**IN THE WEST VIRGINIA SUPREME COURT OF APPEALS**

**DOCKET NO. 19-0907**

**(Kanawha County Circuit Court - Civil Action No. 19-AA-40)**



**TIMOTHY JARRELL,**

**DEFENDANT BELOW, PETITIONER,**

**VS.**

**THE CITY OF NITRO, WEST VIRGINIA**

**PLAINTIFF BELOW, RESPONDENT.**

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# RESPONSE BRIEF OF THE CITY OF NITRO

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**The City of Nitro, West Virginia**

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**Defendant Below, Petitioner**

**v.** **Docket No.: 19-0907**

**The City of Nitro, West Virginia,**
**Plaintiff Below, Respondent.**

# RESPONSE BRIEF OF THE CITY OF NITRO

## ASSIGNMENTS OF ERROR

The Petitioner notes two (2) assignments of error which are more readily discussed as three issues.

1. Whether the Circuit Court improperly substituted its judgment for that of the Civil Service Commission by rejecting certain evidence and concluding that the decision of the Civil Service Commission was clearly wrong;

2. Whether the Circuit Court committed error by finding that the Petitioner's use of force, choking a non-combative misdemeanor suspect into unconsciousness, was excessive in light of the multiple medical and self-defense experts who testified, the testimony of current and former Nitro police officers, a medical study article and an unreported civil service decision from California; and,

3. Whether the Circuit Court improperly considered the testimony of City Attorney Johnnie Brown regarding: (a) training he provided to the Petitioner two weeks prior to the incident which gives rise to this appeal; and (b) his expert legal opinion regarding the legal standards regarding use of force, all of which the Civil Service Commission effectively rejected.

## STATEMENT OF THE CASE

On March 5, 2016, the West Virginia Legislature passed, and the Governor later signed, HB 4362 which made it a felony offense to strangle another person without consent, now codified at West Virginia Code §61-2-9d (Strangulation; definitions; penalties) which provides, in relevant part:

> (a) As used in this section:
>
> (1) "Bodily injury" means substantial physical pain, illness or any impairment of physical condition;
>
> (2) "Strangle" means knowingly and willfully restricting another person's air intake or blood flow by the application of pressure on the neck or throat;
>
> (b) Any person who strangles another without that person's consent and thereby causes the other person bodily injury or loss of consciousness is guilty of a felony and, upon conviction thereof, shall be fined not more than $2,500 or imprisoned in a state correctional facility not less than one year or more than five years, or both fined and imprisoned.

The legislation had an effective date of June 3, 2016.

Petitioner Timothy Jarrell was a police officer employed by the City of Nitro, West Virginia, holding the rank of Sergeant. JA 0457. In the early morning hours of May 8, 2016, after the Strangulation law was passed but before its effective date, Petitioner was one of at least three Nitro police officers who responded to a complaint of an intoxicated individual at the Mardi Gras Casino ("Casino"). JA 0385. There they encountered Jared Hester in the Casino parking lot. Casino security personnel wanted Mr. Hester to leave the property. Mr. Hester did not have a room at the Casino hotel and no one to take custody and care of him. He intended to sleep in his vehicle until he was sober and able to drive home. JA 0350-55.

Not trusting that he would not drive away while intoxicated and in light of the Casino's insistence that he leave the property, Petitioner told Mr. Hester that he would be arrested for

public intoxication unless he agreed to go to a nearby hotel for the evening. JA 0241, 0335. When Mr. Hester opted to get a room nearby, he was not arrested but released without charges and allowed to leave the property in the Casino shuttle bound for the Comfort Inn, which was off the property and about one-half (1/2) mile away and outside of the city limits. JA 0336-37; JA 0477.

When the shuttle dropped Mr. Hester off in front of the hotel, he did not immediately enter to secure a room but remained outside near the front lobby doors. JA 337. Soon thereafter, Petitioner observed Mr. Hester outside of the hotel. *Id.* Despite being outside of his jurisdiction and without lawful authority to make an arrest, Petitioner confronted Mr. Hester and told him that he must go inside and get a room for the night or be arrested. Mr. Hester responded that Petitioner could not force him to spend his money to get a room. JA 0338. Petitioner informed Mr. Hester "Turn around, put your hands behind your back. You're under arrest. I'm tired of fooling with you." JA 0484. In less than a minute after Petitioner approached Mr. Hester, he had Mr. Hester in a choke hold which rendered him unconscious. Video, Nitro Exhibit 5. Petitioner lowered Mr. Hester to the ground where he regained consciousness although he was disoriented. Mr. Hester offered no physical resistance, did not attempt to flee and made no aggressive moves toward Petitioner; at worst, passively resisted Petitioner by not placing his hands behind his back when directed to do so. *Id.* Medical treatment was neither offered nor obtained for Mr. Hester. JA 0343.

