

IN THE MATTER OF THE ARBITRATION  
BETWEEN

---

EVERETT POLICE OFFICERS ASSOCIATION )

and )

CITY OF EVERETT )

---

OPINION  
AND  
AWARD

*Grievant: Troy Meade*

---

Janet L. Gaunt  
Arbitrator

---

June 9, 2012

APPEARANCES

*For the Union:*

Jeffrey Julius, Esq.  
Derrick Isackson, Esq.  
Vick, Julius, McClure, P.S.  
5701 6<sup>th</sup> Avenue South, Suite 491-A  
Seattle, WA 98108

*For the City:*

Lawrence B. Hannah, Esq.  
Perkins Coie LLP  
10885 N.E. Fourth Street, Suite 700  
Bellevue, WA 98004

## WITNESS LIST

1. James Irving Scharf, former Chief of Police
2. Debra Ann Coleman, OPS Detective
3. Troy Meade, Grievant
4. David Ames Klinger, Ph.d., Associate Professor of Criminology and Criminal Justice, University Of Missouri Saint Louis
5. Ronald Michael McCarthy, Tactical Specialist

## EXHIBIT LIST

### *Joint*

1. Collective Bargaining Agreement between the City of Everett and Everett Police Officers Association (2011-2013)
2. Meade Grievance Documents

### *City*

1. Notice of Proposed Termination (6/22/11)
2. Troy Meade response (6/26/11) - redacted
3. Termination Notice (6/30/11)
4. OPS Notebooks (3 binders)
  - Tab 1: Overview of Final Report (6/3/11)
  - Tab 2: Final Report (6/3/11)
  - Tab 3: Findings by Chief Scharf (6/17/11)
  - Tab 4: Authorization for OPS Investigation (3/4/11)
  - Tab 5: Notice to Officer Meade of OPS Investigation (3/4/11)
  - Tab 6: Notice to EPOA of OPS Investigation (3/4/11)
  - Tab 7: OPS Extension Request (4/29/11)
  - Tab 8: Meade OPS Interview w/associated documents (5/18/11)
  - Tab 9: Klocker OPS Interview w/associated documents (5/11/11)
  - Tab 10: CD of OPS Interviews w/Meade and Klocker
  - Tab 11: Transcript of Meade Testimony at Criminal Trial (4/22/10)
  - Tab 12: Transcript of Klocker Testimony at Criminal Trial (4/15/10)
  - Tab 13: Transcript of Whitaker Testimony at Criminal Trial (4/20/10)
  - Tab 14: Court's Instructions to the Jury
  - Tab 15: Jury Verdict Forms
  - Tab 16: Meade Deposition (12/7/10)
  - Tab 17: Klocker Deposition (2/10/11)
  - Tab 18: Civil Settlement Agreement (2/24/11)
  - Tab 19: SMART Investigation Case Summary (8/10/09)
  - Tab 20: SMART Investigative Report (6/19/09)
  - Tab 21: Detective Wells Follow-Up Reports
  - Tab 22: SMART Trajectory Analysis (8/19/09)
  - Tab 23: Detective Honnen Incident Report (6/11/09)
  - Tab 24: Officer Klocker Statement to SMART Team (6/11/09)

- Tab 25: Officer Hacker Incident Report (6/11/09) and Statement (1/8/10)
  - Tab 26: Officer Carman Incident Report (6/11/09)
  - Tab 27: Medical Examiner Autopsy Report (7/14/09)
  - Tab 28: John Atkinson Statement (6/11/09)
  - Tab 29: Thomas Brophy Statement (6/11/09)
  - Tab 30: Paul Dziechiasz Statement (6/11/09)
  - Tab 31: Joanne Hancock Statement (6/10/09)
  - Tab 32: Roger Rosas Statement (3/8/10)
  - Tab 33: Elizabeth Sperry Statement (6/11/09)
  - Tab 34: Trisha Tribble Statement (6/11/09)
  - Tab 35: Cindi Whitaker Statement (6/11/09)
  - Tab 36: Daniel Wolf Statement (6/11/09)
  - Tab 37: Taser Download Report (6/18/09)
  - Tab 38: CAD Incident Report (1<sup>st</sup> 911 Call and Response)
  - Tab 39: CAD Incident Report (2<sup>nd</sup> 911 Call and Response)
  - Tab 40: Selected/Excerpted Radio Traffic (6/10/09)
  - Tab 41: SMART Investigation CD's
  - Tab 42: Meade's Administrative Assignments Notices
  - Tab 43: Meade Employment Application (4/22/97)
  - Tab 44: Meade Performance Evaluations (1999-2009)
  - Tab 45: Meade's Training Record
  - Tab 46: FTO Manual Excerpts
  - Tab 47: Documents provided to OPS by Officer Meade
  - Tab 48: 2006 SMART Investigation Documents
5. Meservey Estate Tort Claim (9/22/09)
  6. Meservey Estate Civil Complaint (2/17/10)
  7. Chief of Police Findings (6/10/09)
  8. Notebook of Media Articles
  9. City's 21 Seconds Chronology (6/10/09)
  10. Meade Defense Costs Paid by the City

*Union*

1. Gear Shift Photo
2. Transcript of Robert Bragg Testimony (4/22/10)
3. Transcript of Kirk Wiper Testimony (4/21/10)
4. Transcript of James Duvall Testimony (4/21/10)
5. Transcript of Greg Sutherland Testimony (4/21/10)
6. Transcript of Daniel Wolf Testimony (4/14/10)
7. Diagram of Shooting Scene
8. Transcript of Michael Brophy Testimony (4/14/10)
9. Wallet- sized instruction card
10. Troy Meade Awards and Commendations
11. Vitae of David A. Klinger
12. Curriculum Vitae of Ronald M. McCarthy

PROCEEDINGS

The Everett Police Officers Association ("EPOA" or "Association") initiated this arbitration on behalf of Officer Troy Meade ("Grievant"). pursuant to the terms of a Collective Bargaining Agreement ("CBA" or "Agreement") with the City of Everett ("City" or "Employer"). At issue is Officer Meade's termination effective July 1, 2011 for a fatal shooting.

The Arbitrator was selected to serve as sole arbitrator through mutual agreement, and a hearing was held in Everett, Washington on March 14-16, 2012. The EPOA was represented by Jeffrey Julius and Derrick Isackson of Vick, Julius, McClure P.S.. Larry Hannah of Perkins Coie represented the City. The parties stipulated that the Arbitrator had jurisdiction to issue a final and binding decision regarding the submitted issues.

At the hearing, both sides had an opportunity to make opening statements, submit documentary evidence, examine and cross-examine witnesses (who testified under oath), and argue the issues in dispute. A court reporter transcribed the proceedings and a transcript was prepared for the Arbitrator's use. The parties elected to make closing argument in the form of posthearing briefs that were received on May 11, 2012, and the hearing was thereupon closed.

STIPULATED STATEMENT OF THE ISSUE

The parties stipulated that the Arbitrator should resolve the following issues:

1. Did the City have just cause to terminate Troy Meade?
2. If not, what is the appropriate remedy?

RELEVANT FACTS

The EPOA serves as the exclusive bargaining representative for all commissioned members of the Everett Police Department (“EPD” or “Department”) up to and including the rank of sergeant. The City and Association have had a bargaining relationship for many years, and are currently parties to a Collective Bargaining in effect from January 1, 2011 through December 31, 2013. Ex. J-1.<sup>1</sup>

**Officer Meade's Background**

Officer Meade was hired by the City in January 1998. The EPD was the Grievant's first job as a civilian police officer. At the time of the shooting that led to his termination, Officer Meade had eleven years of experience. Since

---

<sup>1</sup> Exhibits are referred to as Joint (“Ex. J-\_\_”), City (“Ex. C-\_\_”) or Union (“Ex. U-\_\_”). The transcript is referred to by page and sometimes line number (“Tr. \_\_:\_\_”). Witnesses are referred to by last name. References to exhibits or testimony are intended to be illustrative, not all-inclusive, of evidence in the record that supports a particular statement.

approximately 2000, he had worked as a traffic car officer, and had made over 250 DUI arrests. The Grievant had received specialize training in traffic enforcement and served as a Field Training Officer (“FTO”), responsible for training police officers during their probationary period with the Department. In this assignment the Grievant had to be very familiar with the Department’s policies and procedures. Officer Meade had always received good evaluations, and had never previously received any disciplinary action.

### **Use of Deadly Force Training and EPD Policy**

During his training at the Police Academy and while an EPD officer, the Grievant had received training in use of deadly force decision-making.<sup>2</sup> In general, police officers are taught that they may use deadly force in situation where the officer objectively and reasonably believes there is an imminent threat of death or serious physical injury to the officer or to another person. The EPD has adopted a specific policy regarding the use of deadly force which reads in relevant part:

#### **15.4 USE OF DEADLY FORCE**

Deadly force is defined as the intentional application of force through the use of firearms of any other means reasonably likely to cause death or serious physical injury. [RCW 9A.16.010(2)]

An officer may employ deadly force only in those situations where the officer objectively and reasonably believes there is an imminent threat

---

<sup>2</sup> The basic law enforcement academy is a division of the Washington State Criminal Justice Training Commission (“CJTC”).

of death or serious physical injury to the officer or to another person, based on the totality of the circumstances known to the officer at the time.

