BEFORE THE ARBITRATOR

In the Matter of the Arbitration Between	)	
	)	
The City of Portland	)	**ARBITRATOR'S OPINION**
	)	**AND AWARD**
the Employer	)	
	)	
and	)	
	)	Grievance of
Portland Police Association	)	Ron Frashour
	)	
the Association	)	
	)	

Representatives:

For the Employer:

Howard Rubin, Lead Counsel
Jennifer Nelson
Littler Mendelson
121 SW Morrison St Ste 900
Portland OR 97204

Stephanie Harper
Deputy City Attorney
1221 S.W. 4th Avenue, Suite 430
Portland, Oregon 97204

For the Association:
Will Aitchison, Lead Counsel
Law Offices of Will Aitchison
3021 NE Broadway
Portland, OR 97232

Anil Karia
Tedesco Law Group
3021 NE Broadway
Portland, OR 97232

March 30, 2012

Jane R. Wilkinson
Labor Arbitrator/Attorney
PMB 211
3 Monroe Pkwy, Ste. P
Lake Oswego, OR 97035

TABLE OF CONTENTS

City of Portland Witnesses
Larry O'Dea, Assistant Chief
John Robert (Bob) Boylan, Police Officer
James Quackenbush, Police Officer
Ryan Pannell, witness to shooting
Paul Meyer, Lead AR 15 instructor and current Special Weapons Lead
Jenna Peterson, witness to shooting
David Kemple, Police Officer
Robert King, Lieutenant, formerly Training Division
James C. Ferraris, Salem Deputy Chief, formerly Commander North Precinct, Portland
Mike Reese, Police Chief
Robert Day, Commander
Derek Rodrigues, Lieutenant
James McCabe, Ph.D., Ass't Prof. Crim. Justice, Sacred Heart Univ., Fairfield, CT

Portland Police Association Witnesses
Matthew McAllister, Police Officer
Craig Andersen, Police Officer
Nathan Voeller, Lead Defensive Tactics Instructor
Ryan Lewton, Police Officer
John Birkinbine, Sergeant
Jeff Elias, K-9 Officer
Ryan Coffey, Lead Defensive Tactics Instructor
Todd Engstrom, Investigator, former Lead Defensive Tactics Instructor
Mike Stradley, Officer (now West Linn Police Department)
Don Livingston, Sergeant, formerly Lead Defensive Tactics Instructor
Stephanie Rabey, Officer
Tyrone Willard, Officer
William John Brady, M.D., (Forensic Pathologist)
Josh Bocchino, Field Training Coordinator
Liani Reyna, Sergeant
Ron Frashour, Grievant
William Lewinski, Ph.D., Director, Force Science Institute
W. Ken Katsaris, Law Enforcement Consultant/Trainer

Joint Exhibits

Exh. J-1	Collective Bargaining Agreement, 2010-2013
Exh. J-2	(not submitted)
Exh. J-3	Grievance, Ron Frashour, November 30, 2010
Exh. J-4	Grievance, Step 1 Response from City, December 8, 2010
Exh. J-5	Grievance, Referral to Step 3, December 21, 2010
Exh. J-6	Grievance, Step 3 Response from City, January 14, 2011
Exh. J-7	Grievance, Referral to Arbitration, January 21, 2011
Exh. J-8	Termination Letter, Ron Frashour, November 8, 2010
Exh. J-9	Detectives Investigation, various dates
Exh. J-10	Grand Jury Transcripts, various dates
Exh. J-11	Internal Affairs Investigation, various dates
Exh. J-12	Directive 1010.10, Current, January 2010
Exh. J-13	Directive 1010.20, 2007 Version, January 2007
Exh. J-14	Directive 1010.20, Current, January 2010
Exh. J-15	Directive 315.30, Current, January 2010
Exh. J-16	Suspension Letter, Ryan Lewton, November 8, 2010
Exh. J-17	Suspension Letter, John Birkinbine, November 8, 2010
Exh. J-18	Suspension Letter, Liani Reyna, November 8, 2010
Exh. Jt-19	City of Portland Discipline Rule 5.01
Exh. Jt-20	*Graham v. Connor*, 490 U.S. 386

City of Portland Exhibits

Exh. E-1 Use of Force Board Report (full version), September 15, 2010
Exh. E-2 Deposition of Officer Boylan, January 31, 2011
Exh. E-3 Scene diagram with Officer Boylan's notations on September 15, 2011
Exh. E-4 Scene diagram with Officer Quackenbush's notations on September 15, 2011
Exh. E-5 Power-point presentation, "In-Service 2007" presented by Dave Woboril
Exh. E-6 Poster on report writing regarding use of force, undated
Exh. E-7 Outline of David Woboril's presentation on 1010.20 revisions to officers, undated
Exh. E-8 Power-point presentation, "Civil Law Updates - 2008" presented by Dave Woboril
Exh. E-9 AR 15 Training Power-point presentation
Exh. E-10 Less Lethal Operator Course Power-point presentation
Exh. E-11 Deposition of James Quackenbush, February 2, 2011
Exh. E-12 Scene diagram with Jenna Peterson's notations on September 20, 2011
Exh. E-13 Scene diagram with Officer Kemple's notations on September 20, 2011
Exh. E-14 SMS Training History, Ronald Frashour, showing date of February 5, 2010
Exh. E-15 PPB Training Division, Patrol Tactics (presented October 2004 to June 2005)
Exh. E-16 Command Counselings, Frashour, October 28, 2008 and October 29, 2009 (improper PIT and firing Taser without warning, respectively
Exh. E-17 Frashour IAD Interview (Audio)
Exh. E-18 Excerpts from Frashour IAD Interview (Audio)
Exh. E-19 (not submitted)
Exh. E-20 Lewton Deposition, March 16, 2011
Exh. E-21 Photograph of Bano at canine exhibition, June 16, 2007
Exh. E-22 Elias Deposition, February 1, 2011
Exh. E-23 Birkinbine Deposition, February 10, 2011
Exh. E-24 Investigation report, Officer Stradley, December 16, 1992
Exh. E-25 Letter prepared by Frashour for due process hearing, undated
Exh. E-26 Willard Deposition, February 3, 2011
Exh. E-27 Audio of Officer’s Kemple’s IAD interview
Exh. E-28 Frashour Deposition, March 7, 2011
Exh. E-29 Reyna Deposition, February 9, 2011
Exh. E-30 Proposed Discipline of Frashour, September 14, 2010
Exh. E-31 Due Process Powerpoint, Frashour
Exh. E-32 Transcript of Due Process hearing
Exh. E-33 Clackamas County Sheriff's Office Award
Exh. E-34 CV James McCabe
Exh. E-35 Affidavit of Ken Katsaris, June 23, 2011

Portland Police Association Exhibits*

Exh. A-4 Letter to Chief Reese from Tyrone Willard, September 6, 2010
Exh. A-6 Woboril Roll Call Video, September 15, 2005
Exh. A-18 Commendations given to R. Frashour, various dates
Exh. A-21 E-mail from C. Morgan to R. King, A. Warren and D. Virtue, March 2, 2010
Exh. A-23 E-mail from C. Morgan to R. King and D. Virtue, March 3, 2010, with witness chart
Exh. A-24 E-mail string (C. Morgan, R. King and D. Virtue), March 30, 2010
Exh. A-25 Draft Training Division Review, March 31, 2010 (designated Draft 1)
Exh. A-27 R. King, Draft Training Division Review, sent April 22, 2010 (designated Draft 2)
Exh. A-28 R. King, Draft Training Division Review, sent April 22, 2010 (designated Draft 3)
Exh. A-30 R. King, Draft Training Division Review, sent May 2, 2010 (designated Draft 4)
Exh. A-31 E-mail (Birkinbine transcript) from C. Morgan to D. Virtue and R. King, May 4, 2010
Exh. A-32 R. King, Draft Training Division Review, sent May 12, 2010 (designated Draft 5)
Exh. A-33 E-mail (R. King evaluation of Officer Elias's action), May 25, 2010
Exh. A-34 D. Virtue, Draft Training Division Review, sent May 27, 2010 (designated Draft 6)
Exh. A-35 Draft Training Division Review, May 27, 2010 (designated Draft 7)
Exh. A-36 E-mail from D. Virtue to R. King, June 1, 2010 with Post Shooting Response
Exh. A-37 E-mail from C. Morgan to R. King and D. Virtue, June 4, 2010 with Summary Report
Exh. A-38 D. Virtue, Draft Training Division Review, sent May 27, 2010 (designated Draft 8)

Exh. A-39 R. King, Insert into upcoming draft Training Division Review, sent June 20, 2010
Exh. A-40 R. King, Draft Training Division Review, sent June 21, 2010 (3:48 p.m.) (designated Draft 10)
Exh. A-41 R. King, Draft Training Division Review, sent June 21, 2010 (Same as Exh. A-40, but with a c.c. to Jim Ferraris)
Exh. A-42 D. Virtue, Draft Training Division Review, sent June 21, 2010 (2:30 p.m.) (designated Draft 9)
Exh. A-46 Memorandum from C. Paille to D. Famous, April 28, 2009
Exh. A-47 Letter from D. Famous to F. Waterhouse, April 11, 2009
Exh. A-48 Memorandum from R. Sizer to L. Stevens, September 4, 2009
Exh. A-49 Waterhouse v. City of Portland trial transcript, Rosie Sizer, September 14, 2009
Exh. A-50 Memorandum from K. Sheffer to B. Martinek, October 29, 2009
Exh. A-52 Letter from R. Sizer to M. Baptista, April 27, 2010
Exh. A-54 Memorandum from B. Martinek to S. Murray, May 17, 2010
Exh. A-56 Frank Waterhouse police reports, May 27, 2006
Exh. A-57 PPB Manual of Policy and Procedure, updated January 2010
Exh. A-58 R. Frashour's AR-15 Operator's Course Manual
Exh. A-59 Legal case analysis on use deadly force, undated
Exh. A-60 Less Lethal Operator's Course, February 16-17, 2006, Ron Frashour
Exh. A-64 Draft Training Division Review, from K. Galvan to R. King designated "The Copy I changed," sent June 23, 2010
Exh. A-65 Attack Risk article by Michael G. Conner, Psychologist
Exh. A-66 Memorandum from E. Brumfield to B. Martinek, January 19, 2010 (re Waterhouse)
Exh. A-67 Memorandum from C. Paille to E. Brumfield, January 10, 2010 (re Waterhouse)
Exh. A-70 Memorandum from D. Famous to R. Frashour, October 1, 2009
Exh. A-71 Letter from M. Baptista to D. Famous, November 20, 2009
Exh. A-72 Letter from M. Baptista to E. Brumfield, March 5, 2010
Exh. A- 75 Video of Media Training Session
Exh. A-76 Video of Media Training Session
Exh. A-79 Use of Force Review Board Findings, Steward shooting, May 28, 2009
Exh. A-80 Use of Force Review Board Findings, Hughes Shooting, February 19, 2009
Exh. A-82 Memorandum to L Berg from C. Wheelwright, August 23, 2008, Re PIT
Exh. A-83 Sandy Terrace Apartments Video
Exh. A-85 Video of K-9 Bono in action
Exh. A-98 Photographs
Exh. A-99 Letter of Recommendation for Officer Frashour, June 16, 2008
Exh. A-101 Action/Reaction Videos
Exh. A-105 Powerpoint slides (printout) from a Force Science Institute session
Exh. A-109 CV of William John Brady, M.D.
Exh. A-110 TEC-9 firearm photograph (semi-automatic 9 millimeter)
Exh. A-115 Tyler Camp Interviews (compilation)
Exh. A-116 William Snow Interviews (compilation)
Exh. A-117 Autopsy Photograph
Exh. A-119 CV, William Lewinski, Ph.D.
Exh. A-121 Video-Kids in Hallway
Exh. A-122 Video-London Study
Exh. A-123 Video-Belfast Study
Exh. A-124 CV of Ken Katsaris

** missing numbers were not offered into evidence*

I. PROCEEDINGS

The City of Portland, Portland Police Bureau and the Portland Police Association submitted the unresolved discharge grievance of Ron Frashour (the Grievant) to the undersigned Arbitrator, who was appointed by the mutual selection of the parties, for final resolution. The grievance alleges that the City violated the parties' collective bargaining agreement by discharging the Grievant without just cause. The Arbitrator conducted hearings on September 14, 15, 16, 20, 21, 22, 23, 2011, on October 17, 2011, and on November 15, 16, 17, 21, 22, 23, 28 and 29, 2011. Subsequent to the last hearing day, the Arbitrator received transcripts of depositions of two expert witnesses. At hearing, the parties had the opportunity to make opening statements, submit documentary evidence, examine and cross-examine sworn witnesses and argue the issues in dispute. The parties stipulated that the dispute was properly before the undersigned Arbitrator who has the authority to issue a final and binding decision on the issues submitted herein. A court reporter transcribed the proceedings. Upon the receipt of both parties' closing briefs to the Arbitrator on February 7, 2012, the hearing closed and the case stood fully submitted for decision.

II. ISSUES

The parties stipulated to the following statement of the issues:

> Did the City of Portland have just cause to discharge the grievant? If not, what is the appropriate remedy?

If the Arbitrator grants the grievance and issues a remedy, the parties have requested that she retain jurisdiction over any remedial issues for a period of 90 days following the decision.

III. RELEVANT CONTRACT LANGUAGE AND CITY POLICY

A. Collective Bargaining Agreement

ARTICLE 20 - DISCIPLINE

20.1 Disciplinary action or measures shall include only the following: written reprimand, suspension, or in lieu thereof, with the officer's concurrence, loss of vacation or non-FLSA compensatory time. Disciplinary action shall be for just cause and will be subject to the

following grievance procedure. This section shall not apply to counseling and instruction. Verbal reprimands will not be used as the basis for subsequent disciplinary action unless the officer is notified at the time of reprimand, and if notified, the matter will be subject to the grievance procedure.

ARTICLE 22 - GRIEVANCE AND ARBITRATION PROCEDURE

****

… The arbitrator's decision shall be final and binding, but the arbitrator shall have no power to alter, modify, amend, add to or detract from the terms of the contract. The arbitrator's decision shall be within the scope and terms of the Contract and in writing.

22.5.1 The arbitrator shall be asked to submit an award within thirty (30) days from the date of the hearing.[1] The decision may also provide retroactivity not exceeding sixty (60) days prior to the date the grievance was first filed with the Chief and shall state the effective date.

22.5.2 Each party shall be responsible for paying the costs of presenting its own case in arbitration, including the payment of witness fees, if any. The costs by the arbitrator, court reporter (if any), and the hearing room shall be borne by the losing party. Following the rendering of the arbitrator's decision, the parties shall meet and attempt to agree which is the "losing party". If the parties are unable to so agree, the question of who the "losing party" is shall be submitted to the arbitrator who rendered the decision in question. The arbitrator's subsequent designation of the "losing party" shall be final and binding. If the arbitrator cannot designate which party is the loser, each party will pay one-half (1/2) the cost of the arbitration.

****

B. City Policy

1010.10 DEADLY PHYSICAL FORCE[2]

Sanctity of Life
The Portland Police Bureau recognizes and respects the integrity and value of human life, and that the decision to use deadly physical force is the most important decision that a member will make in the course of his/her career. The use of deadly physical force will emotionally, physically and psychologically impact the member involved, the subject the deadly physical force was directed at, and the family and friends of both and can impact the community as well.

Deadly Physical Force
The Portland Police Bureau recognizes that members may be required to use deadly force when their lives or the life of another is jeopardized by the actions of others, Therefore, state statute and Bureau policy provide for the use of deadly force under the following circumstances:

---

[1] The parties agreed to extend the deadline for the Arbitrator's award to 60 days from her receipt of the parties' post-hearing briefs.

[2] In *Price v. Sery*, 513 F.3d 962 (9th Cir. 2008), the appeals court upheld the constitutionality of Policy 1010.10 as written. The Fourth Amendment requires an objectively reasonable belief on the part of the officer, and not some higher quantitative standard that might be associated with the phrase "'probable cause."

a. Members may use deadly force to protect themselves or others from what they reasonably believe to be an immediate threat of death or serious physical injury.

****

Members must be mindful of the risks inherent in employing deadly force, which may endanger the lives of innocent persons. A member's reckless or negligent use of deadly force is not justified in this policy or state statute. Members are to be aware that this directive is more restrictive than state statutes. Members of the Portland Police Bureau should ensure their actions do not precipitate the use of deadly force by placing themselves or others in jeopardy by engaging in actions that are inconsistent with training the member has received with regard to acceptable training principles and tactics.

Threat indicators, Levels of Control, and Post Use of Force Medical Attention are outlined in detail in DIR 1010.20 Physical Force.

****

1010.20 PHYSICAL FORCE

POLICY 1010.20

The Portland Police Bureau recognizes that duty may require members to use force. The Bureau requires that members be capable of using effective force when appropriate. It is the policy of the Bureau to accomplish its mission as effectively as possible with as little reliance on force as practical.

The Bureau places a high value on resolving confrontations, when practical, with less force than the maximum that may be allowed by law. The Bureau also places a high value on the use of de-escalation tools that minimize the need to use force.

The Bureau is dedicated to providing the training, resources and management that help members safely and effectively resolve confrontations through the application of de-escalation tools and lower levels of force.

It is the policy of the Bureau that members use only the force reasonably necessary under the totality of circumstances to perform their duties and resolve confrontations effectively and safely. The Bureau expects members to develop and display, over the course of their practice of law enforcement, the skills and abilities that allow them to regularly resolve confrontations without resorting to the higher levels of allowable force.

Such force may be used to accomplish the following official purposes:

a. Prevent or terminate the commission or attempted commission of an offense
b. Lawfully take a person into custody, make an arrest, or prevent an escape.
c. Prevent a suicide or serious self-inflicted injury.
d. Defend the member or other person from the use of physical force.
e. Accomplish some official purpose or duty that is authorized by law or judicial decree.

When determining if a member has used only the force reasonably necessary to perform their duties and resolve confrontations effectively and safely, the Bureau will consider the totality of circumstances faced by the member, including the following:

a. The severity of the crime.
b. The impact of the person's behavior on the public.
c. The extent to which the person posed an immediate threat to the safety of officers, self or others.
d. The extent to which the person actively resisted efforts at control.
e. Whether the person attempted to avoid control by flight.
f. The time, tactics and resources available.
g. Any circumstance that affects the balance of interests between the government and the person.

The Bureau's levels of control model describes a range of effective tactical options and identifies an upper limit on the force that may potentially be used given a particular level of threat. However, authority to use force under this policy is determined by the totality of circumstances at a scene rather than any mechanical model.

Directive 315.30 – Unsatisfactory Performance
Members shall maintain sufficient competency to properly perform their duties and assume the responsibilities of their positions.

Members shall perform their duties in a manner that will maintain the highest standards of efficiency in carrying out the functions and objectives of the Bureau. Unsatisfactory performance may be demonstrated by a lack of knowledge of the application of laws required to be enforced; an unwillingness or inability to perform assigned tasks; the failure to conform to work standards established for the rank, grade or position; the failure to take appropriate action on the occasion of a crime, disorder, or other condition deserving police attention; or absence without leave.

In addition to other indications of unsatisfactory performance, the following examples could be considered prima facie evidence of unsatisfactory performance: performance deficiencies or a written record of infractions of rules, regulations, directives or orders of the Bureau.