Petitioner arrested Mr. Hester and had him taken to the Nitro Police Department for processing and later to the South Central Regional Jail. *Id.* Petitioner completed a City of Nitro Municipal Court criminal complaint that charged Mr. Hester with public intoxication and

obstructing an officer. JA 0624. The charges were later withdrawn and dismissed with prejudice.

The City of Nitro later became aware of the incident and conducted an internal investigation of the incident following the requirements of West Virginia Code §8-14A-1 *et seq*. The City of Nitro also made a criminal referral to the Kanawha County Sheriff's Office. The City of Nitro decided to place Petitioner on paid administrative leave pending the outcome of the criminal process. As a result of the criminal investigation, the matter was presented to the Grand Jury which returned criminal indictments for battery and false swearing.

The Circuit Court remanded the charges to the Magistrate Court for a jury trial where the Petitioner was found not guilty of the charges. After the verdict, the City of Nitro delivered its notice of intent to terminate Petitioner. JA 0084-91.[1]

In Petitioner's Procedural History, he suggests that he was unlawfully terminated without the opportunity for a pre-disciplinary hearing which was only granted because he notified the Chief of Police that the termination was unlawful in the absence of a pre-disciplinary hearing. Opening Brief at page 1. In fact, the termination notice specifically provided Petitioner with the opportunity for a pre-disciplinary hearing if he desired a hearing. JA 0085:

> **If you desire a hearing before a Hearing Board, you must deliver your request in writing to my office not later than 4:00 p.m. on October 30, 2017. If you do so I will schedule a hearing before a Hearing Board pursuant to West Virginia Code §8-14A-3 and provide you notice of the date, time and location of the hearing. If you request a hearing before a Hearing Board, your termination will not be effective until the Hearing Board renders its decision.**

(emphasis in original).

[1] Note that the pages of the "Notice of Termination, Statement of Charges and Notice of Right to a Hearing" are shuffled out of their correct order in the Joint Appendix. The correct order for reading the statement of charges is 0086, 0088, 0089, 0090, 0091, 0085 and ending with 0087.0084.

Petitioner also goes to great length to discuss the conduct of Mr. Jared Hester while at the Mardi Gras Casino, however, the disciplinary action taken by the City of Nitro did not involve the conduct of Mr. Hester or Petitioner while they were within the jurisdictional limits of City of Nitro at the Casino. The City of Nitro never sought to discipline Petitioner for using his verbal skills to convince Mr. Hester to "voluntarily" leave the premises of the Casino to avoid arrest. The disciplinary action was based entirely on the conduct of Petitioner after that incident was peacefully resolved at the Casino while at the Comfort Inn located about one-half (1/2) mile away, outside of Petitioner's jurisdiction. JA 0499; Commission Finding of Fact 9 at JA 0635. The Commission also erroneously concluded, as a matter of law, that Petitioner \had the authority to arrest Mr. Hester outside of the Nitro city limits based upon West Virginia Code §8-14-13.

**SUMMARY OF ARGUMENT**

In cases where the Circuit Court has amended the result before the administrative agency, this Court reviews the final order of the Circuit Court and the ultimate disposition by it under an abuse of discretion standard and reviews questions of law *de novo.* " Syl. Pt. 2, *Muscatell v. Cline,* 196 W.Va. 588, 474 S.E.2d 518 (1996).

The Circuit Court correctly reversed the decision of the Civil Service Commission because it was objectively unreasonable, as a matter of law, to use a disabling choke hold on a non-combative misdemeanor suspect. Moreover, the Circuit Court did not abuse its discretion when it rejected portions of Petitioner's testimony that was clearly contradicted by the video evidence of record. In addition, the Circuit Court was well within its discretion to credit the testimony of the City Attorney regarding the training that he provided to Petitioner two weeks before the incident and to disregard the testimony of Petitioner's use of force and martial arts

witnesses, and the unreported California civil service decision as irrelevant to the Court's determination of the critical issue of whether choking a non-combative misdemeanor suspect into submission constitutes excessive force under the City's Use of Force Policy, and was excessive as a matter of law. The Circuit Court correctly determined that the Commission was clearly wrong when it found no violation of the City of Nitro's Police Department Use of Force Policy which required its officers to use the minimum force reasonably necessary to accomplish a legal purpose. Policy at second paragraph A. JA 0558.

## STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The City of Nitro respectfully suggests that this case does not require oral argument because there are no novel issues of law, the facts are relatively straight forward, the dispositive issue or issues have been authoritatively decided; the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument.

The undersigned welcomes the opportunity to argue this case to the Court if it determines that argument would be beneficial to the decision making process, particularly in light of the Circuit Court's use of video evidence which contradicted the testimony of Petitioner.

## ARGUMENT

1. Whether the Circuit Court improperly substituted its judgment for that of the Civil Service Commission by rejecting certain evidence and concluding that the decision of the Civil Service Commission was clearly wrong;

2. Whether the Circuit Court committed error by finding that the Petitioner's use of force, choking a non-combative misdemeanor suspect into unconsciousness, was excessive in light of the multiple medical and self-defense experts who testified, the testimony of current and

former Nitro Police officers, a medical study article and an unreported civil service decision from California; and,

3. Whether the Circuit Court improperly considered the testimony of City Attorney Johnnie Brown regarding: (a) training he provided to the Petitioner two weeks prior to the incident which gives rise to this appeal; and (b) his expert legal opinion regarding the legal standards regarding use of force, all of which the Civil Service Commission effectively rejected.

**A. Whether the Circuit Court improperly substituted its judgment for that of the Civil Service Commission by rejecting certain evidence and concluding that the decision of the Civil Service Commission was clearly wrong.**

Contrary to Petitioner's First Assignment of Error which claims that the Circuit Judge committed legal error by conducting a *de novo* review of the record below, this Court has held: "Our review of the circuit court's decision made in view of the Commission's action is generally *de novo*. Thus, we review the Commission's adjudicative decision from the same position as the circuit court." *In re: Queen,* 196 W.Va. 442, 446, 473 S.E.2d 483, 487 (1996), citing, *Randolph County Bd. of Educ. v. Scalia*, 182 W.Va. 289, 292, 387 S.E.2d 524, 527 (1989). "To be specific, in no case will this Court act as a rubber stamp. Although the Hearing Board's findings of fact are given respective consideration, they are not binding on this Court." *In re Hamrick*, 204 W.Va. 357, ___, 512 S.E.2d 870, 872 (1998), citing *In the Matter of Browning*, 192 W.Va. 231, 234 n. 4, 452 S.E.2d 34, 37 n. 4 (1994). Although the factual findings of the Commission are entitled to deference, an appellate court may reverse a decision of the Civil Service Commission as clearly wrong or arbitrary or capricious 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. See Syllabus point 2, *In Re: Queen,* 196 W.Va. 442, 473 S.E.2d 483 (1996).

"The 'clearly wrong' and the 'arbitrary and capricious' standards of review are deferential ones which presume the agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis." *Frymier-Halloran v. Paige*, 193 W.Va. 687, 695, 458 S.E.2d 780, 788 (1995). An administrative agency such as the Civil Service Commission, may not elect one version of the evidence over the conflicting version "unless the conflict is resolved by a reasoned and articulate decision, weighing and explaining the choices made and rendering its decision capable of review by an appellate court." Syl. Pt. 6, *Muscatell v. Cline,* 196 W.Va. 588, 474 S.E.2d 518 (1996). Here, the only two witnesses at the scene of the arrest and use of force testified to contradictory versions of events but there was also congruence on a number of issues. Nevertheless, the Commission elevated Petitioner's testimony over the conflicting testimony of Mr. Hester and the video evidence, without making a reasoned and articulate decision weighing and explaining the choices made and rendering its decision capable of review by an appellate court. As this Court said in *In re Queen*,

> administrative agencies should make specific and separate findings of fact, opinions, and conclusions of law that will address all material aspects of the case, including credibility issues. Important liberty and property interests, not to mention significant public interests, are at stake in these proceedings and it is the obligation of administrative agencies to give the parties the full benefit of their reasoning by setting forth their findings in suitable detail in their final orders.