Deadly force may be employed:

- When necessarily used by a peace officer to overcome actual resistance to the execution of the legal process, mandate, or order of a court or officer, or in the discharge of a legal duty.
- When necessarily used by a peace officer
- To arrest or apprehend a person who the officer reasonably believes has committed, has attempted to commit, is committing, or is attempting to commit a felony,
- To retake a person escaped from a federal or state correctional facility,
- To prevent the escape of a person from a county or city jail or holding facility if the person has been arrested for, charged with, or convicted of a felony, or
- To lawfully suppress a riot if the actor or another participant is armed with a deadly weapon.

When considering using deadly force to arrest or apprehend any person, officers must have probable cause to believe that the suspect, if not apprehended, poses a threat of serious physical harm to the officer or others. Among circumstances which may be considered as a “threat of serious physical harm” are:

- The suspect threatens a peace officer with a weapon or displays a weapon in a manner that could be reasonably construed as threatening; or
- There is probable cause to believe the suspect has committed any crime involving the infliction or threatened infliction of serious physical harm.
- A warning is given prior to the use of deadly force, if practicable.

Warning shots are prohibited.

\* \* \* \*

Firing into a moving vehicle is generally prohibited, except where the officer reasonably believes that there is an imminent threat of death or serious physical injury to the officer or to a third party if the officer does not do so and that it is the only reasonable means of protecting the officer and/or a third party. Given that any officer's likelihood of successfully preventing the escape of a subject in any moving motor vehicle is very low, an officer choosing to fire at a fleeing vehicle must be fully prepared to justify this extreme action.

\* \* \* \*

The use by an officer of any hard object to intentionally strike a blow to a person's head is generally prohibited, except in certain extreme situations of self defense or defense of others. An officer applying a blow to a person's head must be prepared to justify this extreme action. . . .

\* \* \* \*

Ex. C-1. As an FTO, Officer Meade trained new hires in the application of this policy.

### **Meade's Prior Use of Deadly Force**

In 2006, Officer Meade was backing up two other EPD officers (Bakke and Dawson) on a call. During that call, Meade and Bakke spotted the suspect sitting in the driver's side of a car parked in a lot between two other vehicles. While they were approaching the car to make contact, the suspect started the vehicle. Bakke approached from the driver's side and Meade approached from the passenger's side. The suspect did not comply with officer commands to turn off the vehicle. At one point, while Officer Bakke was positioned at the driver's window, in-between the suspect's car and an adjacent vehicle, the suspect suddenly threw the car into reverse and began backing up. Officer Bakke took a step or two



backwards, but the corner of the vehicle caught Officer Bakke's pant leg, flipping her into the air. As the suspect subsequently exited the parking space and began driving forward towards Officer Dawson, the Grievant fired four shots, which struck the car but did not stop the vehicle.

The Snohomish County Multiple Agency Response Team ("SMART") investigated the 2006 shooting, and the Snohomish County Prosecutor's office determined that the shooting had been justified.<sup>3</sup> There was no administrative investigation by the EPD, but the Grievant later discussed the incident with EPD Range Master James Duvall. Duvall advised Officer Meade to aim for the driver, not the vehicle, if ever called upon to shoot at a moving vehicle in the future.

### **The Shooting of Mr. Meservey**

On June 10, 2009, the Grievant was working a 3:00 p.m. to 3:00 a.m. shift as the north end traffic unit. He was driving a regular EPD patrol car, and was in uniform. At approximately 10:00 p.m., a patron of the Chuckwagon Inn ("Chuckwagon") called 9-1-1 to report that an intoxicated male customer (later identified as Niles Meservey) was going to get into his car, a white Corvette, and drive away. The Chuckwagon is a restaurant that includes a bar. By the time other EPD officers responded to the scene, Mr. Meservey had left the bar. Officers

---

<sup>3</sup> SMART is a unit comprised of detectives from various Snohomish County law enforcement agencies as well as the Washington State Patrol.

cleared the scene without making contact with Meservey, but reported that his car was parked in a lot behind the restaurant.

After officers left the scene, 9-1-1 Dispatch received another call that Meservey had returned to the Chuckwagon and was intending to drive away. SNOPAC broadcast a possible Driving Under the Influence (“DUI”) call, and Officer Meade volunteered to take the call. As he was enroute, Dispatch changed the call to an “area check” because of mistaken reports that Meservey had left the scene.<sup>4</sup>

There are two parking lots located behind the Chuckwagon, separated by a chain-link fence approximately four (4) feet tall. An opening between the back of the Chuckwagon and the fence allows foot traffic to go between the lots. The restaurant has a smoking deck out back that looks at the parking lot. Mr. Meservey's white Corvette was parked in an angled stall facing the fence. There was a Land Rover SUV parked to the left of the Corvette, and a sedan parked to the immediate right. The Corvette and SUV were separated by about three (3) feet.

As the Grievant drove into the lot, his view along the fence line was partly obscured by a truck. Upon passing the truck, Meade noticed the brake lights of a white Corvette, and realized it was the vehicle he was looking for. Meade parked his patrol car approximately fifteen (15) feet away, perpendicular to the Corvette, with the patrol car's passenger side facing the back end of the Corvette, while he

---

<sup>4</sup> An “area check” is a drive through the area to see if a suspect can be located.

ran the vehicle's license plate number in his Mobile Data Terminal. The Grievant did not activate his overhead emergency lights or his spotlight. Instead, he turned his right alley light on to illuminate the Corvette. The Grievant radioed that he was on scene at 11:37 p.m.. Ex. C-4, Tab 39. Officer Meade's arrival was noted by several patrons of the Chuckwagon who watched from the Chuckwagon's smoking deck.

When Officer Meade exited his vehicle, he left the engine running and did not lock its doors. Meade approached the driver's side door of the Corvette. The vehicle's engine was not running, but its car alarm was going off and the driver's side window was rolled up. Using his flashlight to illuminate the car interior, the Grievant observed Mr. Meservey in the driver's seat fumbling with a set of keys. Meservey managed to turn the car alarm off, and looked at Meade as the Grievant was knocking on the window to get his attention. Meade observed Meservey insert the key into the car's ignition and thought he was doing so to roll down the window. Meservey did that but also started the vehicle's engine. Officer Meade says he was startled, and the 2006 incident came to mind, but he remained in place in order to talk with Meservey.

The Grievant could tell that Meservey was extremely intoxicated and repeatedly told Meservey to turn off the engine but Meservey did not do so. When Meade explained that he was there in response to a 9-1-1 call, Meservey began yelling about entrapment. Meade asked Meservey to get out of the car and take

a taxi home, at which point Meservey did turn off his engine but did not get out of the vehicle. While Meade was talking with Meservey, a woman approached and said she was the one who had called 9-1-1. When she asked if she could leave, the Grievant directed her to wait by her car. About this same time, Officer Meade saw another EPD patrol car enter the lot from the east. That was Officer Steven Klocker.

The recollections of Officers Meade and Klocker differ somewhat regarding subsequent events. According to Officer Meade's testimony at the arbitration, the arrival of another patrol car made Meservey even less cooperative. Since he was refusing to get out of the car, the Grievant contends he hand signaled Klocker for assistance. When Klocker started driving out of the lot instead, Meade radioed that he needed Klocker to stand by. Klocker returned on foot within a couple of minutes and stood at the right rear corner of the Corvette.

The Grievant says he kept trying to reason with Mr. Meservey, who just kept getting angrier and angrier. Meade tried to open the driver's side door but it was locked. When Meservey started the car's engine again, the Grievant recalls thinking he was in a bad location between the Corvette and SUV, but did not reposition himself. Instead, the Grievant took out his Taser and decided to use it if Meservey reached for the car's gearshift. Meade did not tell Klocker what he planned to do, and does not recall warning Meservey that he would be tased, but some civilian witnesses recall hearing words to that effect. CAD records indicate

Meade radioed Dispatch to close the air at 11:48 p.m. Shortly thereafter, Meade fired probes from the Taser through the open driver's side window into the exposed back of Meservey's left shoulder when Meservey reached for the gearshift.<sup>5</sup>

The Taser probes made contact, but did not incapacitate Meservey, who cried out in pain but recovered quickly and again reached for the car's gearshift. Realizing that Meservey was going to try driving away, Officer Meade says he took a quick step or two backwards towards the left rear of the Corvette as that vehicle lurched forward over a parking curb into the chain link fence.

The Grievant contends he was unaware of how close he was to the back end of the SUV, and was also unaware that there was a parking curb at the head of the parking stall where the Corvette was parked. Meade heard a crash when the car went forward, and thought it had hit a truck parked on the opposite side of the fence. He did not realize the Corvette had gone over the parking curb. The Grievant contends that almost instantly after the Corvette impacted the fence, he saw the Corvette's backup lights flash in his peripheral vision. Thinking the car was coming back at him under power, the Grievant drew his firearm and fired

---

<sup>5</sup> According to a taser download report, Meade administered a six second application followed immediately by a five second application.

towards the driver's headrest until he saw Meservey slump towards the passenger seat. Eight rounds were fired, and Meservey was fatally wounded.

After shooting at Meservey, the Grievant realized he had the Taser in his left hand, and his gun in the right hand, so he placed the Taser on the back bumper of the SUV in order to key his microphone to radio Dispatch.<sup>6</sup> It was 11:48 p.m. when Officer Meade radioed that shots had been fired. The amount of time from when he closed the air until he announced shots had been fired was approximately twenty-one (21) seconds. After the shooting, Meservey's car was still in the parking stall with its front wheels hung up over the parking curb.