IV. SUMMARY OF THE EVENTS LEADING TO THE FATAL SHOOTING OF AARON CAMPBELL

The Sandy Terrace Apartments comprise several two-story buildings. Each apartment is accessed through an alcove containing a staircase. Four units are accessed from each alcove. The ground floor apartments contain glass doors that open to a lawn and pool in the rear. The two buildings relevant to this dispute are located on the east side of the complex and run in a north-south direction. There is a narrow walkway between the first and second building that accesses the rear lawn and pool. The first building or northernmost building off Sandy Boulevard contains unit 37, a ground floor unit located off the third alcove from Sandy

Boulevard. This unit was occupied by Angie Jones, who was Aaron Campbell's girlfriend. Perpendicular parking spaces are located on both sides of the driveway in front of the units.

A. Police Dispatched to Sandy Terrace Apartments

Shortly before 1622 on January 29, 2010, emergency dispatchers directed police to conduct a welfare check of Angie Jones' unit. The caller was concerned about the welfare of Ms. Jones and her three children. Police dispatchers noted that Aaron Campbell might be in the apartment and that he was suicidal, possessed a gun, had tried to kill himself and "poss[ibly] wants to do suicide by police." Exh. Jt-9, at 677 (the CAD log). Mr. Campbell was extremely distraught over the recent death of his brother.

Dispatchers pulled up Aaron Campbell's arrest record and dispatched that information. That record included arrests for resisting arrest, domestic violence, and attempted murder using a gun.

The events that took place over the next 100 minutes will be described in some detail because they convey the circumstances that are of considerable importance to this dispute.

B. Arrival and Positioning of Officers

Officer John Boylan reached the Sandy Terrace Apartments first, at 1630, followed shortly after by Officer James Quackenbush. Over the next 15 minutes, Officers Ryan Lewton, Josh Bocchino and Christopher Gryphon arrived. The latter two officers positioned themselves near the rear door of unit 37.

At some point, Courtney Jones, Angie Jones' father, arrived. Ms. Jones received a text or call from him and in response, at about 1703, went outside to talk to her father and to Officer Boylan. She told Officer Boylan that her three small children were still inside the apartment and that Mr. Campbell was resting or napping on the sofa. She verified that Mr. Campbell had a gun which he kept inside a sock in the front pocket of the jacket he was wearing as he napped. Although the information about the gun being in Mr. Campbell's jacket pocket was not broadcast, other officers who arrived on the scene did learn of it. Ms. Jones related that Mr.

Campbell was much improved over the previous evening when he'd been drinking and had attempted suicide.[3] Officer Boylan testified that Ms. Jones seemed calm, not emotionally upset, wanted police to leave, and believed their presence would only make things worse. She wanted to go back inside but the officers would not allow her to do so.

Sergeant Liani Reyna arrived at approximately 1722 and assumed command of the scene. Officer Boylan passed the information he obtained from Ms. Jones to Sergeant Reyna.

At 1724 Mr. Campbell sent a text message to Ms. Jones wondering what was going on and stating she should know that he doesn't want to be bothered. Ms. Jones replied, “IDK but they want you to come outside.” Exh. Jt-9, at 177. Mr. Campbell responded, “who" and then “I told [you] not to have nobody bother me." *Id*. Mr. Campbell next texted Jones, “don’t make me get my gun, I ain't playing.” *Id*. A CAD notation was made of these text messages. Officers are aware of the CAD dispatches via a computer in their vehicles.

The Grievant and his patrol car partner, Officer Tyrone Willard, arrived at 1729. They walked into the grassy area at the rear of the apartments, passing through the narrow walkway that separates the two north-south buildings. The Grievant conversed briefly with Officer Bocchino and at the same time heard the dispatch of Aaron Campbell's "Don’t make me get my gun, I ain't playing" text message. Officer Bocchino told the Grievant that Mr. Campbell was armed with a gun and had threatened suicide by police. After the Grievant's arrival, Sergeant Reyna (who had first assumed lethal cover responsibility) went to the first alcove of Ms. Jones' building, which became her command post. With her were Sergeant John Birkinbine, Officer Quackenbush and Officer Boylan.

By the time of the Grievant's arrival, two police cars had been parked in the entry driveway. One was situated diagonally (in approximately a northwest to southeast direction) across the

[3] During a later interview, Ms. Jones stated that the previous evening (January 28, 2010) Mr. Campbell told her he had put the gun to his head and pulled the trigger four times, but the gun misfired (or wasn't loaded) and nothing happened. He later went outside and shot into the air, and the gun fired properly. He did not try to shoot himself at that point. When the gun was later found, it did contain ammunition.

driveway roughly 60 feet from a Volvo station wagon parked in front of unit 37. Four officers used this patrol car for cover and formed what is called the "custody team" or "contact team."[4] The Grievant, who responded to a call for an AR unit, was designated "lethal cover" and held the AR15 rifle.[5] He located himself behind the engine block of the patrol car which gave him good hard cover. Officer Lewton handled the less lethal beanbag gun. He was located at the other end of the four-officer line, in the most northwest position. Officers Tyrone Willard and David Kemple carried holstered guns but were there for taking hands-on custody if needed. Officer Kemple also held a spotlight, as it was growing dark. Officer Willard was located next to the Grievant, and Officer Kemple was between Officers Willard and Lewton. Some dumpsters were located slightly east or southeast of the custody team. Officer Jeffrey Elias, a K-9 officer who arrived at 1734, positioned himself behind the dumpsters for cover, along with his German shepherd, Bano. Two later-arriving officers (Craig Andersen and Matthew McAllister, who arrived at about 1739) placed themselves behind a car in the carport of an apartment complex east of Sandy Terrace known as Darrin's Place. They had a view of the alcove leading to Mr. Campbell's apartment and of the parking lot in front of the patrol car, but they could not see the custody team located behind the patrol car. The Darrin's Place units are separated from the Sandy Terrace units by a chain link fence. The Grievant testified that he was not made aware of Officers Andersen's and McAllister's location or even presence, although he did know that a request had gone out to place officers to the east of the Sandy Terrace apartments. Officer Willard, however, testified that he knew two officers were positioned at the Darrin's Place complex.

---

[4] The Portland Police Bureau forms a custody team, as a matter of standard procedure, when there is a high risk stop or similar situation. Police cars are set up to provide cover for the officers. A custody team typically consists of a lethal cover officer, an officer armed with a less-lethal weapon, and two officers who are hands on.

[5] An AR15 is a high powered rifle and is more accurate at a greater distance than a handgun. An AR-trained officer can shoot accurately to 100 yards. The bullets are designed to fragment on impact so that if they hit a penetrable object, such as a car or wood-sided dwelling, they won't harm people inside.

Only officers located behind the engine block of a vehicle had good hard cover, that is, very good protection from bullets. Bullets are capable of penetrating and even passing through a vehicle when not deflected off the engine block. Nevertheless, a vehicle does provide protection. Officer Lewton was positioned behind the passenger door, so his cover was not optimal, nor was Officer Elias's cover behind a dumpster.

The arrival of officers attracted the attention of nearby apartment dwellers, including Randy Pannell in unit 34, an upstairs unit, and college students Jenna Peterson, William Snow and Tyler Camp, who were in a second floor unit in Darrin's Place apartments.

Once assembled, the custody team did not have a discussion among themselves about what they would do if Mr. Campbell came out of the apartment or the best reaction to any other contingency that might occur, nor did they receive instructions from Sergeant Reyna. Officer Lewton explained that no instructions or extra discussion were necessary because it was standard practice that team members with certain skills or certifications, such as AR or less lethal, would fill their assigned roles, and extra officers would be the hands-on team. He has been on many calls in which this standard practice has played out. There was little discussion among the team members as events unfolded; this is not unusual, Officer Lewton said. The Grievant testified that after he joined the custody team, he did remark to team members, "he's supposed to be armed?" Tr. 2964. Officer Lewton answered affirmatively. The Grievant said he then asked for confirmation that Mr. Campbell keeps a gun in his coat pocket and there was a suicide by cop threat. Officer Lewton confirmed that information also. It was Officer Lewton's impression that officers in the alcove would try to coax Mr. Campbell out of the apartment. The Grievant testified that he did not think it likely that Mr. Campbell would be asked to come out, nor did he think that would be a good idea. He explained that police were "interfering in some degree" with Mr. Campbell's life. Tr. 2986. According to the Grievant, it can increase the chance of a problem for police to personally confront an armed suicidal person who might want to provoke police into shooting him. "[M]y understanding is you don't want to back the person into

a corner to where you increase the likelihood of conflict between the police and the person."[6] Tr. 2983. He testified that he did believe that Sergeant Reyna would be trying to obtain assurances from Mr. Campbell that he would not hurt himself and that once she received that information, police would leave the scene.

Officer Boylan took Ms. Jones' cell phone back to the command alcove while Officer Justin Burns escorted her away from the premises to a safe location. Ms. Jones' three young children, however, remained inside the apartment with Mr. Campbell.

C. Telephone and Text Contact Made with Mr. Campbell

At around 1730, Officer Quackenbush was tasked with trying to make telephone contact with Mr. Campbell. Officer Quackenbush took on this task because he has a reputation of being able to gain the trust and cooperation of troubled people. He first tried calling on his police cell phone, but Mr. Campbell would not answer. At about 1732, he used Ms. Jones' phone to contact Mr. Campbell, who answered that call. (At 1732, a dispatch log reported, "OFCR QUACKENBUSH TALKING W/ SUSP." Exh. Jt-9, 673.) Officer Quackenbush recalled that he introduced himself and explained, "we're out here because we're concerned about your welfare; we received information that you were thinking about hurting yourself, you know, you were having some family problems, you lost your brother this morning, and we're concerned about you; again, you're not in trouble." Tr. 416. He had a great deal of difficulty hearing Mr. Campbell's response because of interference on the line. He recalled hearing Mr. Campbell's voice, which sounded angry. Mr. Campbell indicated that he wanted the police to just go away and leave him alone. Officer Quackenbush recalled responding to the effect that "we're not necessarily opposed to doing that, but the problem is, we -- you know, amongst other things, I know that there's three young kids in there, and we have a report that you're armed and you're

[6] Sergeant Reyna agreed with this assessment. To be clear, Officer Quackenbush never requested Mr. Campbell to come out of the apartment. According to Officer Quackenbush, he suggested to Mr. Campbell that the police could take him to the hospital or some other place that could help him deal with how he was feeling. Any mention of his coming out was part of the dialogue meant to expand their rapport.

upset, and so we're concerned about the babies." Tr. 417. He then realized that there was no longer anyone on the line, but he didn't know whether it was because it was a dropped call or was because Mr. Campbell had hung up. At about the same time he heard someone shouting that the kids were coming out.

At about 1734, the three children emerged from the apartment. This took everyone by surprise. Officers Quackenbush and Boylan (who knew of the former's communication with Mr. Campbell), took this as a positive sign. They thought that Mr. Campbell was responding to Officer Quackenbush's expressed concern about the children. The other officers were only aware of a dispatch notation that Officer Quackenbush was in contact with Mr. Campbell, but they did not know the nature of that contact. Officers generally viewed the release of the children as a positive sign, since they were safe, but officers also were concerned that Mr. Campbell might be getting the children out of harm's way so that he could provoke the police or fire shots at them.

At 1748, a CAD entry informed officers on the scene that Mr. Campbell had no known drug problems and was last seen drinking the evening before. This information came from Angie Jones.

Meanwhile, Sergeant Reyna and Sergeant Birkinbine engaged in a discussion about when police should leave. Sergeant Reyna believed that after the children came out of the apartment, leaving Mr. Campbell alone inside, the threat he posed had diminished and the police should leave, perhaps after getting assurances from him that he would not hurt himself. She explained that with a suicide by cop threat, police should leave and not put the person in the position to carry out the threat. Sergeant Birkinbine, however, did not want to leave the scene only to have Mr. Campbell shoot himself. He believed a face to face encounter to be the most effective way to ascertain whether Mr. Campbell would hurt himself. They resolved their differences by telling Officer Quackenbush to obtain assurances from Mr. Campbell not to hurt himself; then they would leave.

Officer Quackenbush renewed his contact with Mr. Campbell by sending a text message, thinking he might be more responsive to texting. A dispatch log notation appeared at 1751 saying "ON THE PHONE w/ SUSP NOW." Exh. Jt-9, at 674. At 1755, Officer Quackenbush sent a message stating, "Aaron we need to know if you intend on hurting yourself." Exh. Jt-9, at 175. A minute later, Mr. Campbell responded, "Never … wow u guys text too … u get kudos." *Id.* Officer Quackenbush testified that he and Sergeant Birkinbine laughed at this a little and he was relieved to hear a little humor being injected into the matter. He believed the situation was de-escalating.

At about 1757, Sergeant Reyna orally broadcast that "We're getting some positive texts, feedback from him, we're still in text communication." Exh. Jt-11, at 548. At 1758, a dispatch log notation appeared saying, "In text communication." Exh. Jt-9, at 674.

Several minutes earlier, Captain Robert Day (now Commander Day) and Lieutenant Derek Rodrigues arrived separately at the scene. Captain Day, not knowing that critical communications were in progress with Mr. Campbell, relayed a message through Lieutenant Rodrigues that he wanted a debriefing from Sergeant Reyna at his vehicle parked on Sandy Boulevard. Sergeant Reyna testified that she viewed this request as an "order" and immediately left her alcove to report to Captain Day.[7] Sergeant Reyna's departure left the scene without an on-site incident commander.

At 1803, a CAD dispatch stated that Mr. Campbell had opened his back blinds and was looking out. Officers testified that they have been trained that suspects do this when they want to determine the location of police in order to flee or shoot it out with them. But, of course, it

[7] Sergeant Reyna testified that Captain Day, pursuant to police bureau policy, became the incident commander. However, he was still in his car and knew nothing about the events that were unfolding. Captain Day disagreed that his request for a debriefing should have been viewed as an order. He testified that the incident commander should comply only if it does not put the operation in jeopardy. He testified that she could have relayed a message back that it was not a good time for her to leave her post, or she could have called him on a cell phone. He could have gone to her, he added. Incident commanders in the past have not viewed a request for a debriefing at his vehicle as an order, he maintained.

could be that Mr. Campbell was looking out because he was curious, he "just wanted to know if the police were there." Tr. 2729 (Sergeant Reyna testimony).

Also at 1803, Officer Quackenbush responded to Mr. Campbell's previous "kudos" message and said, "Thanks Aaron. I appreciate your help. I am truly sorry about your brother. Can u promise me u wont hurt yourself-Jim." Exh. Jt-9, at 175. Mr. Campbell responded the next minute saying, "Ur textin me and not callin me that’s real weird Jimmy." *Id*., at 176. This dialogue was not broadcast to other officers at the scene.

At 1806, Officer Quackenbush, at Sergeant Birkinbine's advice, called Mr. Campbell using a cell phone. Officer Quackenbush could not recall the exact sequence of the dialogue or exactly what was said. The gist, however, was that Mr. Campbell began by saying that the police should go away and leave him alone. Officer Quackenbush responded the police didn't have a problem with that, but that they wanted to make sure he was okay, that he wasn't going to hurt himself or other people, and that they wanted perhaps to explore other options like taking him to a hospital to talk to someone, if he was willing. He recalled telling Mr. Campbell that he knew what it was like losing someone close, that he had recently lost his grandparents. He said that just as with the previous telephone conversation, he suddenly realized he wasn't talking to anyone. The line had gone dead. At the same time he heard officers shouting that Mr. Campbell was coming out of his apartment. Mr. Campbell's emergence from the apartment took everyone by surprise, including Officer Quackenbush.

The evidence was that the Grievant saw the CAD dispatch notations referenced above concerning phone and text contact with Officer Quackenbush. The Grievant also heard Sergeant Reyna say that they were receiving positive texts and feedback from Mr. Campbell and they remained in text communication. Officers not in the alcove, however, did not know the content of Officer Quackenbush's texting and telephone communication with Mr. Campbell.

D. The Critical Minutes

The few minutes that elapsed after Mr. Campbell emerged from his apartment are the most critical ones in this case. The numerous witnesses to what transpired next varied in their description of the details.

Most witnesses described Mr. Campbell as wearing baggy clothes with his pants sagging. He was wearing a puffy jacket according to all but one witness. (Civilian witness Ryan Pannell, who was watching from a window of unit 34, recalled Mr. Campbell wearing a T-shirt and no jacket.) Officer Kemple testified that he could see the top of Mr. Campbell's underwear and four or five inches of skin when he was at the closest point to officers. Ryan Pannell said that that Mr. Campbell's jeans hung below the waistband of his bluish, boxer-style underpants by three or four inches. Officer Lewton recalled Mr. Campbell wearing blue jeans, a long jacket, and black boxer shorts. He said he could see Mr. Campbell' boxers because his pants were pulled down below his waistline. Some witnesses (Officer Elias, Jenna Peterson, William Camp and Tyler Camp) said Mr. Campbell's jacket covered his waistband area so they could not see underneath. At hearing, the Grievant was not asked to describe Mr. Campbell's attire, but during an investigative interview, he described Mr. Campbell as wearing a dark jacket with perhaps a camouflage print on it, loose fitting pants, and he recalled glimpsing a white T-shirt under the jacket. He couldn't recall whether he saw underwear. See Exh. Jt-11, at 233-234. The remaining witnesses could not recall whether Mr. Campbell's waistband was exposed, did not comment on it or provided unclear testimony.

All witnesses agreed that as Mr. Campbell came out of his apartment, he put his hands on or near the top of his head with his hands clasped or fingers nearly touching. He walked first in an easterly direction, past the Volvo and to the center of the parking lot. Some witnesses said he walked forward to the center of the lot, others said he sidestepped with his back toward officers -- or he might have done a combination of walking forward and sidestepping. At the center of the parking lot he turned so he could walk backwards toward the officers behind the

patrol car. His hands remained on his head. Some thought he turned his back toward officers in response to a command to do so. Others did not hear such a command.

At this point it was getting dark and a spotlight operated by Officer Kemple was focused on Mr. Campbell. Kemple stated he aimed the light on Mr. Campbell's torso where most weapons are concealed.

Witnesses agreed that Mr. Campbell walked backwards toward the officers and stopped at a point approximately 15 to 20 feet from the custody team when told to do so. Witnesses' testimony varied over the pace of his walk:

- Civilian witness Jenna Peterson testified that Mr. Campbell's backwards pace was “pretty decent." Tr. 685. It was close to speed walking, but it did not strike her as an unusual pace.

- Civilian witness William Snow stated that Mr. Campbell did not walk at a leisurely pace, but it did look like he was giving himself up.

- Civilian witness Tyler Camp said Mr. Campbell walked backwards "very quickly." Exh. A-115 at 5.

- Officer Lewton testified that Mr. Campbell was walking backwards too fast, almost like he was running backwards and he had to shout loudly at him six times to slow down. Mr. Campbell finally did slow down, but Officer Lewton found that his pace was worrisome and a "real threat." Tr. 1924.

- Officers Boylan and Kemple testified that Mr. Campbell's pace was neither fast nor slow; it did not cause them undue concern.

- Officer Elias described Mr. Campbell's pace as "pretty fast" and this "surprised” him. Tr. 2132. It was "pretty much faster than I've ever seen anyone walk back towards the police." *Id*. People usually walk slowly backwards because they are scared and because they can't see where they are going, Officer Elias explained. In his judgment, this increased the threat level. During the investigation, however, Officer Elias stated Mr. Campbell's pace was slow, and in a deposition he said, "Yeah, he walked out slow, but it was kind of -- it was walking out in a way he wanted to walk out. It wasn't just kind of -- It was weird. I can't explain it. You could just tell there was something up with the way he was walking out there. It was like he was in control." Tr. 2179-80.

