

James E. “Jeb” Brown, Bar No. 162579
jbrown@lcwlegal.com
LIEBERT CASSIDY WHITMORE
A Professional Law Corporation
6033 W. Century Blvd., 5th Floor
Los Angeles, California 90045
Telephone: 310.981.2000
Facsimile: 310.337.0837

Attorney for Respondent CITY OF VALLEJO

IN THE MATTER OF THE DISCIPLINARY APPEAL
BEFORE ARBITRATOR ALEXANDER “BUDDY” COHN

JARRETT TONN,

Claimant,

v.

CITY OF VALLEJO,

Respondent.

Case No.: LDF 20.1413

**CITY OF VALLEJO’S CLOSING
ARBITRATION BRIEF**

Arbitration Hearing Dates: March 20, 21, 2023

The City of Vallejo (hereinafter “City” or “Respondent”) presents the following closing brief in conjunction with the hearing in the above matter that took place on March 21 and 22, 2023. As set forth in detail below, the City requests that the Arbitrator find that Detective Jarrett Tonn engaged in misconduct warranting termination (hereinafter “Detective Tonn”). The evidence before the Arbitrator demonstrates that Detective Tonn violated Vallejo Police Department policies by engaging in behaviors which placed Detective Tonn and the public at risk. Accordingly, the termination imposed was warranted and is the appropriate level of discipline for such violations.

//

//

//

//

1 **I. INTRODUCTION**

2 As stated in the stipulated facts, the incident giving rise to this arbitration occurred on
3 June 1, 2020 when Detective Jarrett Tonn, Detective [REDACTED] and Detective [REDACTED]
4 [REDACTED] were called into work to supplement Vallejo Police Department (“VPD”) staffing due to
5 a high level of civic unrest and looting in the City of Vallejo. All three were members of the
6 SWAT Team and Crime Reduction Team (CRT) and rode in an unmarked pickup truck driven by
7 [REDACTED]. On June 1, 2020, they were all activated in their SWAT Team capacity to assist
8 with the apprehension of looters and other criminals, and were all wearing their SWAT Team
9 uniforms and equipment. [REDACTED] was driving, [REDACTED] was in the front passenger seat
10 and Det. Tonn was in the rear seat.

11 On June 2, 2020, at approximately 12:36 am, Captain [REDACTED] broadcast that looting
12 was occurring at the Walgreens on Broadway and Redwood Street in Vallejo. [REDACTED]
13 drove to [REDACTED] location and there was a brief conversation, lasting only a few seconds,
14 wherein [REDACTED] ordered [REDACTED] to drive through the south entrance of the Walgreens
15 while he drove into the northwest entrance.

16 As [REDACTED] drove into the Walgreens parking lot, he broadcast words to the effect
17 that the looters were all wearing black and it looked like they were armed; possibly armed. In
18 response, [REDACTED] turned on his emergency lights as he approached the Walgreens and
19 people began to flee.

20 As people began to flee, [REDACTED] stopped the truck and he and [REDACTED] began to
21 exit the vehicle. At this time, the detectives encountered Mr. Sean Monterrosa in the parking lot.
22 As they were exiting their vehicle, Det. Tonn perceived Mr. Monterrosa grabbing an object in his
23 waistband that Det. Tonn believed to be a firearm. Perceiving a threat of death or serious bodily
24 injury to himself and his partners, Det. Tonn fired five rounds in quick succession with his duty
25 rifle through the front windshield. One round struck Mr. Monterrosa, resulting in his death. It was
26 subsequently determined that Mr. Monterrosa had a hammer in his waistband and was not armed
27 with a firearm.

28 //

1 The OIR Group subsequently conducted an administrative investigation into the officer
2 involved shooting, which was completed in June 2021. Det. Tonn was placed on Administrative
3 Leave on June 17, 2021. On December 1, 2021, the City of Vallejo served Det. Tonn with a
4 Notice of Intent to Discipline for Termination for various policy violations, including use of
5 deadly force. On April 20, 2022, Det. Tonn participated in a Skelly meeting with the City's
6 designated Skelly Officer, Marc Fox. On May 10, 2022, Mr. Fox issued his Skelly findings and
7 decision wherein he determined that Det. Tonn did not violate the Vallejo Police Department's
8 Use of Force Policy and recommended retention of Det. Tonn's employment and corrective
9 action for poor performance, consistent with the discipline received by the other employees
10 involved in the incident.

11 On October 3, 2022, the City of Vallejo served Det. Tonn with a Notice of Discipline for
12 Termination. On October 4, 2022, Det. Tonn's Notice of Appeal and Request for Arbitration was
13 filed with the City of Vallejo.

14 **ISSUE PRESENTED**

15 The issue before the arbitrator is: Was the termination of Detective Jarrett Tonn from the
16 Vallejo Police Department supported by just cause, and, if not, what is the appropriate remedy?

17 **II. CHARGES AGAINST TONN**

18 The Notice of Intent to Terminate, dated October 3, 2022, described Detective Tonn's
19 violations of the following City of Vallejo Police Department policies.

20 **A. 300.4 DE-ESCALATION**

21 Officers are required to take "reasonable and prudent actions which operate to
22 mitigate the immediacy of the threat."

23 **B. 300.5 USE OF FORCE**

24 "An officer shall use only that amount of force that reasonably appears necessary
25 given the facts and totality of the circumstances know to or perceived by the officer at the
26 time of the event to accomplish a legitimate law enforcement purpose."

27 //

28 //

1 **C. 300.6 DEADLY FORCE APPLICATION**

2 “An officer may use deadly force to protect him/herself or others from what he/she
3 reasonably believes is an imminent threat of death or serious bodily injury to the officer or
4 another person.” The policy further states that “An “imminent’ threat of death or serious
5 bodily injury exists when, based on the totality of the circumstances, a reasonable officer
6 in the same situation would believe that a person has the present ability, opportunity and
7 apparent intent to immediately cause death or serious bodily injury to the officer or
8 another person. An officer’s subjective fear of future harm alone is insufficient as an
9 imminent threat. An imminent threat is one that from appearances is reasonably believed
10 to require instant action. (Penal Code 835a).”

11 **D. 321.5.6 EFFICIENCY**

12 Unsatisfactory work performance

13 **E. 423 PORTABLE AUDIO/VIDEO RECORDERS**

14 **a. 423.4 Member Responsibilities**

15 **b. 423.5 Activation Of The Portable Recorder**

16 “Members shall activate their recorder whenever there is a reasonable expectation
17 of an adversarial encounter, violence, inter-personal conflict, use of force, or display of
18 weapons or any time the member believes it would be appropriate or valuable to record an
19 incident.”

20 **III. PROCEDURAL HISTORY**

21 On June 17, 2021, Detective Tonn was placed on Administrative Leave. On December 1,
22 2021, the City of Vallejo Police Department issued a Notice of Intended Disciplinary Action to
23 Terminate Detective Tonn. Detective Tonn requested a pre-disciplinary Skelly conference, which
24 occurred on April 20, 2022 with City retained Skelly officer Marc Fox. Fox issued his Skelly
25 report on May 10, 2022.

26 On October 3, 2021, the City of Vallejo Police Department issued a Notice of Discipline
27 to Terminate to Detective Tonn. Detective Tonn appealed his termination on October 4, 2022. In
28 accordance with the City of Vallejo Police Department Grievance Procedure, the matter was

brought to arbitration on March 20 and 21, 2023.

IV. FACTS SUPPORTING THE CHARGES

**A. DETECTIVE TONN PARTICIPATED IN A “PLAN” THAT WAS
POORLY AND HASTILY CONCEIVED AND LED TO THE SHOOTING
OF SEAN MONTERROSA**

As stated in the stipulated facts above, Dets. Tonn, [REDACTED] and [REDACTED] were riding together in [REDACTED] unmarked CRT truck when they heard a radio report from [REDACTED] [REDACTED] [REDACTED] advising of looting in progress at a Walgreens in Vallejo. (Transcript 29: 1-5; 87: 3-5) Since they were close by, [REDACTED] drove his vehicle to [REDACTED] location to provide assistance. (Transcript 29: 13-18) Detective [REDACTED] in the front passenger seat, was closest to [REDACTED] [REDACTED] and spoke briefly with him. (Transcript 30: 16-21; 88:10-19) At that point, [REDACTED] [REDACTED] shared the “plan” whereby [REDACTED] would enter the south driveway of the Walgreens parking lot and the CRT vehicle would enter the north driveway. (Transcript 31: 2-6; 88: 21-25) This discussion was “very brief” (Transcript 31: 1) lasting less than ten seconds (Transcript 89: 1-2). Det. Tonn himself admitted in an interview that this “plan” was not great. (Transcript 452: 1-18)

The lack of planning and understanding of what was happening led to this shooting. In fact, those in the CRT vehicle thought the “plan” had different goal. [REDACTED] thought they were going to set a perimeter and conduct a felony stop of the looters. (Transcript 32: 6-10) But as the CRT vehicle was driving into the parking lot approaching the looters, [REDACTED] [REDACTED] stated on the radio that the looters were armed or possibly armed. (Transcript 33: 4-7; 90: 4-7)

The CRT detectives viewed multiple people running from the Walgreens and entering vehicles that then left the parking lot. (Transcript 34: 15-25; 90: 14-21) [REDACTED] and [REDACTED] observed someone later identified as Sean Monterrosa, attempt to enter a silver sedan (described as a Nissan Altima by [REDACTED] (Transcript 90: 22-23)). The sedan then left the parking lot without Monterrosa. (Transcript 36-37: 15-9; 90-91: 19-11)

At this point, an officer involved shooting took place when Det. Tonn shot Sean Monterrosa, killing him.

//

**B. DETECTIVE TONN FAILED TO DE-ESCALATE THIS SITUATION AND
USED EXCESSIVE FORCE IN VIOLATION OF VALLEJO POLICE
DEPARTMENT POLICY**

Det. Tonn recalled that [REDACTED] broadcast stated that someone in black was armed. (Transcript 458: 9-14) All three CRT detectives became focused on Monterrosa because he was wearing black and attempted to get into a sedan that left the scene before he could enter the vehicle. (Transcript 36-37: 15-9; 90-91: 22-19)

Despite the fact that Tonn never saw Monterrosa pull and present any sort of weapon (Transcript: 459-460: 25-7), Tonn pushed himself and his rifle forward from the back seat of the CRT truck and fired through the windshield at Monterrosa. (Transcript 38-39: 21-16; 93: 3-6) Detective [REDACTED] saw Monterrosa with his hands at his waistband when Tonn fired his weapon at Monterrosa. (Transcript 37: 15-20) [REDACTED] did not see anything in Monterrosa's hands at that time. (Transcript 37-38: 21-4) Detective [REDACTED] testified that he saw a "black object" in Monterrosa's hand. (Transcript 92: 1-2) [REDACTED] thought Monterrosa had a gun in his hand, but later determined that it was likely a cellphone. (Transcript 92: 2-14) Neither [REDACTED] nor [REDACTED] fired at Monterrosa (Transcript 462: 6-8)

Detective Tonn fired at Monterrosa through the windshield of the CRT truck, which damaged the windshield, creating difficulty in viewing the alleged threat presented by Monterrosa. (Transcript 458-459: 24-12; 459:16-18) Tonn gave no warning prior to firing at Monterrosa. (Transcript 459: 19-21) Tonn testified that he fired five rounds in 1.5 seconds. (Transcript 462: 9-13) As testified by Tonn's, expert Shane Bower, there should be constant perception by the officer of the threat and there needs to be a constant reevaluation of the threat. This perception is primarily going to be a visual perception. (Transcript 300: 9-22). Tonn testified that firing through the windshield caused damage to the windshield and made it difficult to see in that area. (Transcript 459: 13-18) Tonn did not perceive or reevaluate any alleged threat after he fired a 5 round burst of rounds because it was difficult to see through the damaged windshield. Therefore, Tonn could not constantly perceive and reevaluate the alleged threat Tonn believed Monterrosa presented.

1 Tonn wasn't even sure what threat existed, stating immediately after the shooting "what
2 did he point at us" to [REDACTED] responded by telling Tonn, "I don't know
3 man." Tonn then attempted to support his actions by saying "He pointed a gun at us". (Transcript
4 41:1-9) The three detectives then approached Monterrosa and handcuffed him. (Transcript 41:
5 10-15) When they searched Monterrosa, they realized that he had a framing hammer, not a
6 firearm. (Transcript 41: 15-18)

7 **C. DETECTIVE TONN FAILED TO ACTIVIAE HIS BODY WORN VIDEO**
8 **RECORDER**

9 As is evidenced by the review of the Body Worn Camera (BWC) videos submitted as
10 exhibits in this arbitration, Tonn did not activate his camera prior to this incident despite VPD
11 policy requiring such activation. As Tonn testified, he did not believe that this incident would be
12 an exigent circumstance. (Transcript 463-464:15-17) Although Tonn testified that the BWC has
13 a two minute buffer which captured the incident, audio is not captured in buffer mode, proving
14 Tonn's failure to activate the BWC since there is no audio at the beginning of his video.
15 (Transcript 466-467: 19-25) Tonn failed to comply with this policy.