Klocker did not testify at the arbitration, but his initial and follow-up statements to SMART investigators, his testimony at the criminal trial, civil deposition, and OPS interview transcript were all admitted into evidence. Exs. C-4, Tabs 9, 12, 17 and 24. Klocker says that upon first arriving at the scene, he just observed from his patrol car for a minute or so, and started to leave after receiving a "Code-4" hand signal from the Grievant.<sup>7</sup> Believing Officer Meade had indicated assistance was not needed, Klocker drove westward and was just exiting

---

<sup>6</sup> Officer Meade says this was the first time he realized the SUV bumper was very close behind him to the left. In his civil deposition, Meade estimated the right rear bumper of the SUV was 12-18 inches behind him. Ex. C-4, Tab 16, p.43. During his OPS interview, Meade estimated the SUV bumper was even closer: "behind me, maybe, oh, six inches or so" and to his left side, "very, very close." Ex. C-4, Tab 8, p. 22-23.

<sup>7</sup> Displaying four (4) fingers is a sign used by officers to indicate everything is okay.

**Everett Police Officers Association / City of Everett (Troy Meade Grievance)  
Arbitrator's Opinion and Award, p. 12**

the lot when Meade radioed and requested Klocker stand by. Klocker parked his patrol car on Fleming Street directly across from the lot's west entrance and walked back to the scene where he assumed a cover position off the right rear corner of the Corvette. Looking towards the Chuckwagon, Klocker could see people standing out on the smoking deck about twenty to thirty feet away. At one point, Klocker moved up to the passenger side door, quickly illuminated the interior with his flashlight, and then returned to his cover position by the right rear bumper.

For a minute or more, Klocker listened while to Grievant tried to convince Meservey to get out of the car. On two or three occasions, Klocker recalls Meade saying: "Enough is enough. Get out of the vehicle." Ex. C-4, Tab 24, p.18. Because he sensed Meade was not getting through to Meservey, whose tone was belligerent, Officer Klocker eventually took out his Taser and asp and was preparing to break out the passenger side window when he noticed that Meade also had a Taser out. Klocker says he then headed to the driver's side of the vehicle in anticipation of helping Meade pull Meservey out the driver's door. Klocker believes Meade did warn Meservey that he was going to use the Taser. Ex. C-4, Tab 12, p.12.

When Meade discharged his Taser, Officer Klocker saw Meservey stiffen up, but then recover quickly. Asking Meade "why the fuck did you do that?" Meservey

reached for the gearshift, and started the Corvette.<sup>8</sup>

Klocker was worried that Meservey would reverse and “t-bone” the patrol car, so he headed to the patrol car planning to turn it so the front push bar would face the rear bumper of the Corvette. Klocker believes he advised Meade of this intent.<sup>9</sup> Before Klocker reached the driver's side door of the patrol car, the Corvette went forward into the chain link fence. After impact with the fence, Klocker believes the Grievant was still yelling to Meservey to get out of the vehicle. Ex. C-4, Tab 24, p.18.

Klocker was familiar with the lot and knew there was a parking curb in front of the Corvette so he changed plans and started heading to back towards the passenger side of the Corvette to break the window and apply OC. As he reached the trunk area of Meade's patrol car, Klocker could see the Corvette moving, as if Meservey was revving the engine. Klocker is not sure, but also thought he saw the backup lights come on. Ex. C-4, Tab 24, p.7. As the Corvette was rocking, Klocker believes Officer Meade took a couple of steps backwards and said

---

<sup>8</sup> Officer Klocker does not recall the car's engine being on until after the tasing, but Meade and nearly all the witnesses believed the Corvette's engine had been running before the Taser application. Ex. C-4, Tab 19.

<sup>9</sup> The Grievant does not recall any conversation with Klocker. Officer Meade contends he thought Klocker remained off the right rear corner of the Corvette throughout the whole incident.



something like “Enough is enough. Time to end this.” Ex. C-4, Tab 12, p.16.

Meade then drew his firearm, and started shooting.

### **The SMART Investigation**

Officers Meade and Klocker were transported separately to the EPD's North Precinct. Because this was an officer-involved shooting, a SMART team conducted the ensuing investigation, which included interviews of all civilian witnesses as well as Officer Klocker.<sup>10</sup> Officer Meade was asked to provide a voluntary statement, but declined to do so.

An autopsy of Mr. Meservey indicated his blood alcohol level was over three times the legal limit and his death resulted from multiple gunshot wounds. SMART photographs taken at the scene indicate that after the shooting, Meservey's Corvette was tightly wedged between the fence and the parking curb with the vehicle's front wheels between the curb and the fence. The Corvette had an automatic transmission, whose gear shift was located between the R (reverse) and N (neutral) positions. The Corvette and adjacent Land Rover were still closely parallel after the shooting.

The Corvette was processed by forensic scientists from the Washington State Patrol Crime Laboratory Response Team and a bullet trajectory analysis

---

<sup>10</sup> SMART is a unit comprised of detectives from various Snohomish County law enforcement agencies as well as the Washington State Patrol.

indicated that Officer Meade's maximum distance from the Corvette was no greater than 6-7 feet. This maximum distance would place the Grievant approximately 3-1/2 feet to the rear of the Corvette and 3-1/2 feet off the driver's side. The close proximity of the fired bullet casings is consistent with a relatively close firing position. A trajectory analysis by SMART indicated that four bullet holes were clustered in the upper part of the driver's seat, and four shots were clustered to the middle right of the driver's seat.

### **The Criminal Trial and Civil Suit**

The SMART Final Report was submitted to the Snohomish County Prosecutor's Office to determine whether a crime may have been committed. As the result of that review, Officer Meade was criminally charged with Second Degree Murder and First Degree Manslaughter. At a criminal trial that commenced on April 14, 2010, Officer Meade claimed he acted in self-defense and was eventually found not guilty on both charges.

RCW 9A.16.110 obligates the State of Washington, in some circumstances, to reimburse criminal defendants for all reasonable costs of defense. The reimbursement statute required the jury to render a special verdict regarding the question: "Did the defendant Troy Meade prove by a preponderance of the evidence that the use of force was lawful?" The jury's answer was no, so liability

for the Grievant's defense costs remained with the City of Everett. Those defense costs totaled \$241,614. Ex. C-10.

Before the criminal trial commenced, Mr. Meservey's daughter had filed a civil lawsuit for wrongful death, claiming up to \$15 million in damages from the City. In February 2011, the suit was settled with the City agreeing to pay \$500,000. In addition to that settlement amount, the City incurred defense costs totalling \$485,712. Ex. C-10.

### **The OPS Investigation**

Once criminal charges and the civil lawsuit had been resolved, Chief of Police James Scharf authorized the Office of Professional Standards ("OPS") to conduct a fact-finding investigation into whether the Grievant's actions on June 10, 2009 had violated applicable EPD policies.<sup>11</sup> The investigation was conducted by OPS Detective Debra Coleman under the supervision of OPS Inspector Peter Grassi. During the investigation, Officer Meade was interviewed and had the opportunity to provide any information he felt was relevant to the investigation. The OPS Final Report, along with three binders of referenced documents, was submitted to Chief Scharf on June 3, 2011 for review.

---

<sup>11</sup> Policies potentially violated were: 4.46 (Code of Conduct / Canons of Ethics); 4.48 (Committing Unsafe Acts or Endangering Self or Others); 4.58 (Knowing, Observing, and Obeying All Directives, Rules, Policies, Procedures, Practices and Traditions); 4.60 (Unbecoming Conduct); 15.3 (Use of Force Policy); and 15.4 (Use of Deadly Force Policy).

### **The Termination Decision**

On June 17, 2011, Chief Scharf made a finding that five of the potential policy violation should not be sustained. However, Chief Scharf sustained a Use of Deadly Force violation. On June 22, 2011, the Chief issued notice to Officer Meade of the key OPS findings and Chief Scharf's decision that termination was the appropriate discipline for sustained misconduct.

Officer Meade exercised his right to a Loudermill meeting with the Chief, and delivered a written rebuttal to the EPD in advance of that meeting.<sup>12</sup> In his rebuttal, the Grievant contended that the jury's special verdict not to grant him financial restitution for his court costs was based inadequate instruction and confusion. Officer Meade insisted he believed he and Officer Klocker were in imminent danger of being run over by a high powered sports car operated by an extremely uncooperative and intoxicated driver. The Grievant contended he felt a legal obligation to prevent Meservey from illegally operating his vehicle under the influence of alcohol and that once Meservey started his vehicle, he was attempting to commit the felony of attempted vehicular assault. Meade said he regarded the vehicle as a deadly weapon, and had nowhere to go once it was coming back at

---

<sup>12</sup> The U.S. Supreme Court has held that a tenured public employee is entitled to "oral or written notice of the charges against him, an explanation of the employer's evidence and an opportunity to present his side of the story." Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985)("Loudermill")

him. The Grievant contended the incident escalated so fast it was impossible and unreasonable for him to take his eyes off the threat and start looking for an exit.

Meade denied making statements that Klocker had attributed to him; noting that Officer Klocker had changed his statements regarding the incident. The Grievant contended Klocker's statements, and his perceptions of when deadly force should be used, were not reliable. The Grievant noted that there were civilian witnesses who agreed with Meade's account of events the night of June 10<sup>th</sup>. Ex. C-2.