- Officer Willard recalled Mr. Campbell walking backwards very quickly toward the custody team and ignoring Officer Lewton's commands to slow down and stop. He added, "I felt like he was just escalating things. He's in control, he's running the show, he's doing something, he's setting up for something." Tr. 2597. He pace was faster than he'd seen any subject in the past back up toward officers.

- Sergeant Birkinbine said Mr. Campbell's pace was faster than normal, but it did not cause him undue concern.

- Officer McAllister said that Mr. Campbell walked backwards with long, fast strides, at a pace that concerned him. He did not view it as classic surrender behavior.

- Officer Andersen testified that he was alarmed by Mr. Campbell's rapid pace because it was "kind of strange, erratic behavior." Tr. 1745.

- The Grievant testified that Mr. Campbell was walking very fast, so fast that he had to have been doing it on purpose. His walk resembled a march step and seemed determined. It was not in response to direction from police, testified the Grievant. He had never before seen anyone who was giving up walk at that pace. People who give up typically walk cautiously at a somewhat slower pace than normal walking, he stated. The Grievant had his weapon pointed at Mr. Campbell but was looking over the sight, not through it, he testified.[8]

Officer Lewton shouted most or all of the commands to Mr. Campbell. Testimony varied considerably over what commands Lewton gave to Mr. Campbell as he walked backwards and whether and how he complied with those commands. Witnesses agreed the commands were loud, so Mr. Campbell probably heard them.

- Jenna Peterson testified that officers told Mr. Campbell to slow down and he would slow down for a step or two and then he would speed back up. Finally the officers told Mr. Campbell to stop, and he did so. She said that he was not respectful of the officers, was not compliant, and appeared not to care.

- Tyler Camp recalled commands to “slow down, slow down.” Exh. A-115, at 2. Mr. Campbell finally stopped for a second and then he continued to walk backwards and an officer continued to tell him to walk slower, according to Mr. Camp. He further stated Mr. Campbell "was definitely not following directions, he was not following his orders." *Id*., at 7. He added, "at that point, it was, he wasn’t gonna listen to what anybody was saying and he was gonna to do what he wanted." *Id*., at 8. However, he also said he believed Mr. Campbell was giving himself up.

- William Snow stated that as Mr. Campbell walked backwards, officers asked him to stop, but he did not immediately stop. He indicated that instead he began to "speed back." Exh. A-116, at 5.

- As stated above, Officer Lewton said he told Mr. Campbell six times to slow down. Mr. Campbell did not slow down immediately and Officer Lewton thought that Mr. Campbell was executing some sort of plan and that he, Officer Lewton, needed to gain control. According to Lewton, Mr. Campbell finally stopped mid-way in his trajectory and

[8] As Mr. Campbell walked backward toward the team, the Grievant turned on the light on his weapon so he could see better and flipped his aperture sight as Mr. Campbell got closer. Both of these were momentary actions, he stated. He stood up because he had been squatting a long time and believed that he might not be able to react quickly enough from his squatting position. These actions were instinctive, he testified.

Lewton ordered him to walk slowly backwards toward the patrol car. Mr. Campbell complied and when ordered to stop, he did so.

- Officer Kemple stated that he thought Officer Lewton was giving commands to have Mr. Campbell move backwards toward the patrol car and Mr. Campbell complied, but he mostly does not recall the commands Officer Lewton was giving. He was very focused on Mr. Campbell himself. He described Mr. Campbell's behavior as being compliant as far as he could recall.

- Officer Boylan recalled Mr. Campbell complying with the commands being given him.

- Officer Elias did not hear or could not recall Officer Lewton's commands. Bano was barking and Officer Elias was partially focused on the dog.

- Officer Willard said Officer Lewton was yelling "slow down" and "stop." Tr. 2595. He stated that Officer Lewton asked Mr. Campbell to stop "many times," but Mr. Campbell did not comply. *Id*. On cross-examination, he agreed he told investigators he heard Lewton tell Mr. Campbell to face away from officers and walk backwards toward the sound of his (Lewton's) voice. Mr. Campbell did so, but Officer Willard believed Mr. Campbell was doing that of his own accord and not in response to Officer Lewton's commands.

- Sergeant Birkinbine could not hear specifically what commands were given.

- Officer McAllister testified that he could hear loud words being shouted to Mr. Campbell, but he could not hear the exact nature of those commands. On cross-examination, however, he agreed he had told Internal Affairs investigators (a year and a half earlier, when his recollection was better, he said) that he heard Mr. Campbell being commanded to "walk back toward us," and to walk "slower" or to "slow down." Tr. 1700. He also told IA investigators that Mr. Campbell did respond by slowing down and obeying the command to stop.

- Officer Andersen could not hear or could not recall Officer Lewton's commands.

- The Grievant testified that while Mr. Campbell was walking, he could hear commands being given to Mr. Campbell but he could not recall the substance of those commands. He recalled saying to Officer Lewton, “slow him down, he’s going too fast,” or words to that effect. The dog Bano was barking loudly by this time, according to the Grievant.

All officers facing Mr. Campbell testified that it was reasonable to believe that Mr. Campbell was carrying his gun, even though no witness actually saw a gun. Officers were aware he had a gun in the apartment, had threatened to use it, that Ms. Jones had reported he kept it in his jacket pocket, and he was wearing a jacket when he came out. Officer Kemple testified that he was looking closely for a firearm and he did not see one, nor did he see any suspicious bulge. He acknowledged, and other officers agreed, that a handgun can be concealed without a visible

bulge. Officer Lewton testified that he did not observe any bulges in Mr. Campbell's waistband but that the absence of a bulge did not rule out the possibility that he carried a weapon. Ryan Pannell testified that he could see the waistband of Mr. Campbell's pants but did not see evidence of a gun. No witness reported seeing a bulge in Mr. Campbell's jacket pocket, but witnesses generally were not in a good position to observe the front of Mr. Campbell's jacket.

Witnesses mostly agreed that Mr. Campbell reached his final stopping point about 15 to 20 feet from the nearest point of the patrol car. He stopped in compliance with Officer Lewton's command to stop. The Grievant testified that he did not feel alarmed at this point because Mr. Campbell complied with the instructions to slow down and stop, but he was still feeling very cautious.

As Mr. Campbell reached his final stopping point, he continued to keep his hands on the top of his head. At this point, Officer Lewton ordered Mr. Campbell to put his hands in the air. The order was given because having one's hands in the air makes it more difficult to reach for a gun; it also helps officers see whether there is a gun in the waistband area and it makes it easier to secure the person. Mr. Campbell did not respond to Officer Lewton's command. The consensus among witnesses was that Lewton repeated the order several times in a very loud voice. There was no dispute that Mr. Campbell should have heard Lewton. Finally, Lewton shouted that police would shoot if he did not put his hands in the air. At this point, most witnesses said that Mr. Campbell turned slightly to the left toward the officers and said, "Go ahead and shoot me, go ahead and fucking shoot me" (Boylan, Tr. 330) or words to that effect. Some witnesses indicated that Mr. Campbell's hands remained behind his head and looked under his armpit at officers. Others thought he dropped his left hand when he did this. The Grievant said he did not hear exactly what Mr. Campbell said, but he observed that Mr. Campbell had a hostile and angry look on his face. Officer Willard also described Mr. Campbell's demeanor as angry.

With Mr. Campbell's refusal to put his hands in the air, Officer Lewton fired a round from his beanbag gun and it hit Mr. Campbell, probably in his buttocks or thigh area. The evidence was

that being hit by a beanbag gun is like being hit by a fastball pitch at over 100 miles per hour. It can be very painful, although the pain can be mitigated or blocked by padded clothing. In addition, some subjects may be in a mental state that allows them to appear impervious to the pain.

The Grievant said he heard a beanbag round being fired and saw a beanbag cross his field of view. He did not see precisely where it struck Mr. Campbell but believed it was between his buttocks and his knee. The Grievant observed Mr. Campbell stumble forward with his left foot, then right himself back to his original standing position with his hands behind his head. Mr. Campbell's hands never came off his head, testified the Grievant. The stumble forward was obviously a reaction to the beanbag but did not resemble any pain reaction that the Grievant had ever seen.

Witnesses generally agreed that at the point of being hit by the first beanbag round, Mr. Campbell faltered or stumbled forward in some fashion and then straightened himself, more or less as the Grievant described. He next began to run in the direction of his apartment and the Volvo parked in front of it. Officers agreed that the Volvo could be used as cover by Mr. Campbell should he decide to start shooting at officers.

As Mr. Campbell ran, Officer Lewton fired five more beanbag rounds at Mr. Campbell. It is not clear how many of those rounds hit Mr. Campbell or where those rounds hit him, although it is known that one hit him in the back of thigh, above his knee. This is the only round that left any visible mark on Mr. Campbell. Other rounds may have hit his buttocks, witness testimony suggests. In any event, Mr. Campbell did not slow down.

While running, Mr. Campbell lowered his arms, witnesses agreed. Witnesses differed as to what Mr. Campbell did with his hands as he ran. Bear in mind that as Mr. Campbell ran towards the Volvo and his apartment, the view trajectory of witnesses varied, depending on their location.

- Ryan Pannell, whose view was of Mr. Campbell's right rear, recalled that when Mr. Campbell was first hit by beanbag rounds in the back, he lowered his arm to reach for the spot he was hit. It appeared obvious to him that it was a pain reaction. He recalled Mr. Campbell running, but he was distracted by his son and did not see much more.

- Jenna Peterson, whose view was from the left rear, recalled that after the first beanbag shot, Mr. Campbell "dropped both of his hands, and reached backward with one of them, looking like reaching toward the place where he had gotten shot." Tr. 688. To her, it looked like a pain reaction to being shot with the beanbag. She recalled that once he removed both his hands from the top of his head, a second beanbag round was fired. She recalled that Mr. Campbell then started running, and his arms were in a pumping motion when he started running. She recalled that at some point during the next few seconds, Mr. Campbell reached for his waistband with his left hand and she thought it appeared that he was trying to pull up his baggy pants.

- William Snow said that he saw Mr. Campbell run after being hit with beanbag shots, and as he ran, he saw Mr. Campbell reaching back for what appeared be a weapon on the small of his back. He thought he saw him reach for a dark object but he couldn't tell whether it was a gun. His impression, however, was that it was a weapon and that Mr. Campbell either was going to fire on police or possibly on himself. He recalled Mr. Campbell's reach being with his left hand. He saw Mr. Campbell's left hand lift his jacket and go under his beLieutenant

- Tyler Camp, with the same perspective as Ms. Peterson and Mr. Snow, saw Mr. Campbell run after being hit with beanbag shots. He told the grand jury that when Mr. Campbell decided to run, he dropped his hand toward his back. "I couldn’t see if he was reaching for something. I didn’t see anything on his back, but his hand was definitely back towards his back." Exh. Jt-10, at 197. A Grand Juror asked whether it appeared "he was reaching in pain?" Mr. Camp responded, "I would say no." *Id*. He also told investigators that he saw Campbell reach back toward his pants after being hit with the second beanbag shot, and he didn't know whether he was "just pulling his pants or trying to grab something, but he had definitely reached back behind him." Exh. A-115, at 3. He stated Mr. Campbell's hand wasn't behind him very long, perhaps a second, and then he was shot.

- Officer Lewton said he could not see Mr. Campbell's hands once he removed them from his head and started running.

- Officer Boylan indicated that as he ran, Mr. Campbell lowered his arms to mid-torso and they seemed to be reaching forward. He did not report seeing Mr. Campbell reach for anything in his rear torso, but he thought it odd that his arms were not pumping as people normally do when they run.

- Officer Kemple recalled that after being hit by the beanbag, Mr. Campbell immediately lowered his arms and began running. He agreed that Mr. Campbell's "arms were moving as you would see when somebody's running." Tr. 734.

- Officer Elias said that after Mr. Campbell removed his hands from his head and began running, he saw his hands "next to his waistband." Tr. 2157. He indicated that Mr. Campbell’s hands were in a normal running position but noted he was not concentrating on Mr. Campbell’s hands.

- Officer Willard testified that Mr. Campbell had lowered his hands before the first beanbag round hit him. He further testified that as Mr. Campbell ran, not only did Mr. Campbell appear to reach for his waistband with his left hand but he actually partially turned and put his right hand in a position that would help him pull a gun out. He did this as he ran. (Officer Willard demonstrated this motion at hearing which is not entirely reflected in the transcript.) According to Officer Willard, Mr. Campbell "started sprinting as he's diving his hands back. It was the exact mirror image as if I was reaching for my weapon. He was just a left-handed version of what I would do to reach for my weapon." Tr. 2607. He added that Mr. Campbell "was in a full sprint, or accelerating to a full sprint, looking over his shoulder at us, and "just digging for something towards his hip." Tr. 2607-08. Willard believed at the time Mr. Campbell was reaching for a gun. He did not believe Mr. Campbell's hand placement was a pain reaction because the motion was that of going for a gun.

- Sergeant Birkinbine testified he left the alcove at about the same time Mr. Campbell began running. He said he was not in a position to see the left side of Mr. Campbell's body. When he started running, his hands went up in front of him and his arms were pumping somewhat. While Mr. Campbell was running, Sergeant Birkinbine was moving from the alcove to the contact team area.

- Officers McAllister and Andersen were not in good positions to see Mr. Campbell's hands while he ran, although McAllister recalled that Mr. Campbell dropped his hands when he was hit with the beanbag gun, and he ran with his hands dropped in a running position. He added that his recollection was not very clear.

The Grievant's testimony informs what he did next. The Grievant testified that Mr. Campbell first lowered his arms as he began to run. He heard a second beanbag round fired and observed Mr. Campbell pause, a “substantial break in the action,” then bring his left hand down behind his back and turn about 45 degrees toward the Volvo. Tr. 3094. By the time he finished the turning motion, Mr. Campbell’s hand was completely in his pants beneath his waistband, the Grievant testified. He began to sprint away, still with his left hand in his pants beneath his waistband.

The Grievant did not think that Mr. Campbell’s reach was a reaction to the pain of being beanbagged. Mr. Campbell’s pause preceded his reach into the waistband, and during that pause Mr. Campbell displayed no reaction to the beanbag, testified the Grievant. He stated that when a subject feels the pain of a beanbag, he exhibits this by instinctively reaching for the area that was struck, violently arching the back, crying out, or falling to the ground. When a person reaches for the struck body part, he typically does not have the frame of mind to reach

underneath his clothing, the Grievant stated. Mr. Campbell's reach seemed too methodical to be a reaction to the beanbag, he testified.

The Grievant agreed that about three seconds elapsed between the time Mr. Campbell began running and when he was lethally shot. As Mr. Campbell was running with his hand down his pants, the Grievant thought he was reaching for a gun. He recalled thinking, "don't do that; oh my gosh, don't do that, what are you doing, don't do that," he testified. This was the first time he became aware of having Mr. Campbell in the sights of his rifle. He testified that he was trying to give Mr. Campbell a chance to remove his left hand from his pants and bring it up empty. He also was thinking that he could not let Mr. Campbell get to the Volvo, which would have provided hard cover. He turned his attention from the rifle's sight to Mr. Campbell's hands to give him another chance to not be pulling out a gun, but instead Mr. Campbell appeared to be pulling out an object, testified the Grievant. The Grievant remembered thinking, "gun," and thinking, "I have to." As Mr. Campbell neared the right front corner of the Volvo, the Grievant fired upon him. He fell a foot or two from the corner of the Volvo. The shot was fatal. Mr. Campbell turned out not to be armed; he had left his gun in Ms. Jones's apartment.

The Grievant testified that using deadly force was "the hardest thing in the world to do." Tr. 3140. He also said,

> This whole thing has just been a tragedy. And I don't like to say out loud what I'm about to say, it's very uncomfortable, is that I took a life. And I understand that. And I take it very seriously. And I hope that I never have to experience it again.

Tr. 3037.

E. The Release of the K-9

At some point during Mr. Campbell's approximately three-second run, Officer Elias released Bano, the dog. Bano had been focused on Mr. Campbell and was barking before he was released. Witnesses differed in their recollection of when Elias released Bano, or they simply could not recall. Those who could recall testified as follows:

- Jenna Peterson thought that the dog was released just before the fatal shot was fired.

- William Snow thought the dog was released almost immediately when Mr. Campbell was shot.

- Tyler Camp's testimony was that the dog was on top of Mr. Campbell about 2 to 4 seconds after he heard the gun shot. He thought he was released at about the same time as the gun shot.

- Officer Lewton said he did not see the dog at the time the lethal shot was fired. Instead he saw the dog afterwards, at the point Campbell fell, apparently.

- Officer Willard recalled first seeing the dog in the middle of the parking lot and this was about the same time the shot was fired.

- Officer Kemple testified that the dog was in front of the police car (which would be at or near the center of the parking lot) when he heard the fatal shot. He thought he saw the dog and heard the shot at roughly the same time.

- The Grievant, as the AR handler, was focused on Mr. Campbell, and not the dog, although he was aware of Bano's presence. He was not aware the dog had been released until he saw the dog on top of Mr. Campbell after he went down.

- Officer Elias' testimony may be the most reliable, since he was Bano's handler. Officer Elias said he made the decision to release the dog as soon as he processed the fact that Mr. Campbell was running. He unhooked the leash with a "take" command, and Bano began to run toward Mr. Campbell. He did not tell the custody team he was releasing Bano. Elias indicated (by pointing at a drawing of the scene) that Bano was approaching the center of the parking lot when he heard the fatal shot. Elias told the grand jury that Bano was "a few feet" or "pretty close" to Mr. Campbell when he fell. Exh. Jt-11, at 42. Immediately after hearing the fatal shot, Bano was on top of the fallen Mr. Campbell. During an investigative interview, Elias said he watched Bano close the distance with Mr. Campbell as Mr. Campbell ran. He did not believe the other officers at the scene had reason to know he was releasing the dog. But he added, "but you know, common sense, they call me there, they know what the dog does, someone runs, the dog will usually get sent. I mean, like I said, we work together all the time." Exh. Jt-11, at 382. Elias also told investigators that he released Bano to prevent Mr. Campbell from getting to a position of cover. He added that there were people in the apartments and it "just would have been a very ugly situation if it would have gone to a shoot out. *Id*., at 387. (He did not, however, see Mr. Campbell reaching for a gun, although he believed he was armed).

F. The Grievant's Reasons for Shooting Mr. Campbell

The Grievant testified at length as to why he made the decision to shoot Mr. Campbell. The Grievant believed that Mr. Campbell was pulling a gun to fire at police and was headed toward hard cover. His decision to pull the trigger came from Mr. Campbell’s conduct during the approximately three seconds that elapsed while he was running, he stated. The evidence pointed to the conclusion that Mr. Campbell was armed, explained the Grievant. Mr. Campbell

was reported to have a gun in the apartment, had threatened suicide by police, was known to keep a weapon in his jacket pocket, and he came out wearing the jacket. He emerged from the apartment in an atypical fashion (walking rapidly backwards), making his intent unclear. He did not comply with commands to put his hands in the air. He shouted something at the police in an angry or hostile manner, and this is a risk indicator, the Grievant noted. Mr. Campbell reacted oddly to the beanbag rounds, the Grievant opined. He ran toward hard cover and as he ran, the Grievant saw Mr. Campbell reach into his waistband, in the body's 60th percentile zone where most guns are kept.[9] It would have been easy for Mr. Campbell to move the gun from his jacket pocket to his waistband before coming out of the apartment, he noted.

