

DO NOT REMOVE
FROM FILE
IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

JAN 21 2020

SUPREME COURT
WEST VIRGINIA

FILE COPY

TIMOTHY JARRELL,
PETITIONER

vs.

THE CITY OF NITRO, WEST VIRGINIA
RESPONDENT

Docket No.19-0907
(Kanawha Circuit Court Action No. 19-AA-40)

BRIEF OF PETITIONER

Mark McMillian (W. Va. Bar No. 9912)
Counsel for Petitioner
Mark McMillian - Attorney at Law, L.C.
Boulevard Tower - Suite 900
1018 Kanawha Blvd., East
Charleston, WV 25301
Tele: 304.720.9099
email: mark@markmcmillian.com

TABLE OF CONTENTS

	Page
ASSIGNMENTS OF ERROR	1
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	7
STATEMENT REGARDING ORAL ARGUMENT AND DECISION	8
ARGUMENT	8
1. <u>The Court below erred in finding the decision of the Nitro Police Civil Service Commission clearly wrong after conducting essentially a <i>de novo</i> review of the record and substituted its judgment for that Civil Service Commission, though the Commission's decision was based based upon substantial evidence and its findings and conclusions were more than adequately explained.</u>	9
2. <u>The Court below critically erred in its findings of facts and application of same to the law by arbitrarily finding that the arrest technique employed by the Petitioner amounted to excessive force, based exclusively on the city attorney's testimony that he had stated his "opinion," during a legal in-service seminar, based upon his legal experience that such constituted deadly force, though the City Attorney could however point to absolutely no legal or medical authority for that position; nor did he have an official presence or reporting authority in the police department. The Petitioner produced multiple medical and self-defense experts and his Nitro Police Department supervisors, and without objection, a medical study supporting its use.</u>	15
CONCLUSION	25

TABLE OF AUTHORITIES

CASES	Page
<i>Queen, In re</i> , 473 S.E.2d 483, 196 W.Va. 442 (W. Va. 1996)	8,9
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474, 488, 71 S.Ct. 456, 465, 95 L.Ed. 456, 467-68 (1951)	9
<i>Martin v. Randolph County Bd. of Educ.</i> , 195 W.Va. at 304, 465 S.E.2d at 406	9
<i>Graham v. Connor</i> , 490 U.S. 386, 396-97 (1989)	21,22
<i>Elliott v. Leavitt</i> , 99 F.3d 640, 642 (4th Cir. 1996).	21
<i>Sloan v. Dept. Of Health & Human Res.</i> , 600 S.E.2d 554, 557 (W. Va. 2004)	22
<i>Cahill v. Mercer County Bd. of Educ.</i> , 539 S.E.2d 437 (W. Va. 2000)	22
<i>Bell v. Wolfish</i> , 441 U.S. 520, 559 (1979)	22
<i>Tennessee v. Garner</i> , 471 U. S., at 8-9	22
<i>Poole v. City of Shreveport</i> , 691 F.3d 624, 629 (5th Cir. 2012)	24
<i>Gore v. San Diego Civil Service Commission</i> , Cal. App. Ct, 4 th Div., Dist. I, Docket No. D069068 (2016)	24
<i>Rudlaff v. Gillispie</i> , 791 F.3d 638, 641 (6th Cir. 2015)	24
STATUTES AND CODES	
W.Va. Code §60-6-9	4
Nitro City Code 521.06	4
Nitro City Code 509.01	4
W.Va. Code §8-14-20	25
OTHER AUTHORITIES	
<i>Mechanism of loss of consciousness during vascular neck restraint</i> as published in the Journal of Applied Physiology. (J.Appl Physio 112: 396-402, 2012 - Mitchell, Roach, Tyberg, Belek, Sheldon)	17
Webster's New World Dictionary, Second Concise Edition	23

ASSIGNMENTS OF ERROR

1. The Court below erred in finding the decision of the Nitro Police Civil Service Commission clearly wrong after conducting essentially a *de novo* review of the record and substituted its judgment for that Civil Service Commission, though the Commission's decision was based based upon substantial evidence and its findings and conclusions were more than adequately explained.

2. The Court below critically erred in its findings of facts and application of same to the law by arbitrarily finding that the arrest technique employed by the Petitioner amounted to excessive force, based exclusively on the city attorney's testimony that he had stated his "opinion," during a legal in-service seminar, based upon his legal experience that such constituted deadly force, though the City Attorney could however point to absolutely no legal or medical authority for that position; nor did he have an official presence or reporting authority in the police department. The Petitioner produced multiple medical and self-defense experts and his Nitro Police Department supervisors, and without objection, a medical study supporting its use.

STATEMENT OF THE CASE

Procedural History

After a protracted period of paid administrative leave imposed by the City of Nitro ("City"), Petitioner received a letter from the Police Chief informing of his dismissal from the police department on October 19, 2017 (JA 0084-85). Undersigned Counsel notified Chief Eggleton by letter that such was an unlawful action in absence of a predisciplinary hearing. (JA 0092). On May 22, 2018, A Hearing Board was convened consisting of three duly appointed members of the police department. The parties to that proceeding agreed by stipulation that the evidence placed before the hearing board would consist of the video record of testimony of witnesses appearing at a misdemeanor jury trial, wherein Petitioner had been acquitted. Prior to submitting the testimony for the board's consideration, the parties made opening statements. Once the board's review had been completed, the parties returned and made closing arguments. The board rendered a decision vindicating the Petitioner. (JA 0220-21). Upon appeal by the City,

a *de novo* hearing was convened before the Nitro Police Civil Service Commission (“Commission”) on February 12, 2019. The parties, by stipulation, presented certain of the witnesses by way of the video record of the testimony referred to above and others appeared in person. By *Decision Order* (JA 0010-29) of March 30, 2019, the Commission unanimously vindicated the Petitioner, ordering his reinstatement, lost wages and benefits, as well as his retroactive promotion to the rank of lieutenant based on a grievance he had previously filed upon which a hearing had been conducted. Although W. Va. Code §8-14-20 (a) requires an award of reasonable attorney fees to a vindicated officer by the Commission, following the appeal to the circuit court, the Commission, in essence deferred that question.