16 **V. STANDARD OF REVIEW**

17 It is the City's burden to prove Detective Tonn's misconduct by a preponderance of the
18 evidence. (*Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, 204 fn. 19 ("the appointing
19 power has the burden of proving by a preponderance of the evidence the acts or omission of the
20 employee upon which charges are based.") A "preponderance" of the evidence exists when the
21 evidence on one side, weighed with that opposed to it, has more convincing force." (*Chamberlain*
22 *v. Ventura County Civil Service Com.* (1977) 69 Cal.App.3d 362, 369.) The City meets its burden
23 if the evidence shows that Detective Tonn more likely than not engaged in this misconduct.

24 The City's discipline should not be overturned unless the City has abused its discretion.
25 (*Id.* at 217-219.) Courts instruct civil service commissions, arbitrators, and hearing bodies to give
26 deference to the employer's penalty decision considering such things as the employer's
27 administration of its own standards and rules. (See *Kolender v. San Diego Civil Service*
28 *Commission* (2007) 149 Cal.App.4th 464, 471.) The fact that reasonable minds may differ

1 regarding the penalty imposed supports a finding that the employer has acted within its discretion.
2 (*Ackerman v. State Personnel Board* (1983) 145 Cal.App.3d 395, 401.)

3 **VI. THE CITY PROVED ALL CHARGES AGAINST DETECTIVE TONN**

4 An unfortunate cascade of errors led to a tragic outcome in this case. The ill-conceived
5 “plan” proposed by [REDACTED] (that by Tonn’s own admission was not a “great plan”)
6 contradicted the general practice of slowing events and gathering the necessary resources to
7 address a particular situation. This “plan” forced the detectives to rush into a situation where
8 looters outnumbered officers and created the potential for catastrophe.

9 After the “plan” was in motion, [REDACTED] and the CRT detectives were put in an
10 untenable position of responding to multiple looters in two vehicles that were leaving the scene of
11 the Walgreens. While Monterrosa attempted to enter a sedan leaving the scene, for whatever
12 reason, his attempt failed and he was left at the scene.

13 Each of the CRT detectives describes the threat presented by Monterrosa differently. [REDACTED]
14 [REDACTED] places Monterrosa’s hands at his waistband but does not see anything in his hands. [REDACTED]
15 [REDACTED] thought he had a gun in his hand, but later determined it was a cellphone. Neither
16 [REDACTED] nor [REDACTED] fired at Monterrosa. Only Tonn shot at Monterrosa, firing a five round
17 burst of bullets through the windshield of the CRT truck while his partners were still inside the
18 truck. One of the bullets struck Monterrosa in the back of the head, killing him.

19 When analyzing the facts as presented in the OIR Investigation Report, interview
20 transcripts and the evidence at this arbitration hearing, it is clear that Tonn failed to de-escalate
21 this incident as required by VPD Policy 300.4. Tonn followed an insufficient plan proposed by
22 [REDACTED] erroneously believed that Monterrosa was presenting a threat when he only had a
23 hammer; and based on that, fired multiple rounds through a windshield which caused the
24 windshield to fragment making it impossible to see Monterrosa or to evaluate the effectiveness of
25 each round fired. This force used in response to this erroneously perceived threat was
26 unreasonable as defined by the VPD Use of Force and Deadly Force policies (VPD Policies 300.5
27 and 300.6 respectively).

28 //

Further, as evidenced by Tonn's interview during the investigation of this matter, his testimony at the arbitration and a review of the BWC presented as an exhibit in this matter (Exhibit 17), it is clear that Tonn failed to promptly activate his BWC prior to this incident as required by VPD policy 423. The totality of these failures results in the charge of poor work performance as provided in VPD Policy 321.5.6, Efficiency.

The evidence presented in this matter proves by a preponderance that Tonn violated all of these policies. These policy failures, each building on the other, led to the tragic events of the early morning of June 2, resulting in the death of Sean Monterrosa. These policy violations justify the termination imposed on Tonn.

VII. DETECTIVE TONN'S DEFENSES DO NOT MITIGATE THE CHARGES AGAINST HIM

Tonn states that he perceived Monterrosa as an imminent threat to himself and the other CRT detectives and argues he had no choice but to fire. Tonn believed that Monterrosa was armed with a gun and that he was going to shoot Tonn or one of the other CRT detectives. The evidence simply doesn't support that position. Tonn's pre-shooting conduct put him in a position where he erroneously perceived a threat where one didn't exist resulting in his erroneous decision to shoot at Monterrosa, killing him.

Tonn attempts to argue that after following a plan he admits wasn't "great", he perceived Monterrosa as an imminent threat despite testifying at the arbitration that he never saw Monterrosa pull and present a weapon. Neither of his partners, who were in the same vehicle and presented with the same facts, fired at Monterrosa. Tonn's arguments just aren't supported by the facts learned from the investigation of this matter and presented in this arbitration.

VIII. TERMINATION IS THE APPROPRIATE PENALTY

After reviewing the investigation of this matter by the OIR Group (Exhibit 7), Chief Shawny Williams determined that termination was the appropriate level of discipline. (Transcript 141-142: 2-9; 150-151:15-3) Specifically, after reviewing the investigation, Chief Williams determined that Monterrosa did not present an imminent threat, making deadly force unwarranted under VPD Policy. (Transcript 143:9-20) This conclusion is also supported by the fact that

1 Monterrosa was shot in the back of the head, which indicates that he was not facing the CRT
2 vehicle or the detectives when that fatal shot was fired. (Transcript 146:17-23) Chief Williams
3 concluded that Tonn was not sure of the basis of the threat since he asked [REDACTED] “what did he
4 point at us”. This lack of clarity indicated to Chief Williams that Tonn did not know what, if
5 anything, was pointed at them. (Transcript 147:4-24) In fact, Tonn himself knew that nothing
6 was ever pointed at the CRT detectives because he stated in his investigative interview and
7 testified in this arbitration that he did not see a weapon pulled or presented.

8 It is well settled in California that peace officers are held to a higher standard of conduct
9 than non-police employees. (See, e.g., *Bailey v. City of National City* (1991) 226 Cal.App.3d
10 1319, 1328, cert. denied, 502 U.S. 859; *Anderson v. State Personnel Bd.* (1987) 194 Cal.App.3d,
11 761, 771; *Titus v. Los Angeles County Civil Service Commission* (1982) 130 Cal.App.3d 357,
12 364; *Ackerman v. State Personnel Bd.* (1983) 145 Cal.App.3d 395, 400.)

13 According to the California Courts of Appeal, “there are certain professions which impose
14 upon persons attracted to them, responsibilities and limitations on freedom of action which do not
15 exist in other callings. Public officials such as judges, policemen, and school teachers fall into
16 such a category.” (*Ackerman*, supra at 440.) In *Unruh v. City Council of the City of Selma* (1978)
17 78 Cal.App.3d 18, 25, the Court of Appeal emphasized the special nature of police operations:

18 “in police officer cases it is imperative that special emphasis be placed
19 upon the paramilitary nature of police operations; the necessity of developing and
20 maintaining discipline, morale, loyalty, confidentiality and efficiency of the force
21 with view toward the proper protection of the public safety, which is the primary
22 objective and function of a police department. [citations omitted]”

23 Here, the Department exercised its discretion to terminate an officer who violated multiple
24 Department policies. Detective Tonn’s termination was supported by the preponderance of the
25 evidence, and based upon a careful and considered evaluation of all the available evidence. It was
26 not an abuse of discretion and should be upheld.

27 //

28 //

1 **IX. CONCLUSION**

2 For all of the reasons identified above, all of the evidence and testimony clearly shows
3 that Detective Tonn violated policy by following a plan that was not thought out and was likely to
4 lead to a bad outcome. Which is exactly what happened. The evidence shows that Tonn
5 perceived a threat where no threat existed and he used deadly force to respond to this mis-
6 perceived threat when he fired 5 rounds which killed Monterrosa.

7 The evidence further shows that Detective Tonn used deadly force without any effort to
8 de-escalate the situation, without giving any warnings prior to using force and by using the
9 extraordinary tactic of firing through a windshield from the inside of a vehicle. Tonn failed to
10 timely activate his BWC as required by policy.

11 Tonn misinterpreted Monterrosa's actions to be an immediate threat of harm. Tonn
12 believed Monterrosa had a firearm when he did not. Tonn believed that Monterrosa was facing
13 him when the evidence shows Monterrosa was facing away from him when the final shot was
14 fired. Therefore, Monterrosa could not have been a threat as he was facing away from Tonn and
15 the CRT truck.

16 Again, this is a tragic circumstance where Monterrosa has lost his life. These policy
17 failures that lead to Mr. Monterrosa's death resulted in Tonn losing his job. The City has shown
18 by a preponderance of the evidence that Tonn violated these policies and the appropriate level of
19 discipline is termination. This decision to terminate Tonn under these circumstances should be
20 upheld.

21
22 Dated: June 30, 2023

LIEBERT CASSIDY WHITMORE

23
24 By: /s/ James "Jeb" Brown

25 James E. "Jeb" Brown
26 Attorney for Respondent CITY OF
27 VALLEJO
28