The Grievant believed that when Mr. Campbell started to reach for what he believed to be a weapon, he posed an immediate threat of death or serious injury and could not be allowed to reach the Volvo (or his apartment) where he would have had hard cover and could have started shooting. However, the Grievant agreed that there was potential hard cover in the parking lot that was closer to Mr. Campbell than the Volvo when he started running.

The Grievant testified that he did consider the possibility that Mr. Campbell was unarmed, but he did not think the information he had supported that possibility. That information was that Mr. Campbell owned a hand gun, had it on his person in the apartment, had threatened both suicide and suicide by police, and when he learned that police were outside, texted to Angie Jones, "Don't make me get my gun. I ain't playing."

He said he also was concerned about the possibility that a bullet from Mr. Campbell's gun could hit a bystander should he start firing. Regarding the possibility that Mr. Campbell was running simply to get back to the apartment, the Grievant testified that he did not know where Mr. Campbell was running but he was going to get to the Volvo before he got anywhere else. The Grievant added that he did not know whether the alcove also was a pass-through and he

[9] Testimony regarding the "60th percentile" referred to the fact officers are trained that weapons are routinely kept in the 60th percentile of the body from the chest down to the thigh.

considered it unacceptable to allow Mr. Campbell to get to the rear of the building and start firing on unsuspecting police officers positioned there. The Grievant testified that Mr. Campbell's fast backward walk did not justify shooting him, but his walk was part of the totality of circumstances that he had to consider, as was the fact Mr. Campbell refused to put his hands in the air.

The Grievant testified at hearing and he told investigators that he must have been aware of Mr. Campbell's criminal history because he read the CAD log in the patrol car as he was heading to the scene. But he couldn't recall whether this was something he considered and he conceded that he told the IA investigators that Mr. Campbell's criminal history had nothing to do with his decision to pull the trigger.

G. Officer Support of Grievant' Decision to Shoot

Bargaining unit officers who testified agreed that if Mr. Campbell had reached the cover of the Volvo, he could have pulled his gun and begun firing. Bargaining unit officers generally agreed that if the Grievant saw Mr. Campbell make a deliberate and more than momentary reach into his waistband, it was reasonable to believe he was reaching for a gun, and it was further reasonable to believe that Mr. Campbell might have taken cover behind the Volvo and started shooting. They further opined that based on what else the Grievant observed Mr. Campbell doing, and based on what the Grievant knew about Mr. Campbell and the facts and circumstances surrounding the call for police, that it was reasonable to believe that Mr. Campbell posed an immediate threat of death or serious injury to others and therefore the Grievant was justified in shooting Mr. Campbell. Some officers were forceful in their support of Grievant's action, while a few were equivocal. All bargaining unit officers' opinions were based on a hypothetical question about what the Grievant believed he saw.[10]

[10] A number of bargaining unit officers testified who did not witness the shooting. They testified to other matters, but were asked the same hypothetical question, and their answers supported the Grievant's action.

One should note that the commissioned police witnesses who ranked at lieutenant or above disagreed with the testimony of the bargaining unit officers.

Although other officers were armed, no other officer drew his gun or fired a shot, even though they believed that from Grievant's perspective, the use of deadly force was justified. Officer Boylan testified that he did not see Mr. Campbell as posing a risk of death or serious injury as he did not see a gun. Officer Kemple testified that he did not see a gun so he "didn't feel like [he] had enough to pull the trigger, so [he] didn't shoot." Tr. 783. He added, however, that Mr. Campbell's taking cover moved the situation from a potential threat to an immediate threat. Officer Willard, as stated previously, was convinced that Mr. Campbell was reaching for a gun as he started running and believed at that point that Mr. Campbell posed an immediate threat of death or serious injury. But he did not shoot and did not explain why.

The Association wove the "action/reaction" principle into much of its narrative. A number of witnesses described that principle, which was a key consideration in the Grievant's decision to shoot. This principle is based on the known fact that that the initiator of an action has an advantage over the responder when it comes to firearms. Armed subjects can draw a weapon and fire, even while running in the opposite direction, before an officer can respond, even an officer holding a gun. The Association's expert witness, William Lewinski, testified that it takes only a small fraction of a second for someone experienced with a handgun to pull it and fire. This is faster than the reaction time for an armed person on the receiving end of the gunfire. Officers are well trained to be aware of this phenomenon, although they know it is only one of the things to be considered before making the decision to shoot.

H. Opinion of Police Management Witnesses

Police management witnesses, all commissioned law enforcement officers, disagreed with the above-recited opinions of bargaining unit members. Chief Michael Reese was the most important of these witnesses because he made the decision to terminate the Grievant.

Chief Reese testified that he considered Mr. Campbell a potential threat but that Mr. Campbell did not become an immediate threat of death or serious physical injury. Reese listed the facts supporting his conclusion: 1) Mr. Campbell had not threatened anyone except himself,

2) the police were conducting a welfare check on Angie Jones and her three children, not Mr. Campbell, 3) Mr. Campbell came out of the apartment and was giving up to the police officers, 4) Mr. Campbell had not committed a crime and was not wanted for a crime, 5) Mr. Campbell never displayed a weapon, and 6) Mr. Campbell never took offensive action toward the officers or the community.

Mr. Campbell did not become an immediate threat simply by running from the beanbags and reaching into his pants, in Chief Reese's opinion. Running from the beanbags and reaching into his pants were natural reactions to pain. For Mr. Campbell to have become an immediate threat, other clues would need to have been present, such as bulges in clothing indicating a possible concealed firearm. Further, given the circumstances, he believed there was no justification for shooting unless Mr. Campbell took some sort of offensive action such as turning toward the officers, pulling something out, or taking a shooting stance. He considered Mr. Campbell to have been a decreasing threat with increasing distance from officers.

Nothing about Mr. Campbell's actions directly threatened the officers, explained the Chief. None of Mr. Campbell's statements or text messages were directly threatening, nor was his action when he emerged from his apartment. He was basically complying with officers' commands and surrendering. The statement "go ahead and shoot me" was not threatening to officers. Although he considers a "suicide by cop" call a potential threat to officers, such information was third-hand, he said. Officers are taught to not assume that all information received on a call is accurate. In Chief Reese's opinion, Mr. Campbell's noncompliance to the command to put his hands in the air may have been motivated by his distress and depression over the loss of his brother. In his experience, a statement of "just shoot me" indicates passive resistance, not aggression. The appropriate response to passive resistance, stated Chief Reese, is to take time and communicate with the resistor.

Regarding the potential for a weapon, the Chief explained that an officer is supposed to look for bulges in clothing that might indicate a concealed weapon. At the same time, an officer

is also supposed to consider the possibility that an individual may be unarmed even if it is reported that he owns a gun.

Chief Reese explained his conclusion that the use of deadly force was not reasonably necessary. Given what the Grievant knew about the incident, he should have viewed Mr. Campbell as basically compliant when he emerged from his apartment. Because of Mr. Campbell's general compliance, the absence of aggression, and hard cover available to the officers, they had several reasonable options available, such as continuing the dialogue with Mr. Campbell, beanbags, K-9, tasers, containment, and mobilizing SERT (Special Emergency Response Team) or HNT (Hostage Negotiating Team). Had Mr. Campbell taken cover at the front of the Volvo, Chief Reese explained, the dog Bano could have taken and held Mr. Campbell. Had he pulled a gun, officers had hard cover, and the Grievant had an AR-15. SERT and HNT could have been called; they have ballistics shields and other tools available to approach an armed suspect underneath a car, testified Chief Reese. The officers had handguns and shotguns, and they had fields of fire in which they could have stopped Mr. Campbell from engaging police. To take offensive action, stated the Chief, Mr. Campbell would have had to expose himself to the officers, and they would have had a shot at him. Chief Reese added that had Mr. Campbell made it back to his apartment, they would have had the advantage of containment, time, and additional opportunities to communicate with him.

Chief Reese also pointed to the police directives requiring officers to use the least amount of force to gain their objectives. (Those directives are discussed in greater detail below).

The Chief respected officers having to make split-second decisions but emphasized that, in Mr. Campbell's case, they had ample time to evaluate the situation and make sure all officers were on the same page: K-9 officer, Grievant, less-lethal operators, and custody team. He testified that if officers are not certain with the status of a call or with their approach, including communications, they often get on the radio and ask.

The Chief understood that the Grievant was the primary lethal cover for the custody team. Lethal cover simply means that an officer has a lethal weapon out, a handgun or rifle. It does not excuse an officer from all the decision-making that one has to go through when viewing the totality of circumstances. The Grievant erred by viewing all of Mr. Campbell's actions in the worst light. Based on what the Grievant did at the scene and on his explanations during the investigation, his thoughts and actions were like those of a sniper, focusing on the perceived threat to the exclusion of everything else.

Chief Reese also commented on the K-9 resource. The bureau's K-9 program uses German shepherds. Chief Reese testified that he has worked in SERT training scenarios involving dogs, that he has played the part of the "bad guy," the dog's target. He explained that it is terrifying to be hunted and attacked by a police dog. When a dog locates a target, it comes on hard, fast and aggressively, usually barking. When it bites, one is distracted from any aggressive intentions and is focused only on the dog. This is something the Grievant should have known.

The Chief issued lengthy suspensions to Officer Lewton and to Sergeants Reyna and Birkinbine. (These suspensions have been grieved and are pending arbitration.)

Officer Lewton was disciplined for firing the beanbags when he did because Mr. Campbell was not overtly resisting officers. Chief Reese viewed Mr. Campbell's resistance as passive and given the circumstances, Officer Lewton should have restrained himself. He could have pursued options such as engaging Campbell in conversation and having Campbell drop to his knees or remain still so he could be approached by officers and taken into custody. Officer Lewton's discipline also charged him with failing to consider circumstances mitigating any potential threat posed by Mr. Campbell.

Regarding the two sergeants (Birkinbine and Reyna), Chief Reese testified they were remiss in not informing the custody team that they had asked Mr. Campbell to send the children

out. There had been ample time to do that. They both erred in failing to talk over the situation or discuss a planned approach with other officers, even though officers in the alcoves visited the custody team from time to time at the scene.

Sergeant Reyna should not have left her post at the critical moment when Captain Day asked for a debriefing, and she should have designated someone else as in charge when she did leave the alcove, concluded Chief Reese. She was remiss in not accepting Sergeant Birkinbine's and another sergeant's offers of assistance, even though she was "task saturated." Exh. Jt-18, at 5. Her communications with others, including the custody team, were not up to expectations. Examples of things the City maintains that she should have communicated to the custody team were:

- Her plan to walk away from the incident in the event Mr. Campbell promised not to hurt himself.
- Her plan to use the K-9 and less lethal shotgun in the event Mr. Campbell came out and attempted to run away or back towards the apartment.
- Her plan to move the custody team and lead the operations in the event Mr. Campbell came out.
- Her assessment that the situation was de-escalating.
- The information provided by Ms. Jones that Mr. Campbell's suicidal behavior had occurred the night before and Mr. Campbell was currently calm.

See Exh. Jt-18, at 6.

Sergeant Birkinbine was disciplined for failing to take steps to communicate critical facts to the officers on the scene. He also did not keep those officers and Sergeant Reyna appraised of the details of Officer Quackenbush's communications with Mr. Campbell. Although he was as surprised as anyone when Mr. Campbell emerged from the apartment, he should have known, as an HNT member, that officers on the scene should have been made ready before contact was initiated and reminded to expect the unexpected:

> Because of these communication failures, there was not a shared situational awareness and the officers on the custody team who used lethal and less lethal force indicate that they were surprised by both events (the children coming out

and Campbell coming out of the apartment) and interpreted Campbell's actions negatively, instead of positively.

Exh. Jt-17, at 4. In addition, he should have more aggressively inserted himself into certain roles to assist Sergeant Reyna and should have contacted a lieutenant if she resisted.

V. INVESTIGATION OF THE SHOOTING AND RESULTING DISCIPLINE

A. Subsequent Inquiries

A number of investigatory or quasi-adjudicatory bodies examined the events surrounding the fatal shooting of Aaron Campbell. Only a brief listing of those examinations is needed because the substance of those investigations is not at issue - an exception being the Police Bureau's internal Training Division Review. Immediately after the shootings, Portland Police Bureau detectives interviewed witnesses, whose statements were transcribed and form part of Exh. Jt-9. In early February 2010 an Internal Affairs Division (IAD) investigation was launched and this investigation was completed in June 2010. See Exh. Jt-11. These two investigations only assembled evidence; they offered no opinion as to whether any officer on the scene violated City rules or policies.

Subsequently, Lts. Robert King and David Virtue conducted a Training Division Review. They submitted a final report on August 30, 2010. That final report found that the actions of the Grievant, Officer Lewton, Sergeant Birkinbine and Sergeant Reyna were not consistent with their training and were out of policy.

Next, Commander James Ferraris prepared the Commander’s Findings and Recommendations regarding the conduct of the Grievant, Sergeant Reyna, Sergeant Birkinbine and Officer Lewton. Commander Ferraris found Grievant’s conduct violated Portland Police Bureau policy and recommended termination of Grievant's employment.

Finally, the Police Bureau convened a Use of Force Review Board. Police Bureau assistant chiefs, peer officers and citizen members comprised this board. The board reviewed the preceding investigations and commander's review and findings. It concluded that the Grievant's

use of deadly force was outside of policy and recommended his termination. It also recommended the discipline of Officer Lewton, Sergeant Reyna and Sergeant Birkinbine.

All pertinent materials went to Chief Michael Reese, who reviewed those documents, conducted a due process hearing, and ultimately determined to discharge the Grievant. As stated previously, he also issued lengthy suspensions to Officer Lewton, Sergeant Reyna and Sergeant Birkinbine.

Externally, the Multnomah County District Attorney submitted the question of criminal misconduct to a grand jury.[11] Starting on February 4, 2010, the grand jury received the testimony of various witnesses. (Exh. Jt-10 is the transcript of those proceedings). The grand jury declined to indict the Grievant or any other officer. The Oregon Department of Public Safety Standards Training agency reviewed the Grievant's conduct to determine whether it complied with state training standards, and found that it did.

B. Evidence Concerning the Fairness of the Police Bureau's Investigations

Arbitrators uniformly hold that the adequacy of an investigation is a component of just cause. A determination of no just cause can be predicated in whole or part on an unduly biased, shoddy or incomplete investigation. The Association does not contend that the various investigations were less than thorough or complete, although it was concerned about a possible political bias in some of those investigations and reviewer recommendations. The fatal shooting of Mr. Campbell received a great deal of media attention and much negative citizen reaction, given that Mr. Campbell was not wanted for a crime, was unarmed, and was shot in the back while fleeing officers. He also was African-American.

The Association's concern was particularly with the Training Division Review report authored by Lieutenant Dave Virtue and Lieutenant Robert King. That report concluded that "Frashour actions were not consistent with his training because he did not de-escalate his

[11] This Arbitrator understands that the district attorney routinely submits fatal shootings by police officers to a grand jury.

mindset despite" facts suggesting Mr. Campbell was cooperating and then ran and reached to his waistband in response to the beanbag rounds. Exh. Jt-11 at 135. The problem exposed by the Association was the fact that the lieutenants first authored and circulated five draft reports that concluded that the Grievant's actions were consistent with his training.[12] The Association also complained that no training division bargaining unit member was asked to give input into the training review and that all disagreed with Lieutenants King's and Virtue's conclusions. At hearing, Lieutenant King stated he regretted not including training officers' opinions in his report.

The five referenced drafts, as they pertained to the Grievant, were substantially similar. The training analysis portion of those drafts was relatively short (four to five paragraphs) and concluded the Grievant's shooting of Mr. Campbell was consistent with his training. (The training analysis portion was preceded by a recitation of information gained during the interviews of the Grievant.) The drafts noted the Grievant's knowledge that Mr. Campbell was armed, suicidal and had threatened suicide by police. The Grievant knew that Mr. Campbell had sent the "don't make me get my gun" message. He had been dispatched as a lethal AR15 operator and he justifiably viewed the call as high risk. He viewed Mr. Campbell's walk backwards, with its rapid pace, as hostile. After Mr. Campbell ran, he saw his hand go deep into his waistband where he'd been trained weapons are often kept. He waited to see if he'd remove his hand and it would come up empty, but that didn't occur, although he never saw a gun. He didn't want Mr. Campbell to take a position of cover so that he could start shooting. Therefore, his shooting was consistent with Portland Police Bureau police, those drafts concluded.[13]

---

[12] Ten draft reports are in evidence, in addition to the final report. The tenth concluded that Grievant's action was not consistent with training, as did the final report. The first four drafts were very rough and did not address whether the Grievant's action was consistent with his training.

[13] Those early drafts also concluded that Sergeant Reyna's handling of communication on the scene was not consistent with her training and that Officer Lewton's firing of the beanbag rounds was not consistent with his training. Officer Elias' deployment of the dog was deemed consistent with his training. The early drafts did not address Sergeant Birkinbine's action, but by draft nine, fault was found with some of his communications.

A different conclusion about the Grievant's action was reached in a subsequent draft. (Exh. A-40). The short training analysis faulted the Grievant for focusing exclusively on Mr. Campbell's suicide by police threat and for failing to consider that Mr. Campbell's hand motion might have been a pain reaction to being shot by beanbag rounds. The next and penultimate draft (Exh. A-64) was similarly brief as it pertained to the Grievant's action.

The final report contained a greatly amplified training analysis regarding the Grievant's action. It also integrated the Grievant's statements during investigations into the analysis. That report contained elements similar to those recited by Chief Reese in his termination letter. In fact, subsequent reviews relied a great deal on the conclusions made in this training analysis.

VI. DISCUSSION AND ANALYSIS

A. Preliminary Issues

1. Burden of Proof

Both parties agree that the City has the burden of proving that the Grievant violated City policies and rules when he shot Aaron Campbell and that it had just cause to discharge him. It is uniformly established in labor arbitration proceedings that the employer has the burden of proving just cause for disciplining or discharging an employee under a collective bargaining agreement. *See*, 1 *Labor and Employment Arbitration*, §19.03[2], T. Bornstein and A. Gosline, eds., (Matt. Bender 1991).

The Association contends that the City must prove its case by clear and convincing evidence. The City asserts that the quantum of proof is a preponderance of the evidence.

This Arbitrator agrees with the City. In most cases, where the quantum of proof is specified (and often it is not), the preponderance of the evidence standard is used. *Elkouri and Elkouri, How Arbitration Works*, 950 (6th ed., BNA 2007). Arbitrators have made exceptions for cases involving charges of possible criminal conduct or moral turpitude, but arbitrators have not been consistent in their application of the higher standard. To this Arbitrator, the possibility of criminal

conduct has to be more than theoretical or speculative. Here, the grand jury effectively absolved the Grievant of criminal wrongdoing when it refused to return an indictment. There was no allegation or insinuation of moral turpitude made by the City. Therefore, the appropriate quantum of proof is the preponderance of the evidence. This means that the City must provide sufficient evidence showing that it is more likely than not that the Grievant violated its rules and that it had just cause to discharge him.