The City appealed the decision of the Commission to the Kanawha County Circuit Court, which considered the case without oral argument and reversed the *Decision Order* of the Commission. (JA 0716-28). The present appeal followed.

Facts of the Case

On May 5, 2016 Mr. Jared Hester came by car to the Mardi Gras Casino in Nitro to gamble from Greensboro, N.C. where he lives, about three and one-half to four hours away. He made no prior arrangements for lodging. While there, he drank mostly beer, but also mixed drinks and shots over a period of hours and was admittedly intoxicated.

Lisa Smith, Security Director for Mardi Gras Casino and Resort, was alerted to Mr. Hester’s presence and along with another security officer observed him “passed out” on an outdoor bench. Once they were able to communicate with him, he was told he could not remain there in his condition. The ensuing discussion focused on getting him to a place of safety – but not his car, where he insisted he wanted to go. Ms. Smith described Hester as aggressive and that

he gave security officers the "finger," told them "f**k you" and called them "douche bags." The Nitro Police Department was notified to further deal with Mr. Hester.

Mardi Gras security personnel and later Nitro police officers attempted to resolve the violative conduct of Mr. Hester considering his own safety as well as that of the public by convincing him to take a nearby hotel room for the night as an alternative to arrest and incarceration. This was important particularly because of his insistence on going to his car, which was parked there¹. Mr. Hester agreed to going to a Comfort Inn & Suites a short distance away and a Mardi Gras courtesy van was specially summoned for that purpose. Sgt. Jarrell followed the van to assure that Mr. Hester complied by checking into the motel. However, once Mr. Hester arrived, he took up a position outside the entry of the motel, having decided he would not.

Q. Okay. And you elected not to get a room at that time?

A. That ' s correct .

Q. And he gave you the opportunity to do that again?

A. Yeah, he told me that I needed to go inside or something about the sorts.

(JA 0357)

Q. Okay. Do you remember what you were saying?

A. Yeah. I said "I don't believe you can make me get a hotel."

(JA 0358)

Having exhausted alternative remedies afforded to Mr. Hester, Sgt. Jarrell clearly not only had

¹This, of course, posed the apparent risk to Mr. Hester and the public had he driven away in his condition.

the clear right, but the obligation to arrest and take Mr. Hester into custody². To accomplish that, Sgt. Jarrell instructed Mr. Hester to place his hands behind his back. Mr. Hester was non-compliant.

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.

(JA 0338).

Mr. Hester further testified:

Q. Did you engage in any physical altercation with him [Sgt. Jarrell] there at that Comfort Inn that night?

A. Well, yes.

(JA 0339)

Q. Do you recall him telling you to put your hands behind your back?

A. Yes .

Q. All right . And you didn't put your hands behind your back?

² No person shall: (a) Appear in a public place in an intoxicated condition (W.Va. Code §60-6-9; identical language, Nitro City Code 521.06)

Mr. Hester also perpetually engaged in the offense of Disorderly Conduct: "(a) No person shall, in a public place, a mobile home park, a public parking area, a common area of an apartment building or dormitory, or a common area of a privately owned commercial shopping center, mall or other group of commercial retail establishments, disturb the peace of others by violent, **profane, indecent** or boisterous conduct or language[.]" Nitro City Code 509.01 (emphasis added).

A. I did not move . I don't remember if I put my hand behind my back or if kept it by my side.

(JA 0359)

Concerning his resistance, Hester ultimately testified:

[A]lthough **I don't remember a hundred percent, I don' t believe** that I would have....”(JA 0361) (bold added)

As observed in the security video³ from the Comfort Inn, which was admitted into evidence, Sgt. Jarrell arrive to find Mr. Hester remaining outside of the motel. Sgt. Jarrell engaged him in nearly one-half minute of dialogue, during which Mr. Hester crossed his arms in the apparent defiance as conceded in his testimony. At 2 minutes 31 seconds into the video, Sgt. Jarrell first reached to touch Mr. Hester's arm, having repeatedly told him to place his hands behind his back. (Hester testimony, *ante*; Sgt. Jarrell, JA 0486). During the next 3-4 seconds, Sgt. Jarrell testified that, having seen Mr. Hester “pumping his fist” is thereby alerted under the circumstances of the danger of being punched. Sgt. Jarrell was aware that he perceived Mr. Hester was very strong, which is supported by Resp. Exhibit 9 (JA 0624), *Nitro Police Department Arrest Report of Jared Devone Hester*, which lists him as 6ft.- 4in. tall, weighing 235 pounds at 29 years of age. Mr. Hester pulled away and turned his back to him, whereupon Sgt. Jarrell placed his arms at the sides of his neck and instructed him to stop resisting, repeating “Stop, stop, stop, stop” as he felt Hester began to lean forward, positioning Jarrell to be thrown over Hester's back. (JA 0487-86). Because Mr. Hester did not cease the resistance, Sgt. Jarrell increased the pressure so as to engage the lateral vascular restraint, which was successful in

³The video is black and white, low resolution, and without audio.

rendering Hester momentarily unconscious, during which time he was lowered slowly to a seated position without injury. (JA 0488). It is only at that point that Sgt. Jarrell was able to place handcuffs on Mr. Hester and gain control of him.