196 W. Va. at 449 n.6, 473 S.E.2d at 490 n.6. The Circuit Court had the benefit of reviewing the same video evidence that the Commission had for certain witnesses.[2]

[2] As noted in Petitioner's brief, not all witnesses testified live before the Commission. Certain testimony was admitted by video of the witnesses' testimony in the Magistrate Court criminal trial, particularly that of Mr. Hester who was beyond the subpoena power of the Commission.

The Circuit Court was well within its discretion to review the video evidence and reject the Petitioner's testimony because his testimony was contradicted by the video evidence. The U.S. Supreme Court stated, "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris*, 550 U.S. 372, 380-81 (2007)("The Court of Appeals . . . should have viewed the facts in the light depicted by the videotape."). *Accord, Hupp v. State Trooper Seth Cook*, 931 F.3d 307 (4th Cir. 2019)("To the extent the video depicts material facts of this case, we review those facts as they are depicted in the video); *Blaylock v. City of Phila.*, 504 F.3d 405, 414 (3d Cir. 2007)("when there is evidence - like the videotape in *Scott* itself - of undisputed authenticity that shows some material element of the plaintiff's account to be "blatantly and demonstrably false, a court of appeals may say so . . . .").

The Commission found, at Finding of Fact No. 11, that Mr. Hester pulled away from the Petitioner and turned his back on him when Petitioner placed hands on him to effect the arrest. It also found, at Finding of Fact No. 14, that Mr. Hester's initial passive resistance "clearly became active." JA 0694. These findings are not supported by the video evidence. What the video establishes, however, is that Petitioner pushed Mr. Hester back against the hotel wall, grabbed hold of Mr. Hester's right arm and spun him around as Petitioner applied the choke hold. Mr. Hester was passive during the entire incident. Mr. Hester's testimony, however, is wholly consistent with the video: he did not comply by putting his hands behind his back and "I just stood there, and when he kind of came up behind me, he kind of took my - I believe it would have been my right arm and put it behind my back." JA 0338. Mr. Hester further testified, consistent with the video evidence, that he did not physically resist in any way, did not attack

Petitioner, did not push him, and did not bump him. JA 0340. Having seen the same video as the Commission, the Circuit Court found at Finding of Fact No. 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. Hester barely moved at all before being choked.

JA 0717-18. The Commission's finding is contrary to the testimony and the evidence, and is clearly wrong.

Curiously, the Commission credits Petitioner's testimony that Mr. Hester was "pumping his fists" during the three (3) or four (4) seconds after being told to place his hands behind his back causing Petitioner to fear that he was about to be punched. Findings of Fact Nos. 9 and 10, JA 0692-93. But the video is clear that Mr. Hester folded his arms across his chest, not a move that signals an imminent punch. Moreover, the Commission did not explain the inconsistency between those Findings of Fact and finding of Fact No. 8, apparently concluding that Mr. Hester was folding his arms when he was "pumping his fists."

The Commission suggested that Mr. Hester openly admitted to engaging in a physical altercation with the Petitioner. Finding of Fact No. 7, JA 0693. Petitioner quotes the same one sentence out of all of Mr. Hester's testimony to make the same representation to this Court. Appeal Brief at page 4. The Circuit Court considered that one sentence in context with surrounding testimony and concluded that any representation that Mr. Hester admitted engaging in a physical confrontation with Petitioner amounted to a severe mischaracterization of the evidence. JA 0724. This is especially so considering that Mr. Hester testified in the same exchange that the physical altercation he was describing was Petitioner advancing on him and choking him.

**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.

JA 0339.

The Commission discounted or disregarded the testimony of Mr. Hester because he was intoxicated, "lack of memory as to many facts" and "interest in the outcome." While it is true that Mr. Hester was intoxicated, the Commission apparently found Mr. Hester's memory, which was consistent in many instances with the testimony of Petitioner and the video evidence, made him not worthy of any level of credibility. Certainly the Commission did not engage in the level of analysis required by this Court in Syl. Pt. 6, *Muscatell v. Cline,* 196 W.Va. 588, 474 S.E.2d 518 (1996). Also considered by the Commission as a factor to disregard the testimony of Mr. Hester was the suggestion that Mr. Hester had an interest in the outcome of the civil service hearing. Finding of Fact No. 3, JA 0691. The truth is the opposite. Mr. Hester did not file a complaint against Petitioner. JA 0368. Mr. Hester was a witness subpoenaed to testify for the State of West Virginia in Petitioner's criminal trial. He did not volunteer to return to Nitro, West Virginia to testify against Petitioner in the Civil Service proceeding. Neither proceeding could result in any financial or other benefit to Mr. Hester. To the contrary, the only witness with the incentive to falsify or shade testimony was Petitioner: potential conviction, fine and

imprisonment in the criminal proceeding and the threatened loss of his public employment in the Civil Service hearing.

Curiously, the Commission also found that Mr. Hester's recollection was less reliable "verses [sic.] those whose recollections were clearer and more consistent with otherwise established facts." Finding of Fact No. 3, JA 0691. The Commission neither identified the "otherwise established facts" or whose recollections were clearer and convincing. Perhaps it is because no one else was present[3] when the choking occurred. Other police officers arrived at the Comfort Inn only after Mr. Hester was on the ground.

Mr. Hester's testimony regarding the events at the Comfort Inn is not riddled with lapses of memory as determined by the Commission. For instance, Mr. Hester testified that the Casino shuttle bus took him to the Comfort Inn, that he was not under arrest at the time, that he exited the shuttle bus and stood outside in front of the hotel near the front door. JA 0336-37. Mr. Hester testified that Petitioner arrived shortly thereafter, approached him until about six (6) or seven (7) feet apart, that Petitioner told him to put his hands behind his back and that he just stood there in response. JA 338. He described having his right hand grabbed, Petitioner telling him to stop resisting, and described how the choke hold was applied. JA 339-40. Mr. Hester also testified that Petitioner told him to get a room or he would be arrested and that he responded to Petitioner "I don't believe you can make me get a hotel." JA 0358.

In short, Mr. Hester's recollection and testimony regarding the critical events at the Comfort Inn are consistent with the testimony of Petitioner and the video recording of the incident. The Commission's finding that Mr. Hester had a lack of memory is simply not supported by the record and the Commission's findings based upon its inadequate and inaccurate

[3] The only other known witness is an unknown customer of the hotel seen on the video but not otherwise identified.

reasons for not crediting his testimony constitute an arbitrary and capricious view of the evidence and an abuse of discretion. The Circuit Court was well within the scope of appellate review of the record to disregard the Commission's findings of fact and adopt different findings which are actually supported by substantial evidence in the record.

**B. Whether the Circuit Court committed error by finding that the Petitioner's use of force, choking a non-combative misdemeanor suspect into unconsciousness, was excessive in light of the multiple medical and self-defense experts who testified, the testimony of current and former Nitro police officers, a medical study article and an unreported civil service decision from California.**

Petitioner suggests that certain testimony regarding medical evidence and journal articles provided to the Commission were admitted without objection from the City of Nitro. Appeal brief at pages 1, 6, 15, and 17. This is not true. Petitioner offered his Exhibit 4, an article entitled "Mechanism of loss of consciousness during vascular neck restraint" during his cross examination of the City Attorney. The City of Nitro immediately informed the Commission that it reserved the right to make objection to the article in proposed findings after having an opportunity to review the submitted article. JA 0307-08.

The City of Nitro's Supplemental Closing Argument identifies the City of Nitro's objection and its reasons for not considering the Exhibit. The City of Nitro identified a number of reasons that the evidence was improper, including the fact that the test subjects were all healthy police officers who were not intoxicated. Each had the ability to "tap out" and an instructor was on site to monitor and stop the use of force as needed. JA 0625-26. In addition, review of the article reveals that test subjects volunteered, went through medical screening, signed informed consent waivers, and refrained from the use of any caffeine containing food or drink for a number of hours before the testing. JA 0590. Also, as noted by Petitioner, the choke hold was "mechanically simulated" by use of a "mechanical harness." Appeal brief at page 17.

Clearly, the study was conducted in sterile and optimum conditions and closely monitored to avoid risk to the test subjects. This does not mirror the conditions under which Mr. Hester was rendered unconscious. The author also concluded that his results might not apply to different populations. JA 0595.

Petitioner states that this article concluded that the technique is "safe and effective." Appeal brief at page 17. The whole sentence from which that conclusion was drawn by Petitioner is: "With the majority of subjects rendered unconscious and, **importantly, no serious adverse events in our subjects**, we conclude that VNR is a safe and effective force intervention; however, outcomes could vary in different populations (i.e., unhealthy or older subjects.)" JA 0595 (emphasis added). Moreover, the author does not suggest that the choke hold be generally used, instead he suggests that Vascular Neck Restraint "is a technique that police offices may employ to control **combative** individuals." JA 0590 (emphasis added). Petitioner's reliance on this article is misplaced and has no, or extremely limited, relevance to Petitioner's use of a choke hold on Mr. Hester.

Petitioner also glosses over the City of Nitro's objection to the admission of an unreported, not for publication, decision in a civil service appeal in San Diego, California. Appeal brief at page 24. The City of Nitro objected to the consideration of this decision for any purpose. JA 0312, 0315. The City of Nitro also addressed the inapplicability of that case in its Supplemental Closing. JA 0626-28. In California, the citation to or reliance on an unpublished opinion is only appropriate to establish the law of the case or involves the same defendant or respondent; neither of which applied to Petitioner in this case. The Commission obviously

disagreed. JA 0699. Moreover, the San Diego case was so factually different[4] from the Comfort Inn arrest of Mr. Hester that it, and its reasoning, should have been rejected out of hand.

Petitioner's expert testimony is no more relevant to the primary issue submitted to the Commission. On direct examination, Dr. Yancich was asked: "So based upon your experience and understanding and expertise and the anatomy we discussed, is there any **serious risk** of **permanent injury** if the technique of suppressing those arteries occurs?" JA 0435-36 (emphasis added). He replied: "I fail to see where there would be a risk of **permanent damage** or injury." JA 0436 (emphasis added). The Commission's conclusion that Dr. Yancich testified "conclusively" that a properly applied choke hold "does not carry the risk of injury or death," Finding of Fact No. 16, JA 0654, is not supported in the record.

Dr. Nathanson's testimony in the criminal trial was apparently based solely upon Petitioner's description of events. JA 0738. Based upon the information provided by Petitioner, Dr. Nathanson testified that that he could not "imagine he wouldn't be able to do it properly and he wouldn't do it with the right technique." JA 0743. Interestingly, Dr. Nathanson was informed by Petitioner that Mr. Hester "lifted him [Petitioner] off of the ground." JA 0739. Clearly, Petitioner exaggerated the action of Mr. Hester or Dr. Nathanson misunderstood Petitioner's version of events. See JA 0252, 0725. During the criminal trial when the Assistant Prosecutor informed him that Mr. Hester complained of pain in his neck and throat as a result of the choke hold, Dr. Nathanson admitted that such reported pain is not consistent with a properly applied carotid restraint; suggesting, instead, that Mr. Hester's pain might have been caused by some unknown pre-existing condition. JA 0744-45.

[4] This case involved an inmate with a long and violent history, including injury to Deputies and other inmates, and had aggressively turned from a controlled position to a face-to-face confrontation with the Deputy. Most importantly, the agency use of force policy specifically authorized the choke hold for use on inmates who are actively resisting or resisting.

Finally, the testimony of current and former Nitro police officers was not binding on the City. More to the point, their testimony is contrary to the Use of Force training provided to all City police officers two weeks earlier. In short, even if they believed that a choke hold was authorized in years past, those opinions predated the recent Change of Policy and had no relevance to the issue before the Commission or the Circuit Court on appeal.

Petitioner's evidence establishes, at best, that a properly applied vascular neck restraint is not expected to cause permanent injury or disability to a suspect. But this conclusion begs the question of whether it is objectively reasonable for a police officer to choke a non-violent misdemeanor suspect into unconsciousness.

**C. Whether the Circuit Court improperly considered the testimony of City Attorney Johnnie Brown regarding: (a) training he provided to the Petitioner two weeks prior to the incident which gives rise to this appeal; and (b) his expert legal opinion regarding the legal standards regarding use of force, all of which the Civil Service Commission effectively rejected.**

City Attorney Johnnie Brown was offered as a witness by the City of Nitro for two reasons: he was to give the Civil Service Commission a legal standard by which it should judge whether the level of force employed by Petitioner on Mr. Hester was reasonable; and second, to present factual testimony regarding Use of Force Policy training that he provided to all Nitro police officers at the request of the City of Nitro just two weeks before the choking incident at question in this appeal.

City Attorney Brown has years of legal experience in defending police officers in excessive force cases. JA 250-52, 0258, 0262, and 0270-72. During training, Attorney Brown informed Petitioner that the City of Nitro considered the use of lateral neck restraint to be a use of deadly force. JA 0269. The City Attorney was also concerned with the frequency that Petitioner admitted using a choke hold on suspects. JA 0270. Petitioner, however, gave no

weight to the City Attorney's opinion that the use of a choke hold was only reasonable when deadly force was appropriate because Attorney Brown has "no experience or training in mechanics of arrests or techniques or anything like that." JA 0261, 0280.

City Attorney Brown was not the only person to inform Petitioner that the choke hold was limited to seriously dangerous situations. Petitioner testified that the Kanawha County Sheriff's Office authorized its deputies to use the carotid restraint, but then had to admit on cross-examination that the restraint was authorized for use "only in the most serious of situations." JA 0262.

Petitioner was not free to unilaterally reject the City of Nitro's training on its Use of Force Policy or the City Attorney's explanation of that policy, specifically the choke hold, simply because he disagreed with the training and policy.

Likewise, the Civil Service Commission gave no weight to the City Attorney's testimony on the subject: "We now note that Mr. Brown concedes no special medical or self defense training or expertise, but rather expressed opinions based upon his legal education and representing parties to police use of force cases and teaching use of force related topics." Commission Order at page 9, paragraph 13, JA 0652-53. Not only did the Civil Service Commission reject the testimony of Attorney Brown, it suggested that the use of the choke hold should be more widely used:

> the present departmental ban on this restraint takes away a potential option to officers and eliminates a potential rung on the force continuum. There are studies done in reference to the addition of resources made available (tasers) that examine a long term effect on police departments.[5] One of these studies examines the effects on the City of Houston, TX. It shows the positive benefits including a reduction in time off due to worker's comp issues for officers involved in altercations with suspects and also a reduction in police officer claims for worker's compensation with this additional tool. I do not believe that by

[5] None of the "studies" referenced by the Commission are part of the record because they were never introduced, offered discussed or mentioned by either the City of Nitro or Petitioner.

> eliminating the use of this carotid restraint hold that this is the best decision for the officers employed by the city of Nitro. I think this technique should be allowed for officers to use as it may have the effect of eliminating or reducing officer involved injuries or worker's comp claims for officers when dealing with resisting suspects. If anything, I think not allowing this technique sets up liability on the department and the city because it forces the officer to go up the force continuum thereby exposing the officer to unnecessary potential injury.

The Commission's suggestion that the choke hold become a preferred method of arrest is clearly contrary to West Virginia Code §61-2-9d, which makes strangulation a felony. The Commission committed clear legal error when it rejected Attorney Brown's testimony regarding the legal standard, objective reasonableness, which applies to any use of force and chose, instead, to suggest a policy that would violate the State Criminal Code.

### D. The Commission failed to give effect to the City of Nitro's policy that its police officers utilize the least amount of force to achieve a lawful objective.

The City of Nitro's Use of Force Policy requires its officers to use the minimum amount of force. Nitro Exhibit 2, on the first page of the Nitro Police Department Use of Force Policy, clearly requires officers to employ the "minimum degree of force reasonably necessary to accomplish a legal purpose." Despite this unambiguous statement of policy, the Civil Service Commission determined that "[t]here is no requirement that the force used be the minimum amount of force available." Commission Order at p. 15, JA 0699.

The obligation to use the minimum force is required by policy. JA 0558. Retired Officer Javins, a witness called by Petitioner, testified that the use of minimum force is a long-standing requirement for the Nitro Police Department. JA 0148-50. Chief Eggleton confirmed that the policy required the least amount of force required to effect the lawful purpose. JA 0384.

The seminal authority on whether any particular use of force is reasonable is *Graham v. Connor*, 490 U.S. 386, 397 (1989) ("the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their

underlying intent or motivation"). This Court, relying upon *Graham*, has noted that the 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." *Maston v. Wagner*, 236 W. Va. 488, ___, 781 S.E.2d 936, 952 (2015), quoting *Graham,* 490 U.S. at 396, 109 S.Ct. 1865.

This Court also noted a more extensive list of things to consider when weighing the objective reasonableness of an officer's actions, emphasizing that the list was not exclusive:

> Considerations such as the following may bear on the reasonableness or unreasonableness of the force used: 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. We do not consider this list to be exclusive. We mention these factors only to illustrate the types of objective circumstances potentially relevant to a determination of excessive force.

*Maston* at ___, 781 S.E.2d at 952, quoting *Kingsley v. Hendrickson,* 135 S.Ct. 2466, 2473 (2015).

The *Graham* and *Maston* cases apply reasonableness analyses in the context of Fourth, and by extension to the states, Fourteenth Amendment principles in civil litigation. Law enforcement agencies are, of course, entitled to be more protective of citizens' rights and enforce more stringent standards against its own employees in an administrative setting such as the internal administrative charges against Petitioner in this case. *See* syllabus point 2, *Pauley v. Kelly*, 162 W.Va. 672, 255 S.E.2d 859 (1979). The primary tenant of federalism permits West Virginia to place higher standards on its police pursuant to its own laws than those required by

the federal government. *See, State v. Mullens*, 221 W.Va. 70, 650 S.E.2d 169 (2007); *Peak v. Ratliff*, 185 W.Va. 548, 408 S.E.2d 300 note 12 (1991)(Police Department Policy does not set standard of care in civil litigation).

Based upon the Civil Service Commission's erroneous determination that Petitioner was not required to use the least amount of force needed to effect the arrest of Mr. Hester, failed to credit or truly consider the City of Nitro's evidence regarding lesser degree of force options that were appropriate and available to Petitioner. For instance, Petitioner successfully used verbal persuasion and the presence of additional police officers at the Mardi Gras Casino to obtain voluntary compliance from Mr. Hester. JA 0335-36, 0477. In addition, the same three police officers that assisted Petitioner at the Casino were close by if Petitioner was unable to convince Mr. Hester to get a room by verbal persuasion. In fact, the video shows those police officers arriving at the Comfort Inn seconds after Mr. Hester was rendered unconscious.

The physical presence of additional manpower constitutes a slight escalation of physical presence within the Use of Force Policy. If necessary, an officer can resort to compliance techniques pursuant to policy. The Policy provides:

> At times, uncooperative people who refuse to be taken into custody may only respond to a combination of strength, leverage, take-downs, control holds, or come-alongs with sufficient force to make the lawful arrest. The object of this level of force is to gain control and enforce the suspect's compliance while minimizing the risk of injury to officers, bystanders, or the person being placed in custody. Where lesser forms of force appear ineffective, officers may employ hand control methods as appropriate.

Petitioner dismissed each of these alternatives due to what he characterized as the substantial risk of serious injury and/or broken bones for the suspect. JA 0465-68. Petitioner's reasoning is unavailing because he, with all of his training, was probably the most capable Nitro police officer in the proper and safe application of the authorized techniques. In fact, Petitioner had no

recollection of ever injuring a suspect by use of those approved tactical techniques. JA 0497 ("at the risk of sounding arrogant, I would like to think . . . that I have a better understanding than those on my department.").

**CONCLUSION/PRAYER FOR RELIEF**

The use of a choke hold to cause a non-combative citizen to lose consciousness for a minor misdemeanor arrest is not objectively reasonable and violates the City of Nitro's policy. Even assuming that this Court were to find Petitioner's actions to be objectively reasonable under the circumstances, it is undoubtedly clear that the use of a choke hold cannot be considered the minimal amount of force required to effect the arrest; especially considering that there was no attempt at all to utilize the approve hand controls. Petitioner's conduct in this instance constituted seriously wrongful conduct which justifies his termination from the police force. *Magnum v. Lambert*, 183 W. Va. 184, 394 S.E.2d 879 (1990).

The City of Nitro respectfully asks this Court to affirm the decision of the Circuit Court upholding the termination of Petitioner for good cause.

**CITY OF NITRO, WEST VIRGINIA**

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## IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**Timothy Jarrell,**
**Defendant Below, Petitioner**

**v.** **Docket No.: 19-0907**

**The City of Nitro, West Virginia,**
**Plaintiff Below, Respondent.**

## CERTIFICATE OF SERVICE

I, John R. Teare, Jr., counsel for the City of Nitro, West Virginia, do hereby certify that on this 4th day of March, 2020, I have served the foregoing ***"Response Brief of The City of Nitro"*** on the following persons by U.S. Mail, postage prepaid, at the following addresses:

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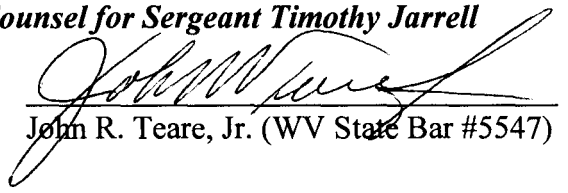

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