

**DECISION AND AWARD**

**In the Matter of a Controversy between the**

\*\*\*\*\*

**THOMAS DESTEFANO,  
Appellant,**

**And**

**CITY OF PALO ALTO,  
Employer**

**Termination of Thomas DeStefano**

\*\*\*\*\*

**For the Grievant:**

**William J. Hadden, Esq.  
Rains Lucia Stern St. Phalle & Silver  
1428 2<sup>nd</sup> Street  
Santa Monica, CA 90401**

**For the Employer:**

**Suzanne Solomon, Esq.  
Liebert Cassidy & Whitmore  
135 Main Street, 7<sup>th</sup> Floor  
San Francisco, CA 94105**

**Arbitrator:**

**David A. Weinberg**

## PROCEDURAL BACKGROUND

Pursuant to a list supplied by the California State Mediation and Conciliation Service (ARB-21-0143) the parties selected David A. Weinberg as Arbitrator in the above referenced case. The Arbitrator conducted Arbitration hearings in the City of Palo Alto, CA on March 13 & 14, 2023. The parties filed their closing briefs on September 8, 2023 with the Arbitrator. The parties stipulated that the issue to be decided by this Arbitrator is as follows:

**“Was there just cause for the termination of the Appellant; if not, what shall be the remedy?”**

In addition, the parties stipulated the matter is properly before the Arbitrator for resolution and that jurisdiction may be retained to resolve any disputes over the meaning or application of the Decision and Award.

### RELEVANT CONTRACTUAL and OFFICIAL DOCUMENTS

1. Palo Alto Police Department Policy 300 – Use of Force
2. Palo Alto Police Department Policy 344 – Report Preparation
3. Palo Alto Police Department Policy 340 – Standards of Conduct

### STATEMENT OF FACTS

The following is a summary of the facts of the case, which were necessary to decide the matter. A more detailed finding may be found in the Analysis and Discussion section of this Award when appropriate.

Thomas DeStefano (hereinafter “Appellant”) was hired by the Palo Alto Police Department in 2008 as an Officer and was promoted in 2015 to an Agent with the Department, which is a supervisory function. The incident which resulted

in the Appellant's termination began on February 17<sup>th</sup>, 2018. On the evening of February 17, 2018, at approximately 2223 hours Officer Chris Conde witnessed Gustavo Alvarez driving his vehicle, who was known to Conde from prior police contacts as having a suspended drivers license. Conde followed Alvarez to his residence in a trailer park and witnessed him exit his vehicle, and Officer Conde told him he was detained for driving with a suspended license. Alvarez proceeded to enter his residence and Officer Conde called for backup and stated Alvarez was verbally aggressive and would not exit his residence. The Appellant, Sergeant Wayne Benitez, Officer Matthew Hubbard, and Officer Johnson responded to Conde's request for backup. At the time of this incident, the Palo Alto Police Department did not have its officers wearing body worn cameras (BWC). The Department's patrol vehicles had video cameras and the officers were wearing microphones which are activated and synced to the patrol mobile audio video (MAV). The worn microphones are automatically activated and audio footage and video from the patrol car cameras are automatically downloaded in a department server.

Alvarez was eventually detained and arrested that evening by the responding officers. At this time, the Appellant as an Agent was assigned to review and approve the police reports filed by the responding officers including Sergeant Benitez. After Alvarez was arrested and transported to the Police Department, Officer Conde, Officer Johnson and Sergeant Benitez filed police reports, which were approved by the Appellant, who did not file his own report. Sergeant Benitez wrote in his police report the following:

*"On 2-17-18 at approximately 2230 hours I arrived at 3980 El Camino Real space # [REDACTED] after hearing on the police radio that a known driver with a suspended driver's license had defied police orders after stopping and parking his car and fled into his mobile home. It should be noted that I am one of the nighttime sergeants and I was in full uniform and driving a fully marked patrol vehicle #5260. As I was driving to the scene, I heard on the police radio that the suspect (Gustavo Alvarez) had open the front door to his mobile home, taunted police with "come and get me" and then close the door". Upon my arrival, the front door of the mobile home was closed and Agent DeStefano was giving clear and loud verbal orders for Alvarez to open his door and exit his house. Agent Destafano was standing approximately 10 feet from the front door while giving his orders. Within a short period of time I saw Alvarez (who I also know from prior law enforcement contacts) open the front door with an older man standing behind him. While standing in the open doorway, Alvarez was acting like a juvenile while sarcastically calling out, " come and get me, come and get me". The older man standing behind Alvarez was motioning with his arms for us to leave. At this point Agent DeStefano and I started walking towards the front door to apprehend Alvarez since officers had two on-view charges against him; driving on a suspended license and now resisting officers. As we walked toward the front door Alvarez suddenly stepped back inside and shut the door. As I approached the front door I could hear the locking mechanism being turned. I tried to turn the door knob with my hand but noticed it was locked. At this point I told Agent DeStefano that I was going to kick the door open. While standing on the stairs leading to the front door, I kicked the front door a bit too low and the door did not open. I then reposition myself on the stairs and kicked a second time, this time higher on the door. This time the door sprung open as the door jamb splintered. When the front door opened Alvarez was standing next to it and he seems surprised that his front door had been kicked it open. I then use my right hand and grabbed Alvarez at the front of his shirt and physically pulled him outside. His vehicle was parked directly in front of the short set of stairs that lead to his*

*front door so agent DeStefano and I put Alvarez on the hood of his car where he was handcuffed. No other force was used on Alvarez.”<sup>1</sup>*

Officer Conde also filed a police report which was approved by the Appellant. Conde also included the statement given to him by Alvarez. In this report, Conde made no mention of any force being used or any injuries sustained by the suspect. Officer Johnson’s report also did not contain any mention of a use of force or injuries. Johnson during this incident was stationed on the perimeter and his report only focused on the search of Alvarez’s vehicle.