Upon the Commission's hearing and consideration of the evidence, it appropriately considered the testimony of Mr. Hester, Nitro Police Chief Robert Eggleton and contract Nitro City Attorney Johnnie Brown, who were the only witnesses called by the City in its case. Mr. Hester conceded that at all relevant times he was intoxicated and had a lack of precise memory as to a variety of important facts. In spite of that, he testified that he would not have intended or done that which others witnessed. Mr. Brown, though professing no expertise or experience in tactical use of force or law enforcement techniques, anatomy or medical training, testified as a fact witness as to levels of acceptable force when confronted with passive or active resistance to police directives or physical controls. While he testified that the carotid restraint was an appropriate technique only when deadly force was acceptable, he was unable to produce a single tangible document in support of that. Chief Eggleton joined the Department long after the events in question occurred. Though he testified that he had reviewed the case and recommended the action taken against Sgt. Jarrell, he acknowledged that he had recommended him in writing for an armed security position at a United States consulate abroad.

On the other hand, two medical doctors who were familiar with defense tactics testified that when applied by an appropriately trained officer, the carotid restraint did not carry with it the risks posited by the City. The Commission received into evidence, without objection, an empirical study wherein volunteer subjects (police officers) were actually subjected to application of that technique. That study supported the medical doctors' conclusion. Two

Captains from the Nitro Police Department, one a retired Assistant Chief and the other currently serving there and formerly the Police Chief, each testified that the policies of the department at the times in question did not preclude use of the restraint. The former, Ret. Capt. Gene Javins, was part of the Command Staff of the department tasked with formulating the applicable rules, including the use of force continuum, and testified that the technique was properly used in the subject situation.

SUMMARY OF ARGUMENT

Considering the facts logically found by the Civil Service Commission and legal standards applied thereto, the Court erred in finding the Commission's Decision Order clearly wrong. The questioned force was appropriately used in the ultimate arrest of Mr. Hester after he had exhibited combative and aggressive behavior to security officers and later in the final encounter with the Petitioner, who had exhausted all reasonable means, first to arrange an alternative to his arrest and later to take him into custody without violence. The Petitioner had not only the right, but the obligation, for the safety of others, to prevent Mr. Hester from his apparent purpose of leaving the premises in his vehicle. When Mr. Hester refused to submit to arrest by not allowing himself to be handcuff, pumping his fist and lifting his body against Sgt. Jarrell, Jarrell tightened a restraint hold so as to restrict his carotid blood flow in subduing Hester. This was not in violation of policies of his department, physically dangerous to Hester, or in any sense an unreasonable use of force as contemplated by controlling authorities. Unopposed medical and martial arts experts confirmed that this is a safe and effective technique when properly applied; and, Petitioner is extensively trained in defense tactics and safely administered

the measure. The Commission properly found that the removing authority had failed to meet its burden to prove that just cause was establish to warrant his termination.

STATEMENT REGARDING ORAL ARGUMENT

Rule 19 argument is appropriate in this case in that, as discussed herein, it involves error in the application of settled law; unsustainable exercise of discretion where the law governing that discretion is settled; and, insufficient evidence for the court below to have reversed the decision of the Civil Service Commission. This case is not appropriate for memorandum decision.

ARGUMENT

Standard of Review

An adjudicative decision of [a] Civil Service Commission should not be overturned by an appellate court unless it was clearly erroneous, arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. Review under this standard is narrow and the reviewing court looks to the Civil Service Commission's action to determine whether the record reveals that a substantial and rational basis exists for its decision. Syl pt.1, *Queen, In re*, 473 S.E.2d 483, 196 W.Va. 442 (W. Va. 1996). An appellate court may reverse a decision of the Correctional Officers' Civil Service Commission as clearly wrong or arbitrary or capricious only if the Commission used a misapplication of the law, entirely failed to consider an important aspect of the problem, offered an explanation that ran counter to the evidence before the Commission, or offered one that was so implausible that it could not be ascribed to a difference in view or the product of Commission expertise. Syl. Pt. 2, *Id.*. The "clearly wrong" and the

"arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Syl. Pt. 3, *Id.*

Legal Discussion

1. The Court below erred in finding the decision of the Nitro Police Civil Service Commission clearly wrong after conducting essentially a *de novo* review of the record and substituted its judgment for that Civil Service Commission, though the Commission's decision was based based upon substantial evidence and its findings and conclusions were more than adequately explained.

Also, this Court may not "displace the ... [Commission's] choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before ... [us] *de novo*." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488, 71 S.Ct. 456, 465, 95 L.Ed. 456, 467-68 (1951); *Martin v. Randolph County Bd. of Educ.*, 195 W.Va. at 304, 465 S.E.2d at 406. Civil Service Commission members, like juries, are usually representatives of the community-at-large; in addition, given that they draw on a fund of knowledge and expertise all their own, we must also give great deference to the Commission's selection of remedy. *Queen, In re*, 473 S.E.2d 483, 487 (W. Va. 1996).

Here, the Court below gave no deference whatsoever to the well reasoned findings of the Nitro Police Civil Service Commission.

As a starting point, the Court below simply adopted a version of events as most favorable to Mr. Hester. The Commission below however, considered both the testimony of Hester and that of Sgt. Jarrell and determined, *inter alia*, as follows:

5. Mr. Hester agreed to going to a Comfort Inn & Suites a short distance away and a Mardi Gras courtesy van was specially summoned for that purpose. Sgt. Jarrell followed the van to assure that Mr. Hester complied by checking into the motel. However, once Mr. Hester arrived, he took up a position outside the entry of the motel, having decided he would not.

Q. Okay. And you elected not to get a room at that time?

A. That ' s correct .

Q. And he gave you the opportunity to do that again?

A. Yeah, he told me that I needed to go inside or something about the sorts.

(Tr. P. 121)[JA 0357]

Q. Okay. Do you remember what you were saying?

A. Yeah. I said "I don't believe you can make me get a hotel."

(Tr. P. 122)[JA 0358].

6. Accordingly, we find that, having exhausted alternative remedies afforded to Mr. Hester, Sgt. Jarrell clearly not only had the clear right, but the obligation to arrest and take Mr. Hester into custody.

7. To accomplish that, Sgt. Jarrell instructed Mr. Hester to place his hands behind his back. Mr. Hester was non-compliant.

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.

(Tr. P.102)[JA 0348].

Mr. Hester further testified:

Q. Did you engage in any physical altercation with him [Sgt. Jarrell] there at that Comfort Inn that night?

A. Well, yes.

(Tr. P. 103)[JA 0349]

Q. Do you recall him telling you to put your hands behind your back?

A. Yes .

Q. All right . And you didn't put your hands behind your back?

A. I did not move . I don't remember if I put my hand behind my back or if kept it by my side.

(Tr. P. 123) [JA 0359]

Concerning his resistance, Hester ultimately testified:

[A]lthough I **don't remember a hundred percent, I don't believe** that I would have...."(Tr. P. 125) [JA 0361] (bold added)

8. As observed from the security video⁴ from the Comfort Inn, which was admitted into evidence, Sgt. Jarrell arrived to find Mr. Hester remaining outside of the motel. Sgt. Jarrell engages him in nearly one-half minute of dialogue, at which Mr. Hester crosses his arms in the apparent defiance conceded in his testimony.

9. At 2 minutes 31 seconds into the video, Sgt. Jarrell first reaches to touch Mr. Hester's arm, having repeatedly told him to place his hands behind his back. (Hester testimony; *ante*; Sgt. Jarrell, Tr. P. 250).[JA 0386].

⁴The video is black and white, low resolution, and without audio.

10. During the next 3-4 seconds, Sgt. Jarrell testified that, having seen Mr. Hester "pumping his fist" is thereby alerted under the circumstances of the danger of being punched. Sgt. Jarrell was aware that he perceived Mr. Hester was very strong, which is supported by Resp. Exhibit 9, *Nitro Police Department Arrest Report of Jared Devone Hester*, which lists him as 6ft.- 4in. tall, weighing 235 pounds at 29 years of age.

11. However, Mr. Hester pulled away and turned his back to him, whereupon Sgt. Jarrell placed his arms at the sides of his neck and instructed him to stop resisting, repeating "Stop, stop, stop, stop" as he felt Hester began to lean forward, positioning Jarrell to be thrown over Hester's back. (Tr. 251-252). [JA 0387-88].

12. Because Mr. Hester did not cease the resistance, Sgt. Jarrell increased the pressure so as to engage the lateral vascular restraint, which was successful in rendering Hester momentarily unconscious, during which time he was lowered slowly to a seated position without injury. (Tr. P. 252).[JA 0388] It is only at that point that Sgt. Jarrell was able to place handcuffs on Mr. Hester and gain control of him.

(Commission's Decision Order, JA 0016 - 18)

It was certainly proper for the Commission to credit testimony of Sgt. Jarrell as to certain aspects of the events. First, they heard the testimony from the witnesses and were able to assess the credibility of them directly. Hester was admittedly intoxicated to the point of having been discovered "passed out." His self-serving denial of resistance were accompanied by his inability to remember much of what had occurred. He used extremely coarse profanity in addressing Resort personnel that were acting in the interest of his safety. He admitted to first agreeing to, as an alternative to arrest, taking a hotel room; then once arriving there, changing abruptly to "you can't make me." After exhausting all reasonable attempts of persuasion, Sgt. Jarrell informed Hester that he was under arrest and to place his hands behind his back. Even assuming the accuracy of Hester's claim that he did not comply, but rather just stood there, City Attorney Johnnie Brown conceded in his direct testimony:

Q. Is there, in your mind and in your practice, any limitation on the amount of time somebody should spend with a verbally noncompliant subject?

A. There is no specific standard that I can tell you that a police officer has to tried to give

commands for 30 seconds or a minute.

At some point in time, he can obviously, if the person is not going to obey his verbal commands, he's going to be allowed to put his hands on the individual to gain control of them, at some point in time. (JA 0277).

Q. Well, in terms of passive resistance-and I think we have a sense of unanimity on what that is-your teaching of the course in that seminar says that, under those conditions, the officer has available to him pain compliance, take downs, and chemical agents.

A. Uh-huh.

Q. Per your understanding, what is a pain compliance technique?

A. Well, that would be like maybe grabbing the wrist, the thumb, to twist. You know, obviously you're making the person move the way you want to, you know, maybe grabbing the shoulder and push down. Those are just some of the examples.

Q. So in other words, the objective to what you described as pain compliance, is induce sufficient pain, to where the person you're trying to gain compliance of would prefer to do what they're told rather than to experience pain of twisting their finger, hyper- extending their wrist, or something like that?

A. Oh, sure. Absolutely.

Q. And that's all within the appropriate realm of that general category as a response to passive resistance, right?

A. Yes.

Q. Okay. Active physical resistance, as depicted in your use of force continuum, would include-I think per your earlier description, pulling away?

A. Yeah. I—you know, like I said

it can get a little murky between those two, but, yeah, if they're actively pulling away, flailing their arms, moving away from you, that's kind of active physical resistance.

Q. Okay. And your continuum indicates then you can use an impact weapon. Does that mean like a—

A. A baton.

Q. – baton?

A. Sure.

Q. So you can strike people?

A. In certain places.

Q. Knees? Places—I mean, shins where it hurts?

A. Sure. Sure.

Q. Leave bruises?

A. Sure.

Q. Can chip the bones in their shins, stuff like that?

A. Legs. Legs—they tried to teach you, I think to hit the large muscle groups. So hopefully you don't want to break a bone, you just want to inflict some pain, if you have to get to that point to control the situation. (JA 0293-94).

Through the foregoing, Mr. Brown clearly indicates that passive resistance would place pain controls at the officer's disposal; and "pulling away" or "moving away from you", as forms of active resistance entitles an officer to use baton blows that chip bones and leave bruises. As discussed, *infra*, however, Lt. Jarrell employed much less force, and avoided injury to Mr.

Hester or himself.

The foregoing notwithstanding, the Court below found and placed considerable significance on the supposition that Sgt. Jarrell had been trained to the contrary by Mr. Brown weeks earlier. That cannot be reconciled with Mr. Brown's own testimony during direct examination:

Q. And when you look at the policy, which I think I've marked and admitted as Nitro Exhibit 2, that was—was that part of your training program for the day?

A. I didn't get into it in detail. It was more attached to the materials so that the officers could have it to review later on. (JA 0270).

The specific discussion concerning the carotid restraint, according to Mr. Brown was likewise somewhat superficial.

Q. Okay. And would you recount for the commission how that came to be?

A. Sure. We were talking about the—use the term “use of force continuum,” which is kind of the term of art when looking at use of force, and Mr. Jarrell had brought up about the chokehold or the lateral vascular restraint and how I viewed that in terms of its degree of force on that use of force continuum, and we had a brief discussion about that that lasted a few minutes. (JA 0269).

Moreover, former Chief of Police, now Captain Brian Oxley testified to the Department's approval of the use of the technique when used by an appropriately trained officer. (JA 0445-46). Retired Captain and Assistant Chief Gene Javins testified as a member of the Command Staff of the Department, he was tasked with formulating rules concerning use of force and the use of force continuum. This was done by researching the policies of various agencies throughout the

country and modeled rules to fit the City of Nitro (JA 0407-413). Capt. Javins also testified to the advantages of the carotid restraint over other techniques discussed by Mr. Brown. For example, the pain controls favored by Mr. Brown are ineffective when dealing with intoxicated people. Taking suspects to the ground on hard surfaces are more likely to result in injuries to suspects and the officer. (JA 417-419).

Q. Okay. Now, in the formulation of these policies, did you also look to see if there were any documented, reliable instances of unintended physical consequences or medical consequences to the person when applied by a competent trained officer?

A. I don't recall ever seeing anything where somebody who used it properly did anything wrong. I've seen it where it was used improperly. (JA 0419).

2. The Court below critically erred in its findings of facts and application of same to the law by arbitrarily finding that the arrest technique employed by the Petitioner amounted to excessive force, based exclusively on the city attorney's testimony that he had stated his "opinion," during a legal in-service seminar, based upon his legal experience that such constituted deadly force, though the City Attorney could however point to absolutely no legal or medical authority for that position; nor did he have an official presence or reporting authority in the police department. The Petitioner produced multiple medical and self-defense experts and his Nitro Police Department supervisors, and without objection, a medical study supporting its use.

The Carotid Restraint

At first, it must be recognized that the carotid restraint has now been generally prohibited by statute in West Virginia. The prohibiting statute came into effect **after** the incident in question here. The Nitro Police Department has also now prohibited the use of it in response to the statute. Petitioner does not dispute the attendant rationale that; though few, there are instances where serious consequences have been attributed to its use by unqualified officers. To the contrary, Sgt. Jarrell testified that he would always follow all policies (JA 0475). As of the time of Mr. Hester's

arrest, there was no statute, rule, policy or other authority that prohibited its use – nor was there evidence presented below that it was an improvident technique when properly utilized.

The Court below erroneously concluded “[E]ven 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.” (JA 0719). This is contrary to the evidence below and ignores the only evidence before the Commission and subsequently the Circuit Court on that point.

Dr. Steven Nathanson appeared by video testimony from the prior proceedings, as stipulated by the parties. Dr. Nathanson served thirty years in military service, including fifteen years in the Special Forces and a like time training combat doctors. In civilian service, he most recently has been the Director of an ER and serves and teaches doctors advanced trauma and life support. He instructs at the Medical University of South Carolina, Emory University and the Defense Readiness Institute. He has also served as Assistant Director of St. Mary's Hospital, Director of Thomas Hospital and Director of Raleigh General Hospital. (JA 0731-33). His testimony was admitted, without objection, as an expert.

Dr. Nathanson explained the different maneuvers that are at times referred to as “chokes” for short. “There's a tracheal restraint that you can put your hands in a different place and your arm in a different place, and that will cut off the airflow.” (JA 0742). “The carotid restraint is more focused in the sternocleidomastoid muscles in the carotids, not on the trachea. So it should not cause any damage whatsoever to the -- to the ligaments and the bones in your neck.”(Id)⁵.

⁵See, also Respondent's Exhibit 3 from the Civil Service Proceeding (JA 0589) illustrating the distinction and explanation of the anatomy and explaining the respective effects.

Dr. Nathanson opined, concerning the lateral carotid restraint, "It's not the harshest way, and it's the way to get your opponent to comply with what you're doing **without doing any damage to them.**" (Emphasis added) (JA 0737). "[I]f your arm is in the proper place, with the V of your arm at the chin level, that gives enough space that your squeeze is going to be on the carotids, but the trachea is going to get a little bit of pressure, but it's not going to cut off airflow." (JA 0742). "[W]ith Tim's level of training, you know, I can't imagine he wouldn't -- you know, after years and years of doing it, and he and I have worked out with -- you know, together in these situations. You know, I can't imagine he wouldn't be able to do it properly and he wouldn't do it with the right technique." (JA 0743). Dr. Nathanson, after both examining critical segments of the video of the Hester arrest and hearing directly from Petitioner his recitation of what he perceived, opined "From what I saw from the video and what he described to me, and with the years of Tim's training, I can't imagine he would put it on improperly." (JA 0745).

Also received into evidence, without objection, was *Mechanism of loss of consciousness during vascular neck restraint* as published in the Journal of Applied Physiology. (J.Appl Physio 112: 396-402, 2012 - Mitchell, Roach, Tyberg, Belek, Sheldon). The subject study utilized twenty-four police officers who underwent mechanically simulated vascular neck restraint using a carotid harness, with extensively monitoring of the effects. The study concluded the technique to be "safe and effective" (JA 0590-98).

Dr. Louis Andrew Yancich testified during the Civil Service hearing below as an expert. Dr. Yancich's testimony and opinions were based on his education and experience as practicing family and emergency medicine. He is also experienced in martial arts. As an emergency room physician he regularly encounters patients whom have experienced diminished blood flow to the

brain. (JA 0426-27). He testified conclusively that the lateral vascular restraint, when applied properly, does not carry the risk of injury or death. (JA 0434-36). He further explained, in substance, that it is a reduction of blood flow to the brain that produces the effect, not a complete blockage, because the vessels interior to the neck maintain flow to the Circle of Willis. (JA 0434).

Also testifying in proceedings below which were introduced by video in the Civil Service hearing by stipulation by the parties was Roger Jarrett, president of the USA Martial Arts Federation. He has taught martial arts for fifty-one years. (JA 0787). He sits on the Police Advisory Board.. He has been involved with training of law enforcement entities ranging from local, state, FBI and Secret Service. (JA 0789). He testified that Timothy Jarrell has been training with him since Jarrell was twelve, and has "spent a lifetime going through these techniques over and over again." (JA 0791). He also reviewed the video and determined that the technique had been used appropriately. "In this situation with Officer Jarrell, he chose the technique that would do the least amount of harm in the situation, in fact, no harm when I've reviewed it at all[.]" (JA 0795).

The Court below placed apparent exclusive reliance, in finding existence of excessive force, on it's independent review of the video and the instructions said to have been imparted by Nitro's contract city attorney, Johnny Brown. An examination of the record of the evidence presented by Mr. Brown simply does not support its conclusions. In fact, Mr. Brown testified during cross-examination as follows:

Q. Okay. I'm just trying to give the Commission a clear picture of what you taught in your course, okay, and how the officers may have understood, how you intended it to be understood.

In the realm of passive resistance, it could be sometimes you see televised accounts of protests or sit-ins, where people are protesting something, sit there, and the officers have to pick them up, move them away.

A. Yes.

Q. Sometimes they resort to spraying down people with chemical agents, fire hoses, things like that.

A. Yeah. Yeah, that's --that's a little bit different level now. I mean --

Q. Well, wait a minute.

A. I mean, you get up into active physical resistance, but those things -- like I said, it gets a little murky --

Q. Well, wait a minute.

A. --between active resistance and passive, and then it's why --that's why the law says, "Under the circumstances." Everything is so factually driven.

Q. Well, in terms of passive resistance - and I think we have a sense of unanimity on what that is - your teaching of the course in that seminar says that, under those conditions, the officer has available to him pain compliance, take downs, and chemical agents.

A. Uh-huh.

Q. Per your understanding, what is a pain compliance technique?

A. Well, that would be like maybe grabbing the wrist, the thumb, to twist. You know, obviously you're making the person move the way you want to, you know, maybe grabbing the shoulder and push down. Those are just some of the examples.

Q. So in other words, the objective to what you described as pain compliance, is induce sufficient pain, to where the person you're trying to gain compliance of would prefer to do what they're told rather than to experience the pain of twisting their finger, hyper extending their wrist, or something like that?

A. Oh, sure. Absolutely.

Q. And that's all within the appropriate realm of that general category as a response to passive resistance, right?

A. Yes.

Q. Okay. Active physical resistance, as depicted in your use of force continuum, would include - I think per your earlier description -pulling away?

A. Yeah. I --you know, like I said, it can get a little murky between those two, but, yeah, if they're actively pulling away, flailing their arms, moving away from you, that's kind of active physical resistance.

Q. Okay. And your continuum indicates that you can use an impact weapon. Does that mean like

a-

A. A baton.

Q. --baton?

A. Sure.

Q. So you can strike people?

A. In certain places.

Q. Knees? Places -- I mean, shins where it hurts?

A. Sure. Sure.

(JA 0291-94).

Retired Assistant Nitro Police Chief William Javins testified that he and a consortium of officers, acting under the auspices of the chief's senior staff constructed the present rules of the Nitro Police Department, including the use of force policy.

Q. Okay. Now, the continuum begins with the lowest levels of resistance and reaction and progresses upwards toward the most severe of interactions, and to the left, it lists what the officer perceives. Now, why does it say "perceives" as opposed to some other term?

A. Perception is everything in law enforcement. One person's perception is different than somebody else's, but a law enforcement's perception, based upon his training, is a key part of why he would do something.

Q. Can I take from your answer that officers, through their training and experience, have an ability to sense, through the repetitive handling of persons under arrest --and I'm going to borrow a term from the chief here, to stay one step ahead?

A. Well, yeah. It goes back to your perception of somebody. Their body language, their demeanor, the way they look, the way they're acting, it sets the tone of the situation, and you always want to stay one step ahead.

(JA 0414).

Former Chief of Police Brian Oxley, who now serves as a captain in the department, testified *inter alia*, as follows.

A. The passive and active resistance area, depending on the Officer in the circumstances, as I was always taught, it was a controlling technique.

Q. Okay. Now, so your understanding of the policy is, then, now, or — when I say "now, " I mean as of the time —

A. Yes.

Q. — that Sergeant Jarrell — the episode evolved that brings us here today, that the carotid restraint was one which could be used as borrowing your words — a controlling technique?

A. Yes

(JA 0447)

Q. Okay. And was he [Sgt. Jarrell] one that - if you know — was trained in the technique of carotid restraint?

A. Yes.

Q. And did that training meet the department's level of satisfaction as one that he could do it efficiently and safely?

A. Yes . The previous chief before me had actually sent him to training....

(JA 0447-48)

Capt. Oxley also testified that he was aware of several incidents where the technique had been used and there had been no reports of injury to a suspect or defendant. (JA 0448).

Concerning the reasonableness of the force used, “The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.” *Graham v. Connor*, 490 U.S. 386, 396-97 (1989). Moreover, “Because police officers are often forced to make split-second judgments-in circumstances that are tense, uncertain, and rapidly evolving, the facts must be evaluated from the perspective of a reasonable officer on the scene, and the use of hindsight must be avoided.” (citations, internal quotations omitted); *Elliott v. Leavitt*, 99 F.3d 640, 642 (4th Cir. 1996). There is no requirement that the force used be the minimal amount of force available, only that it be reasonable. See e.g. *Graham* at 396-97. In the present case, the Court below simply engaged in its own analysis and inexplicably chose to give credit to the testimony of Mr. Hester, who admittedly not only was intoxicated but lacked memory as to critical facts. Those recited by him were self-serving and contradicted by others. “Since a reviewing court is obligated to give deference to factual findings rendered by an administrative law judge, a circuit court is not

permitted to substitute its judgment for that of the hearing examiner with regard to factual determinations. Credibility determinations made by an administrative law judge are similarly entitled to deference. Plenary review is conducted as to the conclusions of law and application of law to the facts, which are reviewed de novo.” *Sloan v. Dept. Of Health & Human Res.*, 600 S.E.2d 554, 557 (W. Va. 2004), citing Syl. Pt.1, *Cahill v. Mercer County Bd. of Educ.*, 539 S.E.2d 437 (W. Va. 2000).

In *Graham* at 396, the Court stated: Because “[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,” *Bell v. Wolfish*, 441 U.S. 520, 559 (1979), however, its proper application 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. See *Tennessee v. Garner*, 471 U. S., at 8-9 (the question is “whether the totality of the circumstances justifie[s] a particular sort of . . . seizure”).” In the case *sub judice*, the Court below overlooked not only the safety of the then lone officer, but the “safety of...others” as well. Mr. Hester was unquestionably intoxicated and defiant. While that Court minimizes the conduct of Mr. Hester as that that simply of a publicly intoxicated person, it failed to recognize the imperative of protecting the public from Mr. Hester’s insistence on returning to his car, and indeed the hazard that posed to Mr. Hester himself. Viewing the situation from the perspective of the officer, Mr. Hester had, for a protracted period of time exhibited “combative” behavior⁶. Though Mr. Hester became

⁶According to Lisa Smith, Chief of Security: “And **he had his keys**, and so we had to -- you know, we stop people from doing that by encouraging them not to, because of, you know, the dangers of it, but he was not having it. He became combative, argumentative, calling us

temporarily responsive to instructions, once he was alone with Sgt. Jarrell, he admittedly once again became defiant, initially stating "I don't believe you can make me get a hotel." (JA 0358). After being told to place his hands behind his back, Hester stated that he either did not move or put his hand behind his back, or "kept it by my side." (JA 0359). The resistance Sgt. Jarrell described in his testimony resulted in what Mr. Hester recalls as Sgt. Jarrell commanding him to "Stop Resisting". (JA 0362).

The Order appealed from here rests on the finding that "incapacitating strikes or holds" are permitted only in the face of "assaultive (aggressive physical)" resistance, based upon the "Officer's Perception". See, use of force continuum, JA 0558. It should first be noted that the restraint employed here cannot be seen, in view of the uncontroverted medical evidence presented to the contrary, as a "incapacitating strike or hold". Webster's New World Dictionary, Second Concise Edition, defines *incapacitating* as "to make unable or unfit; esp. to make incapable of normal activity; disable." This clearly carries the connotation of "strikes" or "holds" likely leading to serious, lasting consequences, contrasted to Mr. Brown's baton blows, twisting of wrists, etc.. Moreover, Mr. Hester's conduct can only be seen as "aggressively physical". After

names, giving us the finger." "He turned around to me, stuck his finger in my face, and said, 'F**k you,' you know, that he's not doing anything." He went to -- just kept walking out to the parking lot, like towards his vehicle." "We just tried to keep him from driving, trying to talk to him, letting him know that it wasn't safe for him or anybody else to be out on the road...." (JA 0764-65).(emphasis added).

Q. While the police were there, did he indicate any further that he wanted to get in his vehicle and drive away?

A Yes. You know, he told them that he was going to, and they told him that he could not. (JA 0769).(emphasis added).