2. The *Graham* Standard and Portland Rules

The U.S. Supreme Court, in *Graham v. Connor*, 490 U.S. 386 (1989), set forth the basic framework for determining whether the use of force by law enforcement is excessive and a violation of the subject's Fourth Amendment rights.[14] The court held that a police officer's use of force is permissible if it is objectively reasonable. Reasonableness is determined after giving careful consideration to the facts and circumstances of the situation, including the severity of the crime at issue, whether the suspect is actively resisting arrest or attempting to evade arrest, and whether the suspect poses an immediate threat to the safety of the officers or others. The reasonableness of the use of force must be judged from the perspective of a reasonable officer on the scene. The application of 20/20 hindsight is not acceptable. Allowance must be made for the fact that police officers are often "forced to make split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving . . . ." *Id*., at 397. The high Court has recognized the "practical difficulties of attempting to assess the suspect's dangerousness." *Tennessee v. Garner*, 471 U.S. 1, 20 (1985). The Court emphasized that its decision does not require "police to make impossible, split-second evaluations of unknowable facts." *Id*.

---

[14] All federal cases cited in this analysis arose under 42 U.S.C. §1983, which imposes liability for depriving others of their constitutional rights while acting under color of law.

> The City's brief asserts,
>
> > Unlike the §1983 cases seeking to hold police civilly liable for use of excessive force, the question here is whether the City had cause to discharge Grievant for violating the Bureau's standards, not whether he could be held civilly liable under §1983/*Graham* standard. Therefore, *Graham* precedent is not binding in this arbitration.

City's brief, p. 81, n. 48. The City's statement is accurate. However, given that the City's directives are modeled on *Graham,* that precedent gives the Arbitrator important guidance in this proceeding.

The City's police Directives 1010.10 and 1010.20 essentially mirror the ruling in *Graham v. Connor*.[15] Under the City's Directive 1010.10.a and *Graham*, the Grievant's use of deadly force can be justified only if he reasonably believed Campbell posed an immediate threat of death or serious injury to others. The reasonableness of his belief is an objective one and it is evaluated in the context of all the facts and circumstances of the situation as it was unfolding. See Directive 1010.20. This standard is not disputed by the parties, although the City contends that its own directives are more stringent than the one articulated by the Supreme Court. The City's contention is addressed below.

3. Other Relevant Case Precedent

Cases decided after *Graham v. Connor* offer valuable guidance to the resolution of the instant dispute. Those cases examined the *Graham* framework under varying sets of facts and helped illuminate the question of whether the use of force was reasonable in a given situation. Most cases have arisen in the context of summary judgment, and many have dismissed the suit on the grounds that the use of force by law enforcement was objectively reasonable as a matter of law.[16] The following reviews some of the more instructive cases.

a) No Post-Hoc Analysis

The Sixth Circuit made a strong cautionary statement against a post-hoc analysis of deadly force that does not consider the exigencies of the moment:

---

[15] The full text of the relevant Portland rules and policies were set forth in full in Part III.B, at pp. 2-4, *supra*.

[16] In 2001 the high Court gave police officers a second defense against constitutional excessive force claims. In *Saucier v. Katz*, 533 U.S. 194 (2001), the Court ruled that even if the use of force was excessive under *Graham v. Connor*, a law enforcement officer might be entitled to qualified immunity if he or she reasonably misapprehends the law governing the circumstances confronted. That is, the "dispositive inquiry is whether it would be clear to a reasonable officer that the conduct was unlawful in the situation he confronted." *Id*., at 194-5. If the conduct was not clearly unlawful, the officer is entitled to qualified immunity.

Cases subsequent to *Saucier v. Katz,* including cases cited herein, have often dismissed claims based on the qualified immunity defense simply because it is an easier one for the officer to prove. The Arbitrator does not, however, believe that the qualified immunity doctrine plays a role in this dispute. The Portland Police directives reflect the language of *Graham v. Connor*, and not the language of the qualified immunity inquiry expressed in *Saucier v. Katz*. Nevertheless, cases are cited in this discussion that dismissed claims after finding qualified immunity. In each such case, however, the court has also made findings or observations on the objective reasonableness of the use of force.

> [U]nder *Graham*, we must avoid substituting our personal notions of proper police procedure for the instantaneous decision of the officer at the scene. We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day. What constitutes "reasonable" action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure.

Smith v. Freeland, 954 F.2d 343, 347 (6th Cir. 1992).

b) Reasonable Mistake

A pertinent issue in the context of the instant grievance concerns an officer's mistaken belief about the threat posed by the suspect. In *Saucier v. Katz*, 533 U.S. 194 (2001), the U.S. Supreme Court reaffirmed the doctrine of mistaken beliefs, which provides that if "an officer reasonably but mistakenly believed that the suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed." *Id*., at 205. Thus, the inquiry (for purposes of liability) is whether the officer's mistake as to the facts establishing an immediate threat was reasonable. The analysis must be based on information the officer had at the time of the event.

Courts have recognized that mistakes occur because of police officers' need to quickly react to apparent danger. Further, they have acknowledged the need to react before it is too late. Courts have recognized (as does the Portland Police Bureau, according to evidence at hearing) that an officer is not required to "await the glint of steel" before acting because it then may be "too late to take safety precautions." *People v. Morales*, 198 A.D.2d 129, 130 (N.Y.App.Div. 1993). A federal appeals court in *McLenagan v. Karnes,* 27 F.3d 1002 (4th Cir. 1994) found that an officers' shooting of an innocent unarmed person (whom the officer mistakenly believed was armed and had grabbed a police weapon) was objectively reasonable.[17] While the officer did not see the victim holding a weapon, he could not confirm

[17] The facts in that case were particularly tragic. The plaintiff-victim was sitting, with his hands cuffed in front, in the break room of a police station on suspicion of driving while intoxicated. A deputy suspected that a different detainee was going for an unguarded police weapon. Upon hearing that deputy's alarm, the plaintiff tried to flee the room but was shot and seriously injured by second police officer who mistakenly thought he was the detainee going for the weapon.

that the victim was unarmed, the court observed. It added:

> [W]e do not think it wise to require a police officer, in all instances, to actually detect the presence of an object in a suspect's hands before firing on him. … We will not second-guess the split-second judgment of a trained police officer merely because that judgment turns out to be mistaken, particularly where inaction could have resulted in death or serious injury to the officer and others.

Id., 1007-8.

Of course, as the City's expert James McCabe stated, these considerations do not mean that an officer can shoot any person whom he or she believes just possibly might shoot first. There still has to be a reasonable basis for believing the suspect poses an immediate threat. The courts have only said that an officer need not wait to actually see the weapon, so long as the officer reasonably believes, considering all the circumstances, that the person shot was reaching for a firearm that he or she intended to use against others.

c) Furtive Gesture, Reach for a Waistband

Courts have recognized that certain gestures can precipitate the need for force, such as the sudden reach into a pocket or waistband area. Courts have dealt with the possibility of a handgun or other weapon being concealed in a waistband. Like other law enforcement officers across the country, Portland Police officers are trained that weapons are often secreted in the waistband of clothing. In fact, there are a sizeable number of reported cases holding that police have justifiably shot an unarmed person who appeared to be making a furtive gesture towards his pocket or waistband in order to draw a weapon. A sample of those cases are:

- *Lamont v. New Jersey,* 637 F.3d 177 (3rd Cir. 2011) concerned a suspected car thief who stood with his right hand inside his waistband and appeared to be clutching something. After being ordered both to show his hands and to freeze, the suspect suddenly pulled his right hand out of his waistband as though he were drawing a gun. This movement caused officers to open fire, killing the suspect. It turned out that the suspect was not holding a gun, but a cigarette-sized crack pipe instead. The court found that the suspect's abrupt, threatening gestured justified the initial use of force, although it remanded for trial the question of whether 39 rounds was excessive. Quoting from *Thompson v. Hubbard,* 257 F.3d 896, 899-900 (8th Cir.2001), the court observed, "An officer is not constitutionally required to wait until he sets eyes upon [a] weapon before employing deadly force to protect himself against a fleeing suspect who ... moves as though to draw a gun." *Id*., at 83.

- In *Loney v. Miles*, 213 F.3d 631 (4th Cir. 2000), the federal appeals court held that an officer's action was objectively reasonable when he fatally shot a man who fled a traffic stop when the man first dropped what appeared to be an ammunition clip and later reached into his waistband and then removed something as he turned his head and upper body to the right. Although the officer apparently did not see a weapon, he had previously heard someone shout that the man was armed. The dismissal was based on qualified immunity grounds, but the court also found that the shooting was objectively reasonable. The court did not say whether the slain man was actually holding a weapon when the officer shot him.

- In *Krueger v. Fuhr*, 991 F.2d 435 (8th Cir. 1993), an officer was pursuing a suspect who allegedly had committed an assault with a weapon. As the suspect ran, he appeared to be trying to pull something, which the officer believed to be a knife, from his waistband. The officer thereupon fired four shots which hit the suspect in the back, killing him. The court noted that the officer reasonably believed that the suspect probably had a knife and was inebriated. Even if the officer's belief as to the suspect's possession of a knife or his gesture towards his waistband was mistaken, the officer's shooting of the suspect was objectively reasonable, held the court. It should be noted that the *Krueger* court emphasized the fact that the suspect was a fleeing and probably dangerous felon, whereas in the case before me, Aaron Campbell was not wanted for any crime.

- *Thompson v. Hubbard,* 257 F.3d 896, 899-900 (8th Cir.2001), involved an officer's pursuit of a man who fit the description of a suspect in a robbery. In the course of the chase, the man looked over his shoulder at the officer and moved his arms as though reaching for a weapon at waist level. The officer yelled, "stop." When the man's arms continued to move, the officer fatally shot him in the back. The decedent was not armed and the court's decision did not say whether he was the actual robbery suspect. The court found the officer's conduct was objectively reasonable even though the decedent's loose sweat pants might not have been capable of holding a weapon.

- *Sigman v. Town of Chapel Hill*, 161 F.3d 782 (4th Cir. 1998), is a case that is partially (but not wholly) analogous to the Aaron Campbell shooting. In that case, numerous officers responded to a domestic violence call and set up a perimeter. The suspect was angry, drunk, throwing objects and had cut himself. He had not harmed anyone else. When police tried to communicate with him, he threatened them several times and tried to slash at one officer through an open window with a knife. He then emerged from his dwelling allegedly carrying a chef's knife with a broken tip. He ignored commands to halt, and yelled "Go ahead and shoot me" and "I want to die." *Id*., 785. When the suspect reached a distance of 10 to 15 feet, an officer opened fire, killing the suspect. Officers testified that they are trained to not allow a suspect with a knife to get closer than 21 feet. The court ruled that a officer's perception of a threat to his safety and that of others in "this tense and dangerous situation" was "objectively justified and reasonable." *Id*., at 787. The court further stated,

> Where an officer is faced with a split-second decision in the context of a volatile atmosphere about how to restrain a suspect who is dangerous, who has been recently--and potentially still is--armed, and who is coming towards the officer despite officers' commands to halt, we conclude that the officer's decision to fire is not unreasonable.

Id., at 788.[18] As the City notes in its brief, the subject in this case was walking towards the officers carrying the knife, unlike Aaron Campbell, who was fleeing officers with no weapon in sight.

- In *Anderson v. Russell,* 247 F.3d 125 (4th Cir. 2001), two officers in a mall area approached the plaintiff, whose sweater contained a suspicious bulge, with their guns drawn and ordered him to raise his hands. The plaintiff initially complied, but then without explaining to officers, reached to his rear pocket to turn off his Walkman radio. Believing the plaintiff was reaching for a weapon, an officer shot him three times, inflicting serious injury. The plaintiff was unarmed. The appellate court held that this was not excessive force under *Graham*. The court found the evidence conclusive that the officer reasonably believed the plaintiff to be armed with a gun, and that he was reaching for a gun, since there was a bulge in his clothing, which, as it turned out, was caused by an eyeglass case. This perceived reach for a gun made it reasonable for the officer to fear for his safety and that of others. The court's certainty was not diminished by the statement of an eyewitness who believed plaintiff was shot when his hands were still near his head. It observed:

  > In a rapidly evolving scenario such as this one, a witness's account of the event will rarely, if ever, coincide perfectly with the officers' perceptions because the witness is typically viewing the event from a different angle than that of the officer.

  Id., at 130. The court rejected the plaintiff's argument that the minor nature of the suspected crime (a concealed weapon misdemeanor) should be a consideration against the use of lethal force. It indicated the nature of the crime is irrelevant when the officer reasonably, but mistakenly, believed the plaintiff was drawing a gun. It added that the Fourth Amendment does not "require omniscience" on the part of the officer. *Id*., at 132.

- In *Estate of Moppin-Buckskin v. City of Oakland,* 2010 WL 147976, (N.D. Cal, 2010), the court exonerated officers who shot an unarmed noncompliant suspect who appeared to be reaching for a weapon, stating:

  > The unfortunate reality of [the decedent's death] is that it represents an example of how a sudden furtive movement in defiance of an officer's order can reasonably precipitate an officer's use of lethal force.

  Id., at *12.

- *Sherrod v. Berry,* 856 F.2d 802 (7th Cir. 1988) overturned a jury's verdict in favor of an unarmed robbery suspect who was shot and killed by police when he was perceived to make a quick movement with his hand into his coat. The court stated, "It is not necessary that the danger which gave rise to the belief actually existed; it is sufficient that the person resorting to self defense at the time involved reasonably believed in the existence of such a danger, and such reasonable belief is sufficient even where it is mistaken." *Id* at 806. Indeed, in that case, the Seventh Circuit *en banc* majority (over a blistering dissent) went so far as to hold that the jury should not be permitted to know

[18] The decision was rather remarkable for the length the court went to disregard the statements of bystanders who claimed that the suspect had his hands in the air, showed no weapon, and was shot at some distance.

whether or not the slain subject was armed, as this information is both prejudicial and irrelevant. The relevant evidence, the court majority opined, is what the officer reasonably believed he saw at the time he fired the shot. In that case, the suspect made a furtive movement with his hand into his coat.

- In *City of Oakland*, 128 LA 1217 (Gaba, 2011), an arbitrator reinstated an officer who had fatally shot an unarmed man in the back after a high-risk traffic stop. The terminated officer believed he saw the suspect reach to or into his waistband, as if to draw a weapon. The arbitrator did not question the terminated officer's belief that the suspect was reaching for or into his waistband and noted that the result would be the same regardless of how far the reach had gone. He noted that with perfect hindsight, it is now known that the suspect's "actions were the product of intoxication, impaired judgment, and incredibly loose-fitting baggy, pants." *Id*., at 13.

- In *City of St. Petersburg (Fl.)*, 1993 WL 790384 (Richard, 1993) an arbitrator found that an officer was justified in shooting an unarmed fleeing burglary suspect in the back when he thought he saw the suspect pull a gun and start to turn to shoot. That the officer could have handled the entire situation differently was irrelevant, the arbitrator held.

Many or most of these cases involved circumstances (generally a suspected underlying criminal offense, sometimes a serious one) that differed from the case under consideration here. In fact, no two cases present identical circumstances. Nevertheless, these cases illustrate that when an officer has reason to believe a subject is armed, particularly with a gun, and reasonably perceives that the subject is reaching for that weapon in his pocket or waistband (but hasn't actually observed the weapon), the fact that the officer was mistaken in that belief will not render the shooting a violation of the subject's constitutional rights under *Graham*.

d) Close Cases - Officer May Be Liable

Most of the previously bulleted cases involved the shooting of an unarmed person whom, in the reviewing court's opinion, could be reasonably perceived as reaching for a weapon. The Arbitrator is aware of only a few cases where the court held that the reasonableness of the action was debatable and therefore allowed the dispute to proceed to trial.[19] Those cases also

[19] When the case proceeds to trial, it is still possible that the trier of fact (usually a jury) will rule for the defendant police officer and the employing law enforcement agency.

There is a sizeable body of case law on this subject and the Arbitrator's research was far from exhaustive. The Arbitrator did not expect the parties to brief all such cases either, since in the end, the analysis is very fact-dependent.

are important to review here.

In one police shooting case, a Ninth Circuit panel rejected the officer's claim that the felony suspect appeared to dive forward and reach down in his vehicle for a weapon because her claim was not supported by the testimony of other witnesses.

> None of these witnesses mentioned that Haugen dove forward, and none has offered any support for Brosseau's assertion that Haugen looked as if he might have been reaching for a weapon. Nor has Brosseau offered any other evidence to support her belief that Haugen might have had a gun. She did not see a gun in the car, and she had not received any reports that he might have one, or indeed that he had ever had one. Under Ninth Circuit precedent, the mere presence of a weapon does not justify the use of deadly force,

Haugen v. Brosseau, 351 F.3d 372, 383 (9th Cir. 2003) *reversed on other grounds*, 543 U.S. 194 (2004). The court further stated:

> Movements by a suspect are not enough to justify deadly force if, in light of the relevant circumstances, those movements would not cause a reasonable officer to believe that the suspect was reaching for a weapon.

Id. The panel also would not credit her other explanations for the shooting. Officers were at the scene because Haugen's business partner accused him of stealing tools.

A case that addressed a mentally unstable subject, who, like Mr. Campbell, had not committed a crime, is *Deorle v. Rutherford*, 272 F.3d 1272, 1281 (9th Cir. 2001). Although this was not a deadly force case, it is instructive. In *Deorle*, the court found that the officer's use of less lethal, but harmful, force was not reasonably justified because the victim had not committed a serious offense, was generally compliant, was mentally or emotionally disturbed, and had not displayed a weapon--even though the victim was walking steadily in the officer's direction. The court found an important circumstance to be that the victim was clearly troubled or disturbed and for 40 minutes had shouted at various times that he wanted officers to kill him.

The *Deorle* court noted that "[e]ven when an emotionally disturbed individual is 'acting out' and inviting officers to use deadly force to subdue him, the governmental interest in using such force is diminished by the fact that the officers are confronted, not with a person who has committed a serious crime against others, but with a mentally ill individual." *Id.* at 1283. The

court also found that the officer had less dangerous options available to him that he did not consider. The majority wrote that if it is:

> apparent to the officers that the individual involved is emotionally disturbed, that is a factor that must be considered in determining, under *Graham*, the reasonableness of the force employed."

Id., at 1283.

The court did not say that the subject's mental state must be taken into account when a decision to use lethal force is made. Obviously, a mentally unstable person can be very dangerous and if that person is brandishing a firearm and appears very likely to shoot someone, the person's mental state is irrelevant, and the court did not suggest otherwise. The court left open the question of whether the officer must consider the subject's mental state if it appears that the subject *might* be reaching for a gun that he or she intends to use on others.

Glenn v. Washington County, 661 F.3d 460 (9th Cir. 2011) involved the particularly tragic fatal shooting of a suicidal, intoxicated, teenager who was holding a pocket-knife to his neck. He had been unruly and noncompliant but had not posed any danger to family members and friends who were trying to calm him down when police arrived. He was beanbagged six times in response to his noncompliance. Upon being beanbagged, the teen reacted with a stunned look and began retreating, more or less in the direction of the house. The two officers had already predetermined that if the teen moved towards the house (where family and friends had been confined), they would use lethal force, and they did so. The deadly force occurred before the last beanbag round was fired and four minutes after the first officer arrived on the scene. The court emphasized that there were no circumstances that reasonably showed that the victim was an immediate threat. Rather, he was emotionally disturbed and suicidal, had pointed a knife only at himself, had never threatened to harm others, and was not wanted for any crime. Further, he had not attempted to move until the beanbag rounds were fired.

