

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

THE CITY OF NITRO, WEST VIRGINIA,
Petitioner/Complainant below,

v.

Civil Action No. 19-AA-40
The Honorable Louis H. Bloom

TIMOTHY JARRELL,
Respondent/Respondent below.

**FINAL ORDER REVERSING AND VACATING THE DECISION OF
THE NITRO POLICE DEPARTMENT CIVIL SERVICE COMMISSION**

Pending before the Court is a *Notice of Appeal* filed on April 19, 2019, by the Petitioner/Complainant below; the City of Nitro, West Virginia; by counsel, John R. Teare, Jr. The *Appeal* seeks to reverse the *Decision Order* entered on March 30, 2019, by the Nitro Police Department Civil Service Commission (“the Commission”). The Commission’s *Order* reinstated the employment of the Respondent, Timothy Jarrell, and granted to Respondent an advancement in rank to lieutenant. On June 26, 2019, Petitioner filed its *Appeal Brief*; on July 31, 2019, Respondent filed his *Response Brief*; on August 14, 2019, Petitioner filed its *Reply Brief*. Upon reviewing the record, pleadings, and applicable law, this Court finds and concludes as follows.

STANDARD OF REVIEW

1. “A final order of a police civil service commission based upon a finding of fact will not be reversed by a circuit court upon appeal unless it is clearly wrong or is based upon a mistake of law.”¹ “Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review.”²

¹ Syl. Pt. 1, *Mangus v. Ashley*, 199 W. Va. 651, 652, 487 S.E.2d 309, 310 (1997).

² Syl. Pt. 3, *Alden v. Harpers Ferry Police Civil Service Com’n*, 209 W. Va. 83, 84, 543 S.E.2d 364, 365 (2001).

FINDINGS OF FACT

2. On May 7, 2016,³ Jared Hester was a customer at Mardi Gras Casino in Nitro, West Virginia. Mr. Hester admittedly became intoxicated and believes he fell asleep on a bench outside before being awakened by casino security guards. Mr. Hester told the guards he would go to his car. The guards said he could not do so and called the Nitro Police Department. Multiple police officers arrived at the casino, including the Respondent, Sergeant Timothy Jarrell.
3. The police told Mr. Hester that he would need to rent a hotel room or he would be criminally charged. Mr. Hester agreed to rent a room, and a casino shuttle van drove Mr. Hester to a nearby hotel. However, upon arrival, Mr. Hester determined that he would not rent a hotel room. Respondent Jarrell had followed Mr. Hester to the hotel and restated that Mr. Hester would be arrested if he did not rent a hotel room. At first, the two men stood a few feet apart. However, after roughly one minute, Respondent Jarrell moved toward Mr. Hester, briefly placed his hands on Mr. Hester's body, and ultimately performed a "lateral carotid restraint" – more commonly known as a choke hold – upon Mr. Hester, rendering him unconscious. Prior to losing consciousness, Mr. Hester recalls being placed under arrest, being told to place his hands behind his back, and being told to stop resisting.
4. This Court has reviewed a video recording of the arrest from hotel surveillance.⁴ The video clearly shows the two men conversing from a few feet apart before Respondent Jarrell moves closer to Mr. Hester. The video is likewise plain in showing that Mr. Hester made no threatening movements or gestures before being placed in a choke hold, and it appears that Mr.

³ The Court notes that the date on which these events occurred is inconsistent throughout the pleadings and record. Petitioner's *Brief* offers the "early morning hours of May 8, 2016," Respondent's *Brief* states "May 5, 2016," and the *Nitro Police Department Arrest Report* states that the arrest occurred at 12:33am on May 8, 2016. The Court finds the arrest report to be most reliable and thus finds that the events began on May 7, 2016, and culminated with the arrest at 12:33am on May 8, 2016.

⁴ Nitro Exhibit 5.

Hester barely moved at all before being choked. The video demonstrates that roughly one minute elapsed between Respondent Jarrell arriving at the hotel and Respondent Jarrell placing Mr. Hester in a choke hold and causing him to lose consciousness. Still, the video does not have sound, and the Court is unable to discern what was said between the two individuals.

5. Johnnie Brown, a city attorney for the City of Nitro, testified during the hearing below. The record includes a Nitro Police Department training log showing that Respondent Jarrell was one of nine individuals to have received training from Mr. Brown on April 26, 2016, less than two weeks before Mr. Hester's arrest.⁵ Also included is the PowerPoint presentation shown during that training. The presentation includes a document titled *Use of Force Continuum* which states that "Incapacitating Strikes or Holds" should be used when the officer perceives "Assaultive (aggressive physical)" behavior from the suspect. The record indicates that an officer is to utilize higher levels of force only in response to the officer perceiving a greater threat of danger from the suspect. That is to say, if the officer does not perceive assaultive, aggressive, and/or physical behavior from the suspect, the officer should utilize a lesser degree of force than an incapacitating hold to execute the arrest, such as "Pain Compliance, Take Downs, [or a] Chemical Agent."