Lt. Jason Garbin, the shift supervisor, also testified that he was there, that Hester was intoxicated and "We really didn't want him driving off in that car. I think he said a couple times that he just wanted to be back in his car." (JA 0780).(emphasis added).

becoming “combative” and sticking his finger in the face of security personnel and behaving aggressively for a protracted time, he ultimately used his superior size and strength to oppose Sgt. Jarrell’s attempt to arrest him. Sgt. Jarrell prudently used a non-injurious tact in controlling him, rather than to take him to a concrete surface, administer the blows or painful techniques advocated by Mr. Brown, which would have had the greater risks of injury to Mr. Hester and the officer. In *Poole v. City of Shreveport*, 691 F.3d 624, 629 (5th Cir. 2012) the Court observed “It is undisputed that Stalnaker repeatedly commanded Poole to turn around and give up his right arm. It is undisputed that Poole did not do so. Poole’s resistance was immediate and persistent. Stalnaker responded with verbal commands and attempted to grab Poole’s arm, before resorting to a taser, which, the video reveals, he applied and withdrew very quickly.” In that case, the Court held “Viewed objectively, Stalnaker and Creighton responded with ‘measured and ascending’ actions that corresponded to Poole’s escalating verbal and physical resistance.” and “Because Poole, upon refusing to turn around and be handcuffed, posed an ‘immediate threat to the safety of the officers’ and ‘actively resist [ed]’ the officers’ instructions, the use of force was not ‘clearly excessive.’” *Poole* at 629. See, also *Gore v. San Diego Civil Service Commission*, Cal. App. Ct, 4th Div., Dist. I, Docket No. D069068 (2016), an unpublished opinion exonerating a deputy who subdued a passively resisting prisoner by use of a carotid restraint. The parties did not disagree that this was likely the only case wherein a civil service decided the issue. See, also *Rudlaff v. Gillispie*, 791 F.3d 638, 641 (6th Cir. 2015) (active resistance includes a subject’s refusal to move his hands to allow the police to handcuff him and disobeying the orders of police officers).

Remedies

The Civil Service Commission appropriately found, as contained in its Decision Order, that the Petitioner was entitled to reinstatement, and lost wages and benefits and retroactive promotion to Lieutenant from the time after scoring highest on the promotional exam and promotions made. (JA 0010, *et seq.*) Once he prevailed in that action, he moved for attorney's fees and costs which were submitted by motion, accompanied by an itemized bill and affidavit in support executed by an attorney knowledgeable and experienced in civil service litigation. (JA 0662-73). That was opposed by the Respondent for reasons in its Response (JA 0674 -78), followed by Petitioner's Reply (JA 0679-84). The Commission, in consideration of the appeal of Respondent did not then rule on that motion. For reasons expressed in his pleadings, and as set forth in the West Virginia Code, those should be granted.

W.Va. Code §8-14-20 provides, in pertinent part:

At the [civil service] hearing, the burden shall be upon the removing, discharging, suspending or reducing officer, hereinafter in this section referred to as "removing officer", to show just cause for his or her action, and in the event the removing officer fails to show just cause for the action before the commission, then the member shall be reinstated with full pay, forthwith and without any additional order, for the entire period during which the member may have been prevented from performing his or her usual employment, and no charges may be officially recorded against the member's record. The member, if reinstated or exonerated, shall, if represented by legal counsel, be awarded reasonable attorney fees to be determined by the commission and paid by the governing body.

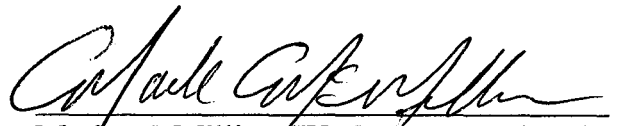
Additionally, as provided by that article, he should also be awarded such fees and costs for defending the Circuit Court appeal as well as the present one.

CONCLUSION

For reasons above and as may be advanced in oral argument and otherwise appearing to this Court, Petitioner respectfully prays that the Final Order of the Circuit Court be reversed, that

the Decision Order of the Nitro Police Civil Service Commission be reinstated and that he be awarded back wages and benefits, with interest, retroactively promoted consistent with that order, and that he be awarded all legal fees and costs, and granted such further relief to which this Court determines he is entitled.

Respectfully Submitted,

A handwritten signature in cursive script, appearing to read 'Mark McMillian', is written over a horizontal line.

Mark McMillian (W.Va. Bar No. 9912)

Mark McMillian - Attorney at Law, L.C.

Counsel for Petitioner

1018 Kanawha Blvd, East, Suite 900

Charleston, WV 25301

Email: mark@markmcmillian.com

Phone: 304-720-9099 Fax: 304-720-0290

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

TIMOTHY JARRELL,
PETITIONER

vs.

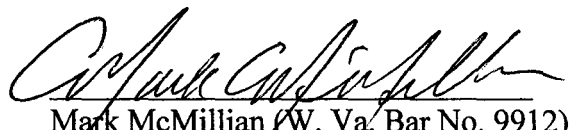
THE CITY OF NITRO, WEST VIRGINIA
RESPONDENT

Docket No.19-0907
(Kanawha Circuit Court Civil Action No. 19-AA-40)

CERTIFICATE OF SERVICE

Undersigned Counsel for the Petitioner hereby certifies that a true copy of the accompanying *Brief of Petitioner* and *Appendix* were served this the 21st day of January, 2020 by hand delivery, upon the Respondent the City of Nitro, West Virginia through its Counsel, directed as follows:

John Teare, Esquire
Spilman Thomas & Battle, PLLC
300 Kanawha Blvd., E.
Charleston, WV 25301


Mark McMillian (W. Va. Bar No. 9912)
Counsel for Petitioner
Mark McMillian - Attorney at Law, L.C.
Boulevard Tower - Suite 900
1018 Kanawha Blvd., East
Charleston, WV 25301
Tele: 304.720.9099
email: mark@markmcmillian.com