On April 12, 2019, the City was provided a video of the incident from a camera, which was attached to the carport at Mr. Alvarez’s home where the arrest took place. This video was given to the City by Mr. Alvarez’s attorney who was suing the City for this incident.

This video given to the City lasts one minute and 18 seconds. The video begins after Alvarez has entered his house and depicts Sergeant Benitez, Agent DeStefano, and Officer Conde, in that order approaching the suspects door. Benitez announces to the people in the house as he first approaches the front door to “come out” and DeStefano can be heard adding “or we’re going to break down the door”. Someone in the house can be heard asking if there is a warrant and DeStefano responds that “we don’t need one”. Then, Sergeant Benitez can be seen kicking the door twice to break down the door and DeStefano can be observed removing his firearm from his holster and pointing it towards the doorway, while holding it level and straight forward. He then puts his weapon back in his holster as Benitez grabs Alvarez from the house and Benitez and

---

<sup>1</sup> City Exhibit #10-9

DeStefano can be seen grabbing Alvarez and placing him chest down on the car front hood with Officer Conde in the back of DeStefano. Benitez is positioned on the left side of Alvarez's body, DeStefano is on his right side and Officer Conde is on the right side of DeStefano. It takes about 20 seconds for the officers to place handcuffs on Alvarez while they struggle with him to submit to the handcuffing. Benitez can be heard saying to Alvarez "You think you're a tough guy now" and "shut up", and Benitez can be observed striking Mr. Alvarez's head, who says "he just hit me". At this time, DeStefano and Conde are hands on Alvarez and within a foot of him. After the officers succeed in handcuffing Alvarez, DeStefano steps back a foot or so, and activates his radio while Conde moves to the other side of the car. DeStefano is using his radio while looking slightly right of Benitez and Alvarez from one to two feet away. Then Benitez can be seen lifting Alvarez off the hood of the car and slamming Alvarez back down on the hood and windshield of the car while holding the back of his coat and saying, "you think you're a tough guy". At this time, Agent DeStefano is looking towards Benitez and Alvarez when Benitez slams Alvarez and makes the "tough guy" statement. Benitez can then be seen walking Alvarez alongside his car, and Alvarez can be heard saying he is bleeding. Benitez in response to this can be heard saying to Alvarez "You're going to be bleeding a whole lot more". At this point, DeStefano is about two to three feet directly behind Benitez, while Officer Conde was on the other side of the car and further down and out of view of the video. <sup>2</sup>

---

<sup>2</sup> City Exhibit #15

During the IA investigation the Department reviewed the MAV units of the officers involved and MDT messages. MAV audio taken from Officer Conde captures Sergeant Benitez telling Alvarez he “going to be bleeding a lot more” in response to Alvarez saying he was bleeding. MAV audio from Benitez’s unit also captures Alvarez saying he was hit and that he was bleeding, and it captures Benitez responding he would be bleeding a whole lot more. Agent DeStefano’s MAV unit captures Alvarez saying he was hit and bleeding, and Benitez’s response that Alvarez would be bleeding a whole lot more. DeStefano’s MAV later captures him telling Sergeant Alinez that “He pissed off the wrong Sergeant”.<sup>3</sup> The Appellant’s MAV audio was turned off by him after Alvarez was transported to jail. After Alvarez was in custody, Sergeant Benitez can be heard on his MAV telling DeStefano “No leniency here, see how quickly they behave once we put our foot down and that’s what we don’t do enough of”. The Appellant sent a text message (MDT) later that evening to Officer Mullarkey telling him “You missed out -The fuse was lit tonight”. Mullarkey replied, “that’s my favorite thing ever I saw it go off before when I was brand new and I was like this is what it’s like in Los Angeles”. The Appellant replied, “yup it happened tonight”. Mullarkey then replies, “amazing I love it thats a 100% real cops right there”.<sup>4</sup>

After Alvarez is transported in the patrol car to the Police Department, there is video from Officer Conde’s MAV which shows Conde walking Alvarez to the patrol car and talking with him about submitting to a drug test and the Appellant is seen in the background talking with two other officers (Johnson and

---

<sup>3</sup> City Exhibit #15

<sup>4</sup> City Exhibit #13

Ghilarducci) by a patrol car. The MAV video shows DeStefano, while talking with the officers, raise his right hand and swing it down on the hood of the patrol car, which he does twice.

On the basis of the video received from Alvarez as part of his lawsuit, an Internal Affairs Investigation (IA 2019-02) was opened by the Department. Sergeant Wayne Benitez was placed on Administrative Leave on April 17, 2019. Initially, Lieutenant Wagner and Lieutenant Becchetti were assigned to conduct the investigation, but after Alvarez filed a federal lawsuit, Captain Reifschneider was assigned by Chief Lum to the IA along with Lieutenant Becchetti. Lieutenant Becchetti sent a Supplemental IA Memorandum to Assistant Chief Binder on October 29, 2020 and Captain Reifschneider sent the IA Memorandum later. In his May 5, 2021, Memorandum to Assistant Chief Binder, Reifschneider stated he began his investigation by reviewing the police reports associated with the underlying incident, and that numerous interviews of witnesses had already taken place. He also reviewed MAV footage from Benitez, DeStefano, Hubbard, and Conde. Hubbard's MAV was not activated until after Alvarez was arrested.

As part of the IA investigation, the Appellant was interviewed on August 28, 2019. In his interview, he recalled that Alvarez was actively resisting the officers attempt to get his hands behind his back and be handcuffed. He said that he did not see Sergeant Benitez deliver any blows to Alvarez. He stated that he did not hear Alvarez say he had been hit or injured and did not see how Alvarez was pushed back on the hood of the car. DeStefano said that after seeing the (Alvarez) video he would have considered getting medical for Alvarez and would



have had concerns about policy violations, but he did not see or hear any of this at the time. He said that if he had seen any of the strikes to the head of Alvarez he would have inquired who would potentially do a use of force report. DeStefano said in his interview that he shifted his attention and then looked back and noticed that Alvarez was back on the hood and that he didn't know what happened with Wayne and didn't know if he was getting stomped on the foot. DeStefano said that after seeing the video taken from PAPD where Alvarez is telling Officers Conde and Hubbard that he had been hit by an officer he would have expected this to be included in their reports or brought to his attention, but none of this information was brought to him at the time.

On May 5, 2021, Captain Reifschneider issued his Memorandum on IA 2019-02, which he sent to Assistant Chief A. Binder. In the Analysis section of this Memorandum, he stated in reference to Agent DeStefano the following:

*“The evidence shows that Agent DeStefano was in the immediate vicinity of the above referenced use of force employed by Sergeant Benitez. When presented with footage of the use of force, Agent DeStefano was unwilling to deem it unreasonable without more facts, but did expressed some concern. With that, inadequate evidence exists to prove that agent DeStefano actually saw the entirety of the force when it occurred, much less recognized it as unreasonable at the time. While the incident was captured on video, the camera is positioned behind the officers so the footage does not depict the gaze of the officers. Initially, agent DeStefano was actively engaged in trying to control a suspect who is less than entirely cooperative, and his attention would have been understandably directed towards that task. Once Alvarez was handcuffed, Agent DeStefano immediately stepped away from Alvarez and Benitez, and directed his mental and visual attention toward putting out radio traffic. He acknowledges that his attention was drawn back to Alvarez when he was back on the hood but he*

*denies witnessing how or why that occurred. While I cannot eliminate the possibility that Agent DeStefano saw the use of force and recognized it has unreasonable, it is also entirely possible that he did not based on the facts presented. Lastly, even if Agent DeStefano had seen the force and recognized it as unreasonable, he was likely not in a position to intercede as the entire use of force occurred within mere seconds. Therefore, the facts do not support a finding that he failed to intercede or failed to report unreasonable force... The evidence shows that, just prior to Sergeant Benitez kicking Álvarez's door, Agent DeStefano drew his firearm to a low ready position in order to cover Sergeant Benitez. When the door open moments later, the weapon appears to be pointed at Alvarez – albeit momentarily - before Sergeant Benitez steps forward to grab him. At that time, Agent DeStefano holstered his weapon and assisted Sergeant Benitez with controlling Alvarez, who resisted being handcuffed. After Alvarez had been placed in handcuffs, Agent DeStefano observed that Sergeant Benitez had pushed Alvarez back down onto the vehicle. Although agent DiStefano reported that he did not observe how this occurred, he concluded at the time that Sergeant Benitez had done this to overcome further resistance from Alvarez. Agent DeStefano did not author a police report regarding the incident. As a result, Agent DeStefano he did not document pointing his firearm at Alvarez or the force used to overcome what agent DeStefano described as Alvarez' active resistance to being handcuffed. Because Agent DeStefano also read an approved the reports generated by others about the incident, he would've been aware that these facts were not documented elsewhere either. The facts support a finding that agent DeStefano failed to document pointing his firearm at a person and failed to document the force employed to handcuff Alvarez. Sergeant Benitez's report did not make mention of the use of force employed to overcome Alvarez's resistance to being handcuffed. It also made no mention of the force he employed when he pushed Alvarez down onto the vehicle after Alvarez was handcuffed. Even if he did not recognize the force as unreasonable or such that an administrative use of force report was required, Agent DeStefano witnessed Sergeant Benitez's use of force and subsequently reviewed and approved*

*Sergeant Benitez's report, which failed to properly document this force. The facts support a finding that agent DeStefano approved a report that was inaccurate and unacceptable...CONCLUSIONS & FINDINGS Based on a preponderance of the evidence standard, this investigation reached the following conclusions as to each subject office: ...Agent DeStefano – Failure to Intercede/Failure to Report PAPD 300.2.1 – NOT SUSTAINED Failure to Document a Use of Force, PAPD 300.5 – SUSTAINED Failure to Document Pointing a Firearm, PAPD 344.2.2 (a) – SUSTAINED Inadequate Supervisory Report Review, PAPD 344.4 – SUSTAINED”<sup>5</sup>*

On May 18, 2021, Assistant Chief Andrew Binder wrote a Memorandum to Chief Robert Jonsen regarding IA2019-02 and the findings of Captain Reifschneider with respect to the Alvarez incident and the conduct of the officers involved including the Appellant. In this Memorandum to Chief Jonsen, Binder wrote the following:

*“Based on my review and assessment, I am not in agreement with the internal affairs investigation’s conclusions and findings related to Agent DeStefano and found that by a preponderance of the evidence standard, he did fail to promptly report an unreasonable use of force by Sergeant Benitez to a supervisor. In reaching this conclusion, I carefully analyzed all the available evidence and considered the perspectives, observations and statements from all the interviewees. I also considered the motivations of the involved parties, corroborating evidence, plausibility of events, proximity in time and space, and articulated rationale for actions or decisions. In concluding Agent DeStefano failed to promptly report an unreasonable use of force by Sergeant Benitez, I determine the totality of the evidence showed Agent DeStefano more likely than not observed Sergeant Benitez abruptly and forcefully push Mr. Alvarez chest down onto the windshield/hood area of his vehicle. As noted in the investigation,*