CONCLUSIONS OF LAW

6. The Petitioner City of Nitro argues that the Commission erred in finding that Respondent Jarrell acted reasonably in performing the arrest of Mr. Hester, specifically by finding Respondent's use of a choke hold to be appropriate. Petitioner points out that the Use of Force Policy in effect at the time of Mr. Hester's arrest prohibited "[a]ny use of force not reasonably necessary in light of the circumstances confronting the officer."⁶

⁵ Respondent's Exhibit 1, proceedings below.

⁶ Nitro Exhibit 2, paragraph VI, subparagraph C.

7. Here, Respondent Jarrell argues that his use of force was appropriate because Mr. Hester admitted during his testimony at the hearing below that he was engaged in a physical altercation with Respondent Jarrell. Respondent's brief offers Mr. Hester's testimony as an admission that he "offered resistance," thus justifying Respondent Jarrell's actions. However, the Court finds this argument to be a severe mischaracterization of Mr. Hester's testimony. In truth, Mr. Hester's relevant testimony was as follows.

Q: Did you do anything physical with respect to Sergeant Jarrell?

A: No. We were standing probably six or seven feet apart. He was still at his car, and I was still right where I had been.

Q: There was a point when he approached you; is that correct?

A: Yeah.

Q: When he approached you, what did he say?

A: He said, "Put your hands behind your back."

Q: And what did you do?

A: I just stood there, and when he kind of came up behind me, he kind of took my – I believe it would've been my right arm and put it behind my back."

Q: Did you – when he did that, did you resist him in any way?

A: No.

Q: Did you engage in any physical altercation with him there at that Comfort Inn that night?

A: Well, yes.

Q: Did you attack him?

A: No.

Q: What was the physical altercation that you had with him?

A: Well, at the point that he came around behind me and took my hand, he quickly said "Stop resisting," and put his right arm around my neck, and that was about it. I remember waking up on – from being unconscious.

Q: Were you – were you resisting him?

A: No.

Q: Okay. And you were – you were actually rendered unconscious?

A: Yes.

Hearing Transcript, pp. 102-103. Mr. Hester's only resistance, if any, was in the form of him failing to put his hands behind his back within a few seconds of being ordered to do so by Respondent Jarrell. Still, it is clear that Mr. Hester repeatedly testified that he did not resist Respondent Jarrell; quoting a single line from his testimony and offering the same as evidence

of an admission of resistance appears wholly disingenuous to this Court. When Mr. Hester stated that he engaged in a “physical altercation” with Respondent Jarrell, he immediately specified that he was describing Respondent’s Jarrell’s choke hold and accompanying physical acts as the physical altercation. Mr. Hester precisely stated that he did not resist Respondent Jarrell; this is in stark contrast to Respondent’s argument and his use of Mr. Hester’s testimony.

8. Upon review of the *Use of Force Continuum* on which Respondent Jarrell was trained fewer than two weeks before this arrest, it is clear that Jarrell used more force than necessary in response to anything he could have perceived. Incapacitating holds are to be limited to use in situations wherein the officer perceives “Assaultive (aggressive physical)” behavior. Here, the evidence relied upon by the Commission was that Jarrell saw Mr. Hester “pumping his fist,” observed Mr. Hester to be “very strong,” and finally that Mr. Hester “pulled away and turned his back to [Jarrell]” at which point Jarrell “felt Hester [begin] to lean forward, positioning Jarrell to be thrown over Hester’s back.” While the video contradicts much of Jarrell’s characterization of the arrest,⁷ even if his statements are accepted as true, Jarrell’s act of placing Mr. Hester in a choke hold and causing him to lose consciousness is excessive in light of what Jarrell perceived. The Commission’s *Decision Order* states that “Mr. Hester clearly at first at a minimum passively resisted arrest as confirmed by his own testimony. His resistance then clearly became active, and was cautioned to ‘Stop resisting.’” While this Court agrees that Mr. Hester failing to place his hands behind his back would constitute passive resistance, the Court cannot find any evidence of Hester actively resisting, and the Commission offers no such evidence despite its finding that “[h]is resistance then clearly became active.”

⁷ The Court has reviewed the video many times and can find no support for the notion that Mr. Hester was leaning forward and positioning Jarrell to be thrown over his back. Instead, Mr. Hester is standing up straight while being choked unconscious by Respondent Jarrell.