These last two cases illustrate how the Ninth Circuit has endeavored to truly consider all the relevant circumstances surrounding a shooting, including the victim's mental state, the risk

posed by any noncompliance on the victim's part, and whether a serious threat is involved. In the instant dispute, Aaron Campbell was clearly in a disturbed mental state and he had committed no crime. On the other hand, the Ninth Circuit did not address these circumstances in the context of the perception by the officer that subject was reaching for a gun to shoot. In *Deorle* no weapon draw occurred and deadly force was not used. In *Glenn*, the victim had a knife, which can be deadly, but had not threatened to use it on anyone but himself.

Haugen v. Brosseau, supra, is the only case, to this Arbitrator's knowledge, where a court held that the apparent reach for a weapon was not sufficient reason for shooting. However, the court held that the officer's belief concerning that reach was not *objectively* reasonable because it was not corroborated by other witnesses. The Arbitrator is not aware of any case where a court has held that considering all circumstances, the officer's *objectively* reasonable belief that the subject was reaching for a deadly weapon was not a sufficient basis to shoot.

4. Whether the Portland Rule is More Stringent than the Constitutional Standard: The Consideration of Lesser Alternatives to Deadly Force

The City, citing Policies 1010.10 and 1010.20, contends that "the Bureau's current standards for its officers' use of force are based on the *Graham* analysis but they set a higher standard, and are more restrictive, than the minimum standard for civil liability under *Graham*. (Tr., pp. 486-499.)" City's brief at 27. This higher standard states “[t]he bureau expects members to develop and display over the course of their practice of law enforcement the skills and abilities that allow them to regularly resolve confrontations without resorting to the higher levels of allowable force.” Directive 1010.20. That directive also states: “[t]he Bureau places a high value on resolving confrontations, when practical, with less force than the maximum that may be allowed by law.”

It is not clear that as a matter of law, the City's directives are more restrictive than *Graham*.[20] However, it is not necessary to decide that question because the City's Directive

[20] Research indicates that whether alternatives should be considered depends on the facts and circumstances.

1010.20 does state that officers, in assessing the circumstances, should consider options for "resolv[ing] confrontations without resorting to the higher levels of allowable force." Directive 1010.20.

5. Testimony Issues

a) Whether the Arbitrator Should Discount Grievant's Testimony as Self-Serving

The City's post-hearing brief cites various arbitrators' opinions that presume a grieving employee has an incentive not to tell the truth and his or her credibility should be evaluated accordingly. While the Arbitrator does not subscribe to the belief that a grieving employee's credibility is necessarily questionable, she does evaluate that employee's credibility against other credible evidence. This is particularly important in a case such as this, where the Arbitrator must determine whether the Grievant's subjective belief was objectively reasonable. The Ninth Circuit observed:

> Deadly force cases pose a particularly difficult problem under this regime because the officer defendant is often the only surviving eyewitness. Therefore, the judge must ensure that the officer is not taking advantage of the fact that the witness most likely to contradict his story--the person shot dead--is unable to testify. The judge must carefully examine all the evidence . . . to determine whether the officer's story is internally consistent and consistent with other known facts. [Citations omitted.] In other words, the court may not simply accept what may be a self-serving account by the police officer. It must also look at the circumstantial evidence that, if believed, would tend to discredit the police officer's story, and consider whether this evidence could convince a rational factfinder that the officer acted unreasonably.

The Ninth Circuit explained:

> The Fourth Amendment does not require law enforcement officers to exhaust every alternative before using justifiable deadly force. … The alternative must be reasonably likely to lead to apprehension before the suspect can cause further harm. It is not, as [plaintiff] would have it, any alternative that might lead to apprehension in the future. The option must be reasonable in light of the community's strong interests in security and preventing further harm.

Forrett v. Richardson, 112 F.3d 416, 420 (9th Cir. 1997). The same circuit, in *Brower v. County of Inyo*, 884 F.2d 1316, 1318 (9th Cir. 1989) stated, "Necessity is the second prerequisite for the use of deadly force under *Garner*. The necessity inquiry is a factual one: Did a reasonable non-deadly alternative exist for apprehending the suspect?" The seventh circuit cautioned "law enforcement officers to use all feasible alternatives to avoid a situation where deadly force can justifiably be used. *Plakas v. Drinski,* 19 F.3d 1143, 1148 (7th Cir. 1994). As the City notes in its brief, in *Glenn v. Washington County*, 661 F.3d 460, 472 (9th Cir. 2011), the court considered the employing agency's policy guidelines stating that officers were “required to consider what other tactics if any were available.” If there were “clear, reasonable and less intrusive alternatives” to the force employed, such alternatives would “militate against finding [the] use of force reasonable.”

Keep in mind that disputes on alternatives often concern the overall police strategy and tactics employed when carrying out a police function. In the instant grievance, the overall police response and the conduct of other police officers are not issues before the Arbitrator.

Scott v. Henrich, 39 F.3d 912, 915 (9th Cir. 1994).

Accordingly, the Arbitrator will carefully examine and evaluate the Grievant's testimony concerning what he perceived against the testimony of other witnesses concerning what they observed and against other circumstantial evidence.

b) Whether Testimony of Officers at Scene should be Considered Foremost

The Association contends that when revaluating the Grievant's conduct, one must focus on the facts as Grievant saw them and on the reasonableness of his view and evaluation of the facts. It also contends that the testimony of officers at the scene should be given the greatest weight when evaluating the reasonableness of the Grievant's beliefs and resulting actions.

The Association's argument has partial merit -- obviously a number of officers were in a good position to view and evaluate Campbell's action. On the other hand, the City validly notes concerns about police officer reluctance to testify against a fellow officer.[21] This reluctance has been remarked upon by the courts and independent commissions according to the City's post hearing brief. The testimony of some officers at hearing left this Arbitrator with the impression that they were assiduously avoiding making any statements that would harm the Grievant's case.[22] Therefore, the testimony of the civilian witnesses took on special importance when it came to evaluating the reasonableness of the Grievant's views and the credibility of the officer witnesses generally. Although the civilians were not as close to the action as the officers, they

---

[21] The City's post-hearing brief avers:

> Several sources of this reluctance have been identified, including potential pressure by other officers and concerns about officer safety on the street. As one court recognized, a police officer's decision to testify against another officer can have life and death ramifications. See, e.g., *Domenech v. City of New York*, 919 F. Supp. 702, 705 (S.D.N.Y. 1996) (discussing allegations by officer that fellow officers "told her that if she ever called in as an 'officer in trouble,' nobody would respond"), *on rearg*, 927 F. Supp. 106 (S.D.N.Y. 1996.) See also Report of the Independent Commission on the Los Angeles Police Department (1991), p. 168 (Christopher Commission Report) (discussing the "officer code of silence": "It consists of one simple rule, an officer does not provide adverse information against a fellow officer.")

City's brief, n. 29, pp. 51-2. The City further noted a City of New York report entitled "The City of New York Commission to Investigate Allegations of Police Corruption and the Anti-Corruption Procedures of the Police Department (New York 1994)" (known as the "Mollen Commission Report"), pp. 51-59 that remarked on the special bond shared by police officers because of the high expectations placed on them.

[22] The Arbitrator also had the impression that some management witnesses took pains to avoid statements that could be construed as helping the Grievant's case.

were able to observe much of it. There was no discernable bias in any of their testimony. Ryan Pannell was a military veteran who was critical of the police handling of the matter. He was mistaken about what Campbell was wearing and about his trajectory coming out of the apartment. In addition, he did not observe all of the critical activity. Nevertheless, the Arbitrator found his testimony credible enough to be considered regarding what he observed (except where he was clearly mistaken). The three college students (Jenna Peterson, William Camp and Tyler Snow) at Darrin's Place apartments viewed all the events as they unfolded. Their accounts were non-judgmental, honest and had enough consistency with officer testimony to justify crediting what they said. Bear in mind that on many details, as recounted above, witnesses varied considerably. As any student of the law (or human nature) knows, this is quite common when events unfold very quickly.

c) The Grievant's Allegedly Inflexible and Rigid Decision-Making

The termination letter, Chief Mike Reese's and others' testimony, and the City's post-hearing brief pays particular attention to the City's belief that the Grievant violated City directives because of his inflexible and rigid thought process throughout his time on Sandy Boulevard, a rigidity that prevented him from properly taking into account all the facts and circumstances. Without going into the specific allegations, this rigidity of thinking allegedly prevented him from considering evidence that the situation was de-escalating when Aaron Campbell exited the apartment, that he was intending to surrender, and that if he did reach for his waistband, it was a pain-reaction to the beanbag pellets. The City pointed to various statements of the Grievant's (made during the investigation) as evidence of a failure to consider all facets of a particular piece of information. For instance, during the investigation the Grievant described Campbell's decision to release the children as "bold" and suggested a plan to get them out of harm's way so he could engage the police. The City accuses the Grievant of not considering that Campbell's release of the children could have been an act of cooperation and compliance.

The City's partial focus on the Grievant's alleged mind-set poses two difficulties.

First, it is questionable whether anyone who has made a split-second decision in circumstances such the one at issue can fully and adequately recollect and articulate what went through his head. Thus, this Arbitrator has some difficulty with the City premising its case (in part) on alleged rigid and inflexible thinking on the Grievant's part.[23]

Second and more importantly, the *Graham* standard and the City's directives require an officer's conduct to be considered from an objective standpoint, not a subjective one. In fact, *Graham* stated, "An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use for force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional."[24] *Graham v. Connor, supra,* 490 U.S. at 397. In other words, supposing that the Grievant had clearly articulated how he carefully weighed and balanced each fact and circumstance before concluding that lethal force was justified, his ultimate decision still could have been unreasonable and therefore a violation of Portland Police Bureau directives. Conversely, had it turned out that Campbell was indeed reaching for his gun and turning to fire at police, the shooting would have been deemed justified and the Grievant's thought processes would not have been critiqued.[25] Therefore, the evaluation of the use of deadly force should focus only on the objective circumstances that were, or should have been,

---

[23] This case is a good example of what lurks for an arbitrator who decides to evaluate an employee's thought processes. The Association was able to put into question most or all of the City's allegations about the Grievant having an "inflexible mind set" by supplementing statements from one investigation with something the Grievant said at another, by challenging the City's interpretation of a statement, or by having the Grievant explain himself further at hearing. In the end, it gets the debate nowhere because what counts are the inferences made by the objectively reasonable police officer from the known facts.

[24] *Graham* stated, however, that any officer ill will toward a subject may be pertinent in assessing the officer's credibility. *Graham v. Connor*, 490 U.S. at 399, n. 12.

[25] In its post-hearing brief, the City argues that even if the Grievant's decision to shoot Campbell was justified under *Graham* and Directives 1010.10/1010.20, his rigid and inflexible mindset, including his belief that Campbell had some sort of plan and that Campbell was a threat throughout, violated Directive 315.30, which pertains to unacceptable officer performance. According to the City, "Portland police officers are trained to be adaptive and change their response according to their assessment of circumstances, and the Bureau could not conscientiously continue to employ Grievant when he demonstrated that he could not de-escalate his mindset or be adaptive given the facts in question." City's brief, p. 83. In other words, the City is saying that even if it had turned out that Campbell had a gun and was going to shoot at others, the Grievant still would have been (or could have been) discharged for violating Directive 315.30. Whatever the theoretical merit of this argument, realistically it is too absurd to warrant further consideration. This Arbitrator has never heard, or heard of, a disciplinary case being premised on an employee's thought processes alone.

perceived by the officer, and not on whether or not the officer subjectively or properly considered them.

d) The Grievant's Allegedly Shifting Testimony

The City's post-hearing brief impugns the Grievant's credibility. It charges that the Grievant's description of his thinking as events unfolded at hearing was not consistent with what he told investigators during the internal investigations. According to the City, "At the arbitration hearing, Grievant was trying to present a more sympathetic and flexible picture of his decision making and conduct than he had to previous individuals investigating his behavior." City's brief, p. 65. The City presented a chart of instances where the Grievant's explanation at hearing was, in the City's opinion, a shift from what he previously told investigators.[26]

It is true that the Grievant made an effort at hearing to better articulate his thinking in order to show that contrary to the City's assertions, he did not have a rigid mindset and was not oblivious to the facts that suggested that Campbell did not pose a threat to police. However, this does not necessarily undermine his credibility. When he was interviewed, the Grievant had no reason to know that the City subsequently would focus so heavily on evidence of rigidity and inflexibility in his thinking. Therefore, during the investigation, he may not have emphasized his consideration of factors suggesting Campbell was not a threat to officer safety, as opposed to factors suggesting he indeed posed a threat. In the investigatory interviews, the Grievant, unsurprisingly, was trying to explain why he thought shooting Aaron Campbell was justified.

After reviewing the City's specific allegations, as well as its cited portions of the transcript and investigatory interviews (and Association citations which it believed negated certain allegations), this Arbitrator found nothing that undermined the Grievant's credibility. One should

[26] The City also challenged the Grievant's credibility based on statements made by other witnesses. As noted previously, the statements of other witnesses are very important in cases such as this for determining the objective reasonableness of an officer's use of force. Therefore, the consistency or lack of consistency among all witnesses' statements will be addressed the discussion later in this award that considers the objective reasonableness of the Grievant's decision to shoot Aaron Campbell.

note that the Grievant himself commented about struggling to articulate his thought processes.[27] Along the same lines, some testimony of the Grievant was not shown to be inconsistent because his investigative interview statements were too ambiguous to know for certain what he was trying to say. Furthermore, some of the Grievant's prior statements were not truly inconsistent, in this Arbitrator's opinion, contrary to the City's assertions. Also, at hearing, the Grievant satisfactorily explained the context of a prior statement or pointed out that he wasn't previously asked about some of the things he said at hearing.

In any event, the Arbitrator's analysis of the credibility of the Grievant perceptions will be tested against evidence corroborating the same.

6. Importance of Training and the Training Division Report to this Case

The parties concur that the Grievant's training has significant bearing on the determination of just cause. The City had Lieutenant Robert King and Lieutenant David Virtue undertake an extensive training review. Commander James Ferraris gave substantial weight to that review when he made his recommendation to Chief Mike Reese, as did Chief Reese himself. The Arbitrator presumes that the Use of Force Review Board was influenced by the conclusions reached Lieutenant King and Lieutenant Virtue in their Training Division Review report.

The Association's case focused extensively on the specifics of the Grievant's training. The Association went to considerable effort to show that the Grievant's decision to use lethal force was consistent with this training. He had received approximately 1400 hours of training on such things as defensive and patrol tactics as well as on the *Graham* use of force standard. Specific training topics included the action/reaction principle, the speed at which subjects can fire handguns, even while running away, the fact that everyday encounters can rapidly escalate, and the fact that handguns are often concealed in waistbands without a visible bulge.

---

[27] At hearing, the Grievant explained that he was trying to "voice things [and] trying to put words to feelings and things I'm sensing and seeing. I clearly didn't sit down and have a conversation with myself. That doesn't mean I didn't recognize those things." Tr. 3067. He also stated that he had and was still having difficulty putting his mental processes into words: "It's interpreting my mental processes and what I'm seeing and thinking and understanding. And I'm trying to explain that in English to somebody." Tr. 3103.

The training given the Grievant is an important consideration. It is axiomatic that an employee should not be disciplined for behavior consistent with his or her training. As the Association points out, the Ninth Circuit considers the training given to the officer to be important when evaluating the reasonableness of the use of force. In *Torres v. City of Madera*, 524 F.3d 1053, 1057 (9th Cir. 2008) the court wrote:

> Five factors were relevant to the reasonableness determination: (1) the nature of the training the officer had received to prevent incidents like this from happening; (2) whether the officer acted in accordance with that training; (3) whether following that training would have alerted the officer that he was holding a handgun; (4) whether the defendant's conduct heightened the officer's sense of danger; and (5) whether the defendant's conduct caused the officer to act with undue haste and inconsistently with that training.

Nevertheless, it is important to bear in mind that there are a limitless number of factual scenarios where lethal force may or may not be justified under the *Graham* rule. Because of this large universe of possibilities, police cannot be trained on the proper response to every situation that might arise.[28] Further, police officers cannot justify the use of excessive force based merely on conditioned responses to their training. In fact, as noted in *Warren County*, 122 LA 1451 (Wren, 2006), unthinking conditioned responses are what officers must seek to avoid. Thus, it is possible that the Grievant's behavior was consistent with his specific situational training but still was an unreasonable use of force under *Graham* and the City's rules. The specific training evidence should not be the tail wagging the dog. Training evidence must be evaluated only as a component of the bigger question, which is whether from an objective viewpoint, considering all the circumstances, the Grievant reasonably believed that Mr. Campbell posed an immediate risk of death or serious injury.

Regarding the Training Division Review, described above in Part V.B, pp. 32-33, the Association vigorously complains about the authors' failure to consult the actual trainers (until after the final draft) and the authors' failure to include the trainers' opinions in the report. The

[28] There is no dispute that the Grievant was properly trained regarding the *Graham* expectations, as reflected in the Portland Police Directives 1010.10 and 1010.20, and that he understood those expectations.

Association also finds suspect the fact that there are five draft reports concluding that the Grievant's conduct was consistent with his training followed by a draft reaching the opposite conclusion. It suggests that political pressure had something to do with this reversal of position, a charge Lieutenant King somewhat convincingly denied at hearing**.**

Given the Arbitrator's ultimate determination in this case, she has decided not to make any determination regarding the Association's complaints concerning the process of the Training Division Review and the conclusions contained in the final report. Aspects of the Grievant's training, however, will inform the Arbitrator's final decision in this matter.

7. Deferral to Management's Determination

The City contends that the Arbitrator should defer to management's determination when it is the result of a thorough, multi-level decision-making process. Further, quoting from *Airfoil Forging Textron*, 106 LA 945, 950 (1996) (Klein, Arb.), the City contends:

> A basic principle of labor justice holds that "the initial determination of the appropriate penalty is primarily the function of Management and that only when the Employer's determination can be deemed to be arbitrary, capricious, discriminatory, unreasonable, or made in bad faith is an arbitrator justified in interfering with the Employer's determination by concluding that the Employer abused its discretion in meting out the . . . penalty."

The Arbitrator respects the determinations of those who reviewed the Aaron Campbell shooting and commends the thoroughness of the City's investigatory and decision-making process. Nevertheless, the Collective Bargaining Agreement's just cause clause requires the Arbitrator to conduct an independent review of the appropriateness of the Grievant's conduct under the Police Bureau's directives. The Arbitrator agrees with the City's contention that some deference should be made to management's decision regarding discipline, but that principle applies only to the level of discipline (e.g., reprimand, suspension, discharge, demotion). It is the Arbitrator's task to decide whether an employer has sustained its burden of proving that it had just cause to issue the discipline in the first place.

B. The Reasonableness of the Grievant's Decision to Shoot

This discussion now turns to the central issue in this case, which is whether the Grievant's decision to shoot Aaron Campbell was objectively reasonable, considering all the circumstances known (or which should have been known) to the Grievant at the time of the incident. More specifically, the question is whether, considering all the circumstances, the Grievant had an objectively reasonable belief that Mr. Campbell posed an immediate threat of death or serious injury to others.

The Arbitrator remarked to the parties at the conclusion of the hearing days that she found the call to be a close one. Both sides thoroughly presented their evidence and engaged in vigorous cross-examination of the opponent's evidence. The post-hearing briefs were similarly thorough and their arguments were forcefully presented, leaving the Arbitrator still of two minds. The Arbitrator is aware that this is a controversial case in the public eye and it has received a great deal of media attention. The City appropriately notes that arbitrators are or should be sensitive to issues of police-community relations raised by law enforcement officers' inappropriate use of deadly force. It was only after her careful review of the voluminous record and the *Graham* case law, juxtaposed with the parties' written arguments, that the Arbitrator finally was able to reach her determination that the grievance should be sustained.

Before beginning this analysis, the arguable errors and omissions of other officers on the scene bear mentioning. These included:

- The lack of communication to the custody team regarding the texts and calls to Mr. Campbell,
- The lack of communication to the custody team of the overall plan and strategy,
- The absence of leadership during the critical moments, and
- The beanbagging of Mr. Campbell, which the City believes should not have occurred. One might posit that had Mr. Campbell not been beanbagged and had further effort been made to talk to him, he wouldn't have run.

Ultimately, despite errors committed by others, an officer still must be held to the standards found in the Portland Police Bureau's directives. Therefore, these errors or omissions are only relevant in two respects. One is to emphasize that the Grievant and the custody team did not have all the information that they could have had to make informed choices. The second is to call attention to how rapidly an apparently de-escalating situation can change. This is why *Graham* emphasized that adjudicators must recognize that law enforcement officers are "forced to make split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving . . . ." *Graham, supra,* 490 U.S. at 397.

1. Relevant Circumstances Prior to Mr. Campbell being Beanbagged

a) Circumstances Indicating Mr. Campbell was not a Threat.

During the period leading to Mr. Campbell being beanbagged, there were certain indisputable circumstances that indicated Mr. Campbell was not a threat.

- Mr. Campbell was not accused of committing any crime, which is an important consideration. As noted in *Deering v. Reich*, 183 F.3d 645, *16 (7th Cir. 1999), "we can only assume police do not approach the arrest of a jaywalker and a cop killer in the same fashion."

- Mr. Campbell was suicidal and mentally unstable, but had not threatened others in the apartment.

- Sergeant Reyna communicated that officers in the alcove were still in text communication with Mr. Campbell and were getting positive texts and feedback from him.

- Lighting was to the officers' advantage, since a spotlight shone on Mr. Campbell, making it easier for officers to see him, but difficult for him to see officers.

- When Mr. Campbell came out, he was always walking sideways or backwards with his hands on his head. He never turned toward officers.

- Mr. Campbell kept his hands on his head until he was hit by the beanbag rounds.

- Mr. Campbell's "fucking shoot me" comment was not aggressive, although there were reports that he looked angry when he said this.

- Mr. Campbell never made an unambiguous threat directly to police officers.

b) Circumstances Indicating Mr. Campbell was a Threat

On the other hand, there were certain indisputable facts that justifiably caused the objectively reasonable officer to be wary of Mr. Campbell:

- Mr. Campbell was reported to have threatened suicide by police. Law enforcement officers are understandably wary of this kind of threat because it indicates an intent to provoke police into shooting, perhaps by shooting at police first. The City notes that Mr. Campbell's threat of suicide by police was third-hand information - it apparently came from the 911 caller who obtained it from Angie Jones. However, it does not appear that officers on the scene knew when the threat was made, to whom it was communicated and who related the threat to police dispatch. All they knew was that the threat had been made. The Arbitrator believes that officers reasonably viewed the reported threat as a negative consideration.

- Mr. Campbell, presumably after learning that police were outside, sent a text message to Angie Jones asking her what was going on. She responded, “IDK but they want you to come outside” Exh. Jt-9, at 177. Mr. Campbell responded, “who" and then “I told [you] not to have nobody bother me." *Id*. Mr. Campbell next texted Jones, “don’t make me get my gun, I ain't playing.” *Id*. That final message reasonably could be interpreted as a threat to the police, although it also could be viewed as a threat to only himself. Thus, officers reasonably considered this message as threatening to them.

- Angie Jones related to officers that Mr. Campbell carried a handgun in a sock in his jacket pocket and that he was wearing that jacket as he rested on the sofa. This information was justifiably of concern to officers, although it did not necessarily mean he would bring the gun outside with him. The fact that Mr. Campbell was armed inside the apartment and the implication of that fact are important and will be discussed in greater detail below.

- Mr. Campbell's criminal history included arrests for resisting arrest, domestic violence and attempted murder with a handgun. Although officers did not know the disposition of these arrests, they could reasonably assume they were dealing with a potentially violent subject.

The parties disagreed on how to interpret the Grievant's statements concerning his knowledge of Mr. Campbell's criminal history. The Arbitrator interprets his testimony as saying that since he read the CAD log in the patrol car, he must have read the criminal history, but he subsequently (after the shooting) could not recall that history. It was not something that he recalled going through his head when he made the decision to shoot. The City maintains that since the Grievant's decision to shoot was not consciously influenced by Mr. Campbell's criminal history, the Arbitrator should not consider it when determining the objective reasonableness of his action. The Arbitrator disagrees. She finds the Grievant's testimony credible that he read the

log and therefore must have been aware of the criminal history. Exactly where that information was filed in his cranial reservoir is the kind of subjective evaluation that should be avoided. Of course, the objective reasonableness determination must be based on information that was known, or should have been known to the officer using force, but the Arbitrator will not try to evaluate exactly how the officer processed that information. Although the Grievant told investigators that the history would not have affected his decision to fire, the Arbitrator believes that it is a circumstance that the reasonable officer would at least have at the back of his mind when assessing the overall threat level posed by Mr. Campbell.

c) Circumstances where the Threat Posed by Mr. Campbell was Debatable

There were other circumstances where the threat posed by Mr. Campbell reasonably could be debated:

1. The nature of the 911 call and dispatch: The 911 call and dispatch that set events in motion was for a welfare check at Angie Jones' apartment. However, as the Association points out, it was not treated as an ordinary welfare check. The response by the police was overwhelming. In addition to the previously named officers at the scene, a number of others were present, some 15 officers overall. Sergeant Reyna set up a perimeter and a custody team with a lethal AR-15 operator, a less lethal beanbag operator and a K-9 officer. The Association persuasively argued that the Grievant and other officers reasonably perceived this as a response to a heightened threat.

2. The emergence of the children and looking out the blinds: There was much made at hearing over the release of the children and the fact Mr. Campbell was observed looking out of the blinds. Officers, including the Grievant, stated that the release could be interpreted as a desire by Mr. Campbell to get the children out of harm's way in case of a shootout and that looking out the blinds could indicate he was scanning the area for police positions preparatory to a shootout. Officers also stated that the release of the children

could be viewed as a sign of cooperation and looking out the blinds as an innocuous act. The important thing is that they are trained to view actions such as these both ways.

In the Arbitrator's view (which coincides with the view of the City's expert, James McCabe) officers should have more reasonably viewed the release of the children as a positive thing and his looking out the window as probably innocuous. Nevertheless, it would not have been reasonable to entirely ignore the negative implications of these acts.

3. Mr. Campbell's pace: The City notes that several witnesses thought that Mr. Campbell's pace as he backed toward officers was normal, or at least not alarming. Other witnesses, including the three civilian in the adjacent apartments, described his pace as fast. Several witnesses described Officer Lewton repeatedly telling Mr. Campbell to slow down or stop. Several officers were alarmed at the pace, credibly explaining that typically a subject walks slowly and warily towards a lineup of armed police officers. (Details of this testimony are found *supra* in Part IV.D, pp. 14-15). The evidence supports a finding that a reasonable police officer could find Mr. Campbell's pace at least disconcerting.

4. Mr. Campbell's overall compliance: The City maintains that up to and including his final stop about 15 feet from police officers, Mr. Campbell was compliant with instructions to slow down and stop. His only act of noncompliance was not putting his hands in the air when instructed to do so. Officers Boylan, supported to some extent by Officers Kemple and McAllister, believed Mr. Campbell was basically compliant as he walked backwards.

The Association disagrees. As detailed above in Part IV.D., pp. 15-16, several witnesses testified that Officer Lewton had to repeatedly order Mr. Campbell to slow down and stop. For instance, Jenna Peterson testified that officers told Mr. Campbell to slow down and he would slow down for a step or two and then he would speed back up. She said that he was not respectful of the officers, was not compliant, and appeared not to care. Tyler Camp's testimony was similar and he believed that Mr. Campbell "was definitely not following directions, he was not following his orders." Exh. A-115 at 7. Officer Lewton said

he told Mr. Campbell six times to slow down before he did so. Officer Willard recalled hearing Officer Lewton repeatedly order Mr. Campbell to slow down and stop.

The evidence concerning Mr. Campbell's reluctant compliance as he walked backwards, the evidence of his unsettling pace, and the fact he refused to put his hands in the air is sufficient for the Arbitrator to conclude that Mr. Campbell displayed an unusual and not fully cooperative demeanor in the parking lot, which suggested he was not willing to be taken into custody easily. Officers were justifiably uncertain what was on his mind.

2. Detailed analysis of the Critical Three Seconds

Up to the point when Mr. Campbell was beanbagged, the considerations for and against viewing Mr. Campbell as a serious threat are about evenly balanced. Obviously, there was no justification for the use of lethal force up to that point. But the most important period in this analysis are the approximately three seconds between the time Mr. Campbell was beanbagged and the time he was shot. The four determinative questions the Arbitrator must answer are:

1. Was it objectively reasonable to believe that Mr. Campbell was carrying a firearm when he emerged from the apartment?

2. How credible was the Grievant's stated observation that Mr. Campbell was making a motion of reaching into his waistband?

3. If credible, was it objectively reasonable for the Grievant to believe Mr. Campbell was reaching for a gun to shoot others?

4. If the perception of reaching for a gun was objectively reasonable, were there reasonable alternatives to the use of deadly force?

These questions will be answered next.

a) Was It Objectively Reasonable to Believe that Mr. Campbell Was Carrying a Firearm when He Emerged from the Apartment?

This question is important because if it was not reasonable to believe Mr. Campbell was armed when he came outside, then there would be much less of a reason to view him as a

threat at any subsequent point.[29]

There were certain circumstances, set forth above, indicating that Mr. Campbell was not a threat. In particular, he came out of the apartment with his hands on his head and kept his hands in full view, at least until he was beanbagged. He was known to be suicidal but had not threatened Ms. Jones or her children, nor had he directly threatened officers. These circumstances suggested an intent on the part of Mr. Campbell to surrender to officers in order to get some mental help. Therefore, it is reasonable to wonder why he would bring a gun with him, for he would surely know that the presence of a weapon would not play well with police officers.

On the other hand, the Arbitrator cannot ignore evidence of Mr. Campbell's demeanor after he emerged from the apartment, a less than cooperative demeanor that made his intent uncertain.

Further, the testimony of officers at the scene who believed that Mr. Campbell could be armed is entitled to substantial weight. Sergeant Birkinbine thought that Mr. Campbell could be armed. Officer Kemple stated he thought there was "a good chance he was armed." Tr. 781. Officer Elias testified there was never a time he thought Mr. Campbell was unarmed. Officer Lewton believed Mr. Campbell was armed and a high risk. Officer Boylan said that "every information we had was that he was armed" when he was outside. Tr. 335. Officer Willard agreed. Even the City's expert witness, James McCabe, stated it was reasonable to believe Mr. Campbell was armed.

These witnesses based their view on the fact Mr. Campbell was known to have a weapon with him, was known to keep it in his jacket pocket, and was wearing a jacket when he emerged. He had threatened suicide by police, and when he became aware of police presence,

[29] It could be argued that if it was not reasonable to believe Mr. Campbell was armed, then it would not be reasonable to view him as a serious threat at all. However, the discussion here is about knowing the unknowable. Police officers are sometimes confronted with armed individuals whom they had no reason to believe are armed, too often with tragic consequences.

texted Angie Jones with the statement, "Don't make me get my gun. I ain't playing." In addition, officers did not know why Mr. Campbell had emerged from the apartment. Officers testified that they are trained to be alert for signs that a subject may be armed. Sergeant Birkinbine, for instance, testified that officers are taught to assume subjects are armed in a situation such as the one they faced with Aaron Campbell.

The officers' own conduct at the scene was consistent with the hypothesis that Mr. Campbell was armed (as well as with their training in such situations). Officers wanted him to walk backwards towards them in a controlled manner and they wanted him to put his hands in the air so they could better check for a firearm. Had he not fled and been shot, they would have exercised similar precautions when securing him and exercising custody. Also telling was the extensive precautions that officers took approaching Mr. Campbell after the Grievant shot him. They did not know whether he was dead or incapacitated, so they were concerned that he might pull out a gun and fire at them. The decision to exercise this caution was made by others on scene; the Grievant had nothing to do with it.

Given the information that the Grievant had a handgun in the jacket he was wearing inside the apartment, that he emerged from the apartment wearing a jacket, and that he had made what could be construed as threats to use that gun against police, and also given officers' training in circumstances such as the one at hand, the Arbitrator concludes that there was a reasonable basis for believing that Mr. Campbell could be armed. The Arbitrator was troubled by the Grievant's and other officers' certainty that Mr. Campbell was armed. In her opinion, it was reasonable to believe there was a possibility that he was armed, perhaps even a substantial possibility. One could not be certain, however without actually seeing the gun.

b) How Credible was the Grievant's Stated Observation that Mr. Campbell was making a Motion of Reaching into his Waistband?

This question requires a determination of credibility. The Grievant testified that he saw Mr. Campbell's left hand reach back and into his waistband, a place where indisputably weapons

are sometimes carried. He testified it was not a brief motion but rather he seemed to be digging as he was running.

The City challenged the credibility of his belief, asserting that no other witnesses saw the gesture as the Grievant did. The City contends that the Grievant was too focused on Mr. Campbell as a threat and thought he saw something that was not there.

Court decisions set forth previously indicate that for mistaken conduct to become objectively reasonable, there has to be some basis in fact for the mistake. As stated by the Ninth Circuit, "a simple statement by an officer that he fears for his safety or the safety of others is not enough; there must be objective factors to justify such a concern." *Bryan v. MacPherson*, 608 F.3d 614, 618 (9th Cir. 2010), citing *Deorle, supra*, 272 F.3d at 1281. Corroborating evidence is the best way to evaluate the reasonableness of a mistake. Without corroboration, the Arbitrator would have difficulty crediting the Grievant's belief that Mr. Campbell was making a gesture towards his waistband.

According to the City, "Not a single police or civilian witness saw the movement of Campbell's left hand going all the way into his pants when he was in front of the police car, as Grievant said he did." City's brief at 87. This is true, but then no witness identically described Mr. Campbell's hand movement. The Grievant stated that Mr. Campbell's hand movement began almost immediately after he faltered in reaction to the beanbag rounds and continued as he ran. He also described Mr. Campbell's hand motion as digging into his waistband, all the way in. (Keep in mind, the period at issue is only a few seconds). Other witnesses also saw Mr. Campbell reach to or into his waistband. Each witness's testimony differed as to the details. To reiterate:[30]

- Jenna Peterson saw Mr. Campbell reach back after he was shot with the beanbag and it appeared as a pain reaction. As he ran, however, he reached for his waistband and she thought it appeared that he was trying to pull up his pants, which were baggy. Trying to pull up baggy pants would require some reach into the waistband, although Ms. Peterson wasn't specific.

[30] These witnesses testimony on this subject is set forth in greater detail supra, Part IV.D. at 18-20.

- William Snow thought he saw Mr. Campbell reaching back for what appeared be a weapon on the small of his back - he thought he saw a dark object. He stated that he saw Mr. Campbell's left hand lift his jacket and go under his beLieutenant

- Tyler Camp said that after Mr. Campbell began to run, his hand was definitely toward his back, but he could not see whether he was reaching for anything. He stated,

  > [H]is hand was back there. I didn't see him grab a weapon necessarily, but his hand was back behind him and it was. . . . Uh, it was just weird to see him run with his left hand behind his back for so long." . . . I remember that very vividly cause I was wondering what he was doing."

  Exh. A-115, at 7. But Mr. Camp also stated that Mr. Campbell's hand was not behind him very long, perhaps a second before he was shot. He described Mr. Campbell' jacket as "flailing behind him." *Id*.

- Officer Willard testified that Mr. Campbell had lowered his hands before the first beanbag round hit him. He further testified that as Mr. Campbell ran, not only did Mr. Campbell appear to reach for his waistband with his left hand but he actually partially turned and put his right hand in a position that would help him pull a gun out.

The other officers on scene did not observe Mr. Campbell reach toward his waistband. Sergeant Birkinbine and Officers Andersen and McAllister were not in a good position to observe. Officer Elias was in a position to observe Mr. Campbell's hand motion but he said he was focused more on his dog. The City notes that Officer Elias testified he would not have released Bano had he thought Campbell was reaching for a gun. However, given that Officer Elias did not observe Mr. Campbell reach for a weapon, he had insufficient reason to believe he was putting Bano in jeopardy. That leaves Officers Lewton, Boylan and Kemple who were in positions to observe Mr. Campbell but did not see him appear to reach for his waistband.

Because of these differences of observation, evaluating the credibility of the Grievant's description of Mr. Campbell's hand placement is not easy. It is a factual question, and the City has the burden of proof. Given the testimony of the three students (Jenna Peterson, William Snow and Tyler Camp) who had no apparent bias or interest in the outcome of this proceeding, in addition to that of Officer Willard, whose testimony could be discounted because of his affinity with the Grievant, the Arbitrator concludes that the City has not sustained its burden of proof on this point. Even if Mr. Campbell's hand motion was not exactly as the Grievant described it,

there is sufficient evidence to support the Grievant's view that Mr. Campbell appeared to be placing or digging his left hand into the waistband area of his pants as he ran.

c) Was it Objectively Reasonable to Believe that Mr. Campbell's Reach into his Waistband was an Attempt to Retrieve a Gun to Shoot at Others?

The third and most critical question is, considering all the facts and circumstances, was it objectively reasonable to believe that Mr. Campbell's reach into his waistband was an attempt to retrieve a gun to shoot at others?

This is where all the previously discussed considerations, both for and against viewing Mr. Campbell as a threat, come into play: Mr. Campbell was distraught and suicidal, had not been accused of a crime, had been in some positive communication with the officers in the alcove (the details of which were not known to other officers), had released the children (although our objectively reasonable officer didn't know why), had emerged from his apartment unexpectedly, had walked backwards more rapidly and less cautiously than is typical for a person with his back to a lineup of police officers, but had complied, after a fashion, with commands to slow down and then stop. Mr. Campbell had kept his hands on his head while walking backwards, but for unknown reasons had refused to comply with the directive to put his hands in the air and had cried out, to the effect, "just fucking shoot me." The objectively reasonable officer had reason to believe that Mr. Campbell was armed with a gun, although he could not be certain. He also had reason to view Mr. Campbell as a threat against officers because of information he kept his gun in his jacket pocket, his suicide by police threat and his recently texted statement, "don't make me get my gun, I ain't playing." The objectively reasonable officer observed the firing of two beanbag shots. The officer could have been surprised that this occurred, since he had not observed active resistance on Mr. Campbell's part.

Our hypothetical officer next observed Mr. Campbell lean or take a faltering step forward in reaction to the initial beanbag rounds, then straighten himself up. As Mr. Campbell straightened

himself up, he started running and as he ran, he appeared to reach with his left hand into the waistband of his baggy pants. He kept his hands there for up to two or three seconds

The objectively reasonable officer was aware that a K-9 was positioned off to his left side, ready to heed a "take" command, but did not hear that command (no officers heard it). The hypothetical officer also has been trained that a K-9 is not a match for someone holding a gun. (That subject will be discussed in greater detail below).