---

<sup>5</sup> CITY EXHIBIT #6

*there was clear evidence that at the time Sergeant Benitez used this force, Mr. Alvarez was no longer resisting and did not appear to pose an eminent threat to the officers or others. Despite Agent DeStefano's administrative statement his attention was drawn back to Mr. Alvarez only after Mr. Alvarez was "back" on the hood, the surveillance video and totality of the evidence shows otherwise... In addition to the surveillance video, and other contributing factor supporting a finding Agent DeStefano observed Sergeant Benitez slam Mr. Alvarez onto the windshield/ hood area of the vehicle was Agent DeStefano's failure to document any of his actions and observations at the scene; including the force he used to take Mr. Alvarez into custody. Department policy requires documentation in every case where any force is used against any person and states in part, that all reports shall accurately reflect all pertinent information seen, heard or assimilated by any other sense... Additionally, Agent DeStefano's re-enactment of the incident in the police garage as captured on Officer Conde's MAV is also significant. After the MAV's audio mic captured Agent DeStefano saying, "Don't light the fuse", the video portion captures agent DeStefano slamming his hand down on a patrol vehicle with enough force to be captured on the mic. Agent DeStefano then quickly looked over at Officer Conde's police vehicle (where Mr. Alvarez was seated) and slapped his hand down a second time in a quicker motion than the first. This video is important because the order and manner of the slamming motions are consistent with Mr. Alvarez being taken from his residence and placed on the hood of his vehicle and then later being quickly slammed onto the windshield/ hood area of the car by Sergeant Benitez... Regarding the investigations finding Agent DeStefano approved a report that was inaccurate and unacceptable, I find the analysis of the sustained finding was missing one critical component that is congruous with my finding Agent DeStefano failed to promptly report and excessive use of force by Sergeant Benitez to a supervisor. The internal affairs investigations analysis found Agent DeStefano witness Sergeant Benitez use specific force and then later reviewed and approved Sergeant Benitez's report, which failed to properly document the force. While this conclusion is partially correct, it omits a further analysis and*

*conclusion that in reviewing and approving Sergeant Benitez his report, Agent DeStefano also signed off on a report he knew to be false. This is based on Agent DeStefano's observation of Sergeant Benitez slamming Mr. Alvarez on the windshield/ hood of the car and Sergeant Benitez's written statement that, "No other force was used on Alvarez"... As demonstrated by the audio, video and MDT message evidence, Agent DeStefano's conduct was unbecoming a member of this department and reflected unfavorably upon the Palo Alto Police Department and its members. It also provided insight into what he thought about the incident; that what happened to Mr. Alvarez was amusing and provided an entertainment opportunity to be shared with others. Such conduct included Agent DeStefano laughing at the scene while telling another supervisor about what happened to Mr. Alvarez, commenting that Mr. Alvarez "pissed off the wrong Sergeant", sending an MDT message to another office they "missed out" because "the fuse was lit tonight", and acting out the incident on the hood of a patrol car after saying "Don't light the fuse"...<sup>6</sup>*

On June 24, 2021, Assistant Chief Andrew Binder sent to the Appellant a Memorandum of Notice of Intended Disciplinary Action – Termination. A pre-disciplinary Skelly conference was held on August 19, 2021 with the Appellant. On September 1, 2021 Chief Robert Jonsen sent a Notice of Disciplinary Action – Termination to the Appellant. In this Notice Chief Jonsen set forth the reasons for the termination of Agent Thomas DeStefano effective September 6, 2021:

*"Any future hearing officer or appellate body is advised that anyone of the following charges, standing alone, with support my recommendation to terminate your employment. Your actions during an incident occurring on February 17, 2018 violated the following Palo Alto Police Department Policy Manual sections:*

*1. PAPD USE OF FORCE POLICY – 300.2.1 Duty to Intercede:*

*Any officer present in observing another officer using force that is clearly beyond that which is objectively reasonable under the circumstances shall, when in a*

---

<sup>6</sup> City Exhibit #7

*position to do so, intercede to prevent the use of unreasonable force. An officer who observes another employee use force that exceeds the degree of force permitted by law should probably report these observations to a supervisor.*

*2. PAPD USE OF FORCE POLICY – 300.5 Reporting the Use of Force*

*Any use of force by a member of this department shall be documented promptly, completely and accurately in an appropriate report, depending on the nature of the incident. The report shall minimally include the type of force used, the reason for the force, the description of any injuries and a description of any medical treatment rendered. Additionally, a thorough explanation of the factors considered by the officer shall be included in the officer's police report. The officer should articulate the factors perceived and why he/she believed the use of force was reasonable under the circumstances.*

*3. PAPD REPORT PREPARATION POLICY – 344.4. Report Corrections:*

*Supervisor shall review all reports for content and accuracy and approve them if acceptable...*

*4. PAPD REPORT PREPARATION POLICY 344.2.2 Non-Criminal Activity*

*The following incident shall be documented using the appropriate approved report:*

*(a) Anytime an officer points a firearm at any person.*

*5. PAPD STANDARDS OF CONDUCT – 340.5.5 Conduct Unbecoming:*

*(m) Any other on or off-duty conduct which any member knows or reasonably should know is unbecoming a member of this department, is contrary to good order, efficiency or morale, or tends to reflect unfavorably upon this department or its members. The instances constituting the above policy violations occurred as follows, with a specific policy violation cited in bold:*

*On February 17, 2018 Officer Conde attempted to stop and detain Gustavo Alvarez for operating a vehicle with a suspended driver's license. Mr. Alvarez refused to submit to officer Conde's authority and retreated into his residence. Officer Conde called for assistance and you and other officers responded to help. After you arrived on the scene, a decision was made to breach Mr. Alvarez's front door and arrest him. You and three other officers approached Mr. Alvarez's*

front door and Sergeant Benitez announced he would kick it. Once this plan was in motion, you took on the role of “breacher cover”, which in this context meant providing cover for the person kicking the door. In this cover role, you drew your firearm and held it at the low ready. After Sergeant Benitez kicked at the front door a second time, it opened and Mr. Alvarez was standing in the doorway. With your firearm drawn, you pointed it at Mr. Alvarez and ordered him to exit the residence. You did not offer any report regarding this **incident and never documented that you had pointed your firearm at Mr. Alvarez; this was a violation of PAPD policy 344.4.49(a).**

Once Sergeant Benitez began to physically direct Mr. Alvarez towards his vehicle, you holstered your weapon and used physical force to assist Sergeant Benitez in pushing Mr. Alvarez chest down onto the hood of his car. During your administrative interview, you described Mr. Alvarez as, “actively resisting” and recall Mr. Alvarez was trying to “pull away” and throw “his weight around”. By your own admissions, and confirmed by the surveillance video, your physical actions in assisting with overcoming Mr. Alvarez’s resistance to being handcuffed equated to using force, as defined in the Policy Manual. You did not author any report documenting the force you used to overcome Mr. Alvarez’s resistance. Since you also read and approved all the reports associated with this incident, you were aware these facts were not documented elsewhere. **Your failure to document your own use of force was a violation of PAPD Policy 300.5.**

After Mr. Alvarez was handcuffed, Sergeant Benitez maintained control of him while you and Officer Conde disengaged from any further physical contact. You remained in the immediate vicinity of Sergeant Benitez and Mr. Alvarez and began talking on your police radio at the front of Mr. Alvarez’s vehicle. Initially, your attention was averted away from Sergeant Benitez and Mr. Alvarez as you utilize your police radio. But once Mr. Alvarez was lifted off the hood of the vehicle by Sergeant Benitez and standing upright, the surveillance video depicts your head turn towards Sergeant Benitez and Mr. Alvarez. As Sergeant Benitez began to slam Mr. Alvarez towards the windshield/ hood area of the vehicle, your head remained positioned with a direct line of sight while your body turned so

that you were facing and in alignment with what was occurring between Sergeant Benitez and Mr. Alvarez. Your head and body remained aligned and positioned towards Sergeant Benitez and Mr. Alvarez as Mr. Alvarez was slammed into the windshield/hood area by Sergeant Benitez, which was an unjustified use of force. **PAPD Policy 300.2.1 required you to promptly report your observations to a supervisor, and you failed to do so.**

Officer Conde wrote the primary police report and Officer Johnson and Sergeant Benitez wrote supplemental reports for this incident. Later, acting in a supervisory capacity, you reviewed and approved all the officer's reports by signing each page of their respective portion of the crime report. As part of the report review process, supervisors are required to review reports for content and accuracy and only approve the report if it is acceptable. **You violated PAPD Policy 344.4 by approving Sergeant Benitez's report which you knew was inaccurate.**

**Lastly, throughout this incident, you engaged in conduct that was unbecoming a member of this department and reflected unfavorably upon the Palo Alto Police Department and its members.** In addition to the above describe conduct, you laughed at the scene while telling another supervisor about what happened to Mr. Alvarez, commenting that Mr. Alvarez had "pissed off the wrong Sergeant". You also sent an MDT message informing another officer that they had "missed out" because "the fuse was lit tonight" ("the fuse being a nickname for Sergeant Benitez"). You also jokingly reenacted Sergeant Benitez's excessive force, after the fact, by slamming your hand on the hood of the car.

#### **LEVEL OF PENALTY**

Based on the above basis for action, I have decided that termination is an appropriate penalty. You failed to document your own use of force, failed to notify a supervisor of excessive force that you witnessed, and then approved report you knew to be false. Your conduct was unprofessional and has had an extremely negative impact on the public's trust in this department. You covered up an unjustified use of force that eventually came to light only because of Mr.



*Alvarez's home surveillance system and his pursuit of legal claims against the City. For these reasons, termination is the appropriate penalty.<sup>7</sup>*

The Appellant received several Performance Evaluations from the Department in 2009 and received an Overall rating of Meets or Exceeds Standards on them. In 2010 DeStefano's Performance Evaluation was an overall rating of Exceeds Standards. In 2011 he received an overall rating of Meets Standards. In 2012 he received an overall rating of Exceeds Standards and was made an FTO. In 2013-2014 he received an overall rating of Exceeds Standards. In 2017-2018 he received an overall rating of Outstanding on his Performance Evaluation as a Police Agent. In 2018-2019 he received an overall rating of Outstanding. In 2019-2020 he received an overall rating of Outstanding on his Performance Evaluation.<sup>8</sup> The Appellant has also received multiple Commendations, Awards, and Thank You Certificates in his tenure with the Department.<sup>9</sup>

### **Position of the Parties**

The following represents a summary of the arguments raised by the parties in this arbitration.

#### **City's Arguments:**

The City argues that by a preponderance of the evidence standard they have proved all of the charges against the Appellant. The City proved that Agent DeStefano failed to document his own use of force against Alvarez. PAPD 300.5

---

<sup>7</sup> City Exhibit #1

<sup>8</sup> Appellant Exhibit #A

<sup>9</sup> Appellant Exhibits B-F

states that any use of force by a member of the department shall be documented. It also defines force as the application of physical techniques or tactics, with the only qualifier being "it is not a use of force when a person allows him/himself to be searched, escorted, handcuffed or restrained". DeStefano and the other officers clearly used their hands and arms to struggle to get Alvarez handcuffed. DeStefano in his IA interview said that Alvarez was resisting and trying to pull away. This use of force to get Alvarez handcuffed should have been documented either by DeStefano or another officer. The City argues that DeStefano's argument that his actions used to overcome Alvarez's resistance to being handcuffed were not force and did not need to be reported is not persuasive. There is no carve out in the use of force policy for handcuffing an individual who is actively resisting. Reasonable force is appropriate to affect an arrest and therefore the force used must be documented.

The City argues that Sergeant Figueroa's testimony addressed situations that were different from the Alvarez incident as Figueroa talked about situations where an individual allows himself to be handcuffed, which is not what Alvarez did when he resisted handcuffing. It took three officers 20 seconds to get Alvarez handcuffed. The discipline of DeStefano was not based on his failure to write a report, it was based on his approval of reports which did not mention the use of force by any officer including his own. Figueroa's testimony should be disregarded as biased and not credible as he has a lawsuit against the City for a BLM mural. Figueroa's testimony that the Use of Force Policy is vague because it could be interpreted to cover simply a verbal command, which it clearly does

not, is an absurd conclusion. Captain Reifschneider disputed the claim that the Department has a policy of not reporting physical force if it occurs while handcuffing an actively resisting subject.

The City argues that Agent Destefano saw Sergeant Benitez use unnecessary force, failed to report it and approved Sergeant Benitez's report which made no mention of this force. The Alvarez video clearly shows Benitez, after Alvarez was handcuffed, lift Alvarez off the hood of the car and then slam him down, face first into the hood/windshield area, while taunting him by saying "You think you're a tough guy?" Benitez has been charged with a crime for his actions and there is no justification presented to condone this act. The Alvarez video shows that DeStefano saw Benitez use this unnecessary force and heard Benitez tell Alvarez he was going to bleed a whole lot more. The Appellant's claim that he did not see any of this is not credible and even if he only saw Alvarez back on the hood of the car again, he was required to ask Benitez how this occurred in order to ensure that the police report was accurate and complete. The video shows that after Alvarez was handcuffed, DeStefano used his radio and then turned his head left and directly towards Benitez as Benitez lifted Alvarez up from the car and then slammed Alvarez back on the hood/windshield while saying "You think you're a tough guy?" The Appellant is seen in the video moving his attention to Benitez as he slammed Alvarez back on the car. DeStefano's actions later that evening are further proof he saw Benitez slam Alvarez back on the car, as he joked with Sergeant Alaniz that Alvarez "pissed off the wrong Sergeant". Later on that evening DeStefano can be seen re-enacting

the slam of Alvarez back on the roof of the car for other officers. The Appellant later on tells Officer Mullarkey that he “missed out, the fuse was lit tonight”. The City argues that even if the Appellant only saw Alvarez back on the roof of the car, he should have inquired of Benitez how this happened and made him add to his police report of the incident. DeStefano simply approved a report that he knew did not contain enough information about what happened and that he never asked Benitez to add to his report.

The City argues that DeStefano violated Policy 300.2.1 by failing to notify a supervisor of Benitez’s use of unnecessary force and approved a report that made no mention of this action and it was Agent DeStefano’s job to make sure all the police reports were accurate. The Appellant also failed to report that he pointed his gun at Alvarez in any police report, which is required. DeStefano does not dispute that he pointed his weapon at Alvarez and simply claims not to be certain if he actually pointed the gun at Alvarez. It is not credible to believe that an Agent with as much experience as he has would not remember where he was pointing his weapon while a door was being breached, and his failure to document this violates PAPD 344.2.2(a).

The City argues that DeStefano’s joking about the incident, his covering up of the incident is clearly conduct that is unbecoming of an officer and violates PAPD 340.5.5 (m).

The City argues that the Appellant’s claim that he was not properly trained as an Agent is unpersuasive as there is no evidence that any lack of training was responsible for his failure to properly report the use of force by himself and

Benitez. For all the above reasons termination is the appropriate penalty for covering up the improper use of force by Benitez and his own failure to document his pointing a gun at Alvarez and the great harm this caused to the City of Palo Alto Police Department and their relationship with the public. The Arbitrator should uphold the termination of DeStefano.

**Appellant's Arguments:**

The Appellant argues the Department's use of force policy is vague, ambiguous, and inconsistent with the Department's practices. The Use of Force Policy does not explain what it means by a person allowing themselves to be searched, escorted, handcuffed or restrained. It also does not define any of the terms such as application and physical techniques. With unclear guidance a practice has developed that did not require a force report when resistance to handcuffing occurred from a suspect. Sergeant Figueroa testified that a use of force report for handcuffing was only required when there was a complaint of pain or injury. Figueroa testified that the policy is so unclear that a verbal command could be considered a use of force. Sergeant Tony Becker also confirmed the longstanding practice of only writing a report if there was a complaint of pain or visible injury. The command staff allowed this to keep more officers actively in the field as opposed to writing reports. The Appellant testified that like Figueroa and Becker, it was his longstanding practice to not write a supplemental report if he was merely assisting another officer in placing handcuffs on a suspect.

The Appellant argues that there is no evidence that he pointed his weapon at a person during this incident. The video does not show him pointing a weapon at Alvarez and was never asked if he had in his interview. He only told Reifschneider that he assumed the position of “breacher cover “ in the event someone emerged from the residence. Reifschneider only assumed he pointed it at Alvarez based on the video as it does not show another person having a weapon pointed at them. The City did not attempt to recreate the pointing of a weapon through diagrams or expert testimony. If there was no weapon being pointed at any person then the Appellant was not required to write a report. This speculation is not sufficient to support the violation of a Department policy which requires documentation only when it is pointed at “any person”.

The Appellant argues the City does not have sufficient proof to show the Appellant was required to intercede with Sergeant Benitez. The Appellant was not able to see the totality of all the body parts of Alvarez and Benitez in order to determine that there was an improper use of force by Benitez. Furthermore, the Appellant was reasonably sure that someone of Benitez’s experience and tenure would use sound judgement. This incident was taking place in real time and the Appellant’s actions must be judged not with hindsight and frame by frame video re-enactment, but in the split-second decisions the Appellant made at the time. It should also be noted that Reifschneider specifically rejected this charge. The Appellant acknowledges that because he could not see everything that occurred between Benitez and Alvarez he should have inquired more from Benitez and the other officers present during this incident. However, this is negligence and not

evidence of a deliberate cover-up. Furthermore, Alvarez's alleged injuries were barely visible and minor, and his past serial contacts with law enforcement render his credibility less than perfect.

The Appellant argues the weight of the evidence does not show that he jokingly re-enacted Benitez's use of excessive force. Captain Reifschneider could not conclude based on the video that DeStefano's motion was related to the Alvarez incident and could not discern any audible comments being made by him. The use of the term the "Fuse" is related to Benitez's temperament and not his use of excessive force. Reifschneider who has a better understanding regarding the use of force than Binder, was correctly cautious about making conclusions, which are not based on fact. The Appellant had no reason to hide his own actions as they were completely justifiable given Alvarez's actions and resistance. There is no evidence to support Binder's speculation that the Appellant deliberately did not write a report or refrained from writing a report because he had approved Benitez's report and didn't want to have his report conflict with what Benitez wrote. The system of having a junior officer (Agent) approving a superior's report (Sergeant) is both a departure from normal functions in a paramilitary organization and is also magnified when the lesser rank is not even trained to be a supervisor such as was the case with Agent DeStefano. Furthermore, the volatility of Benitez's temperament was well known to the Department and openly discussed.

The Appellant argues the allegation of unbecoming conduct should be dismissed because the conduct was made known to a supervisor with the

authority to initiate an investigation and nothing was done about it within the statutorily required period. The comments made by the Appellant to Sergeant Alaniz of “he pissed off the wrong Sergeant” were known to the Department in February 2018, because it was made to Sergeant Alinaz, who had management authority, and nothing was done about it until April 2019, after the one-year Police Officers Bill of Rights requirement. Furthermore, this statement made by the Appellant is neither unprofessional nor worthy of being labeled misconduct. This comment was not related to Benitez’s actions against Alvarez, which the Appellant did not see, just Benitez’s outsized demeanor.

The Appellant argues the penalty of termination is excessive after 13 years of dedicated performance by him until he was injured on the job. The Appellant’s conduct for which he was disciplined (the failure to write a report) was based on a long-standing past practice and he never received any POST training as a supervisor to the contrary. There is no evidence the Appellant engaged in any excessive force and Benitez’s behavior was well known to the Department. While the Appellant admits he made errors in not reviewing Benitez’s report more carefully and inquiring about how Alvarez changed positions on the car, these mistakes do not validate terminating a 13-year excellent officer. The termination should be vacated and the Appellant reinstated and offset with more appropriate discipline.

### **ANALYSIS AND DISCUSSION**

In a discipline case the employer has the burden to prove that it had proper or “just cause” to terminate the grievant. While arbitrators may differ in



nuance over the level of weight given to the different elements of just cause, there is broad consensus over its main components. The components can be summarized in the following manner: 1) Did the grievant violate some rule or procedure for which discipline is warranted? 2) Was the grievant aware of, or should have been aware of the rule? 3) Does the Employer have sufficient proof that the grievant engaged in this act? 4) Was the Employer's chosen discipline reasonable for the offense committed? 5) Is there some reason this discipline should be mitigated, i.e., disparate treatment, seniority, or procedural defect?

In this case, the City must have sufficient proof to support their allegations that Agent DeStefano violated the five Palo Alto Police Department Policies for which he is cited, and then based on the Arbitrator's determination whether he violated any or all of the Policies, if termination is warranted.

Chief Jonsen in his Notice of Discipline and Assistant Chief Binder in his Notice of Intended Discipline cited Agent DeStefano for violating PAPD Policy 344.2 because he did not file his own police report documenting that he had pointed his firearm at Mr. Alvarez during the incident on February 17, 2018. There is no dispute that the Policy requires that "Anytime an officer points a firearm at any person", they must file a report to document this occurrence. There is also no dispute that DeStefano did not file such a report. The Appellant argues that there was not sufficient evidence to prove that he pointed his weapon at any person. It is true that the "Alvarez video" does not show the Appellant directly pointing his gun at Alvarez, as Alvarez does not appear in the video at the same time as DeStefano is pointing his weapon. However, I believe the City has met

their burden to conclude that DeStefano pointed his weapon at a person, when he was covering Benitez while Benitez kicked down the door and removed Alvarez. The video shows DeStefano drawing his weapon and pointing it level, with his arm extended towards the door as it is kicked in by Benitez, and then DeStefano quickly places it back in his holster as Alvarez is dragged out. DeStefano never directly disputed pointing his gun at Alvarez and testified that he could not be certain if he did point it at Alvarez. Based on the video showing DeStefano pointing his weapon straight towards the door and level (not pointing to the ground) while the door was kicked in, and the fact that DeStefano acknowledged he was providing cover for Benitez, the only reasonable conclusion can be that he would be pointing the gun towards anyone who might come out the door to protect the officers. The video shows DeStefano pointing his gun as the door is breached and then immediately holsters it so he can help control Alvarez as he is pulled out of the door. DeStefano as an experienced officer, once having drawn his weapon would have pointed it towards the danger, which was the closed door and any person behind it, who then was removed. There is no other reasonable conclusion nor contradictory evidence presented to not support the City's determination that DeStefano pointed his weapon at a person, and he should have documented this in a report.

The City determined that the Appellant violated PAPD 300.5 by not documenting his use of force, when he helped Benitez (and Conde) handcuff Alvarez. The video shows Alvarez clearly resisting being handcuffed, which Agent DeStefano acknowledge in his IA interview, and it cannot be disputed that

force was used to handcuff Alvarez. The Use of Force Policy defines Force as *“The application of physical techniques or tactics, chemical agents or weapons to another person. It is not a use of force when a person allows him/herself to be searched, escorted, handcuffed or restrained”*. The Appellant’s actions along with the other officers in struggling to overcome Alvarez’s resistance to being handcuffed, involved the use of force. There is no proof or contention by the City, that Agent DeStefano violated the Policy by using excessive force in handcuffing Alvarez, it was simply that he should have documented the use of force and required the other officers to document their use of force.

The Appellant argues that there was a past practice to only document the use of force when there is a complaint or noticeable evidence of injury and pain. The evidence of this alleged practice provided by the testimony of Becker, Figueroa, and the Appellant does not nullify the Police Department Policy. To assume that the only time you need to report a use of force is when there is a complaint or visual evidence of injury would lead to absurd results, which run counter to any semblance of accountability. The Department had a right to discipline the Appellant for his failure to report his use of force in helping to subdue Alvarez. However, if this were the only issue in this case, then it certainly would be appropriate to factor in any existing general practices in determining the appropriate level of discipline to issue, and the Appellant’s failure to report his use of force would not justify his termination and a lesser form of discipline would be appropriate.

The most serious and central issue in this case is the determination as to whether or not the Appellant witnessed Benitez slam Alvarez back on the car hood/windshield after he was handcuffed. I believe the Department has met their burden to prove that the Appellant witnessed Benitez slam Alvarez back on the hood/windshield of the car, after he was handcuffed and also that he heard Alvarez say he was bleeding. The Alvarez video clearly and convincingly shows the Appellant's head was facing directly towards Benitez and Alvarez at the time Benitez slammed Alvarez back down. The audio evidence also indicates that DeStefano would have heard Alvarez say he was bleeding and Benitez tell Alvarez "Your going to be bleeding a whole lot more". Also, DeStefano admits that he heard Benitez tell Alvarez "You think you're a tough guy" right before this, which adds credence to the contention that DeStefano could hear this verbal interaction between Alvarez and Benitez, given that DeStefano was only a couple of feet away at the time. Benitez's comments to Alvarez were audible on DeStefano's MAV unit and the Alvarez video. Even under the Appellant's theory that use of force need only be reported when there is a complaint of use of force or injury, the Appellant was required to document it in a report, and his failure to include this use of force and his approval of Benitez's inaccurate report is a violation of PAPD Policy 300.2.1 as charged by the Chief.

The video evidence showing DeStefano after this incident, re-enacting the encounter is corroborating evidence that DeStefano witnessed Benitez slam Alvarez back on the hood while handcuffed. While I could not discern what DeStefano was saying at the time, the video showing DeStefano twice moving

his arm down of the patrol car is most reasonably interpreted to be reenacting the slamming of Alvarez on the hood of the car. This supports the City's argument that DeStefano saw this happen and not simply that Alvarez somehow landed back on the hood/windshield of the car. There is no evidence that supports the contention that DeStefano could have prevented Benitez from engaging in his use of force against Alvarez, as it happened very quickly and there is no evidence or contention that DeStefano engaged in an illegal or improper use of force against Alvarez during this incident.

I agree with the Appellant's argument that his statement to another officer after this incident that Alvarez "pissed off the wrong Sergeant" is not evidence of Conduct Unbecoming PAPD 340.5.5 (m), although his failure to report the use of force by Benitez does constitute conduct unbecoming and a violation of the Policy..

Given that the City has met their burden to prove the Appellant violated multiple Department Policies during this incident, the only question is whether termination is an appropriate discipline and for just cause. I believe that the City did reasonably decide that there was just cause for the Appellant's termination for his conduct and Policy violations in this incident. While the Appellant has a very good record as an officer as evident from his performance evaluations throughout his tenure with the Department, it cannot overcome his failure to report the conduct of Sergeant Benitez. The City has made a reasonable argument that such failure to report caused great harm to the Palo Alto Police Department's reputation and relationship with the community. This failure to

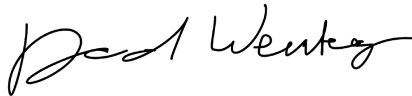
report, led to this incident being unknown to the Department for over a year, until a lawsuit and significant public exposure led to an outcry and contentions that the Department will try to hide bad behavior by its Officers. Given these facts the Department had just cause for its decision to terminate and the grievance is denied.

I have considered all of the evidence and arguments made by both parties. I, however, may not have repeated every item of documentary evidence or testimony, nor may I have repeated completely all of the arguments presented in the respective briefs.

## AWARD

Having received and considered all of the evidence and arguments relevant to this matter, I make the following award:

1. There was just cause for the termination of the Appellant, Agent Thomas DeStefano. The grievance is denied.



---

David A. Weinberg  
Arbitrator  
October 19, 2023