

**VOLUNTARY LABOR ARBITRATION TRIBUNAL**

Michael C. Ryan, Esq., Arbitrator

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In the matter of the  
arbitration between:

BOSTON POLICE PATROLMEN'S  
ASSOCIATION

Case No. 16-2017

Gr: David Williams

-and-

Termination

CITY OF BOSTON

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**DECISION AND AWARD**

**For the City**

Nicole I. Taub, Esquire  
Jeffrey Hughes, Esquire

**For the Union**

Alan H. Shapiro, Esquire  
Kenneth Anderson, Esquire

**I. Background.**

The hearing in this matter took place on September 12, October 24, and December 21, 2012. The parties stipulated to the following statement of the issues:

1. Whether the City had just cause to discharge David Williams on January 18, 2012? If not, what should be the remedy?
2. Whether the City violated the collective bargaining agreement by placing David Williams on administrative leave on February 18, 2011? If not, what should be the remedy?

Both parties filed post-hearing briefs.

The following articles of the collective bargaining agreement and Department rules are relevant to the grievance:

**Article V(A)**

**Discipline and Discharge**

**Section 1.** No bargaining unit member who has completed his one-year probationary period shall be disciplined or discharged without just cause. ...

**Rule 304**

**Use of Non-Lethal Force**

Because there are an unlimited number of possibilities, allowing for a wide variety of circumstances, no rule can offer definitive answers to every situation in which the use of non-lethal force might be appropriate. Rather, this rule will set certain specific guidelines and provide officers with a concrete basis on which to utilize sound judgment in making reasonable and prudent decisions, attending to the spirit over the letter of the rule.

**Section 1. Definitions: ...**

**1.** Reasonable Amount of Force is the least amount of force that will permit officers to subdue or arrest a subject while still maintaining a high level of safety for themselves and the public.

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**Section 2. General Considerations.** The policy of the Boston Police Department is to use only that amount of force that is reasonably necessary to overcome resistance in making an arrest or subduing an attacker.

The right to use non-lethal force is extended to police officers as an alternative in those situations where the potential for serious injury to an officer or civilian exists, but where the application of lethal force would be extreme.

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**Rule 102**

**Conduct and General Rights and Responsibilities of Department Personnel**

**Section 23. Truthfulness.** ... Reports submitted by employees shall be truthful and complete. No employee

shall knowingly enter, or cause to be entered, any inaccurate, false or improper information.

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The grievant, David Williams, began working as a patrol officer for the Boston Police Department (Department) in 1991. All of his previous employment was in law enforcement, with the Suffolk County Sheriff's Department, the MBTA Police, and a local police department in Florida. The grievant's first assignment with the Department was Area C11 (Dorchester), one of the busiest areas of the city. He worked the midnight shift for almost all the time he was assigned to C11. In or around 2006, he was assigned to Area A1, where he continued to work the midnight shift. Area A1 covers downtown Boston, the North End, and Charlestown.

The incident that led to the grievant's discharge took place shortly after midnight on Monday, March 16, 2009. Sunday, March 15 was the day of the South Boston St. Patrick's Day Parade, one of the outstanding social and political events on Boston's calendar. The parade always takes place on the Sunday before St. Patrick's Day. Since the following Monday is a public holiday in Boston and the rest of Suffolk County, many residents carry the celebration into the night.

Twenty-eight-year-old Michael O'Brien attended the St. Patrick's Day Parade. O'Brien, who lived in Burlington, had been a deputy sheriff and correction officer at the Billerica

House of Correction for about five years. O'Brien was about to be married, and on the Saturday night before the parade, he and ten or twelve friends had a bachelor party. They travelled by rented limo to Providence, Rhode Island, where they attended a number of bars and strip clubs. All of the celebrants became intoxicated. After the party, the grievant spent the night at the home of a friend, Alex Vila, who lived in South Boston.

On Sunday morning, the grievant, Vila and other friends watched the parade for a while, visited a friend's house, and returned to Vila's house for lunch. At some point two longtime friends of O'Brien's, Tom Cincotti and Eric Leverone, joined the group. O'Brien testified that he "tried to start drinking" during that day, but was so hung over from the bachelor party that it "just wasn't happening." He testified that he only had a few sips of beer.

Later that evening—O'Brien did not remember exactly when—O'Brien, Cincotti, and Leverone went to the Black Rose, a well-known Irish bar in the Faneuil Hall area of Boston. O'Brien sometimes worked at the Black Rose (and at other bars owned by the same family) and knew the owners and staff. He testified that the bartender sometimes treated him to free drinks, and may have done so that night. But he further testified that he only had "a few beers ... [m]aybe three." He did not think Cincotti was drinking much either, although O'Brien "wasn't

really paying attention." Leverone, on the other hand, had a lot to drink. A group of firefighters learned that he had recently returned from service in Afghanistan, and O'Brien testified that they bought drinks for him "pretty much all night."

O'Brien did not remember when he, Cincotti, and Leverone left the Black Rose. He conceded that they could have been there for as long as five hours. From the Black Rose, the three walked to Cincotti's apartment building on the corner of Richmond and Hanover Streets in the North End. Hanover is the main thoroughfare of the North End, a densely populated neighborhood that is a destination for tourists and locals alike. One of the few wide, two-way streets in the North End, Hanover is lined with cafes, shops, and restaurants. Some of the restaurants were still open and there were pedestrians and cars on the street.

As the three approached his building, Cincotti decided to move his car so that it would not get ticketed the next day. The car, a white Volvo, was parked on the east side of Hanover, north of Richmond. Cincotti got into the car while O'Brien and Leverone waited on the southeast corner of the intersection.

In maneuvering the car out of the space, Cincotti backed across the double yellow line and into a black BMW that was double-parked outside the Café Pompeii, a popular all-night

café. The owner or driver of the BMW, Guy Fils-Aime, was in the driver's seat at the time of the impact.

Cincotti's car came to a stop near the northeast corner of Hanover and Richmond, with the front end facing Hanover St.<sup>1</sup> After the initial shock, Cincotti got out of his car and walked toward Fils-Aime, who had gotten out of the BMW. O'Brien, who saw the collision, walked toward Cincotti.

O'Brien's testimony about the sequence of the immediately following events was somewhat confused, but they can be reconstructed as follows. Cincotti asked O'Brien to move the Volvo because it was in the middle of the intersection, and gave him the keys. Words passed between Cincotti and Fils-Aime, which O'Brien did not hear, except that he testified that he heard Fils-Aime say, "I am a federal agent and you are fucked." O'Brien backed the Volvo down Hanover St. and turned down Richmond, where he saw a parking space at or near the intersection.<sup>2</sup>

O'Brien found it "nerve-racking" that Fils-Aime was a federal agent. He was under the impression that he and his friends might have interfered with some sort of sting

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<sup>1</sup> Judging by the position of Cincotti's car, he hit the front passenger-side corner of the BMW. Double-parking on Hanover St. is illegal, but nonetheless extremely common.

<sup>2</sup> The grievant drove the wrong way down Richmond, which is one-way. Backing down a main street in the direction of traffic, and driving the wrong way on a one-way street, are both illegal, but are common techniques in Boston.

operation. He testified,

If this guy is a federal agent and I did whatever it was he claimed we did wrong, you know, that could impact my employment at the sheriff's office and also the security clearance [in the military], and I was ... trying out for the special forces unit, going through the process, and something like that is a huge red flag if you get in trouble like that and they can kick you out of the program just like that.

As it happens, Fils-Aime's actual words were captured on tape. At one minute and fifty-three seconds after midnight, Fils-Aime made a 911 call to the Department, which was recorded. Fils-Aime spent the first seconds of the call talking to a male third party on the street. Some of his words are garbled, but he clearly said, "No, no, no, don't worry. I work for Homeland Security. I'm a federal agent. You're not going to get in trouble. Relax."

Fils-Aime then described the accident to the dispatcher matter-of-factly, but suddenly became upset and called out, "Yo, don't leave, don't leave! He's driving away!" Fils-Aime then gave the dispatcher the Volvo's license number, and stated, "They're drunk."

O'Brien gave different accounts of how he and Cincotti spent the roughly six minutes between Fils-Aime's 911 call and the arrival of the police. On direct examination he testified that he and Cincotti stood by the Volvo on Richmond St. while Cincotti wrote down his license, registration, and insurance

information for Fils-Aime. But on cross-examination, O'Brien testified that he did not remember what he did during that interval; he thought he might have been talking with Leverone.

The grievant, Officer David Williams, and Patrolman Diep Nguyen responded to the call, arriving on the scene at eight minutes and fifteen seconds after midnight. The grievant parked the cruiser head-to-head with the BMW, blocking the southbound lane of Hanover St.

O'Brien testified that the officers were hostile and aggressive to him and Cincotti from the moment they arrived:

There was a lot of swearing..."don't f'n move, don't open your f'n mouth." ... I think I actually might have said ..., "We just want to exchange papers." Officer Williams was like, "Yeah, I'll exchange your fuckin' papers." It was intense.

O'Brien testified that Nguyen threatened to charge them with leaving the scene of an accident.

... that's kind of when I stepped in again and said, "Hey, you know, we never left the scene of an accident. We were right here, we're not that far away." I remember somebody just saying, "Just hurry the fuck up and finish what you're doing." ... I wasn't rude about it, I was more matter-of-fact about it.

O'Brien testified that Cincotti became "frazzled" and asked the grievant to finish writing out the information while he went across Hanover to the Café Pompeii. He testified that he finished the paperwork and gave it to Nguyen, and "as far as

I was concerned, I was done doing what I had to do.”<sup>3</sup> Nguyen walked back toward the cruiser, and O’Brien “simultaneously” walked in the same direction “to see if I could kind of locate Tom [Cincotti].”

The grievant testified that when he and Nguyen arrived at the scene, they found three white men and a black man having a “verbal altercation” by the BMW. (Judging by his accent, Fils-Aime is Afro-Caribbean, or possibly African.) Both the grievant and Nguyen testified that all three white men were intoxicated. According to Nguyen, “One of them was much worse than the others, but all three of them were pretty bad.” Nguyen was apparently alluding to Leverone, who according to the grievant “could barely stand.”

The grievant and Nguyen testified that they separated the parties, and Nguyen spoke with the O’Brien and his friends while the grievant spoke with Fils-Aime. Nguyen began by instructing Cincotti and O’Brien never to move a car that has been in an accident unless it was absolutely necessary. Nguyen testified that he was calm at first, but began “escalating” because “they weren’t listening to me.” O’Brien, in particular, got “very aggravated” and “kept trying to say that ... I wasn’t doing my job and that they didn’t do anything

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<sup>3</sup>According to Nguyen, this did not happen. The parties never got to the point of exchanging papers.

wrong." Nguyen admitted that by the time the grievant joined them, "everyone" was using profanity, including himself.

The grievant testified that the three men continued insisting that the accident was Fils-Aime's fault because he was double-parked. The grievant responded that be that as it may, Cincotti had backed down the wrong side of the street and hit the BMW. He ordered them to "exchange papers and everybody can go on their way."

O'Brien testified that when he crossed Hanover St. to look for Cincotti, he found the two officers joking and laughing with Fils-Aime, showing a "total opposite demeanor of how they were with us." O'Brien testified that he stood on the sidewalk between the Café Pompeii and a gelateria, and repeatedly asked the officers to ask Fils-Aime whether he was a federal agent. The officers ignored him.<sup>4</sup>

O'Brien testified that he "didn't really know what to do," so he took out his cellphone and began videotaping the officers while continuing to ask, "Hey, excuse me, is this guy a federal agent or isn't he? I'm a taxpayer, I deserve an answer." O'Brien admitted that when the officers continued to ignore him, his voice took on "a little tone of annoyance."

The grievant and Nguyen testified that as they returned to

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<sup>4</sup> The officers were not aware that Fils-Aime had identified himself as a "federal agent," and apparently did not take O'Brien seriously.

the BMW, O'Brien began following them. He repeatedly demanded that they do their jobs and write Fils-Aime a ticket, and also that they ask Fils-Aime whether he was a federal agent.

O'Brien then began filming them with his cellphone. Both the grievant and Nguyen testified that O'Brien was standing in the middle of Hanover Street as he did this, blocking the one open lane. The grievant testified that he told O'Brien to go ahead and record them if he wanted, but to stand on the sidewalk while he did it.

Around this point, Fils-Aime remarked to the grievant that his brother worked at a downtown bar. The grievant testified that Cincotti (who had emerged from the Café Pompeii) began shouting, "Oh, you knows him, that's why you aren't writing him a ticket. Do your job!" After some minutes of this, the grievant said, "You know what, you're right," and ordered Cincotti to produce his license and registration, because he was going to give him a citation for a crossing the double yellow line and backing down Hanover St.

The grievant returned to the cruiser to write the citation, while Nguyen stood nearby. Nguyen testified that O'Brien continued standing in the middle of Hanover St. and yelling at Nguyen. Nguyen warned O'Brien to get out of the street a few times, but testified that O'Brien "kept ignoring me." Nguyen decided to place O'Brien under arrest for

disorderly conduct.

O'Brien denied standing in the middle of Hanover St. He testified that he stopped filming the officers after about 30 seconds, because his cellphone battery was running down.<sup>5</sup> He then crossed Hanover St. and stood on the very edge of curb, slightly north of the BMW. O'Brien testified that the grievant and Nguyen suddenly "came charging over" to him.

I put my hands up, and I had my cell phone in my right hand ... and Officer Diep Nguyen just instantly grabbed my hand with the phone and yelled, "Give me the fuckin' phone." And then it was almost like Williams came right out from underneath him ... and just basically choke-slammed me by the collar and we went to the ground.

Asked to describe the fall in greater detail, O'Brien testified that the grievant grabbed his fleece sweater around the area of his collarbone with both hands and "whipped me around and then we went to the ground." O'Brien testified that he tried to break his fall with his left hand, and landed face-down with his right hand underneath him. His left arm was extended outward, palm up. He described the next few moments as follows:

Officer Williams was on top of me, he had his arm around my neck, he was pulling up, and he kept yelling, "Give me your hand, give me your fucking hand," blah blah blah. ... I absolutely didn't struggle. I realized that he was heavy, I couldn't move my [right] hand ... So, I kept putting my left hand out ... palms up, fingers out ... and I was waving it back and forth...almost to say,

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<sup>5</sup> There is no cellphone video in evidence. O'Brien testified that he no longer has that phone.

"Hey, here it is, take my hand, I'll give it to you, all yours, no problem here." ...

When he had his arm around my neck, he had pulled my neck up and was closing off my esophagus. I had no airway exchange whatsoever, I could not breath in or out.

... I remember ... com[ing] to terms with the fact this...this is how I'm going to die, you know, and almost kind of a real peaceful, peace kind of came over, as weird as it sounds. My vision started to close in. ... [I]t was all black around it and there's just a small little circle where I could see. ...

... I couldn't move -- if I could have given him my right hand, I would have given him my right hand, trust me.

The grievant and Nguyen described the arrest differently. Nguyen testified that he approached O'Brien and tried to take his cell phone away so that O'Brien could not throw it at him. O'Brien pushed him away, and the two began struggling as Nguyen attempted to handcuff him.

The grievant testified that he saw the struggle from the cruiser and immediately went to assist Nguyen. He "tackled" O'Brien by shoving him with his upper body, bringing him to the ground and landing on top of him. Nguyen had a handcuff on one of O'Brien's wrists, and O'Brien's other hand was "clenched underneath him."

In an effort to pull O'Brien's hand out from under him, the grievant got O'Brien in "a semi-bear-hug hold" and tried to roll him over. At the arbitration hearing, the grievant

demonstrated this hold, using his counsel as a subject. To simulate O'Brien's posture on the ground, counsel sat in a chair and bent over so that his upper body was roughly parallel to the floor, with his hands clasped to his chest. The grievant, who was standing, bent over counsel's right side and passed his left arm over counsel's right shoulder, across his chest and around the left side of his ribcage. He wrapped his right arm around counsel's back and clasped his left hand with his right. In this position, the grievant's upper left arm and shoulder were pressed against the right side of counsel's neck. There was no pressure on any other part of the neck.

Nguyen concurred with the grievant's testimony in almost every detail. He testified that while the grievant struggled with O'Brien on the ground, he held on to O'Brien's left hand, which he had managed to cuff. At the same time, Nguyen was "fighting off" Cincotti and Leverone. The only significant divergence was Nguyen's description of the grievant's hold on O'Brien. Nguyen testified that the grievant had his arm "around [O'Brien's] neck" in "[a] chokehold."

The grievant decided that the incident was getting out of hand, and called for assistance on the microphone in his uniform. (Nguyen testified he was about to do the same.) Within minutes, eight officers responded, subdued O'Brien, placed him in handcuffs, and carried him to the police wagon.

They arrested Cincotti as well. On his way to the wagon, O'Brien told the officers that he worked for the Middlesex Country Sheriff.

O'Brien testified that he was relieved when he saw the lights of the police cruisers. He felt someone pulling the grievant's hands off of his neck, "took a huge gasp for air," and tucked his head under the grievant's arm to prevent the grievant from grabbing him again. O'Brien then saw "a bunch of people running" toward him, one of whom seemed about "to slide into my face like it was home plate ...". O'Brien continued:

... I kind of felt the initial blow, and then the next thing I knew, I was just getting, you know, whacked off the side of the head in the temple area, and then the next thing I knew, I was in handcuffs and being carried into the police wagon. ...

In the wagon, he realized that he had urinated in his pants.

O'Brien, Cincotti, and the two officers arrived at the Area A-1 station at 12:40 AM. O'Brien was charged with resisting arrest, assault and battery on a police officer (Officer Nguyen) and disturbing the peace, and was placed in the "cage." In O'Brien's mug shots, a bruise on his left temple is plainly visible, but no other marks. However, according to the standard Visible Injury Report, there was an abrasion on the right side of his forehead, near the hairline.<sup>6</sup>

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<sup>6</sup>There are some other photographs in evidence, which O'Brien's fiancée took soon after the incident. They show

Lt. James Leary was the duty supervisor for the midnight shift in Area A-1. (He has since retired, after 33 years with the Department.) It came to his attention that an employee of the Middlesex County Sheriff's Department was in custody. Because O'Brien was "in the business," Leary decided to go out to the cage and "look him over." Leary entered the cage and examined O'Brien from arm's-length distance, "start[ing] with his face ... from the face down, toes and back up." He testified that he saw no marks on him, and that his clothes were not torn or disheveled. O'Brien said nothing to Leary during this encounter.

O'Brien did not tell anyone in the station that the grievant had strangled him, or that he had urinated on himself. Some time after 1:00 AM, O'Brien complained of chest pains and "pressure" in his head. Boston EMS was called, and arrived at 1:53 AM. The EMTs' notes state:

PT [complains of] pounding headache and pain in anterior chest with inspiration. PT states he was assaulted earlier. PT has small laceration and hematoma on left temple area, small lacerations to right side of head and an abrasion on left fingers. No other trauma noted.

The EMTs transported O'Brien to the Emergency Department at Massachusetts General Hospital (MGH), arriving around 2:30 AM. At triage, O'Brien's chief complaint was recorded as "R

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one tiny red mark on the grievant's right temple, two on his left temple, two scratches near his right ear, and a small scrape or scratch in his upper right hairline.

temple contusion." The triage notes also contain the abbreviation "+ETOH," signifying that the grievant was under the influence of alcohol.

At 3:43 PM, The attending physician, Dr. Andrew Liteplo, took the following history from O'Brien:

28 yo male [complains of] assault to head by police and choked. The patient ... was involved in an incident where he claims he was assaulted by the police. As per him, he was beat in the head and choked-- - he is not sure with what, but at one point there was pressure on the front of his neck and he could not breathe for a few seconds. Currently he has no swelling in his throat or trouble breathing. No [loss of consciousness]./ No headache. No weakness in his extremities, no visual changes.

Upon examination, Dr. Liteplo noted a contusion to the left temple, an abrasion/contusion to the right temple, and "petechiae" on the face. (A petechia is a red spot on the skin, about the size of the head of a pin, caused by a minute subcutaneous capillary hemorrhage.) There was no bruising or tenderness of the neck, and no respiratory or airway symptoms.

O'Brien was given a CT scan, which Liteplo interpreted as showing no fracture or bleed. He was discharged at around 5:30 AM, with the following differential diagnosis:<sup>7</sup>

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<sup>7</sup>A differential diagnosis is a method of arriving at the cause of an illness or disorder for which there could be many possible causes (such as a headache or abdominal pain). The MGH form has spaces for "differential diagnosis" and "diagnosis."

Closed head injury, no [loss of consciousness], GCS 15.8  
Appears well, no headache. CT done as medicolegal  
documentation of injury. No fracture or bleed noted to  
my read... Was choked, but no respiratory or airway  
symptoms ... Continues to look and feel well. ...

The diagnosis was "closed head injury, choking."

O'Brien received the following discharge instructions:

You have sustained blunt trauma to your head. The CT  
scan does not show any evidence of bleeding or fracture.  
You have some abrasions to your face ... There are signs  
on your skin of choking. It is good that you do not have  
any trouble breathing or swelling in your throat. ...  
Follow up with your doctor and return to the ED for any  
worsening problems or other concerns.

The grievant was transported back to the Area A-1 Station,  
where he and Cincotti were bailed out.<sup>9</sup>

Later that day, O'Brien saw his PCP, Dr. John Dickason.

Dickason's notes state:

The patient presents today complaining of having been in  
an assault. ... The patient ... was attacked by several  
officers one of which applied a choke hold to his head  
causing him to feel as if he would lose consciousness,  
lose control of his bodily functions and he was unable to  
breathe whatsoever. ... At this point in time, he is  
reporting some dizziness and some pain in the head where  
he was hit. ...

On physical examination, Dickson noted:

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<sup>8</sup> GCS refers to the Glasgow Coma System, the most common scoring  
system for gauging the severity of a brain injury. A score of  
fifteen signifies the mildest possible injury.

<sup>9</sup>On March 18, O'Brien and Cincotti appeared in Boston Municipal  
Court, where the court ruled that the charges would be  
dismissed upon completion of 50 hours of community service.  
O'Brien performed the service, and the charges were duly  
dismissed. Neither the grievant nor Nguyen received notice of  
the BMC proceeding.

... numerous petechial hemorrhages throughout his entire face and scalp consistent with strangulation injury. In addition, he has several contusions on both temporal areas as well as abrasions particularly on the right temporal area. Fundoscopic exam does not show any intraretinal hemorrhages.

... It sounds as if this was excessive violence on the part of the police officers. The patient was unarmed and did not reportedly initiate any violent conflict. There is certainly evidence of strangulation injury at this time and serious contusions. ...

Dickason advised rest and anti-inflammatories.

At around 2:00 that afternoon, O'Brien was asked to return to MGH. A re-evaluation of his CT scan had revealed a "focal hemorrhagic contusion in the right inferior frontal lobe with mild surrounding edema. Small amount of focal subarachnoid hemorrhage in the high right frontal sulci."<sup>10</sup> The grievant had a second scan, which showed that the subarachnoid hemorrhage had disappeared, and that the other bleed was stable.

O'Brien then had a neurosurgery consultation with Dr. Anna Terry. After reviewing the CT scan, Terry wrote that O'Brien had a "subtle focal R frontal hemorrhagic contusion," and was "neurologically intact without focal deficit and without specific complaints." Terry counseled O'Brien "regarding post-concussive symptoms such as continued [headache], dizziness, and short-term memory difficulties." O'Brien was discharged

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<sup>10</sup>Essentially, this signifies two small bleeds in the right frontal lobe of the brain, with accompanying mild swelling.

with prophylactic anti-convulsant medication and instructions to follow up with his PCP.

Three days later, on March 19, O'Brien called Dr. Dickason, complaining of "severe pain in the throat region where he was choked by the police officer." Dickason referred O'Brien to Winchester Hospital for a CT scan of his neck. The results of the scan were normal.<sup>11</sup> He also underwent a third CT scan of his head, which was also normal. The radiologist, Dr. Philip Steeves, wrote: "There are no abnormal findings in the area today even on review. This means that the previous process [i.e., the intracranial hemorrhage] has resolved to the point that it is no longer apparent."

O'Brien saw Dr. Dickason again on April 6 and May 15, 2009, reporting headaches, dizziness, pain in the head and throat, disturbed vision, difficulty concentrating, and short-term memory loss. On May 4, he had a consult with Dr. Michael Alexander, a neurologist at Beth Israel Deaconess Medical Center, on May 9. Alexander took a history (including O'Brien's account of the March 16 incident), reviewed the medical records and performed a physical examination. His conclusions were:

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<sup>11</sup> This is the opinion expressed by Dr. Michael Alexander, a neurologist at Beth Israel Deaconess Medical Center, in a letter to Dr. Dickason.

Several weeks' status posttraumatic brain injury, minimal evidence for significant diffuse injury, apparently a small right frontal focal contusion and acute subarachnoid hemorrhage. Many of his symptoms are entirely appropriate for this constellation [of] injuries. The problem is complicated by poor sleep habits [owing to his work shift] and significant anxiety. ...

I think it is important to clarify the extent of injury and I have ordered an MRI scan. ...

His headaches and other somatic symptoms are pretty unremarkable, and I think require no specific attention.

O'Brien had a brain MRI at Beth Israel Deaconess on May 9, 2009, with the stated purpose of "evaluat[ing] size of alleged right frontal contusion on 3/15 ...". The radiologist found "no evidence for frontal contusions." He had a second brain MRI on October 16, 2009, which was normal. He had an imaging of his carotid artery on October 19, which was normal; and an imaging of his vertebral artery on October 30, also normal.

Both parties presented physician-witnesses to comment on O'Brien's medical records. Dr. Kristian Arnold, an emergency physician on the staff of Boston Medical Center, is the Department's full-time doctor. Asked which items in O'Brien's medical records were consistent with strangulation or choking, Dr. Arnold identified the petechiae on O'Brien's face. He explained that when a subject is strangled, petechiae may form above the neck because increased pressure in those blood vessels causes the capillaries to rupture. He also testified

that there are many other reasons that petechiae may form, including vomiting, underlying fragility of the blood vessels, blunt-force trauma and "forceful events of any sort." Where blunt-force trauma is the cause, the petechiae are typically localized in the area of the blow.

Dr. Myron Beal is a professor of neurology and neuroscience at Weill Cornell Medical School at New York-Presbyterian Hospital. Beal found no definitive indication in the medical records that O'Brien had been choked or strangled. He based that opinion on the absence of any evidence of trauma to his neck, or of any "chroma" on the CT scans, or of any complaint of difficulty breathing or swallowing until several days after the incident.

Dr. Beal questioned whether the marks on O'Brien's face were petechiae at all. Both he and Dr. Arnold testified that the test for confirming that a mark on the skin is a petechia is applying pressure to the mark to see if it blanches. Petechiae do not blanch. Since the records do not indicate that anyone performed this test, Beal had doubts that they were petechiae.

Assuming that they were, Dr. Beal found their distribution on his face "atypical for a strangulation event." He testified that in cases of strangulation, petechiae appear in all areas of the face, and in particular in the eyes, the eyelids, and

the lips, not just the forehead.

Like Dr. Arnold, Dr. Beal testified that there are many causes of petechiae, including a coagulation deficit; ingesting aspirin, which inhibits coagulation; anything that causes an inflammatory reaction in blood vessels; certain infections like meningitis, dengue fever, Rocky Mountain spotted fever; and trauma or pressure to the skin.

Both doctors testified that strangulation does not necessarily cause visible trauma to the neck.

O'Brien contacted his workplace, the Billerica House of Correction, on the night of the incident, while waiting in the MGH emergency room. In the morning, he reported to Billerica. After a brief interview, O'Brien left and went on sick leave while his employer investigated the incident. Within a few weeks, the Middlesex County Sheriff's internal affairs department exonerated him and allowed to return to work, on condition that he provide a physician's note certifying his fitness for duty.

Dr. Dickason was unwilling to provide such a note. He insisted that the grievant spend six months in a light-duty position to avoid the risk of any further head trauma. The Middlesex County Sheriff had no light-duty work available, because all deputies/COs are expected to respond to emergencies. Ultimately, the grievant resigned from his

position.

On March 19, O'Brian filed an on-line complaint with the Internal Affairs Division (IAD) regarding the March 16 incident:

There was a traffic accident with a man who claimed he was a federal agent. He stated "YOU'RE FUCKED" and instantly got on his phone. Two officers who arrived on scene were instantly using aggressive language and telling us things like "SHUT THE FUCK UP" and "YEAH I'LL EXCHANGE YOUR FUCKING PAPERS." When I questioned the two officers on the individual's status as a federal agent they ignored me, I then took out my phone and recorded as I continued to ask the same question. I then walked toward the other side of the street turned to see both officers charging towards me Officer Nguyen [said] "GIVE ME THE FUCKING PHONE" ripping it out of my right hand, as Williams choked slammed me to the ground getting on top of me and cutting off my airway to the point of becoming incontinent. Other officers arrived on the scene I WAS STRUCK WITH A KNEE in the right side of my head and hit several times in the temple area.

A CAT scan later showed internal bleeding in my brain also broken blood vessels in my face marks on my neck and a possible fracture of my hyoid bone located in my neck, <sup>[12]</sup> multiple welts on my temple area both right and left. I am 5'8 160-165 lbs both officers are much larger, and I was unarmed and at no point struck an officer or did anything else to endanger my job or security clearance with the military. ...

I STRONGLY believe Officer Williams attempted to kill me by cutting off my airway, I was so close to death I became incontinent.

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<sup>12</sup> O'Brien's reference to the hyoid bone derives from the report of Dr. John Dubrow, the radiologist who read the CT scan of O'Brien's neck two days earlier at Winchester Hospital. Dr. Dubrow noted "a lucency [i.e., area of transparency in the film] in the left side of the hyoid bone," but specifically expressed the opinion that it was not a fracture.

O'Brien's complaint was assigned to an IAD officer, but little if any investigation took place. The Department did not bring the complaint to the grievant's attention. In fact, he did not learn of O'Brien's allegations until some months later, when he was served with a summons and complaint in O'Brien's lawsuit.

Through his counsel, Attorney Howard Friedman, O'Brien initiated a lawsuit in federal district court on September 24, 2009. The complaint alleged unreasonable use of force, unconstitutional arrest, and assault and battery. The defendants were the grievant, the City, Nguyen, and four "John Doe" police officers. The factual allegations of the complaint generally tracked O'Brien's testimony in this proceeding.

The following day, Friedman filed a second IAD complaint on O'Brien's behalf, making the same allegations.<sup>13</sup> There was no immediate action on this complaint. On January 22, 2010, Friedman wrote to Sgt. Philip Owens of the IAD, demanding that the IAD investigate the complaint. Officer Owens interviewed the grievant on April 8, 2010, and Officer Nguyen two days later. There was no further action on the investigation for a while.

On February 18, 2011, the Department placed the grievant

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<sup>13</sup>Friedman had withdrawn O'Brien's earlier complaint in May.

on paid administrative leave, shortly after receiving an irate letter from Attorney Friedman. The grievant was reassigned and ordered to turn in his gun. In March 2011, both officers were re-interviewed by IAD, this time by Lt. Det. Brian McEachern.

Officer Nguyen was exonerated, but on June 29, 2011, two specifications were issued against the grievant: the use of unreasonable force, in violation of Rule 304, § 2, and untruthfulness during the IAD interview, in violation of Rule 102, §23. A Departmental hearing (known as a "trial board") took place on November 18, December 7, and December 13, 2011. The two charges against the grievant were sustained and he was terminated on January 18, 2012.

The grievant has one previous disciplinary incident on his record. In 1995, he was involved in a widely publicized incident involving Michael Cox, an undercover patrolman who worked on the midnight shift in Area B3 (Roxbury) at the same time the grievant worked that shift in Area C11 (Dorchester). The grievant was terminated, but reinstated after an arbitrator found no just cause for his discharge. However, the arbitrator found that the grievant had filed a false report about the incident, and gave him a one-week suspension.

## **II. Contentions of the Parties.**

### **The City**

The grievant used excessive force on O'Brien, including

choke-clamming him to the ground and applying enough pressure to his neck to cause significant injuries. A chokehold is not an acceptable maneuver taught in the Academy. The grievant did not attempt other techniques, including verbal commands or other lower levels of escalation, such as pepper spray or a baton. Even if O'Brien was actively resisting, he was not assaultive.

O'Brien's description of the incident was consistent and credible. He told the EMTs, MGH doctors, and his own doctor that the grievant attacked and choked him. He reported the same in his IAD complaint, and during his interviews with the Middlesex County Sheriff's Department. His civil lawsuit was consistent with these accounts, as was his testimony at the trial board. While the Union implies that O'Brien had an ulterior motive, nothing supports that conclusion. By the time of this arbitration, the lawsuit had settled and O'Brien had nothing to gain by testifying against the grievant. In his IAD interview and at the arbitration, Nguyen confirmed that the grievant used a chokehold on O'Brien.

O'Brien's medical records repeatedly refer to signs of choking, including petechiae. Dr. Dickason observed numerous petechiae over the grievant's entire face and scalp, and found them consistent with strangulation. The opinion of the Union's expert, Dr. Beal, was based on an incomplete review of the

records. Dr. Beal did not review any of the witness statements, which could have been relevant in drawing a conclusion about the cause of O'Brien's injuries. While Dr. Beal enumerated several other causes of petechiae, there is no evidence that O'Brien suffered from any of those conditions.

The grievant was untruthful during the IAD investigation. He intentionally withheld information about how he and O'Brien ended up on the ground. His description of his physical contact with O'Brien evolved throughout his various statements, and never amounted to the truth. He described his force as a "semi-bear-hug" and denied choking O'Brien, though he admitted that his arms were in the area of O'Brien's neck.

This is the grievant's second sustained charge for untruthfulness. In the Cox case, Arbitrator Holden found that the Department did not have just cause for the grievant's termination, but found that he submitted a false report and imposed a one-week suspension. A police officer's untruthfulness renders him useless as a witness in court, because the prosecution is obliged to disclose any blot on his credibility under Giglio v. U.S., 405 U.S. 150 (1972) and Brady v. Maryland, 373 U.S. 83 (1963).

The Department acted reasonably throughout the IAD investigation, and did not violate the CBA when it placed the grievant on administrative leave. The grievant was not harmed

by the delay between the incident and his first interview. Pending the full investigation, the grievant remained eligible to perform details and overtime. His placement on paid administrative leave was not disciplinary. The Commissioner has the managerial prerogative to place a police officer on paid administrative leave and take away his service weapon. The grievant had serious charges pending against him that called into question his fitness to serve.

### **The Union**

O'Brien's unreliability and bias as a witness cannot be overstated. Obviously, the Department itself did not believe most of O'Brien's account. If it had, it would have sustained the charges against Nguyen, but he was exonerated. Despite his obviously rehearsed rendition of how he almost died, he never mentioned this near-death experience to any police officer, to the EMTs, or to any doctor. He did not even tell the EMTs or MGH doctors that he had been choked. It was only later that he came up with this story.

Even a perfunctory examination of the medical records shows that O'Brien embellished his injuries over time. O'Brien had an admitted motive to deflect blame from his drunken, irresponsible behavior onto the police officers. At first, he wanted to protect his job; later, he wanted to inflate his claim for damages in the lawsuit. The medical experts could

not verify with any degree of medical certainty that O'Brien indeed had petechiae. Even if he did, the credible medical testimony confirms that their distribution pattern was not consistent with strangulation.

The Department offered no manual, rule, or expert witness to establish that taking a suspect to the ground violates Rule 304. The officers were facing a situation that both viewed as highly threatening. O'Brien was intoxicated and violently resisting arrest. His friends were attempting to physically intervene. The officers did not know whether any of the three was armed. Under these circumstances, the grievant acted reasonably.

The Department's assignment of the grievant to administrative leave violated the CBA. For a year after O'Brien filed his first IAD charge, the Department did absolutely nothing. Then, nearly two years after the incident, the Department put the grievant on administrative leave and re-opened its investigation of O'Brien's allegations. By that time, the outcome was pre-ordained. The only reason for the Department's sudden action was Attorney Friedman's aggressive complaints about the way the Department was handling the investigation.

In the arbitration case of Officer Terence O'Neil, which this arbitrator decided in 2001, the arbitrator noted that even

though there were some inconsistencies in O'Neil's testimony, they were "unintentional, insignificant, and not aimed at misleading the finder of fact." Overall, O'Neil was "honest, candid, and as accurate as possible under the circumstances of the passage of many years." The same is true of this grievant.

As a remedy, the Department must reinstate the grievant and order the Department to make him whole for all lost wages, benefits and other compensation, including overtime, paid details and court time, retroactive to the date he was placed on administrative leave. His records should be expunged of all references to this discipline.

### **III. Opinion.**

The fundamental reason for the grievant's termination is his alleged use of excessive force while arresting O'Brien in the early morning of March 16, 2009. The Department evidently credited O'Brien's charge that the grievant attacked him for no reason, knocked him to the ground, grabbed him around the neck, and strangled him almost to the point of unconsciousness.

The case thus turns on a credibility determination, because the grievant's version of the encounter was radically different. According to the grievant, O'Brien and his friends were drunk and disorderly. O'Brien refused repeated orders to get out of the middle of Hanover St., where he was blocking traffic. When Nguyen attempted to place O'Brien under arrest,

O'Brien resisted violently, and the grievant immediately came to Nguyen's assistance. The grievant maintained that he used only the force that was necessary to subdue O'Brien and effectuate the arrest. He denied choking or strangling him.

The dispute centers on the moments during which the grievant took O'Brien down to the ground and attempted to immobilize him. The grievant freely admitted that he took those actions. But he and O'Brien disagreed on almost every other aspect of the incident. O'Brien maintained that both he and Cincotti had little to drink on March 15, and that both were sober when Cincotti ran into Fils-Aime's BMW. He testified that he and Cincotti peaceably began preparing to exchange information with Fils-Aime. O'Brien was uneasy because Fils-Aime had identified himself as a federal agent, but that was the only unusual aspect of the accident. He purported to find it inexplicable that the two police officers were so hostile and aggressive, and insisted that he (and the unidentified officers that came to their assistance) attacked him for no reason.

After examining all of the evidence with great care, it is clear to me that O'Brien's account of the incident was not truthful. If the officers became aggressive, and there is no doubt that they did, it was because the behavior of O'Brien and his friends warranted it. I do not believe that the grievant

used excessive force, or that he choked or strangled O'Brien. He fully complied with Department Rule 304, Section 2, by using only the amount of force that was reasonably necessary to overcome O'Brien's resistance to arrest. Several factors lead me to this conclusion.

First, it is inherently improbable, and also contrary to the evidence, that O'Brien and Cincotti were sober. The question of O'Brien's sobriety is important for two reasons. (1) If he was intoxicated, it calls into question the accuracy of his perception and memory of the incident. (2) It makes it more likely that he exhibited the disruptive, obnoxious, and assaultive conduct that the grievant and Nguyen described.

There is no question that O'Brien drank heavily during his bachelor party on the night of March 14, and perhaps into the early morning hours of March 15. Becoming intoxicated is one of the *raisons d'être* for these parties. O'Brien testified that he was unable to drink during the St. Patrick's Day festivities that Sunday because he was so hung over. That may be true. Although drinking with friends is a well-known custom on the day of the St. Patrick's Day Parade in South Boston, there is no reason to conclude that a specific individual was imbibing merely because he was in South Boston that day.

However, that calculus changes when one considers O'Brien's visit to the Black Rose on the evening of March 15.

The Black Rose is perhaps the most renowned Irish bar in Boston, and a focal point of celebration around St. Patrick's Day. The overwhelming majority of persons who visit the Black Rose on St. Patrick's Day night do so for the specific purpose of drinking with like-minded companions. O'Brien sometimes worked at the Black Rose and other bars owned by the same family. He gets free drinks there. He did not remember when he arrived at the Black Rose or how long he stayed, but conceded it could have been four or five hours. One of his friends, Leverone, became extremely intoxicated: according to O'Brien, people were buying him drinks "all night." Despite O'Brien's protestations otherwise, it is likely that Cincotti was also drinking. The very nature of his car accident—backing across a double yellow line and hitting a stationary car while changing parking spaces in his own neighborhood—suggests that he was in an altered state.

Under all of these circumstances, it is simply improbable that the grievant himself was not drinking. And the probability that he was intoxicated increases when one considers that a number of persons who encountered him that night considered him to be so. Fils-Aime described him and his friends as "drunk" to the dispatcher. Both police officers observed that the three were intoxicated. Most tellingly, around three hours after O'Brien could have had his last drink,

the triage nurse at MGH noted that O'Brien was still under the influence of alcohol. Whether O'Brien told her so or whether she based this on professional observation, both are equally damning.

Second, O'Brien had a motive to fabricate. According to the grievant, when he and Nguyen arrived at the scene, they found three intoxicated white men involved in a "verbal altercation" with Fils-Aime.<sup>14</sup> I credit that testimony. O'Brien's accounts of how he and Cincotti spent the roughly six minutes between Fils-Aime's 911 call and the arrival of the police were inconsistent. In my opinion, it is unlikely that they were peaceably preparing to exchange information with Fils-Aime; Nguyen testified that they never did exchange information that night. There is no question that Cincotti had words with Fils-Aime immediately after the accident, and they were apparently agitated words, because Fils-Aime urged him "No, no, no, don't worry ... Relax." It is far more probable that O'Brien and Leverone eventually joined the argument.

O'Brien himself succinctly described his motive in his testimony. He was afraid that if "I did whatever [Fils-Aime] claimed we did wrong," it "could impact my employment at the

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<sup>14</sup> The grievant's police report states that the officers arrived to find "both parties ... having a verbal altercation." The ambiguous phrase "both parties" does not necessarily denote that only two individuals were arguing.

sheriff's office." He was also afraid that it would jeopardize his pending application to be admitted to the Special Forces: "[S]omething like that is a huge red flag if you get in trouble like that and they can kick you out of the program just like that." For whatever reason, O'Brien thought that if Fils-Aime were indeed a federal agent, the incident was more likely to come to the attention of his employer and his superiors in the military.

I believe that this line of thinking led O'Brien to create a scenario where he was the victim of police brutality, rather than the intoxicated driver of a car leaving the scene of an accident, and the participant in a street argument with Fils-Aime. It is notable that O'Brien did not allege that the police had assaulted him until about three hours after his arrest, when he told Dr. Liteplo at MGH that police had hit him in the head and choked him. He did not mention it at the station, after his arrest. He said nothing to Lt. Leary, who visited him after he was booked to "look him over." Shortly before 2:00AM, he told the EMTs that "he was assaulted earlier," but he did not identify the assailant.<sup>15</sup> Three hours gave O'Brien plenty of time to ruminate on the possible consequences of his arrest, and the possible means of avoiding

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<sup>15</sup> O'Brien's mention of an earlier "assault" did not necessarily imply that the grievant had been the assailant, nor would the EMTs have had reason to interpret it that way.

them.

Third, O'Brien's mug shots, as well as the other photographs in evidence, are remarkably inconsistent with O'Brien's assertion that he was brutally assaulted by the grievant and other unidentified officers. Admittedly, these are not high-resolution photographs, but there is no blood or dirt on the grievant's face, only one bruise, and some faint scratches or scrapes, as well as three tiny red marks. None of the abrasions are actively bleeding.

Of course, photographs do not always show the extent of an injury, which leads to the most complex factual material in the case, the medical evidence. I have carefully reviewed the records of the grievant's medical treatment from the day of the March incident through October 2009. Most of these records focus on O'Brien's head injury, and are therefore immaterial to the grievant's discharge. O'Brien accused the grievant of tackling him to the ground and choking him, but never of hitting him in the head; according to O'Brien, it the officers who showed up later were responsible for the head injury.<sup>16</sup>

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<sup>16</sup>It should be noted, however, that by October 30, 2009, any observable physical effects from the head injury were gone. O'Brien's first CT scan on March 16 revealed two small bleeds in the brain. His follow-up scan showed that one of the bleeds had disappeared, and the other was stable; an MGH neurosurgeon found him "neurologically intact without focal deficit and without specific complaints." Thereafter, O'Brien complained of headaches, dizziness, disturbed vision,

In scrutinizing these records, it is important to separate the observable medical facts from the items reported by O'Brien. Several of the doctors who saw O'Brien stated that he had been "choked," but one need not be a medical expert to realize that these doctors were not present during the incident of March 16 and had no direct knowledge of the cause of the physical manifestations that they observed. The MGH records reflect that O'Brien had no swelling in his throat or trouble breathing, no bruising or tenderness on his neck, and no respiratory or airway symptoms. On March 19, O'Brien complained to Dr. Dickason of "severe pain in the throat region where he was choked by the police officer." However, a subsequent CT scan to his neck showed no medical evidence of injury.

In fact, the only physical evidence of possible choking that any doctor ever observed was the petechiae. These were the subject of a single notation at MGH: Dr. Liteplo wrote "petechiae on face." He did not state that they were particularly numerous, and he included the observation among the "signs of head injury." He did not relate the petechiae to

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difficulty concentrating, and short-term memory loss. However, additional CT scans and two MRIs of his brain were all normal.

strangulation.

The Department's doctor, Dr. Arnold, confirmed that the petechiae are the only item in the medical records that is consistent with strangulation or choking. He described how when a victim is strangled, petechiae may form above the neck as capillaries rupture. But he also testified that strangulation is not the only cause of petechiae. Vomiting, underlying fragility of the blood vessels, blunt-force trauma, and "forceful events of any sort" may also cause them.

Dr. Beal, the Union's expert, found no definitive indication of strangulation in the medical records. Initially, he questioned whether O'Brien had petechiae at all, since no doctor performed the determinative "blanching" test. But even if they were, Dr. Beal found their distribution on O'Brien's face "atypical" for strangulation. He testified that when a victim is strangled, petechiae usually appear all over the face, and in particular in the eyes, eyelids and lips. Dr. Beal also testified that there are many causes of petechiae other than strangulation.

In light of the foregoing, I do not find the petechiae (assuming that is what they were) persuasive evidence of strangulation. It is true that Dr. Dickason, O'Brien's PCP, wrote that he observed "numerous petechial hemorrhages throughout [O'Brien's] entire face and scalp consistent with

strangulation injury" and "several contusions on both temporal areas as well as abrasions particularly on the right temporal area." But these observations do not comport with the photographs, or with the observations of the EMTs or the MGH doctors.

There is also reason to question Dr. Dickason's objectivity. At the time he made his observations, O'Brien had already told him that he was "attacked by several officers, one of which applied a choke hold to his head ...." Dr. Dickason wrote that he thought there was "excessive violence on the part of the police officers," and that O'Brien was "unarmed and did not reportedly initiate any violent conflict." These were gratuitous, non-medical observations, with no objective, first-hand basis.

There are other reasons to discredit O'Brien's account of the incident of March 16, 2009. One is the mysterious disappearance of his cellphone video, which could have corroborated his description of the officers' hostility. Another is the absence of any corroborating witness. Accompanying O'Brien that night were two individuals whom he described as friends since childhood. O'Brien was still in contact with Cincotti; he had talked to him only a few days before his testimony. Yet neither of these individuals appeared at the hearing to back up O'Brien's story.

In sum, I find that O'Brien was not a credible witness about any of the events of March 16. Specifically, I do not credit his testimony that the grievant attacked him, or choked or strangled him. The City emphasizes Officer Nguyen's testimony that the grievant had his arm around O'Brien's neck in a "chokehold." But putting someone in a "chokehold" is not the same thing as choking or strangling him. "Chokehold" is an imprecise term, and it is not the same thing as choking or strangling. There are a number of different kinds of chokeholds, all of which are methods of restraining a person by placing actual or potential pressure on his neck.

The grievant did not deny knocking O'Brien to the ground and tightly gripping him in a manner that placed the grievant's upper right arm and shoulder against the right side of O'Brien's neck. It would be accurate to call this a chokehold; if the grievant had exerted more force, the pressure on O'Brien's neck would have been uncomfortable. In Officer Nguyen's opinion, the grievant handled O'Brien properly, given the circumstances, and did not use excessive force. Officer Nguyen was a conscientious and credible witness. He surely did not intend to endorse strangulation.

Department Rule 304 requires officers "to use only that amount of force that is reasonably necessary to overcome resistance in making an arrest or subduing an attacker." It

gives officers "[t]he right to use non-lethal force ... in those situations where the potential for serious injury to an officer ... exists ...". The rule recognizes that officers must use "sound judgment" in deciding when and how to use non-lethal force, given the "wide variety of circumstances" that can arise.

In my opinion, the grievant's use of force was reasonable under the circumstances. While the grievant was writing up a citation in the cruiser, Officer Nguyen made the decision to place O'Brien under arrest for refusing his order to get out of the middle of Hanover St. O'Brien pushed him away and began struggling with him. When the grievant saw this, he got out of the cruiser, tackled O'Brien, and tried to restrain him so that Nguyen could handcuff him.

This approach was aggressive, but I am convinced it was warranted. O'Brien was intoxicated. His friends were acting that way. He had not been frisked. The grievant did not know whether he had a weapon. Even if O'Brien was unarmed, there was always the possibility that he would grab Nguyen's gun. For the safety of Nguyen and the public, the grievant made a judgment that he had to immobilize O'Brien.

The grievant testified that knocking a perpetrator to the ground was an accepted method of controlling him. (The City's suggestion that he should have used a baton or pepper spray seems scarcely less likely to lead to harm, particularly the

baton.) Lt. Leary confirmed that the grievant's method was common and effective.<sup>17</sup> He testified, "Personally, I've taken many people to the ground when they're resisting. They're off-balance and that's where I want them." Leary is now retired, and had nothing to gain or lose by this testimony.

Since the grievant handled the incident of March 16, 2009, appropriately and did not use excessive force on O'Brien, it follows that he was not guilty of untruthfulness during the IAD investigation. There was no just cause for his termination.

There is no obstacle to a make-whole remedy retroactive to the date the Department placed him on administrative leave. Both parties accept the principle established in City of Boston and BPPA (Gosline, 1997) (the Delaney Award) that the Police Commissioner has the authority to place an officer on administrative leave provided he has a reasonable explanation or legitimate justification. Those provisos are not present here. The Department became aware of O'Brien's allegations on March 19, 2009, when he filed his first IAD complaint. Certainly the lawsuit, filed on September 24, 2009, made the allegations crystal clear. Yet the Department did not place the grievant on administrative leave until February 2011, seventeen months after the lawsuit and ten months after his

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<sup>17</sup> Actually, O'Brien himself testified that he was trained to take prisoners to the ground get them under control.

first interview by IAD. The Department's decision to place him on administrative leave at this later point is essentially unexplained. Thus, the decision to do so must be considered arbitrary. He is entitled to be made whole for any economic harm he suffered while on administrative leave.

**AWARD**

The City did not have just cause to discharge David Williams on January 18, 2012.

The City violated the collective bargaining agreement by placing David Williams on administrative leave on February 18, 2011.

The City shall forthwith reinstate Officer Williams to his former position and assignment, and shall make him whole for all lost wages, benefits, compensation, seniority and any other benefit, retroactive to the date he was placed on administrative leave.



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Michael C. Ryan  
Arbitrator  
June 20, 2013