9. Instead, the video clearly shows the two men speaking to one another for roughly 30 seconds before Jarrell moves toward Hester. They speak for another few seconds before Jarrell places his hands on Hester. Hester does not move much, if at all, for a few more seconds before Jarrell places Hester in a choke hold until Hester's body goes limp. Mr. Hester is standing up straight while being choked, never leaning forward or showing any sign of either positioning himself to toss Respondent Jarrell or any other method of resistance. Simply put, the Court **FINDS** that Respondent Jarrell's use of a choke hold upon Mr. Hester was excessive in light of the circumstances. Even if the Court accepts as true Jarrell's characterization of the events, it is clear that Mr. Hester's actions did not constitute a situation in which a choke hold would be proper. Respondent Jarrell had been recently trained to limit his use of choke holds to more serious situations wherein the suspect exhibits aggressive, physical behavior. Mr. Hester did not do so, and yet Jarrell responded with an incapacitating use of force.
10. The Court additionally **FINDS** Respondent Jarrell's use of force to be excessive in light of binding precedent cited by both parties. Both Petitioner and Respondent cite *Graham v. Connor*,⁸ an opinion of the Supreme Court of the United States recently relied upon by the Supreme Court of Appeals of West Virginia. In *Maston v. Wagner*, the State Supreme Court quoted the Supreme Court of the United States in saying that "[t]he proper application of the objective reasonableness standard in an excessive force case 'requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.'"⁹ In *Maston*, the State Supreme Court further quoted a later opinion of the United States Supreme Court which

⁸ 490 U.S. 386 (1989).

⁹ *Maston v. Wagner*, 236 W. Va. 488, 504, 781 S.E.2d 936, 952 (2015).

detailed additional factors to consider in analyzing an officer's use of force. Those considerations include, "the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff's injury; any effort made by the officer to temper or to limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting."¹⁰

11. Here, Mr. Hester was ultimately charged with public intoxication, which is not a severe crime. He showed no indication that he was a threat to officers, himself, or others; the *Arrest Report* notes he was unarmed. Respondent Jarrell's argument that Hester admitted he resisted is entirely unfounded, and the record demonstrates that Hester was passively resisting at most, if at all. The need for force was low and the amount of force used, a choke hold, was relatively high, as it caused Hester to lose consciousness, despite him being relatively unscathed afterward. Respondent Jarrell did not make many efforts to limit the amount of force used, as the entire interaction at the hotel took place in roughly one minute and escalated from a conversation to a choke hold in that time. The "security problem at issue" was low, as Hester had not performed any violent or threatening actions, and his alleged crime was public intoxication. Finally, the threat perceived by the officer could not have been high enough to justify the choke hold, as Hester had done nothing to come into or threaten physical contact with either an officer or bystander and was being charged with a non-violent crime. In total, the factors offered by the Supreme Court of the United States and adopted by the Supreme Court of Appeals of West Virginia heavily weigh against Respondent Jarrell and his use of force. The Court **FINDS** Jarrell's choke hold upon Mr. Hester to have been objectively unreasonable in light of all the circumstances.

¹⁰ *Id.* (quoting *Kingsley v. Hendrickson*, 135 S.Ct. 2466, 2472 (2015)).


12. Following a thorough review of the record, pleadings, and applicable law; the Court **FINDS** that the Nitro Police Department Civil Service Commission committed clear error in its role as factfinder by making findings of fact that were clearly wrong and largely contradictory to both the testimony during the hearing below and the evidence presented in the record. Likewise, the Court **FINDS** that the Commission's conclusions of law were clearly wrong in light of the incorrect findings of fact and the application of those facts to the law.

DECISION

Accordingly, the Court does **REVERSE** the *Decision Order* of the Nitro Police Department Civil Service Commission and **ORDERS** that the *Decision Order* be **VACATED**. The Court **FINDS** that termination of Respondent Jarrell's employment was appropriate and thus **ORDERS** the Commission's reinstatement of Respondent Jarrell with full back pay, as well as his advancement in rank, **REVERSED** and **VACATED**. Moreover, the Court **ORDERS** the Commission's recommendation that the City of Nitro authorize the use of choke holds by police **REVERSED** and **VACATED** as improper and likely beyond the scope of the Commission's authority. There being nothing further, the Court does **ORDER** that the above-styled appeal be **STRICKEN** from the docket of this Court. The Clerk is **DIRECTED** to send a certified copy of this *Final Order* to all parties and counsel of record.

ENTERED this 5th day of September 2019.


 Louis H. Bloom

9/6/19
 Certified copies sent to:
 ___ court
 ___ parties
 ___ other
 By: 
 Clerk
 Nitro Rec.

STATE OF WEST VIRGINIA
 COUNTY OF KANAWHA
 I, CATHY S. DIXON, CLERK OF CIRCUIT COURT OF SAID COUNTY,
 AND IN SAID STATE DO HEREBY CERTIFY THAT THE FOREGOING
 IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
 GIVEN UNDER MY HAND AND SEAL OF OFFICE ON THIS
 DAY OF SEPTEMBER 2019.

 CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA