

State of Connecticut  
State Board of Mediation and Arbitration

In the Matter of	:	Case No. 2021-A-0368
	:	
Town of Ledyard	:	
	:	Date of Award
-and-	:	September 23, 2022
	:	
AFSCME Co. 4, Local 2693L	:	Hearing Dates:
	:	December 17, 2021
	:	January 20, 2022
	:	January 22, 2022
	:	January 24, 2022
	:	January 25, 2022
	:	February 1, 2022
	:	March 21, 2022
	:	March 28, 2022

**AWARD**

PANEL MEMBERS:

Dennis C. Murphy, Esq., Chair and Public Member  
Kevin Murphy, Labor Member  
Michael Culhane, Management Member

Lorin Dafoe, Esq., representing the Union  
Christopher E. Engler, representing the Town

### **Procedural History and Issue**

This is a dispute between the Town of Ledyard (Town) and AFSCME, Co. 4, Local 2693L (Union), concerning the termination of Bobby Kempke (grievant) from employment with the Town. After due notice, hearings were held on December 17, 2021, January 20, 2022, January 22, 2022, January 24, 2022, January 25, 2022, February 1, 2022, March 21, 2022 and March 28, 2022, where both parties had opportunity to present evidence, witness and arguments, and to cross-examine same. The parties filed post hearing briefs and reply briefs.

The parties stipulated to the issue before the Panel as follows:

Was there just cause to terminate Bobby Kempke's employment with the Town of Ledyard? If not, what shall be the remedy? (Joint Ex. A).

### **Relevant Regulatory Provisions**

General Order 20-01 Sec. 4(c)

"[a]ll officers are prohibited from the use of a chokehold or other method of restraint applied to the neck area of a person, including but not limited to (1) Arm bar hold, (2) Carotid artery hold, (3) Lateral vascular neck restraint, (4) Neck Restraint or hold with a knee or other object is prohibited." The use of the neck restraint "may only be used when the use of deadly physical force is authorized based on immediate circumstances." (Id.) Deadly physical force –and thus, a neck restraint - may only be used when the officer fears imminently for the safety of themselves or others. (Joint Ex. 30 at p. 4).

### **Findings of Fact**

1. On the night of January 18, 2021, there were four officers and one sergeant on duty in the Town of Ledyard. (Joint Ex. 11.) The Town of Ledyard dispatch center received a call from a woman requesting a wellness check on her friend, Jacqueline LaBatte, (LaBatte) because LaBatte expressed suicidal ideations via text message. Officers Kyle Dugas (Dugas) and Rick McSwain (McSwain) arrived on scene first (Testimony of McSwain; Joint Ex. 22). The grievant also responded to the LaBatte residence.<sup>1</sup> (Joint Exhibits 11, 22.)

2. They first encountered LaBatte's husband who indicated that LaBatte had been consuming alcohol and was in her bedroom. (Joint Ex. 11.) The husband remained in the living

room of the residence, while the officers proceeded to Ms. LaBatte's bedroom, knocked on the door, and entered the bedroom. (Testimony of R. McSwain). The grievant also entered the bedroom on arrival. McSwain reviewed the text messages that LaBatte had sent to her friend and determined that she should be taken to the hospital for evaluation. She indicated that she was joking in the text messages, but also pointed to the eye hooks on the ceiling and said she could use them to hang herself.

3. An ambulance arrived and was staffed by EMTs Derek Fauntleroy (Fauntleroy and Chris Donnelly (Donnelly). LaBatte expressed that she wanted to sleep and not go to the hospital. She was not physically combative or resistant in the bedroom, and left the house without being so, although she repeatedly stated her frustration with the situation. (Test. of McSwain and Donnelly).

4. The ambulance contained a bench and a gurney. LaBatte entered the ambulance without difficulty or assistance and sat on the gurney. Donnelly was in the ambulance and the grievant also entered the ambulance. LaBatte did not exhibit violent behavior of any sort. She was told to sit on the gurney but stood up to exit the ambulance. Testimony differed whether both rear doors were open or one. The grievant blocked LaBatte's attempt to exit. Although the grievant testified that he never lost his balance or fall, LaBatte in some manner brushed into him. Although there is conflicting testimony, we find that the grievant put his forearm against her throat and pushed her to the interior side wall of the ambulance. (Test. of McSwain). Donnelly testified that the grievant's forearm was pressing against her jaw line. Fauntleroy testified that the grievant's forearm was at the clavicle or "above the clavicle". LaBatte herself stated that the grievant was choking her, and told her friends as such. (Joint Ex. 27). The grievant testified that his forearm was "across her body diagonal", from "her right shoulder down to her left". The grievant held her against her neck for a few moments and told her to sit down the gurney or be arrested.