In his split-second decision making, the objectively reasonable officer will consider whether Mr. Campbell's reach to his waistband is for a gun or whether the hand movement took place as a reaction to pain. He knows that if Mr. Campbell were to pull a gun, it could prove deadly. Our hypothetical officer also observed Mr. Campbell approaching a possible position of cover, which would enable him to fire off multiple rounds at officers without first getting shot, at least not immediately. Bullets could hit officers who have less than perfect cover, or stray bullets could hit someone in the apartment buildings.

The City's witnesses and its argument focus on the likelihood that Mr. Campbell's reach with his left hand was a pain reaction to the beanbag shots.[31] However, the City must show that our hypothetical officer could not reasonably conclude that Mr. Campbell was reaching for a gun because it was obvious Mr. Campbell was exhibiting a reaction to pain.

Several witnesses, including the Grievant, testified that Mr. Campbell did not appear to exhibit a pain reaction to being beanbagged. Officer Lewton testified that beanbagged suspects most typically go to the ground. Sergeant Birkinbine testified that after being hit with the first beanbag round and arching forward, he then straightened up before running. He described "it [as] a very deliberate, almost a passively defiant kind of a position." Tr. 2034. He did not think

[31] Two other possibilities were suggested by witnesses at hearing. The first was that Mr. Campbell was reaching into his waistband to pull up his baggy pants. The second was that he was feigning the reach for a weapon in order to provoke police into shooting him. However, the City did not argue that these were reasonable possibilities and City witnesses involved in the decision making process did not bring these up. Although in hindsight, these might have been explanations for Mr. Campbell's hand movement, from the perspective of the objectively reasonable officer, who is making decisions in the heat of the moment, they were less apparent explanations and could have been justifiably discounted.

Mr. Campbell was displaying a reaction to pain. In his experience, "people respond like it hurts." Tr. 2035. But Mr. Campbell "just didn't respond." *Id*. Sergeant Birkinbine did not think that any of the beanbag rounds had an effect on him, apart from the first one that caused him to lean or take a step forward. Officer Elias, during the internal investigation, stated he did not believe Mr. Campbell exhibited a pain reaction to being struck with the beanbags. Officer Willard testified that he had seen other people beanbagged and "they melt to the ground." Tr. 2612. What he saw was not consistent with reactions he has seen from others. Officer Willard was quite certain that he saw Mr. Campbell reach for his waistband and thought that the reach was too specific to be a pain reaction. Officer Boylan similarly opined that the beanbag rounds did not have the typical effect on Mr. Campbell and did not believe he was exhibiting any pain reaction. Officer Andersen testified that the beanbags appeared to have no noticeable effect on Mr. Campbell.

The three civilian witnesses in Darrin's Place Apartments indicated that Mr. Campbell was not reacting in pain. Jenna Peterson stated that when Mr. Campbell was hit with the first beanbag round, his hands dropped and he faltered, as a natural reaction to pain. But as he ran, he made the reach to his waistband and that the only reason she could think of for this reach to the waistband motion was to pull up his pants. This implies that she did not think it was a pain reaction. Tyler Camp did not believe Mr. Campbell exhibited a pain reaction as he ran. He explained that Mr. Campbell did not reach back into his waistband immediately; instead, he ran ten or fifteen feet and then reached into his waistband, as if he were reaching for something. William Snow did not express an opinion regarding a possible pain reaction, but since he thought it appeared Mr. Campbell was reaching for a dark object which he thought was a weapon, the implication is that he did not think Mr. Campbell was exhibiting a pain reaction.[32]

[32] Ryan Pannell thought that Mr. Campbell's faltering step after being hit by the first beanbag round was an obvious pain reaction. However, he only recalled seeing Mr. Campbell running away afterwards and did not see or recall whether or not he placed his hand into his waistband, so could not have opined whether Mr. Campbell exhibited a pain reaction as he ran.

The Grievant, like Tyler Camp, noticed a pause preceding the reach into the waistband, and during that pause Mr. Campbell displayed no reaction to the beanbag. He stated that when a subject feels the pain of a beanbag, he instinctively and quickly reaches for the area that was struck, violently arches the back, cries out, or falls to the ground. When a person reaches for the struck body part, he typically does not reach underneath clothing, nor does he reach methodically.

As stated previously, the Association presented evidence that although beanbag shots are designed to be very painful, some people do not display a pain reaction to the shots. Clothing, particularly if it is bulky, can blunt the impact. Mr. Campbell was wearing a jacket that probably covered most of his waistband as he ran. The bulk of the jacket was not clear although most witnesses described it as puffy. Since this incident occurred in January, one can assume it was a jacket more or less suitable for the weather. Some people simply put themselves in a mental state to not exhibit pain. As part of officers' training, they learn that beanbag rounds can be ineffective.

Significantly, the City's own expert witness, Dr. James McCabe, testified that although it was reasonable to believe Mr. Campbell was exhibiting a pain reaction, it also was reasonable to believe he was reaching for a gun. He further stated that it was reasonable for officers to believe Mr. Campbell's reach was not a pain reaction.

Given the number of witnesses, including three civilian witnesses, who testified that Mr. Campbell did not display a pain reaction to the beanbags, except for possibly the first round that caused him to falter, the Arbitrator concludes that the reasonable police officer could discount pain as being a motivation for Mr. Campbell's reach into his waistband.

The City, in assailing the reasonableness of the Grievant's action, finds it suspect that no other officer fired on Mr. Campbell, except for the Grievant. It presented evidence, through Dr. McCabe, that in deadly threat situations with a number of police officers present, several or even all the officers will perceive the threat at the same time and fire. Although this evidence is

credible, one should bear in mind that only one other officer, Officer Willard, saw Mr. Campbell's hand go into his waistband, so only Officer Willard could have perceived the threat the same as did the Grievant. (It was the three citizen witnesses who mostly persuaded this Arbitrator that the Grievant's perception was credible). Nevertheless, Officer Willard did not fire. He was not specifically asked why he did not fire.

The City also challenges the logic and credibility of the Grievant's belief that Mr. Campbell was going for a position of cover behind the Volvo. It appropriately points out that if Mr. Campbell were seeking a position of cover, he would have headed to one of the three closer vehicles parked roughly in front of Ryan Pannell's apartment. This is a disturbing consideration, the Arbitrator agrees. In fact, the Arbitrator found troublesome the Grievant's focus on Mr. Campbell getting to a position of cover, except to the extent he said he restrained himself from shooting until Mr. Campbell was close to the Volvo. On the other hand, our hypothetical officer need only make the reasonable determination that Mr. Campbell was reaching for a gun that he intended to shoot at officers regardless of whether he reached a position of cover. The reasonable officer might wonder why Mr. Campbell was avoiding closer cover, but would also note his behavior thus far had been erratic.

The Arbitrator finds that based on the above considerations, our hypothetical police officer could determine that there was a reasonable possibility that Mr. Campbell was reaching for a weapon. Presumably, people do not reach for weapons in a police confrontation without the intention of using it. Further, both the court decisions and the Portland Bureau training have emphasized that officers need not wait to see a weapon before firing, so long as there is the reasonable possibility, considering all circumstances, that the suspect is pulling a gun. Therefore, the Arbitrator further concludes that the objectively reasonable officer could infer that Mr. Campbell was reaching for a weapon in order to fire it in the direction of officers on the scene.

d) Were There Reasonable Alternatives to Grievant's Use of Deadly Force?

Before reaching a firm conclusion on this matter, the question of the availability of alternative responses must be addressed. As stated previously, it is something that the City's directives indicate should be considered. The question is a tricky one, because if a subject can be reasonably said to pose an immediate risk of death or serious injury, then options that would place officers at risk surely cannot be considered. However, there may be circumstances - such as where all officers have good cover - where other options might be viable.[33]

The City argues that the Grievant's decision to shoot violated directives because even if Mr. Campbell was trying to pull out a weapon to shoot at officers, the circumstances of the scene obviated the need for deadly force.[34]

Essentially, there was one option available to the Grievant, which will be dubbed here as the "wait and see" option. This option is predicated upon the evidence that officers within firing distance of Campbell had very good to a moderate level of cover protection and that the overwhelmingly superior forces at the scene would have eventually subdued Campbell one way or another. The likely outcomes of this option would have been one or more of the following

1. The K-9, Bano, would have attacked Mr. Campbell and either brought him down, or at least distracted Campbell enough that officers could better see whether he was armed. Of course, had Mr. Campbell been armed, Bano could have been shot.

2. Bano would not have been successful and Mr. Campbell would have escaped either to the cover of the Volvo or to his apartment. From either position he either would have drawn his gun, presumably to fire at officers (thereby clearly justifying deadly force) or he would not have used a weapon, in which case police could have employed other tactics to diffuse the situation.

---

[33] This is a chicken-and-egg problem. If everyone is out of harm's way, one might argue that the subject, at least at that point in time, does not pose an immediate threat of death or serious injury.

[34] Bear in mind that this discussion does not concern alternatives generally available to police officers at the scene, such as talking Mr. Campbell into compliance in lieu of beanbagging him. The Grievant had no input or control over the strategies employed at the scene or decisions made by others.

The City contends the wait and see approach was a reasonable alternative and would thereby render the Grievant's conduct unreasonable, since its rules require officers to pursue reasonable options short of deadly force.

The Association strongly disagrees that options should be considered when the subject already poses an immediate deadly threat. Police are not expected to employ less invasive tactics at the risk of the loss of innocent life, it contends. The Association presented considerable evidence (evidence that also has been considered in a number of court decisions), showing that if the officer waits to see what the suspect who appears to reach for a weapon is about to do, it could easily be too late. A suspect, even while running away, can draw and fire a weapon much more quickly than an officer can react by firing back. Not all officers had perfect cover at the scene. For instance, bullets, even from a small handgun, could have penetrated the dumpster providing cover for Officer Elias or the passenger part of the patrol car shielding Officer Lewton. Further, bullets can penetrate wood-sided apartment buildings. Thus, allowing Mr. Campbell to fire off rounds from his position of cover, even while being attacked by the K-9, would have created an unacceptable risk. The Association vigorously argues that Portland Police Bureau training is entirely inconsistent with the City's position.

To the Arbitrator, the K-9 was an intriguing alternative. Had the Grievant waited perhaps a second or two, Bano probably would have been on Mr. Campbell and could have taken him down. In the relatively confined area that Mr. Campbell was entering (between the Volvo and the apartment building), he had little room for avoiding Bano. As witnesses testified, having a large, hard-charging, snarling German shepherd leap upon you is distracting, to say the least. Even if Mr. Campbell had been armed, he would have had difficulty getting some shots off with Bano pulling him down.

On the other hand, that second or two could have been critical if in fact Mr. Campbell had been trying to pull a gun to shoot. He might have shot Bano, or worse, a bullet could have penetrated the doors of the vehicle behind which Officer Lewton was positioned (he did not

have engine block hard cover), the dumpster which shielded Officer Elias, or it could have hit one of the officers using the patrol car's engine block as cover who might not have crouched down fast enough or who could have been peering over the hood of the car. There was also the possibility that a bullet could have penetrated one of the apartments, hitting an occupant. There was not a high likelihood that a bullet would have hit someone, but it would have been possible. One does not need to delve very deeply into metropolitan newspapers to read about stray bullets hitting an innocent person inside a dwelling or walking on the street, or hitting a police officer with inadequate cover.

Chief Reese believed that the K-9, Bano, was upon Mr. Campbell when the Grievant fired the fatal shot. He testified, "The dog, based on the interviews with the officers, the dog bit him literally as he was shot." Tr. 1517. As the Association contends, Chief Reese's belief was contrary to the evidence. Witnesses generally placed Bano somewhere in the east to center-east of the parking lot when the fatal shot rang out. He was out of the vision of the Grievant and other custody team members at this point. Detailed witness testimony is set forth in Part IV.E., *supra,* pp. 22-23. Even Lieutenant King, as the Association pointed out in its brief, placed Bano roughly east of the center line of the parking lot. Although the Grievant knew that the dog was on the scene as a resource, the Arbitrator finds it credible that he did not know the dog had been released when he fired the fatal shot because at that point, the dog was outside his line of vision as he focused through his weapon's aperture on Mr. Campbell.[35]

The Association presented considerable, persuasive evidence that officers are trained that the K-9 is not a resource when the subject is reasonably thought to pose an immediate threat of death or serious injury to others. A dog is no match for a gun and, as Officer Elias stated with no dispute from the City, a handler would not send his K-9 on a suicide mission.[36] Even if the K-9

[35] Dr. McCabe, the City's expert, stated, "I can understand aiming and not seeing the dog. That's understandable, that's reasonable." McCabe deposition, at 86.

[36] There also was evidence that officers are trained that K-9s are not 100% reliable. While this may be true, the Arbitrator believes that the compelling consideration is the possibility that a gunman could shoot the dog or fire shots around it.

successfully attacks the subject, if the subject is armed, he can fire off a shot that could hit officers, bystanders – or the dog.

The second part of the wait and see alternative discounts the effectiveness of the K-9. Bear in mind that this alternative assumes that it was reasonable to believe that Mr. Campbell was reaching for a weapon and trying to pull it out to shoot at others. The Arbitrator herself asked about that option (as well as about the dog option) relatively early in proceedings. The Volvo was not very good cover for Mr. Campbell because even if he were able to reach the opposite side of the automobile and crouch beside the engine block for hard cover, he was exposed from the side and the rear. There were officers immediately to the east of him. (However, to effectively get a shot at Campbell, they would have to expose themselves by running to a chain link fence, which would have been quite risky.) There were other officers in the rear that could have circled around behind him. In other words, there were ample police resources on the scene that would have overcome Mr. Campbell eventually.

The City's argument emphasizes the availability of these resources and it notes that since Mr. Campbell was running away, the distance gave officers more options. The problem with this argument is that it goes counter to the training the officers have received. This alternative would have had officers wait until Mr. Campbell at least drew a weapon and perhaps, as Chief Reese suggested, also wait for him to take offensive action, before using deadly force. The Bureau has never trained officers to wait to see the gun before firing, so long as there is a reasonable belief that the suspect is a deadly threat (and this alternative makes that assumption). Various training officers so testified, as did the Association's expert witness. Court cases discussed previously also have so ruled. It would have taken only a split second for Mr. Campbell to pull out a weapon and shoot and in a position of cover he easily could have fired off multiple rounds.

It is fair to ask why a reasonable officer (with his AR-15 trained on Mr. Campbell) could not wait until seeing gunmetal to shoot, or even the withdrawal and pointing of the gun as if to shoot. Could he not then simply pull the trigger, beating Mr. Campbell to the punch, so to

speak? The Association's expert witness, Dr. William Lewinski, answered this question in the negative. He testified at length about the underpinnings of the action/reaction principle. He recounted numerous studies where precise measurements have been taken of the time it takes a skilled individual, such as an athlete or a fit and trained police officer, to react to a stimulus. He also recounted measurements of the time it takes to pull a handgun from a waistband and shoot it, even while running. According to his expertise, it would have taken Mr. Campbell an average of 0.25 seconds to pull a gun from his waistband and get off a shot while running (shooting under his right arm, for instance). It would have taken the Grievant, assuming he was alert, skilled and had his AR-15 trained on Mr. Campbell, an average of 0.45 seconds to respond with a shot. Specifically, he testified:

> If the officer has the finger on the frame and the weapon already aligned, . . . the weapon's already aligned and the officer's moving the finger inside the frame and pulling the trigger, the officer's reaction time, totaling perception, processing, motor movement time is 45-100ths of a second.

Tr. 3181. The decision-making prong for the officer would add another 0.25 seconds to the reaction. Thus, in his opinion, Mr. Campbell would have been able to get off two shots before the Grievant could have returned fire. He added that if Mr. Campbell had obtained cover so that the gun could not be seen, the police reaction time would be longer to the sound of a shot. The City did not dispute this evidence.

The City's expert, Dr. McCabe, opined that for Mr. Campbell's shots to have hit anyone, he would have to have been quite "lucky." McCabe deposition, at 68. In fact, he opined that it was reasonable to believe that Mr. Campbell was pulling a gun to shoot, but unreasonable for the Grievant to shoot first because any shot fired by Mr. Campbell would not have been well aimed. The Arbitrator agrees that Mr. Campbell would not have been able to aim very precisely. In addition, officers had full or partial cover and it would have been a truly random shot to hit one of them or someone inside the apartment buildings. Nevertheless, the Arbitrator concludes that even a "lucky" shot posed an unacceptable risk to officers with less than perfect cover or who

would have had to raise themselves slightly above the line of the patrol car's hood in order to shoot back. As stated previously, poorly aimed random shots do tragically kill or injure officers and bystanders, even those located some distance away or inside buildings. There was no evidence that officers are trained to take this risk; indeed, the evidence was to the contrary.

C. Arbitrator's Conclusion

This was a very tragic case, one where the Monday-morning quarterback has the clear advantage when divining what went wrong. The case law regarding the Constitutional use of deadly force has been particularly instructive. Although it turned out that Mr. Campbell did not have a gun with him in the parking lot, *Graham* and its progeny consistently emphasize that "20-20 hindsight" must be avoided. Further, as the recitation of cases showed, those adjudicators have had little difficulty concluding that if a subject appears to be reaching for what could reasonably be considered a gun, deadly force is justified, even though no weapon has been observed. The courts have not said that every reaching motion justifies lethal force, but where the circumstances indicate that the subject could be armed and has indicated possible intent to use the weapon, then deadly force will survive the Constitutional test. The Portland Police Bureau directives on lethal force essentially mirror the Constitutional standard articulated by the courts. The courts are not willing to require law enforcement officers to take risks to themselves or to the safety of others. Further, as the courts have instructed, the determination of reasonableness must make allowances for the split-second decision making that is required of police officers. Although the events here unfolded over a period of time, the critical period was during the few seconds between the time Officer Lewton shot the initial beanbag rounds and the time that Mr. Campbell neared the Volvo. The situation with Mr. Campbell changed very rapidly, forcing the Grievant to make a quick decision.

In the instant case, although Mr. Campbell had not committed a crime and displayed some behavior showing surrender and compliance (although this behavior was inconsistent), the

Arbitrator concludes that it was reasonable to believe that he could be armed, and that when he ran, there was sufficient evidence for a finding that Mr. Campbell made motions that appeared to look like he was reaching for a gun. The Arbitrator also finds that the reasonable police officer could conclude that had Mr. Campbell pulled a gun, he would have fired it - possibly at others, or perhaps at himself. The case law points to the conclusion that this is a sufficient basis for finding that there was an objectively reasonable basis for believing that Mr. Campbell posed an immediate risk of serious injury or death to others.

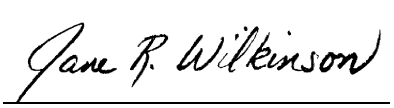
Accordingly, the Arbitrator concludes that the City has not sustained its burden of proving that the Grievant's use of force violated Portland Police Bureau directives 1010.10 and 1010.20. It lacked just cause to terminate the Grievant, and the grievance is sustained.

VII. AWARD

For the reasons set forth in the foregoing discussion and analysis, the determination of the Arbitrator is that the City has not sustained its burden of proving just cause to terminate the Grievant, and therefore that termination violated the Collective Bargaining Agreement. The City is ordered to reinstate the Grievant to his former position as a police officer and to make him whole for wages lost during the period of his unemployment, less interim earnings. The Arbitrator shall retain jurisdiction in this matter for 90 days from the date of this award in order to resolve any issues pertaining to the remedy herein ordered.

The Arbitrator's fees and expenses will be paid according to the Collective Bargaining Agreement, Article 22.5.2.

Date: March 30, 2012



Jane R. Wilkinson
Labor Arbitrator