After the Loudermill meeting was conducted, Chief Scharf issued a final decision on June 30, 2011. The Chief decided to discharge Officer Meade effective July 1, 2011 for unacceptable conduct. A notice of termination sent to Officer Meade on June 30, 2011 described the Chief's concerns in great detail and included the following comments:

. . . . You were found not guilty of the criminal charges. However, the jury also determined that you did not prove by a preponderance of the evidence that your use of force was lawful. . . .

. . . . It is inexplicable that you failed to utilize different force options or to simply move further out of the way of Mr. Meservey's vehicle and reassess the situation; instead, you precipitately used deadly force. In particular, you failed to comply with the requirements of Section 15.4 of the Everett Police Department Policy Manual, entitled "Use of Deadly Force. . . . Your actions were incompatible with the Department's priority of protecting and preserving human life.

\* \* \* \*

One of the fundamentals of law enforcement training is to seek cover or concealment to protect yourself from a threat. In lieu of

cover, you are trained to move in a manner that minimizes your exposure to a threat. You are also trained to establish an appropriate distance between yourself and a threat. Those basic concepts are regularly reinforced through firearms and defensive tactics training. Engaging or facing a threat is unacceptable when doing so tends to create a need to use deadly force.

\* \* \* \*

I am troubled by your trial testimony regarding use of force alternatives you opted not to use on June 10: [citing testimony]

\* \* \* \*

. . . . The vehicle hit the fence to the front and may have rocked backward, blocked by the parking curb. It was then that you moved or "jumped" back to get away from the vehicle. . . . Rather than continue moving backward to get behind Cover and create more distance between you and the threat, you remained in place and shot Mr. Meservey.

At the point of the shooting, by your own admission you were not located directly behind Mr. Meservey's vehicle, but offset from the left rear corner and mere inches away from cover behind the SUV located next to Mr. Meservey's vehicle. . . .

Your use of deadly force was not necessary. The Taser was not the only reasonably effective alternative available to you. Hand strikes, pain compliance techniques, and the use of your asp in the collapsed position were all available to you. Cover Officer Stephen Klocker was on scene and carried OC spray on his duty belt, although a lack of communication with him evidently precluded you from knowing that. Moreover, you were positioned safely behind and off to the left side of Mr. Meservey's vehicle, and thus you could have stepped behind the cover of the SUV next to Mr. Meservey's vehicle to ensure your protection, either after the tasing or earlier. Then you - and Officer Klocker - could have disengaged, reassessed the situation, and formulated a strategy. For one thing, you could have had Officer Klocker move a patrol car so that the push bars were up against the back of Mr. Meservey's vehicle.

\* \* \* \*

The highest priority of law enforcement is to protect human life and safety. To that end, it is imperative that prudent, available options be exhausted before deadly force is utilized.

Ex. C-3.

The EPOA filed a grievance on behalf of Officer Meade on July 1, 2011, contending the City lacked just cause for the Grievant's discharge. When the parties were unable to resolve the dispute during subsequent steps of the contractual grievance procedure, the EPOA invoked arbitration. The contractual issue of whether just cause existed for termination was then litigated and submitted to this Arbitrator for resolution.

RELEVANT CONTRACT LANGUAGE

**ARTICLE 9 - GRIEVANCES**

\* \* \* \*

9.3.4 The Everett Police Officers Association shall be the exclusive representative of any aggrieved employee. Pursuance of any and all grievances shall be determined exclusively by the Association in conjunction with the procedures established in this Agreement. . . .

9.4 Arbitration of Grievances.

9.4.1 The arbitration board shall consist of three persons: One (1) to be named by the Association, one (1) to be named by the City, and one (1) to be selected by these two (2) arbiters. . . . The Arbitration Committee shall observe the timeframes provided within the Rules for Voluntary Arbitration of the American Arbitration Association. The cost of arbitration shall be borne equally by both parties, and each party shall pay its respective representatives' or attorneys' fees. The City and the Association agree that the decision of this committee shall be final and binding upon both parties.

9.4.2 The arbitration committee shall render its decision solely based on the interpretation and application and provisions of this Agreement. Neither the arbitration committee nor any other person or persons involved in the

grievance process shall have the power to negotiate new agreements or to change any of the present provisions of this Agreement.

9.4.3 All time limits in this procedure shall be maximum.

## **ARTICLE 27 - VACANCIES AND PROMOTIONS**

\* \* \* \*

27.3.1 Employees shall be disciplined only for just cause, provided that employees during their probationary period upon hire may be discharged at will. . . . .

### CONTENTIONS OF THE PARTIES

The parties' respective arguments, although presented in much more detail to the Arbitrator, can be summarized as follows:

#### *Association*

1. Although this is a tragic case, the fact that a man died does not change the Arbitrator's function to determine whether just cause for Officer Meade's termination existed. The City bears the burden of proving just cause. By using the City's Use of Force Policy as the basis for discharge, the City is effectively charging the Grievant with a crime, so the Arbitrator should require proof beyond a reasonable doubt. That burden was not met.

2. To support its case, the City is asking the Arbitrator to rely upon statements of witnesses who did not appear at the hearing. The Chief testified that he relied upon some of the witness statements included in the OPS binders when making his decision. Reliance upon such hearsay evidence should not suffice to sustain the City's burden of proof. Instead, the failure to call available witnesses allows an arbitrator to draw a negative inference that the witness, if called to testify, would have had testimony adverse to the City's position.

3. The City should also be precluded from shifting the burden of proof to the Grievant. The special jury verdict does not merit preclusive effect because the burden of proving an entitlement to reimbursement from the State rested upon Officer Meade. Moreover, the record indicates jury confusion over instructions received from the judge, and the judge denied the jury's request for additional



information. The verdict does not satisfy the elements for invoking the doctrines of either res judicata or collateral estoppel.

4. Just cause requires a full, fair and complete investigation before an employee is disciplined or discharged. That was not provided in the Grievant's case because Chief Scharf did not consider information that was favorable to Officer Meade. He only considered material referenced in the final report prepared by OPS. OPS failed to include testimony by witnesses who saw reverse lights flash on the Corvette, or the car start moving backwards under power; failed to include trial testimony of four witnesses who testified about use of force issued and how EPD officers had been trained. The omitted material would likely had led Chief Scharf to reach a different conclusion because he lacked knowledge about how police officers in general, and EPD officers specifically were trained.

5. When a highly intoxicated individual made a split second decision to turn his vehicle into a deadly weapon, Section 15.4 of the EPD Policy Manual authorized the Grievant to use deadly force. Officer Meade objectively and reasonably believed that there was an imminent threat of death or serious physical injury to him, Officer Klocker, and the general public. The applicable standard is what a reasonable police officer with the same knowledge, experience, and training would have done. As Chief Scharf acknowledged during his testimony, it is unfair to use 20/20 hindsight, yet that is what he did.

6. A reasonable police officer with the same knowledge, experience, and training would have known that: (a) the driver was actively resisting orders not to drive his vehicle; (b) vehicles can become deadly weapons; (c) police officers have no duty to retreat; (d) retreating from a moving vehicle can lead to an officer's serious physical injury; (e) EPD officers (and officers in general) are trained not to reach into a vehicle when making contact with a resistive driver; (f) EPD officers (and officers in general) are trained that striking a suspect's head with a blunt instrument is an application of deadly force; (g) EPD officers (and officers in general) are trained that the effectiveness of OC spray diminishes exponentially with the degree of intoxication from either alcohol or drugs. Chief Scharf was not an expert on the use of deadly force and not familiar with the training EPD officers received. Ronald McCarthy, a court qualified expert in the deadly use of force by police officers reviewed the same materials as the Chief and would have concluded that Officer Meade did the right thing under the circumstances. Chief Scharf's conclusion that the Grievant had less lethal alternatives, is contrary to how police officers in general and EPD officers specifically are trained and operate.

7. Officers are trained that they have no duty to retreat. Had the Chief checked with an expert, he would have learned that retreat was not a viable alternative for at least two other reasons. The Grievant had a responsibility to protect Everett citizens from the potential harm of a highly intoxicated individual operating a deadly weapon on the street of Everett. Moreover, Officer Meade was not in a position where he had the time to safely retreat. All of the other supposed alternatives were not viable. Using the ASP baton, applying OC spray, grabbing the driver's arm) required the Grievant to reach into the Corvette, which EPD officers had been trained not to do.

8. The City contends that escalation from a Taser application to deadly force in 21 seconds is unreasonable, but the Grievant actually had much less time to decide whether to use deadly force. That decision had to be made when the Corvette's backup lights went on, which Mr. McCarthy estimated was only a couple of seconds. The contention that the Grievant should have pulled his patrol car closer to the Corvette is simply Monday morning quarterbacking. EPD officers are trained to park some distance from other vehicles in order to prevent their vehicles from becoming hazards due to erratic actions by the drivers being stopped. Had the Grievant opted to return to his patrol car and re-position it after verifying that the Corvette driver was the subject of the call for service, he would have given a highly intoxicated individual the opportunity to drive away. Given the information known Officer Meade, such a maneuver did not make sense.

9. Since the City chose not to call Officer Klocker as a witness at the arbitration, the Arbitrator should give no weight to Klocker's opinion regarding whether the use of deadly force was necessary. The Association had no opportunity to prove his credibility, and Association witness Dr. David Klinger described research showing multiple officers involved in the same use of force event often perceive the event differently. The City likewise failed to call Detective Cunningham to testify, which denied the Association the opportunity to probe the accuracy of a diagram he prepared. Since vehicles move much faster than human beings, that diagram does not support a conclusion that Officer Meade was in a position where he had the time to safely retreat.

10. Even if the Arbitrator were to conclude that the Grievant did violate the City's Use of Deadly Force policy, the penalty of termination was too severe in light of the Grievant's long and commendable work record. Arbitrators have long held that good work records may serve to reduce or even reverse the penalty imposed by an employer. Officer Meade had the type of long and distinguished record of service that entitled him to a second chance. He had never previously been

disciplined or even received a bad evaluation. During his thirteen year career with the EPD, the Grievant had received many commendations/letters of appreciation, thank-you notes, and awards. For all of the foregoing reasons, the Arbitrator should sustain the grievance.

*City*

1. On the night of June 10, 2009, Officer Meade's conduct was both unlawful and deadly. His actions were unwise, impulsive, careless, and/or inexplicable and culminated in a needless death that could have been avoided. The Grievant failed to control the situation and overlooked numerous actions that were alternatives to the use of deadly force. As the primary officer on scene, Meade should have better utilized Officer Klocker's assistance, and when tasing proved ineffective the Grievant should have backed off and taken a less vulnerable position while considering other possible actions.

2. The Department's Use of Deadly Force Policy was violated because the Grievant could easily have taken cover so there was no "imminent threat" or "actual resistance" by Meservey. Meservey had not committed a felony, nor was he attempting to do so. Meservey had not displayed any weapon, and did not pose a serious physical threat since all Meade had to do was get out of the vehicle's way. Shooting Meservey was not the only reasonable means of protecting Officer Meade or any third party. Although technically not binding in arbitration, the jury's special verdict is entitled to great deference when assessing Meade's conduct. It should be given collateral estoppel effect on the issue of whether the use of deadly force was justified.

3. The Chief's decision was well considered and consistent with the Department's expectation that deadly force be a "last resort" utilized only after all other viable options have been utilized. The jury was instructed that "the law does not impose a duty to retreat," only because the jury could conclude that Meade had a reasonable alternative to killing Meservey, *e.g.*, moving to cover. The testimony of Robert Bragg at the criminal trial evidenced the importance of having situational awareness, and the fact that an officer cannot create jeopardy in order to justify lethal force. Officers may not have a legal duty to retreat in the fact of a threat, but they are taught to step behind barriers.

4. In his various explanations for the use of force, Officer Meade has emphasized a duty to prevent Meservey from driving away, yet he repeatedly bypassed multiple opportunities to block Meservey's car. The Grievant admitted that standard procedure is to seek cover when a threat is known, yet he failed to

seek cover when the taser proved ineffective to stop Meservey from starting the car and shifting into gear. Meade knew from experience that standing between two cars left him in a vulnerable position yet he remained in that situation when available cover was readily available. The Grievant's varying explanations have been inconsistent on certain points and contained significant admissions that support a finding of misconduct.

5. The testimony of EPOA witnesses do not support a finding that Officer Meade's actions were justified. David Klinger discussed perceptual distortions; he did not review relevant documents regarding the shooting and was not knowledgeable enough to offer an opinion of the actual shooting. The opinion of Ronald McCarthy improbably converted "reasonable" into "necessary;" reasoning that if the use of deadly force was "reasonable," then ipso facto it was necessary. The propriety of the killing is an ultimate issue for the Arbitrator. McCarthy did not qualify as an expert with knowledge superior to the trier of fact.

6. The negative consequences of Meade's conduct justified his termination. The fact that he was found by a jury to have not acted lawfully in fatally shooting Meservey means this information must be provided to the defense in any future case where the Grievant would be a prosecution witness. This "Brady" rule means the jury's special verdict, and the Grievant's June 30, 2011 termination must be revealed and makes Officer Meade a problematic witness for the prosecution in the future. That alone makes Meade unable to satisfactorily perform the full range of duties as a police officer. The same information would also be grist for discovery in any future civil lawsuit. If Officer Meade again caused serious injury or death to any citizen, the City would be exposed to major damages. Leaving him on the street would pose an unacceptable management risk.

7. The City has already incurred huge costs as a result of the Grievant's actions. If he were reinstated, how could remedial training prove sufficient or how could EPD management adequately supervise to ensure there would not be another unnecessary death in the future. EPD officers would likely regard reinstatement as authorizing aggressive treatment of DUI suspects and the community's reaction would likely be one of outrage and lack of confidence in EPD and City management. For all of the foregoing reasons, the Arbitrator should find the City had just cause for termination and the grievance should be denied.

OPINION

In Article 27, the EPOA and City have agreed that that “just cause” is required for disciplinary action. Ex. J-1, Section 27.3.1. What constitutes “just cause” has not been defined in the labor contract, but its meaning has been well established through years of labor-management jurisprudence. Just cause is a broad and elastic standard involving a balancing of interests and notions of fundamental fairness. Described in very general terms, the applicable standard is one of reasonableness:

. . . whether a reasonable [person] taking into account all relevant circumstances would find sufficient justification in the conduct of the employee to warrant discharge [or discipline].

RCA Communications, Inc., 29 LA 567, 571 (Harris, 1961); Riley Stoker Corp., 7 LA 764, 767 (Platt, 1947). The just cause standard requires an initial determination of whether an accused employee is in fact guilty of the misconduct alleged by an employer. However, the existence of just cause entails more than just proof of wrongdoing. It also involves consideration of procedural fairness, the presence of mitigating circumstances, and the severity of the penalty imposed. Civil Service Commission v. Kelso, 137 Wn.2d 166, 173-174 (1999).

It is by now axiomatic that the burden of proving “just cause” rests with the City. The standard of proof normally required in labor arbitrations is a preponderance of the evidence. For some types of misconduct, a higher burden of proof may

be deemed reasonable. The Association contends that in discharge cases when an underlying offense would constitute a crime or allegedly involves moral turpitude, arbitrators tend to require proof beyond a reasonable doubt. Some certainly do, but I do not believe that is the majority or better view.

Arbitration is not a criminal trial. The rules of procedure and evidence are typically different. My first consideration is whether the parties themselves have had a mutual understanding regarding the appropriate burden of proof. Absent that, my practice is to require clear and convincing evidence in a case like this where alleged misconduct involves a potential violation of criminal law. The clear and convincing burden of proof better balances the competing interests of an employer and employee, while recognizing the serious impact certain types of accusations have on an employee's job prospects and personal life.

**I. THE CITY CONVINCINGLY PROVED THAT OFFICER MEADE DID VIOLATE THE DEPARTMENT'S USE OF DEADLY FORCE POLICY.**

Officer Meade was terminated for "unacceptable misconduct," specifically failure to comply with requirements of the EPD's Use of Deadly Force Policy. The Association takes issue with the fact that the City's only witnesses (Chief Scharf and OPS Detective Coleman) did not have personal knowledge of events that resulted in Mr. Meservey's shooting. Because events surrounding Mr. Meservey's shooting had already been extensively litigated, much of the City's evidence was

hearsay in nature. That does not necessarily preclude consideration of such evidence. The parties contractual grievance procedure does not specify that the rules of evidence are to be applied by this Arbitrator. Absent such language, whether to admit and what weight to give hearsay evidence is left to the discretion of the selected arbitrator.

The rules of arbitration are much more flexible than those of a court of law. Whether hearsay evidence should be admitted and how much weight it deserves is left to this Arbitrator's discretion.

Although the rules of evidence exclude hearsay in a trial at law, the exclusion is not because hearsay is entirely without probative value. It has been said with some justice that the characterization of evidence as hearsay is in reality simply a criticism of the weight that should be given it. In an arbitration, the parties have submitted the matter to persons whose judgment they trust, and it is for the arbitrators to determine the weight and credibility of evidence presented to them without restrictions as to the rules of admissibility which would apply in a court of law.

Instrument Workers v. Minneapolis-Honeywell Regulator Co., 54 LRRM 2660 (1963).

The EPOA contends the City should not be allowed to rely *solely* upon hearsay evidence to meet its burden of proof. It is certainly true that arbitrators will less readily sustain discipline based solely on hearsay evidence. Any experienced arbitrator is sensitive to the reasons why the out-of-court statements of non-testifying witnesses may be suspect.

There may be serious problems with the perceptions of the absent witness; problems with the accuracy of later recollection; the veracity and/or motive of the witness may be questionable, and the language used by the out-of-court declarant may not have accurately conveyed the true facts, thus giving rise to problems of articulateness.

Hill & Sinicropi, Evidence in Arbitration 134-135 (2d ed. 1987). Cross-examination allows a party the chance to correct misstatements of fact or place facts in true perspective, to reconcile apparent contradictions, to elicit known facts or admissions that might be favorable to that party's case, and to impeach the reliability and credibility of a witness.

For the foregoing reasons, I have been mindful that witness statements given to SMART or OPS investigators were not subject to cross-examination. However, an extensive factual record was made in the Grievant's criminal trial where witnesses were subject to cross-examination by Officer Meade's retained attorney. The EPOA was not a party in the criminal trial or the civil lawsuit, so any cross-examination of witnesses was not by EPOA retained counsel, but a skilled attorney acting on behalf of the Grievant did have that opportunity. Moreover, the present case is not one where the City relies solely upon hearsay evidence to prove misconduct. It relies in large part on Officer Meade's own descriptions of his actions on the night in question. His statements prior to the arbitration are clearly admissible, and the evidence I gave the most weight was the Grievant's testimony before this Arbitrator.