5. Pursuant to Conn. Gen. Stat. § 17a-503, an officer on scene was required to fill out a Police Emergency Examination Request ("PEER") form to be provided to the hospital on intake. The form requires the officer to list the reason for intake, and to describe the patient's behavior.

McSwain and Dugas filled out the P.E.E.R. form for LaBatte. When filling out the form, neither McSwain nor Dugas identified Ms. LaBatte as "combative" or "hostile."

6. The Town requires officers to report all uses of force. The Town has a specific form – the LPD 404 – for officers to report use of force incidents. The form requires an officer to provide a narrative about what occurred and to document where on the body the force was applied. The

form should then be submitted to a supervisor for review. The reporting requirement is in place to ensure that all high risk activity is properly documented. None of the officers present, including the grievant, completed a use of force form for this incident.

7. A few weeks following the incident, McSwain described the incident to Officer Jason Pudvah (Pudvah), president of the Union. (Testimony of McSwain). McSwain was concerned that the grievant had used unnecessary force on LaBatte and that the use of force had not been reported. (Id.) He described to Officer Pudvah what he witnessed the grievant “do with his forearm” to LaBatte. Pudvah expressed the opinion that, as described, the grievant’s actions were a use of force and that McSwain should have reported it to the sergeant on duty at the time of the incident. McSwain did not report the incident to anyone else. Pudvah later mentioned the incident to Detective Chris Cadro and stated that McSwain was uncomfortable because the grievant had “jacked up a guy on a mental health call.” (Testimony of Chief John Rich (Rich)) Detective Cadro described the conversation to Lieutenant Kenneth Creutz, the Police Department’s second in command, off duty during the course of dinner. This was the first time that the command staff was made aware of the incident. On March 2, 2021, his next working day, Lt. Creutz notified Chief Rich about the incident.

8. After learning of the incident, Chief Rich attempted to contact LaBatte but failed to reach her. He drove to her home, introduced himself and asked her what had transpired. LaBatte began to cry and told him that an officer had put her in a chokehold. (Test. of Rich). The Chief asked Lt Creutz to conduct a preliminary investigation. The grievant and McSwain were placed on paid administrative leave. Mayor Fred Allyn determined that an independent investigation was warranted. Attorney Gary Starr was engaged to conduct the investigation. He is an experienced investigator, having conducted hundreds of such employment investigations. Starr conducted an independent investigation, interviewing the grievant and all witnesses, and filed his investigative report. (Joint Ex. 42).

9. Starr made determinations on credibility and the facts. He did not offer conclusions on what if any policies were violated, or what discipline should ensue. Rich asked Creutz to review the report and determine if any violations occurred. Creutz concluded that the grievant violated General Order 120-1: Use of Force Policy (Unnecessary and Failure to Report), Oeratinos Manual: Regulation 1.3 Professional behavior, Operations Manual: Regulation 1.5 Civility and Regulation 1.15 Conduct unbecoming (d) neglect or shirking duty. McSwain, Dugas and Sergeant Olsen were also found to have violated policy by their conduct of failure to report.

10. A Loudermill hearing was conducted wherein the grievant, represented by the union, had ample opportunity to respond to the charges against him. At the hearing he did not deny that he held his forearm against LaBatte, that it was a use of force, that he failed to report it, that he did not feel threatened by LaBatte, that he was acting in self-defense, or that she was attempting to harm herself or others.

11. The Chief had a supportive relationship with the grievant. The Chief sent him to training and sponsored him in a wellness retreat after he was involved in an officer involved shooting in January 2019. The Chief was concerned about the grievant and recommended that the grievant see a therapist the Chief used.

12. In March 2018, the grievant used unreasonable force on an arrested individual. The arrestee began to kick the grievant and in response, the grievant forced the arrestee to the ground, struck the arrestee multiple times in the head, and then threatened to tase the individual. The investigation into the incident determined the strikes to the head were an unreasonable use of force, and the grievant was suspended without pay for two calendar days.

He was also sent for mandatory retraining on constitutional matters related to use of force with the Daigle Law Group. (Testimony of Rich). The grievant did not grieve this discipline.

13. In April 2019, the grievant received discipline following a verbal altercation with a supervisor in which he challenged a supervisor to a fight. The investigation concluded that the grievant had violated several policies, including a violation of the workplace violence policy; conduct unbecoming; and civility and professional behavior. Chief Rich issued a one day suspension held in abeyance on the condition that the grievant apologize and continue in mental health counseling. (Id.; Union Exhibit 11-A.). The grievant did not grieve this discipline.

14. In November 2020, the grievant was involved in another incident that prompted investigation. That investigation concluded that the grievant arrested an individual without probable cause. (Testimony of grievant). Sergeant Bushor wrote a detailed account of the incident and sent it to the lieutenant, who forwarded the report to the Chief. While the grievant was not disciplined for this event, Chief Rich sent him for retraining on constitutional law. (Testimony of Rich).

15. Chief Rich became concerned about the grievant's anger issues and his violations of civilian civil rights. As a result of the incident with LaBatte and his past history, the Chief determined that termination was the appropriate discipline. McSwain received a ten-day suspension without pay, mandatory attendance at crisis intervention team training, and mandatory retraining in report writing. Sgt. Olsen was demoted to the rank of officer for failing

to properly supervise his officers. Pudvah received a letter of reprimand for failing to report the use of force after learning about it from McSwain.

### Arguments of the Employer

The Town argues that it had just cause to terminate the grievant's employment. The Town notes that while the collective bargaining agreement does not contain a "just cause" provision, it has agreed to apply that test here.

As a fifteen year officer, the grievant was fully trained on and familiar with the Department's Use of Force Policy. This policy is from the Police Officers Standards and Training Council, as a result of the Police Accountability Act, the Town notes. And a chokehold is defined as "any physical maneuver or other method of restraint applied to the neck area or otherwise that impedes the ability to breathe or restricts blood circulation to the brain." Any such action is required to be reported to a supervisor by any officer who witnesses it within 72 hours. These policies were clearly violated, supporting the "just cause" requirements.

Further, the Town argues that a full and fair investigation occurred. Attorney Starr independent investigation was fairly conducted and thorough. The factual basis that he found fully supports the decision to terminate the grievant.

Lt. Creutz' recommendations off of the Starr Report were fairly concluded from a perspective of a reasonable officer with experience. The union, the Town argues, did not challenge the qualifications of either Starr or Creutz with regards to their reports and conclusions in this matter.

The Town argues that the grievant's forearm against LaBatte's throat was a prohibited use of force. That the grievant was not fearing for his safety or the safety of others. Deadly force was not warranted.

In the alternative, the Town argues the grievant used Unnecessary Force. General Order 20-01 authorizes the use of force to (1) effect an arrest or prevent the escape from custody of a person whom he/she has reasonably believes to have committed an offense; (2) defend him/herself or a third person from the imminent use of less lethal force while effecting, or attempting to affect an arrest or while preventing or attempting to prevent an escape; (3) maintain order of prisoners, or; (4) restrain persons who are mentally ill and dangerous or who are gravely disabled. (Joint Exhibit 30, p. 8.) None of these bases apply to the January 19 incident, the Town argues.

LaBatte, the Town argues, was not in custody for a suspected offense, nor was she under arrest; she was not a prisoner; she was not a danger to herself or others.

The Town further argues the Union's witnesses made much of the legal principle that an officer's use of force is assessed under an "objective reasonableness" standard. See *Graham v. Connor*, 490 U.S. 386 (1989). To summarize *Graham*, the "reasonableness" of a use of force in a particular instance is judged from the perspective of a "reasonable officer on scene." Id. 396-97. This perspective makes an allowance for the fact that officers must make split second decisions regarding what is or is not an appropriate use of force. However, before considering the *Graham* analysis, it must first be established that any amount of force was necessary. Herein lies the crux of Officer Kempke's violations, as unnecessary force is per se unreasonable. (Testimony of Rich).

Finally, the Town argues that the grievant's past history of angry outburst by the grievant and ensuing discipline fully support termination in this matter.

### **Arguments of the Union**

The Union argues that the Town has the burden to demonstrate with clear and convincing evidence that it had just cause to terminate the grievant. And, that it failed to do so.

Further, the Union argues that although the grievant had fair notice that he was required to report the events with LaBatte, he was not on fair notice that his use of a "control technique" would result in termination. The grievant's actions could not reasonably be expected to cause death or serious physical injury. The actions taken did not constitute a deadly use of force.

Actually, the Union argues, the grievant's actions were not a "use of force" as defined by the policy. Since the grievant's actions did not result in injury and LaBatte did not complain of pain or injury on the way to the hospital.

Additionally, the Union argues that it was unfair to take the investigation away from Lt. Creutz and transfer it to Attorney Starr. Starr's investigation was not fair, thorough, or accurate and Starr himself is not qualified to conduct a law enforcement internal affairs investigation and it is clear he lacks the competence to do so, the Union argues. Starr failed to view the actual ambulance where the incident occurred making it impossible to fairly judge the credibility of witnesses as to what exactly occurred.

Starr failed to include all relevant information and evidence in his report. His extensive notes contain all information concerning the events, including LaBatte's alcohol blood level. And, Starr was wrong to conclude that LaBatte was not a physical threat to officers. She clearly pushed the grievant or tried to push past him, the Union argues. The Chief wrongly told Lt. Creutz to base his conclusions on Starr's Report, and wrongly relied upon Creutz' recommendations which were based upon a faulty report.

Although the Town lists three prior disciplines against the grievant, the fact is he only has two priors. And, only one of these arguably violated someone's constitutional rights. This undermines the Chief's view that the termination was based upon the Chief's fears of further violations of someone's constitutional rights.

The grievant did not use unnecessary force against LaBatte who was intoxicated, agitated and unhappy. The grievant's actions were a justified control technique. As such, the Town does not have clear and convincing evidence that termination was justified and as a result, the grievant should be reinstated and made whole.

### Discussion

The Town has the burden to demonstrate by a preponderance of the evidence that it had just cause to terminate the grievant's employment. It has done so.

Although there are slightly conflicting versions of where the grievant's forearm was exactly on LaBatte's body, we find that McSwain had clear view of what occurred and testified with high credibility that his forearm was against the side of LaBatte's neck. And, importantly, LaBatte herself described it as a chokehold. Although she did not testify at the hearing, her clear and emotional description as such to the Chief on his initial conversation with her cannot be taken lightly. The fact that LaBatte did not file a complaint against the grievant, or the Town, does not diminish her credibility, but perhaps enhances it.

Although Fauntleroy testified that the grievant's forearm was at LaBatte's clavicle or above the clavicle certainly does little to undermine the conclusion that the grievant was engaged in a chokehold. Fauntleroy was also found generally not credible.

Regulation 20-1 Section 4(c) states that "[a]ll officers are prohibited from the use of a chokehold or other method of restraint applied to the neck area of a person, including but not limited to (1) Arm bar hold...". Whether we accept LaBatte's version that it was a chokehold, or McSwain's version that the grievant's arm was against the side of her neck, both fall under the prohibition. Clearly, given the failure of all present to describe LaBatte's behavior as threatening in any way, including the grievant, is sufficient to at minimum find the act as an unreasonable use of force.

The Union correctly argues that C.G.S. 17a-503 allows an officer to detain a person whom the officer suspects or believes to be in danger to themselves. Here, however, the grievant had a multitude of options to redirect LaBatte's attempt to exit the ambulance other than a chokehold. De-escalation is a well-established expectation of officers in this type of situation.



There is no basis for the Union's assertion that the Starr Report was substantially flawed. This Panel made its own determinations of credibility based upon the evidence before us.

Importantly, our view of the grievant's act is through the lens of his past behaviors. These are the March of 2018 incident where he used unreasonable force against an individual handcuffed on the ground, and the April of 2019 incident when he challenged a supervisor to fight, a highly violative act in a paramilitary organization. The grievant did not protest his discipline resulting from these acts.

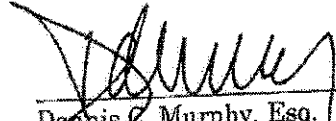
The Chief, in light of the grievant's past conduct, was well within reason to finally determine that the grievant could no longer be entrusted with the power and high responsibility that comes with someone in law enforcement. The Chief's admirable and repeated attempts to assist, coach and train the grievant to curb his anger demonstrates his fair-handed and unbiased judgment in this matter. His judgment is upheld.

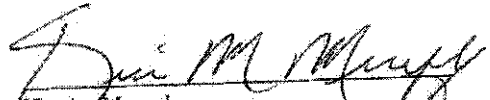
#### AWARD

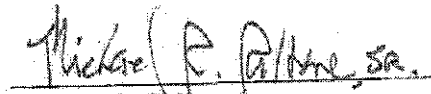
There was just cause to terminate Bobby Kempke's employment with the Town of Ledyard.

Case No. 2021-A-0368

By the Panel

  
Dennis C. Murphy, Esq.  
Chair and Public Member

  
Kevin Murphy  
Labor Member *Dissenting*

  
Michael C. Culhane  
Management Member