me and started going again. So I got back in the car and tried to chase again, but I couldn't get my vehicle to move.

And it took -- well, before I realized I had mashed the E brake on when I got out and I forgot to release the emergency brake, so the car wouldn't go, so I was out of it then.²⁸

[REDACTED] did not initially believe his vehicle was damaged, and he resumed looking for the Raptor but he was unable to locate it.²⁹

[REDACTED] is a retired KCSO sergeant who was on duty on November 25, 2019. Sergeant [REDACTED] provided a witness statement on November 26, 2019 detailing what happened on November 25, 2019.³⁰ Sergeant [REDACTED] stated he inspected Deputy [REDACTED]'s vehicle after the Raptor struck it, and concluded that the Raptor had made incidental contact with [REDACTED]'s vehicle. Sergeant [REDACTED] then advised his units over the radio that they could conduct area checks for the Raptor but they could not initiate a pursuit of the Raptor, as KCSO had a policy of not pursuing stolen vehicles. Sergeant [REDACTED] then responded to who he believed was [REDACTED] asking about the fact that [REDACTED] had rammed [REDACTED]'s vehicle, to which [REDACTED] responded it was

²⁸ Vol III, Tr. pg. 437, ln 25 to pg. 438, ln 6 & Pg. 438, ln 24 to pg. 439, ln 8.

²⁹ [REDACTED]'s Report of the incident is at Guild Ex. 13.

³⁰ [REDACTED]'s statement is at KC Ex. 19.

incidental contact and that [REDACTED] could not authorize KCSO deputies to pursue [REDACTED]. However, [REDACTED] told his units that they could assist in a pursuit and could assist in boxing in the Raptor.

Per Sergeant [REDACTED]'s report, [REDACTED] and [REDACTED] spotted the Raptor at 11:51 a.m. and at 11:52 a.m., [REDACTED] and [REDACTED] were travelling 50 mph (which was the speed limit) as they started following the Raptor.³¹ Sergeant [REDACTED] headed toward the location of [REDACTED] and [REDACTED]. Sergeant [REDACTED] assumed that [REDACTED] and [REDACTED], who were in an unmarked vehicle, would continue to follow the Raptor without engaging with it.

By the time, Sergeant [REDACTED] arrived at the scene at 11:59 a.m. [REDACTED] had already been shot and killed, and a Washington State Trooper had already arrived on scene

In [REDACTED]'s February 2018-January 2019 performance evaluation, Sergeant [REDACTED] quoted [REDACTED]'s previous supervisor, Sergeant [REDACTED], who had stated: "[REDACTED] is an absolute hunter. He is the go-to person if you need a bad guy found and arrested. This is mostly a result of his ability to gain the respect and confidence of criminal informants."³² This statement was repeated by Sergeant [REDACTED] in [REDACTED]'s April 2019 request for transfer to the SET team.³³ Sergeant [REDACTED] testified that, as

³¹ See KC Ex 19, KC_001108.

³² Guild Ex. 17, KC_007537.

³³ Guild Ex. 18, KC_00242.

[REDACTED]'s supervisor, he found [REDACTED]'s work to be exemplary and that [REDACTED]'s work performance was always at or above standards.

[REDACTED] is the King County Sheriff, and was the Undersheriff from June 2020 to December 31, 2021. As the Undersheriff, she made findings and proposed discipline for [REDACTED]. Her findings and recommendations were outlined in a January 26, 2021 memorandum, which served as the *Loudermill* Notice of Discipline.³⁴ In her *Loudermill* Notice, she concurred with Major [REDACTED] and Division Chief [REDACTED]'s factual findings regarding what happened on November 25, 2019. She specifically made the following factual findings:

Sgt. [REDACTED] said the primary goal [of the SET team] is to observe and stand back until marked police officers arrive. . . .

When asked what type of factors he looks for before deciding to "pounce" and not wait for patrol Sergeant [REDACTED] stated, "Danger to the public would be the biggest one. If we have to act, we're going to. Factors to consider whether to change from observation to offensive arrest include danger to the public, "the biggest one," but another factor is how close backup is . . .

The Use of Force policy in effect at the time of this event included a section on De-Escalation (6.022020; effective 1/17), that reads: When safe under the totality of the circumstances and time and circumstances permit, deputies shall use de-escalation tactics in order to reduce the need for force. 6.00.020(1). Further, that "When time and circumstances reasonably permit, deputies shall attempt to de-escalate use of force situations by (a) moving from a position that exposes deputies to potential threats to a safer position; (b) Decreasing exposure to the threat by Distance, Cover, and Concealment." 6.00.020(3)(a) and (b).

³⁴ See KC Ex. 23.
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Your primary justification for making contact under the circumstances was that children and adults were at a nearby bus stop, and the suspect vehicle was pointed towards those civilians. I would note here that the intersection was at a standard 90 degrees. You also expressed a general public safety concern due to the suspect's history of reckless driving, peculiar behavior, and the capabilities of the vehicle.

When you made the decision to contact the suspect, there was no imminent risk. The vehicle was at rest and parked on the side of the road at the power station. While pedestrians were nearby, the risk to them was speculative. It turned out that the suspect was smoking. What was not speculative but certain was that the suspect was hostile to law enforcement, likely to attempt to evade, was willing to drive recklessly to do so, and was driving a high-performance vehicle that would outperform your leased SUV. It was foreseeable that approaching him was more likely to cause him to drive recklessly and endanger others.

In addition, you knew that backup had been summoned. . . . In fact, WSP backup arrived just after shots were fired at 1155 hrs.

Up until about 1152 hrs your plan was to locate, observe, maintain surveillance, and call in the calvary to effect the arrest. You did not use the opportunity you had to slow things down, create distance, observe or take time to confer with your partner about a plan. The initial phases of de-escalation, create time and distance, were overlooked by you. One of the questions stressed repeatedly in training, included "was immediate action necessary?" The answer here was no.³⁵

Based on these findings, [REDACTED] recommended sustaining the allegations of a "policy violation" for [REDACTED]'s failure to don a vest and for performing "at a level significantly below the standard achieved by others in the work unit" for not utilizing de-escalation tactics on November 25, 2019. She did not recommend sustaining the allegation of

³⁵ KC Ex 23, KC_006967-006968.
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excessive or unnecessary use of force, as the CIRB had already found those uses of force to be within policy.

She recommended the following corrective actions for [REDACTED]: a written reprimand for the vest issue; and a transfer out of the SET and SWAT teams to a patrol assignment and training in de-escalation for the “perform[ance] at a level significantly below the work unit” issue.³⁶ The written reprimand regarding the vest issue was ultimately issued and not grieved. [REDACTED] provided the following testimony as to how she came to her corrective action recommendations for the failure to de-escalate issue:

I thought long and hard about it, and talked to a number of my command staff, and really struggled with what would be the appropriate amount of discipline. And I felt that Detective [REDACTED] needed to be in a position that required more supervision, and so having a patrol assignment where there's a sergeant he had to report to, and he reported to a sergeant in his SET duties, but they are plain clothes, they are doing whatever. It's not the same as having a patrol assignment where you have an operational supervisor who is, you know, engaging with you on a daily basis.

So I felt he, I had concerns about him continuing in a position that had so much leeway, so much ability to just do whatever he wanted to do. And SWAT, SWAT team, I looked at that as SWAT is a specialty assignment, it's a coveted position within our agency and with all of law enforcement, anybody who is on a SWAT team.

And, again, I felt that his judgment was such that I did not feel comfortable in continuing to have him in that type of assignment, so that's why I recommended he be transferred from SET and SWAT to a patrol assignment.

And then the training, clearly he needed some more training, remedial training on what de-escalation means, what it is and what the expectations are around it.³⁷

³⁶ KC Ex 23, KC_006971.

³⁷ Tr. Vol IV, pg. 547, ln 1 to pg. 548, ln 2.

Sheriff [REDACTED] noted that [REDACTED]'s previous disciplinary history was either stale or involved minor offenses.

Sheriff [REDACTED] further testified that she had multiple conversations with then Sheriff [REDACTED] about Sheriff [REDACTED]'s decision to elevate the proposed discipline to termination, and that she understood why Sheriff [REDACTED] arrived at the decision to terminate.

As the then Undersheriff, Sheriff [REDACTED] authored the CIRB memorandum finding that [REDACTED]'s use of his vehicle to push the Raptor up onto the rocks and ultimately discharging his weapon did not violate the excessive use of force policy.³⁸

Sheriff [REDACTED] noted that the CIRB was not tasked with determining whether [REDACTED]'s tactical decisions leading to the uses of force amounted to performance below standards. She also testified that Deputy [REDACTED] was called into the CIRB to provide subject expert testimony on the use of tasers instead of firearms, and Deputy [REDACTED] took it upon himself to expand on the subjects he addressed, which [REDACTED] found inappropriate.

On cross-examination, Sheriff [REDACTED] acknowledged that the outcome of the November 25, 2019 encounter with [REDACTED]—namely, his death—contributed to the

³⁸ See Guild Ex 4.
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disciplinary decision to terminate [REDACTED]. She also acknowledged that Chief [REDACTED]'s report stated the following:

The investigation does not establish there was an objective standard which guides or directs deputies on selection of appropriate strategies or tactics, nor are there interviews with a number of other detectives interviewed who offer their professional judgment on historical or current customs or procedures when encountering similar high risk situations.³⁹

However, [REDACTED] disagreed with this part of Chief [REDACTED]'s report and stated:

I reject the restrictive position that we are required to identify a specific policy to review a member's exercise of judgment under this performance standard. If a rule was required for every potential action, we would need a rule prohibiting running with scissors.⁴⁰

When asked about the difference between her initial recommendation, which did not impose termination, and Sheriff [REDACTED]'s decision to terminate [REDACTED], Sheriff [REDACTED] testified as follows:

ARBITRATOR KHOURY: So was your testimony that you thought that that was the only appropriate decision -- so in other words, you thought your decision was wrong here, or just that okay, you can see why this was a reasonable decision and you also see why her decision was a reasonable decision?

THE WITNESS: I guess the way I would describe it is at the time I recommended what I thought was reasonable. This was a ten-year⁴¹ employee, well respected by many in the agency, good work, as you indicated, and so I am always about redemption and opportunity for people. But having lengthy conversations with the sheriff, in her expertise and her many 37 years I believe it was, of law enforcement, how --

³⁹ KC Ex 22, KC_012347.

⁴⁰ KC Ex 23, KC_006966.

⁴¹ While the court-reporter transcribed ten-year, I believe the witness stated "tenured." [REDACTED] had over twenty years of service.

ARBITRATOR KHOURY: Let me stop you because I understand why you think, why you were convinced. My question is do you still think your decision here, your recommendation here is reasonable?

THE WITNESS: Well, it's what I recommended at the time. I believe, if I were sheriff today, I would impose termination.

ARBITRATOR KHOURY: I understand that because I think you stated a couple times that there are shifting expectations, and I certainly agree. And certainly after 2020, but this happened in 2019. So my question to you is in 2019 you thought, if this were back in 2019, would you think the recommendation you made here was reasonable?