**A. The Special Jury Verdict Does Not Merit Preclusive Effect.**

I do agree with the Association that the jury's special verdict in Officer Meade's criminal trial should not be given collateral estoppel effect regarding whether the Grievant's use of force was lawful and justified. The City acknowledges that verdict is technically not binding in arbitration, but contends it should be given collateral estoppel effect, which establishes that the Grievant's use of force was not lawful and thus necessarily violated Section 15.4 of the EPD Policy Manual.

The doctrine of collateral estoppel, also referred to as "issue preclusion," prevents a party from relitigating an issue determined against that party in an earlier action, even if the second action differs significantly from the first one. The party seeking the doctrine's application bears the burden of proving that:

1. The issue in the prior proceeding was identical to the issue presented in the later proceeding;
2. The earlier proceeding ended in a judgment on the merits;
3. The party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the earlier proceeding; and
4. Application of collateral estoppel does not work an injustice on the party against whom it is applied.

Christiansen v. Grant County Public Hospital District 1, 152 Wn.2d 299, 307 (2004). Those requisite elements were not established in this case because issue

preclusion is only appropriate if the issue raised in the second case involves substantially “the same bundle of legal principles that contributed to the rendering of the first judgment.” LeMond v. Dept. of Licensing, 143 Wn. App. 797, 805 (2008)

The jury's special verdict resolved the issue of whether Officer Meade was entitled reimbursement of his defense costs pursuant to a state statute. In this arbitration, I must resolve a contractual issue not a statutory one and the issues are not identical. As discussed later in this decision, the legal principles that applied to the jury's verdict are not completely identical to those that apply to the “just cause” determination I must make. That determination rests upon requirements of Section 15.4 of the EPD Policy Manual, something the jury never considered. Finally, in an arbitration where the burden of proving just cause clearly rests upon the City, it would work an injustice to give binding effect to the jury's special verdict because it resulted from a proceeding where the Grievant bore the burden of proof.

**B. Officer Meade Used Deadly Force Because He Thought The Corvette Was Reversing Towards Him.**

Officer Meade insists he fired at Niles Meservey because the Grievant believed he was in imminent danger of being hit or run over by the Corvette Meservey was driving. I credit the Grievant's assertion that he thought the

Corvette was moving back in *his* direction under power.<sup>13</sup> Meade appears to have been mistaken if he believed the vehicle was reversing at great speed, but his assertion that the reverse lights came on is lent corroboration by Officer Klocker, who also thought he saw the backup lights come on. Ex. C-4, Tab 24, p.7, 18. Klocker confirmed that Meservey was revving the engine, the car was rocking in motion, and Officer Meade was standing towards the rear of the Corvette at the time of the shooting. Ex. C-4, Tab 24, p. 7-8.

I have considered the location of the Corvette's gearshift after the shooting. Photos clearly show the gearshift had been moved out of park. Ex. U-1. The City contends the fact it was positioned between Reverse and Neutral is inconsistent with the Grievant's contention that he thought the Corvette was reversing at some speed. The problem with that assertion is the fact that there is no way to know how the gearshift's position might have been affected by the movement of Mr. Meservey upon being shot. I do believe the Grievant wrongly believed the car was reversing with any speed, but there was clearly some sort of rebound action after the car hit the fence in front of it. I can understand how that movement in conjunction with a revving motor could have contributed to a mistaken impression that the Corvette was coming backwards under power.

---

<sup>13</sup> No other individuals were in *imminent* danger, and the record is not persuasive that the Grievant reasonably believed they were.

The recollections of Officers Meade and Klocker certainly differ in some significant respects. Some of the conflicts in what they describe seem attributable to honest differences in perception or recall. Even the most sincere and truthful witnesses may have conflicting and contradictory views of events. The attention of witnesses is called to different events at different points in time. Their positions and thus ability to accurately observe incidents may differ, plus each witness views and recalls events through the prism of his/her own preconceptions. It is a rare investigation where eyewitnesses provide exactly the same version of events. That was certainly true of witnesses who gave statements to SMART investigators after the shooting.

At the arbitration, Dr. David Klinger well described the impact that sensory distortion plays in instances where police officers resort to deadly force. I well understand how multiple officers involved in the same incident often perceive and recall events differently. In the instant case, it is not surprising that Officer Klocker did not perceive as much threat as did the Grievant. Klocker was further away from the Corvette and knew about the presence of a curb that the vehicle had lunged over. As Klocker noted during his OPS interview, "I knew there was a concrete header there and was convinced that the car was effectively stuck." Ex. C-4, Tab 9, p.13. Officer Meade's knowledge base was different. He was very close to the Corvette's rear end and unaware of the curb. Thus, Meade would not

**Everett Police Officers Association / City of Everett (Troy Meade Grievance)  
Arbitrator's Opinion and Award, p. 34**

have as readily realized that the curb would be impede the Corvette's reverse movement.

I am mindful of the "enough is enough" statement Officer Klocker contends the Grievant made just before the shooting. Under oath at his criminal trial and before this Arbitrator, Officer Meade has denied doing so. The City did not call Klocker to testify at the arbitration, so this Arbitrator had no opportunity to observe his demeanor and ask some questions that came to mind when reviewing his transcribed statements. I was struck, for example, by the fact that Klocker also recalls Meade saying "enough is enough" multiple times *prior* to tasing Mr. Meservey. Ex. C-4, Tab 12, p.56-57. The record provides no reason to believe Officer Klocker would have deliberately lied about comments he believes the Grievant made.<sup>14</sup> After a stressful event, witnesses sometimes recall events out of their actual sequence. Since Chief Scharf made no mention of the alleged "enough is enough . . ." comment in his letter describing the basis for termination, I haven given that allegation no weight.

Officers have been trained that motor vehicles can become deadly weapons. Officer Meade's sense of danger was undoubtedly heightened by his experience in 2006 when he had seen first hand how another officer in a similar situation was

---

<sup>14</sup> The two officers knew one another but had rarely worked together. There is no evidence of any prior animosity.

injured by a reversing car.<sup>15</sup> The burden rested with the City to disprove the Grievant's asserted reason for shooting, and it did not convincingly persuade this Arbitrator that Officer Meade lacked a good faith concern about his own safety when he resorted to deadly force. I credit the Grievant's assertion that he thought the vehicle had become a deadly weapon headed in his direction and placing him in danger of serious injury or death.

**C. Officer Meade Did Violate An Applicable Requirement of  
The Department's Use of Deadly Force Policy.**

The critical issue in this case is whether Officer Meade had a reasonable alternative to the use of deadly force. The Department has adopted a Use of Deadly Force Policy (Section 15.4 of the EPD Policy Manual), a portion of which specifically addresses shooting into a moving vehicle. That is what the Grievant thought he was doing.

Q. Now, did you believe you were firing into a moving vehicle or a stationary vehicle?

A. A moving vehicle.

Ex. C-4, Tab 16, p.44.

---

<sup>15</sup> The testimony of EPOA witness Ronald McCarthy demonstrates why Meade had reason for concern. According to FBI statistics for the past 12-14 years, the number of police officer fatalities due to moving vehicles has ranged from three to eight per year. Tr. 439-40. The City characterizes this amount as extremely rare, but even one officer fatality is too much.

Officer Meade has described Department policy as not recommending officers shoot unless in fear for their life or the safety of others. Id. That description omits a significant part of EPD Policy Section 15.4. The relevant portion states:

Firing into a moving vehicle is *generally prohibited, except where* the officer reasonably believes that there is an *imminent threat of death or serious physical injury* to the officer or to a third party if the officer does not do so *and* that it is the *only reasonable means of protecting the officer and/or a third party*. Given that any officer's likelihood of successfully preventing the escape of a subject in any moving motor vehicle is very low, an officer choosing to fire at a fleeing vehicle must be fully prepared to justify this extreme action.

Ex. C-1 (emphasis added by italics). As can be seen from the italicized text, officers are generally "prohibited" from firing into a moving vehicle unless two (2) conditions are met. There must be both an imminent threat of death or serious physical injury to the officer or to a third party **and** shooting must be the only reasonable means of protecting the officer and/or a third party. It is the latter requirement that Officer Meade failed to satisfy.

### **Tactical Errors Placed Meade In Harm's Way**

Apart from Mr. Meservey's death, the most tragic aspect of this case is the fact that Officer Meade never needed to find himself in a position where he felt compelled to shoot. The Grievant was responding to a 9-1-1 call because Chuckwagon patrons were concerned that an intoxicated individual was going to drive away in a white Corvette. Upon noticing the white Corvette parked in the lot

behind the Chuckwagon, Meade says he realized this was probably the car he was looking for. The Grievant also acknowledges thinking "Oh, the suspect's still here." Ex. C-4, Tab 8, p.7. Officer Meade knew someone was in the car, because the flash of backup lights is what drew his attention to the car. Since the whole point of responding was to prevent the car from leaving, it is hard to understand why Officer Meade did not position his patrol car to effectively block the Corvette into the parking stall until he determined who was driving.

The Association cites a section of the FTO Manual that addresses pre-stop vehicle positioning. That section does advise stopping at a distance "which is not so close as to present a hazard due to erratic actions by the driver." Ex. C-4, Tab 46. However, it also states an officer should stop at a distance "that is not so great as to encourage escape." Id. Kirk Wiper is a lead instructor at the Police Academy. He testified that if an officer is responding to a DUI call and identifies a suspect preparing to leave a parking lot, the preferable position is bumper to bumper. Ex. U-3, p.65. During his testimony, Officer Meade acknowledged knowing that his car should be positioned close enough to prevent a suspect from driving off. Tr. 276. He admitted parking the way he did was contrary to training and left the Corvette driver with enough space to reverse and potentially flee.

Q. Parking your car the way you did it was contrary to training for both a tactical position as well as a defensive position?

A. Yes. . . . .



Ex. C-4, Tab 11, p.99:8-11.

Officer Meade says he did not initially think about the possibility that the Corvette might back out.

Q. And did you have any concerns at that point that the car might try to back out?

A. At that point, I didn't. I wasn't even thinking about it. . . .

Ex. C-4, Tab 8, p.8:15-17. After making contact with the driver, Meade says he focused on talking Meservey out of the car. Even assuming the Grievant did not think blocking the car would be necessary upon his arrival, it certainly should have become a tactical measure once Officer Klocker arrived on scene. By then, Meade knew how intoxicated and uncooperative Meservey was.

Meade acknowledges that as the "primary" officer, he was in charge at scene, yet Meade never gave Klocker any direction other than asking him to "stand by." The Grievant finds fault with Klocker for initially starting to drive away, but it appears that resulted from a misunderstanding over Meade's hand motion. What this Arbitrator finds significant is the fact that Meade thereafter did not take advantage of Klocker's arrival to block the Corvette more effectively.

Officer Meade testified that when initially approaching the driver's side door of the Corvette, he was mindful of the 2006 incident and very concerned about standing between the Corvette and adjacent SUV. If he was so concerned about his vulnerability between the two vehicles, it is hard to understand why Meade did

not ask Klocker to completely block Meservey's vehicle. Meade's patrol car was still running and its door was unlocked. Only a partial turn of the steering wheel would have been needed to angle the patrol car bumper close enough to block the Corvette from reversing. Doing so would have eliminated the possibility that the Corvette could be turned enough to pinch Meade between the cars. There was clearly enough time to either block the Corvette himself, or direct Officer Klocker to do so. Officer Meade never satisfactorily explained his failure to utilize either tactical measure.

At the arbitration, the Grievant testified that he had his hands full and expected Klocker to come up with solutions on his own.

My hands were full with Mr. Meservey. He was yell - - raised voice, cussing and swearing at me, and that just drew my attention to him. . . . It's pretty easy to see that I'm dealing with a drunk in a car who's angry.

Tr. 311-312. The problem seems to have been that Officer Meade spent too much time arguing with someone he recognized was not acting rationally instead of taking tactical steps to ensure the car had nowhere to go. The Grievant has repeatedly stated that he felt his primary duty was to prevent Meservey from driving away. Yet he bypassed multiple opportunities to do that without resort to deadly force.<sup>16</sup>

---

<sup>16</sup> Officer Meade also failed to effectively use his vehicle lights to better control the encounter with Mr. Meservey. At the arbitration, Meade acknowledged that the

### **Protective Cover Was Readily Available**

Because he failed to use available time to block Meservey's car, Officer Meade subsequently concluded he was in danger when Meservey seemed to be reversing in his direction. At that point, the Grievant contends he had no viable alternative to using deadly force. Chief Scharf did not agree and neither can I. An especially tragic aspect of this case is the fact that protective cover was readily available if the Grievant had better prepared to use it.

The Grievant contends that after the Corvette first lurched forward, he did not know how close he was to protective cover. In reality, all he had to do to get out of harm's way was step around the corner of an SUV right beside him. Ex. C-4, Tab 11, p.172. As Officer Meade approached the Corvette, it would have been easy to pace off the number of steps it would take to reach cover behind the SUV, yet Meade failed to do so. "I was never aware of where the back of that SUV was." Ex. C-4, Tab 11, p.152.

Police officers are trained to have situational awareness and identify avenues of escape or cover. A text that has served as a common source of

---

emergency lights on a patrol car are used to indicate to someone that they are not free to leave, yet he did not activate those lights when parking behind the Corvette. Tr. 301. At the criminal trial, police trainer Kirk Wiper described the tactical advantage of using a bright light to affect a driver's ability to see. Ex. U-3, p.65 (Wiper). The way Meade parked his patrol car and failed to reposition it meant the spotlight could not be used to both better illuminate the Corvette and blind Meservey, which is an officer safety tactic. Ex. C-4, Tab 11, p.104.

information for PO's is entitled: "Street Survival, Tactics for Armed Encounters."

On page 45 in a chapter entitled "Approach to Danger," the author wrote:

To wait until you need to draw and fire your gun to think about survival tactics is like waiting until you're coughing up blood to think about an annual physical check-up. . . . By properly planning your approach to a call, you may be able to prevent a shooting from occurring.

Ex. U-3, p.58.

Robert Bragg is a full-time instructor at the Washington State Criminal Justice Training Commission ("Police Academy"). He teaches physical force and use of force decision-making. At the criminal trial, Bragg testified that taking cover is a tactical option and an officer cannot create jeopardy in order to use force. Ex. U-2, pp. 20-21, 25. If an officer is concerned about a car moving, "taking a step or two to the side and then giving myself time to make other decisions" is preferable to standing one's ground. Id. at 31-32. Kirk Wiper concurred. He attested to an officer's need to always have in mind a "what-if" plan, which includes identifying escape routes. Ex. U-3, pp.2-5.

Meade's deadly force experience in 2006 gave him special reason to plan an escape route. While approaching Meservey's Corvette, the Grievant says he had the 2006 incident in mind and was thinking about the fact that standing between two parked cars could be dangerous. "I make myself aware of it, of that situation, that it's a danger to be between two cars if things were to go bad." Tr. 303-304.

When Meservey started the Corvette engine again shortly before Meade radioed Dispatch to clear the air, the Grievant says he was concerned about the vehicle backing out on him. Ex. C-4, Tab 11, p.64. The Grievant had been trained to have situational awareness and should have been able to realize how close he was to stepping behind an adjacent SUV once he realized Meservey was attempting to drive away.

### **There Was Sufficient Time To Take Cover**

Officer Meade contends the incident escalated so fast, it was impossible and unreasonable for him to take his eyes off the threat and to start looking for an exit. I appreciate the fact that events unfolded quickly after Officer Meade closed the air. Chief Scharf was critical of the fact that in a mere 21 seconds, Meade escalated from tasing Meservey to firing eight rounds at him. That does not mean resort to deadly force was necessarily unreasonable.

I credit the opinion of McCarthy that Officer Meade only had a few seconds to decide whether to use deadly force. However, before closing the air, the Grievant had been in contact with Meservey for at least nine minutes. There had been enough time for Meade to talk briefly with the woman who called 9-1-1, for Klocker to park his car and walk back to the lot, and for Klocker to reposition himself at Meade's patrol car in preparation to move that vehicle. The assertion

that Meade had no time or opportunity to glance back to see how far away cover would be behind the SUV is simply not credible.

Neither is the assertion that there was insufficient time to take cover when tasing proved ineffective. The record does indicate that shots were fired soon after the Corvette impacted the chain link fence in front. Ex. C-4, Tab 19, p.4. Even before that impact, the Grievant had started moving backwards. He did so upon seeing Mr. Meservey get his hand on the Corvette's gearshift.

Q. Okay. What did you do when he got his hands on the gearshift lever?

A. I realized he was going to get it in gear and I thought, holy crap, I have got to get out of here because he is going to run me over.

Ex. C-4, Tab 16, p.30:11-12.

By his own admission, the Grievant had time to take at least a couple of steps backwards when the car lurched *forwards* into the fence. He only needed to take one step more to reach cover behind the SUV. During his OPS interview, Officer Meade acknowledge that the position from which he started shooting was "very, very close" to the SUV's back bumper. Ex. C-4, Tab 8, p. 23. "It's back behind me, maybe, oh, six inches or so." *Id.* at 22. There was enough time to take cover for an officer who had properly identified an escape route. Instead, Officer Meade remained in a vulnerable location where he then felt it necessary to use deadly force because of a mistaken impression that he was about to be run

over. Retreat behind available cover is clearly a reasonable means of protecting an officer instead of shooting into a moving vehicle.

The Association offered evidence that police officers in Washington State are trained that they have no duty to retreat. That may be true as a general rule, but EPD officers are also trained in their Department's Use of Deadly Force Policy. Municipalities are free to adopt specific performance expectations for their commissioned officers. The Department can reasonably decide to adopt more restrictive conditions before officers shoot into moving vehicles.<sup>17</sup> It has done so with Policy Section 15.4.

Taking cover did not mean Niles Meservey would necessarily manage to leave the lot and endanger Everett citizens. At the time Officer Meade decided to use deadly force, there was potential harm to citizens but not "imminent" harm. Taking cover would buy time to consider other options and see what happened when Meservey reversed. As intoxicated as he was, it seems likely that Meservey would have struck some part of the Grievant's patrol car and had difficulty exiting the lot. While he was trying to do so, there would have been an opportunity to yell that he should stop and/or that officers would shoot. There would also have been

---

<sup>17</sup> RCW 9A.16.040 regarding "Justifiable Homicide or Use of Deadly Force" specifies that the statute is not to be construed as "preventing a law enforcement agency from adopting *standards pertaining to its use of deadly force that are more restrictive than this section.*" RCW 9A.16.040(4)(b)(emphasis added by italics).

more opportunity for Meservey to see the Grievant with his gun drawn, which may have caused even a highly intoxicated individual to stop trying to drive away.

### **A Reasonable Officer Would Have Taken Cover**

Ronald McCarthy is a court qualified expert in police use of deadly force. I have considered Mr. McCarthy's opinion that Meade's use of deadly force was necessary and reasonable. McCarthy's focus was mainly on the point in time when Officer Meade made the decision to shoot. My focus has been broader because mistakes committed prior to the use of deadly force impacted whether Officer Meade failed to use an alternative that was reasonably available. McCarthy felt retreat was not reasonable because he viewed public safety is a priority above officer safety. I read EPD Policy Section 15.4 as imposing a specific precondition before firing into a moving vehicle.

As noted earlier in this decision, I understand that a police officer's perception and reaction is impacted by the training and experience he/she has previously had. Because of having seen a fellow officer injured in the 2006 incident, Officer Meade seems to have become pre-conditioned to more readily use deadly force while ignoring another lesson he should have learned, *i.e.*, to plan an escape route if the driver he was approaching proved uncooperative. A reasonable police officer, who had gone through a similar experience, would have learned the latter lesson and applied it just three years later.



**Everett Police Officers Association / City of Everett (Troy Meade Grievance)  
Arbitrator's Opinion and Award, p. 46**

Having arbitrated police cases for over thirty years, I am well aware that police officers have to make quick decision in unpredictable situations. They are “forced to make split-second judgments - - in circumstances that are tense, uncertain, and rapidly evolving. Graham v. Connor, 490 U.S. 386, 397 (1989). Officer Meade was clearly faced with a completely uncooperative individual, who was actively resisting the Grievant's attempts to prevent him from operating a vehicle and endangering the public. Nevertheless, given the extent of Officer Meade's experience and training, as well as lessons he should have applied from his 2006 use of deadly force experience, the City could reasonably expect the Grievant to utilize available cover instead of fatally wounding Mr. Meservey.

The Association effectively rebutted most of the non-lethal options that Chief Scharf mentioned in his letter of termination, but utilizing available cover was not one of them. A “reasonable” police officer with the same knowledge, training and experience as Officer Meade would have known: (a) to use his patrol car to block the Corvette from leaving; (b) to have more situational awareness regarding his location in relation to the back end of the SUV where protective cover was available; (c) to utilize that cover and gain time to consider other potential options before resorting to deadly force on an individual he knew was so intoxicated and not acting rationally. Because taking cover was a reasonable means of protecting

Officer Meade, his failure to utilize that alternative was in violation of EPD Policy 15.4's provisions about firing into a moving vehicle.

## **II. THE CITY CONDUCTED A FAIR INVESTIGATION.**

The adequacy and fairness of an investigation is a recognized component of just cause. I have therefore considered various Association criticisms of the Department's investigation, such as the fact that Chief Scharf only considered material referenced in the final report prepared by OPS.<sup>18</sup> I do not find any deficiencies so prejudicial that they justify overturning the Grievant's discharge.

The U.S. Supreme Court has ruled that a tenured public servant is entitled to "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985). Arbitrators have incorporated similar due process requirements into the "just cause" standard for discipline or discharge.

Chief Scharf reviewed a considerable amount of evidence, and the EPOA had notice of *all* the material that had been collected, including testimony given at the Grievant's criminal trial. Prior to or at his Loudermill meeting with the Chief,

---

<sup>18</sup> Chief Scharf did not consider other materials the OPS had available but did not include in the binders provided to Scharf. Tr. 113-114.

Officer Meade and his EPOA representative had an opportunity to draw the Chief's attention to any omitted witness statements or other exculpatory evidence they felt should be considered in addition to the documents included in OPS binders. I find no fault with the scope and sufficiency of the investigation that was conducted.

### **III. THE CITY HAD JUST CAUSE FOR TERMINATION.**

Even though Officer Meade made some serious mistakes, that does not automatically justify his termination. Once alleged misconduct is proven, a final consideration, unless contractually precluded, is whether the imposed penalty reasonably relates to the seriousness of any proven offense and the employee's prior record. It is well established that an arbitrator has the authority to reduce a penalty imposed by management. Arbitrators vary, however, in their descriptions of the circumstances under which they can properly do so.

This Arbitrator, like most others, will change a penalty if the facts and circumstances of a case indicate that the discipline imposed is clearly out of line with generally accepted standards of discipline. However, I agree with the arbitral view that deciding officials should be given some latitude for the reasonable exercise of discretion since the minds of equally reasonable men or women can differ.

A consideration which would weigh heavily with one man will seem of less importance to another. A circumstance which highly aggravates an offense in one man's eyes may be only slight aggravation to another. If an arbitrator could substitute his judgment and discretion for the judgment and discretion honestly exercised by management, then the functions of management would have been abdicated, and unions would take every case to arbitration. The result would be as intolerable to employees as to management.

Stockham Pipe Fittings Co., 1 LA 160, 162 (1945). In recognition of this, some arbitrators have developed the concept of a range of reasonableness.

Within a reasonable range of penalties the Company may exercise discretion as to the particular one to be selected. ... If the penalty for a particular violation may reasonably range from one week to one month's layoff, for example, two different persons might very well choose two different penalties; ... *[the arbitrator's] power is only to modify penalties which are beyond the range of reasonableness, and are unduly severe.*

St. Clair County, 80 LA 516, 519 (Roumell, 1983).

Officer Meade had never received any prior disciplinary action and was a well regarded officer in the Department. For some types of misconduct, that prior good record would make resort to termination too severe. However, the more serious an offense, the less protection an employee's prior good record will provide to an offending employee. Piedmont Publishing Co., 97 LA 739, 741 (Nolan, 1991). In the instant case, the City would be running the risk that Officer Meade might again prove too quick to resort to deadly force before considering other viable alternatives. The City has a legitimate concern about retaining someone whose own negligence and breach of policy led to an unnecessary death.

As this case demonstrates, the City incurs considerable liability when its police officers overreact or act precipitously and cause serious injury or death to others. The cost of defending Officer Meade in the criminal case, defense of the civil lawsuit against the City, and settlement of the civil suit exceeded \$1.25 million. That is not a consideration that becomes relevant if Officer Meade acted reasonably. However, once misconduct is found to have occurred, City management has a legitimate basis for concern about future costs should an employee once again prove too quick to resort to deadly force in a situation where it was likely avoidable.

I have considered whether further retraining would minimize premature resort to deadly force in the future, but the Grievant had already received extensive training that should have resulted in better control of the incident with Niles Meservey. In addition to the training regular officers receive, Officer Meade had an additional forty (40) hours of training at the Police Academy before becoming an FTO. He was not only very familiar with the Use of Deadly Force Policy, he trained new EPD officers in that policy. As a traffic officer for at least eight years, Officer Meade also had more than the usual amount of expertise in dealing with DUI drivers. He knew highly intoxicated persons are commonly uncooperative and likely to act irrationally. Because of his 2006 experience, Officer Meade had more reason than most officers to know he should block

Meservey into the parking stall or identify an escape route when he failed to do that. Yet, at the arbitration Officer Meade evidenced little recognition of how he might have better handled the situation and perhaps avoided the use of deadly force.

The Grievant initially insisted that he had done nothing wrong, and would probably act the same if faced with a similar situation in the future. Tr. 351, 355. Officer Meade did not seem to recognize the importance of prior situational awareness and forethought about an escape route. He was loathe to acknowledge any tactical mistakes, and when pressed about what he would do differently if in the same situation, the first thing that came to his mind was not volunteering to take the DUI call. Tr. 352. It took awhile before the Grievant reluctantly acknowledged that perhaps he could have positioned his patrol car a little better. Tr. 353, 357-58. Frankly, it is hard to second guess Chief Scharf's decision when this Arbitrator was left feeling little assurance that Officer Meade would better handle a similar situation in the future.

Officer Meade testified that he wants to remain an EPD officer because he believes he is an honorable man. I do not doubt he tries to be, but even honorable men or women make mistakes. The record is convincing that Officer Meade made significant mistakes in how he responded to the DUI call on June 10, 2009; mistakes that resulted in violation of the EPD's Use of Deadly Force policy. The

consequences were so tragic, costly and avoidable that the City should not be required to risk a recurrence.

**Conclusion:** Officer Meade shot at a vehicle he believed was reversing in his direction. Department policy prohibits shooting into a moving vehicle unless there is no other reasonable means of protecting an officer or third party in imminent threat of serious injury or death. Officer Meade did have a reasonable alternative, *i.e.*, protective cover readily available behind an adjacent SUV. By failing to use that alternative, Meade violated applicable provisions of the EPD's Use of Deadly Force Policy and caused a civilian death that could have been avoided.

I reach this conclusion with regret, because I respect the prior years of good service that Officer Meade provided to the Department. The citizens of Everett should as well. For some types of misconduct, Officer Meade's long record of good service would make termination too severe. However, there is insufficient reason to believe that further training or experience would preclude Officer Meade from using deadly force too precipitously in the future. Termination may seem overly severe to the Grievant and his supporters, but Mr. Meservey suffered an even more extreme sanction. The City had just cause to conclude that the Grievant should no longer have the legal authority to use deadly force as one of its commissioned officers. The grievance is therefore denied.

AWARD

After careful consideration of all oral and written arguments and evidence,  
and for the reasons set forth in the foregoing Opinion, it is awarded that:

1. The City did have just cause to terminate Troy Meade. The grievance is therefore denied.

Dated this 9th day of June, 2012 by



---

Janet L. Gaunt