THE WITNESS: It was 2019, I do, yes, when I made that recommendation.⁴²

[REDACTED] was the King County Sheriff who decided to terminate [REDACTED]. She testified that in 2017, the King County Council directed the Department to develop de-escalation training in response to some high-profile KCSO officer-involved shootings, and that [REDACTED] had received that training in 2018.

Sheriff [REDACTED] testified that she disagreed with the then Undersheriff's recommendation on discipline for a variety of reasons including:

So the de-escalation training in particular, you have to be mindful of several things that take place when you are doing your work, and this is one of which is the training started was to tell people to slow down, to take a step back, to work from a place of safety, to, you know, decide on what your legal standing is, and then to really just from having a history of trying to put somebody in handcuffs quickly and work from there. To slow down and make it safe or safer or safe as humanly possible for the community, for the officers, for the people involved before, you know, you end up getting to a place where it's safe to go hands-on and take somebody into custody.⁴³

⁴² Tr. IV, pg. 616, ln 22 to pg. 618, ln 2.

⁴³ Tr. Vol V, pg. 662, ln. 19 to pg. 663, ln 6.

Sheriff [REDACTED] also noted that [REDACTED], as a long-time member of the SWAT team and a member of the SET team, had received extensive training, and yet this training did not positively influence his decision making on November 25, 2019. She took issue with several of [REDACTED]'s tactical decisions, which she believed demonstrated that [REDACTED] performed at a "level significantly below the standard achieved by others in the work unit."

It starts with the role normally out of the unit expectations of what the role is and what the job of that day was going to be which is to go and try to find this stolen vehicle, the suspect, if possible.

And so while that was taking place, as a law enforcement officer, you are always making decisions about what your tactics are going to be, and what you say you are going to do, and making plans and being prepared, and using all your training and skills.

And so for me the factors that, that were not considered was taking the time to make a plan, that seeing the suspect vehicle instead of calling for others to come and support and effect an arrest based on all of the information known about from the BOLO and other conversations on the police radio that this person didn't like the police.

And so the tactical decisions of concern I note here is to make contact with the suspect first off, which then led to pulling up next to the suspect vehicle, which Detective [REDACTED] as far as I know from this didn't alert his partner that was going to happen. So he's pulling up next to his partner there exposed to the person in the vehicle. So it was noted that the person was in the vehicle, they knew that was happening, and that they were pretty sure they had the suspect vehicle, and they could see the dog inside the vehicle which was part of the announcement.

And so that happened without having any gear on, other than Detective [REDACTED]'s badge and yelling that he's a police officer. So there was no planning, there was no conversation, no stopping to put on identifying equipment, which if you know you are going out to find somebody, the potential for finding them can happen, and you are not even looking like a cop.

And in this particular point of time in our world, people may not have recognized that you are a cop just by a badge, because badges can be acquired, and so there wasn't any protective gear. I go on about knowing the suspect was hostile to law

enforcement, the history of evading police, these numbers of things, in an unmarked vehicle that had no emergency equipment.⁴⁴

Sheriff [REDACTED] did not believe the presence of civilians in the vicinity of the pulled over Raptor justified [REDACTED]'s actions:

Those people weren't in harm because the vehicle was stopped. And while this person may have fled from vehicles in the past, but certainly from marked units, an unknown person pulling up, in my mind creates substantial risk that that vehicle is going to take off and evade.⁴⁵

Sherriff [REDACTED] also took issue with the fact that [REDACTED] continued to engage with [REDACTED] after [REDACTED] rammed the Raptor into the Yukon, reasoning that:

I find your continued efforts to engage the suspect when he was spinning his wheels, driving backwards at high speed unsupportable as well. You knew backup was nearby. Reaching into a vehicle that is capable and likely to move is not warranted under the facts here and admittedly put you at risk. Continuing to break and pull out windows resulted in a series of bad tactical decisions.⁴⁶

On cross-examination, Sherriff [REDACTED] acknowledged that she reduced a proposed ten-day suspension to a five-day suspension in a case where a deputy made an error in an initial decision to make a traffic stop, thus escalating a chain of events that ended with the deputy using profanity against the driver and stating he would "dump" the driver while having his weapon raised in a horizontal position.⁴⁷ Sherriff [REDACTED] believed there were mitigating circumstances in that other case, including the deputy having apologized for his mistake.

⁴⁴ Tr. Vol V, pg. 667, ln 22 to pg. 669, ln 13.

⁴⁵ Tr. Vol V, pg. 671, lns 18-23.

⁴⁶ KC Ex. 25, KC_003567.

⁴⁷ See Guild Ex. 25 for the *Loudermill* Response in that case.

[REDACTED] is the Guild's president. He testified that he helps officers with *Loudermill* hearings; that before this case, the level of discipline had never been increased after the *Loudermill* notice; and that [REDACTED], in part, waived his *Loudermill* hearing because [REDACTED] was willing to accept the punishment suggested by then Undersheriff [REDACTED].

As the Union president, [REDACTED] also participated as a voting member in the CIRB process and voted to find that [REDACTED]'s decisions made during the November 25, 2019 incident were sound. He also noted that the King County prosecutor's office reviews all fatal officer involved shootings, and that the prosecutor has made no decision in the [REDACTED] case due to the inquest process having been on hold for a number of years.

[REDACTED] asserted that [REDACTED] and [REDACTED] would have testified in this case had KCSO compelled them to testify but that absent being compelled to testify, they both were instructed by their criminal defense attorneys not to testify. He also testified that he is unaware of any other officer having been discharged for failing to perform up to standards based on one incident. [REDACTED] finally testified that after the George Floyd incident, KCSO officers have changed their behaviors and work practices; that [REDACTED] was a good officer who generally performed well; and that [REDACTED] believes [REDACTED] can adapt to new policing standards.

KING COUNTY'S POSITION

King County makes the following arguments. KCSO cannot impose rules governing all situations that may occur in the field, and so it provides generally applicable expectations, along with robust training to support those expectations. Specifically, [REDACTED] was on notice that

he could be disciplined for performing “at a level significantly below the standards achieved in the work group.” One such standard required “[w]hen safe under the totality of the circumstances and time and circumstances permit, deputies shall use de-escalation tactics in order to reduce the need for force.” Moreover, it was a well-known work rule within his unit that plainclothes deputies should observe and wait for marked officers to effectuate arrests. [REDACTED] had received additional training as a member of the SWAT team, and that training reinforced the fact that [REDACTED] should have waited for additional units before engaging with [REDACTED]. The evidence, therefore, clearly shows that [REDACTED] failed to utilize de-escalation tactics on November 25, 2019, that such a failure placed [REDACTED]’s performance at a level significantly below the standards of his work group, and that [REDACTED]’s actions warranted discipline.

Moreover, KCSO conducted a fair and reasonable investigation before imposing discipline. While the Arbitrator noted at the hearing that Sheriff [REDACTED] criticized actions that were not addressed in then-Undersheriff [REDACTED]’s *Loudermill* Notice, the *Loudermill* Notice clearly stated that the findings and recommended discipline were only recommendations. The Sherriff was not precluded from adding other facts that demonstrated [REDACTED] failed to engage in de-escalation tactics on November 25, 2019. Moreover, [REDACTED] chose to waive his *Loudermill* hearing on the advice of his criminal defense attorney.

[REDACTED] exaggerated the description of the circumstances that caused him to immediately engage with [REDACTED]. Indeed, the circumstances and his training make clear

that he should not have engaged with [REDACTED] in an unmarked car without support from marked patrol units, and that by doing so, he put himself, his partner, and nearby civilians in greater risk than they were in before [REDACTED] engaged with [REDACTED]. After [REDACTED]'s vehicle became stuck or stalled across the road, [REDACTED] had another opportunity to implement de-escalation tactics, and he failed to do so.

Finally, the CIRB's findings on the use of force did not preclude KCSO for disciplining [REDACTED] for his poor tactical decision-making decisions, and termination was appropriate due to the seriousness of the misconduct and the likelihood that the actions would be repeated.

For all these reasons, King County argues that the Grievance should be denied and the discharge should be sustained.

GUILD'S POSITION

The Guild makes the following arguments. Pursuant to GOM 3.03180(2), KCSO must prove by clear and convincing evidence that the alleged misconduct occurred. In this case, KCSO discharged [REDACTED] pursuant to GOM 3.00.020(1)(c), which states "unsatisfactory performance of duty shall be grounds for non-disciplinary action or disciplinary action up to and including discharge" with the definition of unsatisfactory performance including performing "at a level significantly below the standard achieved by others in the work unit." However, there is no evidence in the record that [REDACTED]'s conduct fell below any clearly delineated standards.

Questionable tactical decision-making decisions have been and should be addressed with training, not discipline. Indeed, the 2017-2018 in-service training on de-escalation was not designed to create or set any standards but was designed to provide broad tactical concepts and to offer differing techniques for deputies to consider. While Captain [REDACTED] testified that SET unit officers normally observe and stand back until marked units arrive, he also noted that SET officers can engage when a suspect might escape and poses a danger to the public.

[REDACTED] had legitimate concerns that [REDACTED] posed an immediate threat to the public, meaning [REDACTED]'s rapid tactical decision-making to pull in front of the Raptor was reasonable given the circumstances. Before [REDACTED] had briefly stopped by the side of the road, he had struck Deputy [REDACTED]'s vehicle, had repeatedly eluded police with the very powerful Raptor, and had been driving at excessive speeds. There were also children in the nearby vicinity. Moreover, [REDACTED] never placed the Raptor in park and could have sped off at a moment's notice.

[REDACTED]'s tactic of pulling in front of a suspect's vehicle was trained, practiced and within policy. Captain [REDACTED] testified that [REDACTED] used the tactic in an earlier November 2019 incident as part of a pre-planned arrest involving multiple deputies. Deputy [REDACTED] had used his vehicle to attempt to block the Raptor earlier on November 25, 2019. And Deputy [REDACTED] testified that the SWAT team trains on Mobile Arrest Tactics, which include having vehicles pull in front suspects.

While no punishment should be upheld in this case, termination is certainly not in keeping with the principles of progressive discipline. Progressive discipline requires punishment to be corrective rather than punitive. KCSO has never discharged a deputy for a single instance of working below unit standards. In another case, Sherriff [REDACTED] lowered a deputy's suspension from ten days to five days in a case where she found the officer "used poor judgment in his tactics" and engaged in conduct comparable if not worse than [REDACTED]'s conduct.

KCSO also shares some culpability for the events of November 25, 2019 as, after an earlier deadly encounter between plainclothes detectives and a suspect, KCSO did not adopt a clear, absolute policy prohibiting plainclothes detectives from engaging in police work before donning identifying gear. KCSO also did not develop a policy about tactical decision making even after Sherriff [REDACTED] disciplined a deputy for poor tactical decision making in 2018.

Sheriff [REDACTED] also violated the double jeopardy principle when she included [REDACTED]'s failure to don a vest as a reason to support his termination. [REDACTED] was already punished for this, having received and not grieved a written reprimand.

Finally, the investigation in this matter was unfair as the de-escalation policy was not a stated reason for disciplining [REDACTED], meaning [REDACTED] had no opportunity to address the issue.

For these reasons, the Guild asserts that the Grievance should be granted and the discharge overturned.

OPINION

In any arbitration involving discipline or discharge of an employee under a collective bargaining agreement containing a just-cause standard, the employer necessarily bears the burden of proof.⁴⁸ It must establish to the satisfaction of the arbitrator that the employee engaged in the charged misconduct, and that such conduct was sufficiently egregious to warrant the level of discipline imposed in light of any mitigating or aggravating circumstances.⁴⁹ The standard of proof in this case is set out by KCSO GOM Section 3.03.180, which provides that “in cases in which criminal or serious misconduct is alleged, and there is a likelihood of suspension, demotion, or termination, the standard of proof is ‘clear and convincing’ which is a higher standard than ‘a preponderance of evidence.’”⁵⁰ The clear and convincing standards means that the party which carries the burden of proof “must present evidence that leaves you with a firm belief or conviction that it is highly probable that the factual contentions of the claim or defense are true.”⁵¹

The Agreement in this case specifically requires the use of progressive discipline. Progressive discipline affords an employee the opportunity to modify behavior before more severe discipline, up to and including termination, is imposed. However, the facts and circumstances in each case determine the appropriate level of discipline even with the

⁴⁸ “The burden of proof is generally held to be on the employer to prove guilt of wrongdoing, and probably always so where the agreement requires just cause for discipline.” How Arbitration Works, Elkouri & Elkouri, Eighth Edition (Arlington, VA: Bloomberg BNA Books, 2016) at 15-25.

⁴⁹ “It is said to be ‘axiomatic that the degree of penalty should be in keeping with the seriousness of the offense.’” How Arbitration Works, Elkouri & Elkouri, Eighth Edition (Arlington, VA: Bloomberg BNA Books, 2016) at 15-44.

⁵⁰ KC Ex 2, KC_003942.

⁵¹ Manual of Model Civil Jury Instructions, 9th Cir., Instruction 1.7.

application of a progressive discipline analysis. Progressive discipline does not preclude the possibility of termination for a first offense if that first offense is severe.⁵² While the “definition of a disqualifying ‘serious offense’ remains elastic,”⁵³ the types of misconduct that normally qualify are theft, assault, fighting, use of racial slurs, sleeping on the job, or other misconduct of a similar magnitude.⁵⁴

A. The County Has Shown By Clear and Convincing Evidence that [REDACTED] Failed to Utilize De-Escalation Before Engaging With [REDACTED] On November 25, 2019

The Guild emphasizes that the higher clear and convincing standard of proof applies in this case, and that there was no clearly delineated standard that [REDACTED] failed to meet. The Guild, therefore, argues that [REDACTED] did not have clear notice that the tactical decisions he made on November 25, 2019 would place him significantly below the standards of the work group. This is simply wrong. The evidence is undisputed that [REDACTED] received de-escalation training and knew of the GOM’s de-escalation requirements. The GOM clearly states that deputies can be disciplined for performance issues that include failing to meet standards expected of a work unit. In this case, KCSO had created clear de-escalation standards that applied to all work units, and [REDACTED] failed to meet those standards on November 25, 2019.

⁵² “Summary discharge in lieu of corrective discipline of the employee is deemed appropriate for very serious offenses.” How Arbitration Works, Elkouri & Elkouri, Eighth Edition (Arlington, VA: Bloomberg BNA Books, 2016) at 15-44 to 15-45.

⁵³ How Arbitration Works, Elkouri & Elkouri, Eighth Edition (Arlington, VA: Bloomberg BNA Books, 2016) at 15-45.

⁵⁴ How Arbitration Works, Elkouri & Elkouri, Eighth Edition (Arlington, VA: Bloomberg BNA Books, 2016) at 15-45 to 15-46.

The Guild argues that Captain [REDACTED] stated that the de-escalation training was meant to provide deputies tools and techniques but was not designed to create clear standards. However, Captain [REDACTED]'s presentation cited mandatory portions of KCSO's GOM that made clear that de-escalation was not optional when the totality of circumstances allowed for it.

Specifically, under Section 6.00.020 of the GOM, [REDACTED] was required, "when time and circumstances reasonably permit," to move "from a position that exposes deputies to potential threats to a safer position," to create "distance, cover, and concealment," and to call for additional deputies. [REDACTED]'s decision to engage with the Raptor within seconds of seeing it on the side of the road was the opposite of de-escalation. [REDACTED] took himself and [REDACTED] from a position of distance, cover, and concealment, and proceeded to specifically place [REDACTED] right in front of the Raptor. Moreover, he did this without verbally communicating in advance with [REDACTED] about his plans, and while knowing that other police units were nearby (but without waiting for them).

The Guild points out that [REDACTED] learned the tactic of using his vehicle to box in a suspect's vehicle through his SWAT training and that he had utilized this tactic earlier in November 2019. However, the SWAT training contemplates the tactic being used in conjunction with multiple vehicles,⁵⁵ and the earlier pre-planned arrest had involved multiple units. [REDACTED]'s training and experience with regards to using his vehicle to block another

⁵⁵ See Guild Ex 22, KC_018103.
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vehicle should have reinforced the need for him to wait for additional officers. Therefore, there is no factual dispute that [REDACTED] failed to apply required and known de-escalation standards when he decided to place his Yukon in front of the Raptor before additional units arrived.

In addition to the de-escalation standard that applied to all units, [REDACTED] violated a work standard that applied to his specific work unit, the SET unit. Captain [REDACTED], who was the supervisor of the unit, testified that the goal for SET officers was to call in marked units to effectuate arrests, and that SET officers should only initiate arrests if there is imminent danger to the public.

During his investigatory interviews, [REDACTED] stated he acted immediately because he believed [REDACTED] posed an imminent threat, especially given the presence of nearby civilians including children. However, there is clear and convincing evidence that demonstrates this belief, even if sincere, was not one a reasonable deputy in [REDACTED]'s situation should have held in light of the following.

Sergeant [REDACTED] testified that nothing in the BOLO or about [REDACTED]'s actions on November 25, 2019 allowed him to authorize KCSO deputies to pursue [REDACTED], including [REDACTED] driving at excessive speeds. Indeed, [REDACTED] stated such on the radio to KCSO units shortly before [REDACTED] engaged with [REDACTED]. Specifically, [REDACTED] had instructed KCSO units that they could assist in pursuing or boxing in the Raptor but could not initiate any pursuits.

During his investigatory interview, [REDACTED] stated the radio reception was spotty when [REDACTED] broadcasted these instructions, but [REDACTED], who was in the same car as [REDACTED], asked over the radio whether the Raptor's encounter with [REDACTED] constituted ramming which would allow KCSO deputies to pursue. [REDACTED] responded that it was only incidental contact, and the officers could not pursue. Moreover, at the start of their shift, [REDACTED] and [REDACTED] had told Captain [REDACTED] that they would attempt to locate the Raptor but would call marked patrol units if they found the Raptor, implying that they knew they were not to engage the Raptor without additional law enforcement present.

Upon reviewing the investigatory report, Major [REDACTED], Chief [REDACTED], and then-Undersheriff [REDACTED] all concluded that there was no imminent threat that justified [REDACTED] escalating the situation. There is no reason to believe that their collective expertise was wrong. There is also nothing in the record to suggest that [REDACTED] was targeting civilians that day, or would have purposefully driven into the individuals on the side of the road.⁵⁶

For these reasons, I find that the clear and convincing evidence supports the following finding made by Sheriff [REDACTED]:

While pedestrians were nearby, the risk to them was speculative. It turned out that the suspect was smoking.⁵⁷ What was not speculative but certain was that

⁵⁶ The Guild points out that the Raptor was not in park while it was on the side of the road; however, [REDACTED] had no way of knowing this fact at the time.

⁵⁷ The Guild asks that I conclude that the Raptor was not bound to stay stationary for very long, as there was only eight seconds between when it pulled to the side of the road and when it rammed into the Yukon.

the suspect was hostile to law enforcement, likely to attempt to evade, was willing to drive recklessly to do so, and was driving a high-performance vehicle that would outperform your leased SUV. It was foreseeable that approaching him was more likely to cause him to drive recklessly and endanger others.

In addition, you knew that backup had been summoned. . . . In fact, WSP backup arrived just after shots were fired at 1155 hrs.⁵⁸

Given that there was no imminent danger when [REDACTED] was on the side of the road, [REDACTED] had to utilize de-escalation tactics and should not have attempted to arrest [REDACTED] without marked units present. These standards and requirements were clear, and [REDACTED] clearly fell short in not meeting these standards.

B. KCSO Did Not Violate Due Process In Disciplining [REDACTED] Under the Failure to Perform Policy Rather than Under the De-Escalation Policy

The Guild argues that KCSO violated [REDACTED]'s due process rights by not listing the de-escalation policy as a reason for his discipline. For whatever reason, KCSO decided not to charge [REDACTED] with a standalone violation of the de-escalation policy. As will be discussed below, this choice has ramifications for the progressive discipline analysis. Due process requires that a *Loudermill* Notice specify the proposed discipline and the factual bases for the discipline. The *Loudermill* Notice in this case gave [REDACTED] such clear notice. The

However, this just indicates that [REDACTED] located the Raptor soon after it came to the side of the road. If anything, this suggests that there was more time to wait as [REDACTED] had just started smoking his cigarette.

Of course, [REDACTED] did not know how long the Raptor had been on the side of the road when he made his decision.

⁵⁸ KC Ex 23 KC_00692.
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Loudermill Notice details the alleged facts that support finding that [REDACTED] failed to meet standards when, instead of implementing de-escalation tactics, he immediately pulled in front of the Raptor upon finding it on the side of the road.

C. The Department's Investigation Was Not Flawed And Allowed Sheriff [REDACTED] To Determine That [REDACTED]'s Actions Fell Below The Work Standard Of His Unit.

The Guild argues that the investigation in this case was flawed. First, the Guild points out that Sergeant [REDACTED] “never interviewed any witnesses who provided an opinion regarding whether Detective [REDACTED]'s tactical decisions that day were within or outside the standards of his work unit.”⁵⁹ However, Sergeant [REDACTED] was developing a factual record for the decision makers who would make recommendations regarding policy violations and about discipline. Her job was not to make a recommendation about whether [REDACTED] committed a policy violation, and so it is unclear why the Guild believes her investigation was deficient due to her not ascertaining opinions regarding [REDACTED]'s tactical decisions. She did her job and gathered the facts, and she passed on those facts to the decision makers.

The Guild also argues that “Major [REDACTED] and Chief [REDACTED], while they questioned some of the tactical decisions in this case, were unable to find sufficient evidence that Detective [REDACTED]'s tactical decisions placed him significantly below the standards of his work unit.”⁶⁰ This is not quite accurate. Major [REDACTED] and Chief [REDACTED] thought it would be bad policy to discipline a deputy for poor tactical decision-making, and that

⁵⁹ See Guild Brief, pg. 39.

⁶⁰ See Guild Brief, pg. 39.

deputies should only be disciplined when bright-line rules are violated. Sheriff [REDACTED] disagreed with this restrictive view. She determined that the facts in this case could support a finding that [REDACTED]'s actions placed him below the standards of his work unit.

I agree with Sheriff [REDACTED] that poor tactical decision making can place a deputy below the standards of the work unit, especially when a plainclothes deputy has clear notice that de-escalation tactics should be used whenever possible and that such a deputy should only assist marked units in making arrests unless there is immediate danger.

D. Sheriff [REDACTED]'s Recommended Corrective Actions Were Consistent With the Principles of Progressive Discipline

The KCSO GOM requires punishment to be corrective, not punitive, and progressive discipline should only be bypassed for serious offenses.⁶¹ The types of conduct that support bypassing progressive discipline usually involve intentional misconduct: theft, assault, fighting, use of racial slurs, or sleeping on the job.⁶² In this case, Sherriff [REDACTED] noted that [REDACTED] only had stale or minor discipline on his record before the November 25, 2019 incident, which is partially why she did not recommend termination.

As discussed above, KCSO decided to discipline [REDACTED] pursuant to the

“Performance

⁶¹ See GOM 3.03.200.

⁶² How Arbitration Works, Elkouri & Elkouri, Eighth Edition (Arlington, VA: Bloomberg BNA Books, 2016) at 15-45 to 15-46.

Standards” portion of the GOM and not pursuant to the “De-escalation” portion of the GOM. The “De-escalation” portion of the GOM falls under the “Use of Force” portion of the GOM. One can easily imagine a fact pattern where a violation of the “Use of Force” provision could be so serious as to justify bypassing progressive discipline; however, it is much harder to imagine a scenario in which failure to perform up to standards on one occasion leads to immediate discharge. Indeed, performance issues are particularly suited for progressive discipline, as performance issues do not imply intentional misconduct and can be addressed through training and reassignment.

Understanding this, Sheriff [REDACTED] recommended corrective actions that specifically addressed [REDACTED]’s November 25, 2019 performance issues. She recommended that [REDACTED] be transferred from the SET team to a marked patrol team, that he lose his SWAT assignment, and that he receive additional de-escalation training. Sheriff [REDACTED] reasoned that [REDACTED], if assigned to a marked patrol unit, would have greater supervision and would not be able to repeat the mistake of engaging with a suspect while not wearing identifiable gear. She also reasoned that SWAT assignments are prized assignments that require additional levels of independence and sound judgment. Further, she correctly concluded that [REDACTED] needed a better understanding of de-escalation, which is why she recommended additional training on the subject. These narrowly tailored corrective actions were designed to address the specific performance shortcomings of [REDACTED] and to minimize the chances that [REDACTED] would repeat his actions. This is precisely how progressive discipline should be implemented.

E. Sheriff [REDACTED] Wrongly Used The Failure To Don Police Markings As A Reason to Terminate.

Sheriff [REDACTED] increased Sheriff [REDACTED]'s recommended corrective action to termination. It appears she did so in part due to [REDACTED] not having had his protective vest nearby and for not having donned the vest when he initially pulled his vehicle in front of the Raptor. Specifically, her March 25, 2021 Final Decision letter refers to Captain [REDACTED]'s statement that "at a minimum, what we're doing is we're going to throw on our vest that has markings on the front and back."⁶³ However, on January 27, 2021, KCSO issued [REDACTED] a written reprimand for these very same issues.⁶⁴ Therefore, Sheriff [REDACTED]'s March 25, 2021 Final Decision letter could not use those very same facts to justify greater discipline: "Double jeopardy concepts also preclude increasing the penalty for a violation after discipline has been imposed. This is particularly true when all of the facts are known to the employer at the time the initial discipline is issued."⁶⁵

In the Unit Expectations section of her March 25, 2021 decision letter, Sherriff [REDACTED] also referenced the expectation that SET detectives should "observe and stand back until marked police officers arrive." There was no double jeopardy issue with Sheriff [REDACTED] raising this point; however, this point alone does not justify raising discipline to the level of termination.

F. There Is No Clear and Convincing Evidence Showing That [REDACTED] Could Have De-escalated the Situation After [REDACTED] Attempted To Reverse The Raptor

⁶³ KC Ex. 25_KC_003561.

⁶⁴ See Guild Ex. 9.

⁶⁵ Discipline and Discharge In Arbitration, Norm Brand, 3rd Edition (Bloomberg BNA Books, 2015) at 2-29.
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In elevating Sheriff [REDACTED]'s recommended discipline, Sherriff [REDACTED] also found fault with portions of [REDACTED]'s conduct on November 25, 2019 that no other KCSO official had previously stated was problematic. Specifically, Sheriff [REDACTED] stated:

I find your continued efforts to engage the suspect when he was spinning his wheels, driving backwards at high speed, unsupportable as well. You knew backup was nearby. Reaching into a vehicle that is capable and likely to move is not warranted under the facts here and admittedly put you at risk. Continuing to break and pull out windows resulted in a series of bad tactical decisions.⁶⁶

This finding is confusing and unsupported. First, it is confusing because the breaking and pulling out of the windows was a use of force, and the CIRB found that the uses of force on November 25, 2019 were consistent with KCSO policies or practices. Sheriff [REDACTED] provided no explanation for why the CIRB was wrong on this point.

More crucially, KCSO failed to carry its burden of showing by clear and convincing evidence that [REDACTED] violated the de-escalation standard at the point when [REDACTED] began driving backwards at high speeds. De-escalation is only required when the totality of the circumstances allows for it. The CIRB report made the following statement about [REDACTED]'s state of mind when the Raptor went into reverse: "If [REDACTED] turned to his right, he could kill Detective [REDACTED]. If [REDACTED] continued backwards, he could potentially run over and kill the kids and/or oncoming motorists. Detective [REDACTED] talked about 'seeing your life flash before your eyes' and said he almost shot [REDACTED] at that moment but Detective

⁶⁶ KC Ex. 25_KC033567
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[REDACTED] was too close.”⁶⁷ Put differently, [REDACTED] clearly believed de-escalation was not possible at the point at which the Raptor attempted to reverse.

Neither Major [REDACTED] nor Captain [REDACTED] took issue with [REDACTED]’s actions at the point when the Raptor attempted to reverse. Sheriff [REDACTED] did not raise this as a factor in her *Loudermill* Notice. Other than Sherriff [REDACTED]’s conclusory statement, KCSO provided no evidence to allow me to question [REDACTED]’s assessment that de-escalation was not feasible when [REDACTED] attempted to reverse the Raptor. Given the clear and convincing standard that I must apply in this case, I cannot find that [REDACTED] violated any standards when he engaged with [REDACTED] while [REDACTED] attempted to reverse the Raptor.

G. The Department Bears Some Fault In Providing Mixed Messages

The Guild argues that a mitigating factor is that KCSO bears some fault for the misconduct in this case. I agree that KCSO bears some responsibility in this case but not for the reasons stated by the Guild. It is commonly recognized that where “an employee is guilty of wrongdoing, but management (ordinarily the supervisor) is also at fault in some respect in connection with the employee’s conduct, the arbitrator may be persuaded to reduce or set aside the penalty assessed by management.”⁶⁸

⁶⁷ Guild Ex. 4, KC_007347.

⁶⁸ How Arbitration Works, Elkouri & Elkouri, Eighth Edition (Arlington, VA: Bloomberg BNA Books, 2016) At 15-87 to 15-88.

The Guild argues that the Department was at fault for not having a policy in November 2019 that prohibited SET detectives from engaging in police work without police markings. However, the Department had such a standard, and such a standard could only be deviated from when immediate danger required action. Second, the Guild argues the Department never implemented a policy against poor tactical decision making even after other officers had engaged in poor tactics. As discussed above, I agree with Sherriff [REDACTED]'s rejection of the Guild's narrow view on this point.

I find that the Department bears some culpability for a different reason. On November 25, 2019, de-escalation was a relatively new concept, having been introduced in 2017 with [REDACTED] receiving the in-service training in February 2018. As Captain [REDACTED] testified, the de-escalation training was meant "to create a shift in mind set from previously learned arrest techniques that encourage deputies to get subjects into handcuffs as quickly as possible."

However, in [REDACTED]'s performance evaluation for the February 2018-January 2019 time-period, he was praised as follows: "[REDACTED] is an absolute hunter. He is the go-to person if you need a bad guy found and arrested."⁶⁹ This sentence was repeated in his April 21, 2019 application to transfer to the SET unit.⁷⁰

The Department was sending [REDACTED] mixed messages. KCSO was simultaneously trying to shift [REDACTED]'s mind set away from getting subjects into handcuffs as quickly as

⁶⁹ Guild Ex. 17.

⁷⁰ Guild Ex. 18.

possible while praising him for being a hunter who is the go-to person in getting someone arrested.

H. No Backpay Should Be Awarded

Arbitrators will often order reinstatement without backpay when the employee engaged in misconduct that warrants discipline: “Most cases involving reductions in back pay are based on fact situations where the grievant committed an offense, but discharge was too harsh a sentence and/or the employer acted improperly.”⁷¹ [REDACTED]’s performance failure on November 25, 2019 led to a tragic outcome. While there is no way of knowing what the outcome would have been had [REDACTED] followed his work unit’s standards, the chances of the day ending in tragedy would have been reduced. Therefore, backpay is not warranted.

AWARD

The grievance is GRANTED in part. [REDACTED] failed to meet the standards of his work unit when, instead of implementing de-escalation tactics and waiting for marked patrol units, he immediately placed his vehicle in front of the stolen Raptor. However, Sheriff [REDACTED]’s decision to bypass progressive discipline and terminate [REDACTED] for a performance issue was not in keeping with just cause. Sheriff [REDACTED]’s recommended corrective actions as laid out in her January 26, 2021 *Loudermill* Hearing Notice⁷² are consistent with the principles of just cause and progressive discipline and should be followed and implemented in this case.

⁷¹ How Arbitration Works, Elkouri & Elkouri, Eighth Edition (Arlington, VA: Bloomberg BNA Books, 2016) at 18-50.

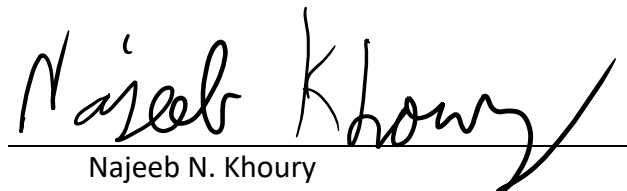
⁷² The *Loudermill* Notice is KC Ex. 23.

The discharge was also without just cause because KCSO provided mixed messages to [REDACTED] regarding de-escalation and had some responsibility for [REDACTED]'s actions on November 25, 2019. Nevertheless, [REDACTED]'s actions on November 25, 2019 weigh heavily against an award of backpay.

For the foregoing reasons, Grievant [REDACTED] will be reinstated without backpay. [REDACTED] will be transferred out of the SET unit and will not be given a SWAT assignment until and unless the Sherriff believes he has demonstrated the ability to meet the standards of those assignments. [REDACTED] will also be required to complete additional de-escalation training before being given a field assignment. I shall retain jurisdiction for sixty days for the sole and limited purpose of addressing any issues regarding implementation of this award.

IT IS SO ORDERED

Date: May 30, 2023
La Crescenta, California


Najeeb N. Khoury