BEFORE THE OREGON EMPLOYMENT RELATIONS BOARD
SHIANNE SCOTT, APPOINTED DESIGNATED ARBITRATOR
IN THE MATTER OF THE ARBITRATION BETWEEN

GRANTS PASS POLICE ASSOCIATION, on behalf of OFFICER [redacted] (Grievant), Union and CITY OF GRANTS PASS, Employer	**ARBITRATION OPINION AND AWARD** **Union Grievance No. 2025-01** **Date Issued: February 24, 2026**

APPEARANCES:

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INTRODUCTION

This Arbitration Opinion and Award (this Award) arises pursuant to the Collective Bargaining Agreement (the Agreement, or the CBA) between the Grants Pass Police Association (the Association, the GPPA, or the Union), on behalf of Officer [redacted] (Officer [redacted] or the Grievant), and the City of Grants Pass (the City, or the Employer), on behalf of the Grants Pass Police Department (the GPPD, or the Department) (collectively, the Parties).

THE SUBJECT OF THIS AWARD

This Award determines the outcome of Grievance No. 2025-01 (the Grievance), filed by the Union on February 12, 2025, concerning Officer [redacted] demotion from the Police Corporal classification to the Police Officer classification (the Demotion).

The Demotion occurred following two spitting incidents that occurred on October 27, 2024 (the First Spitting Incident), and October 31, 2024 (the Second Spitting Incident) (collectively, the Spitting Incidents), while Officer [redacted] was in uniform and on duty in his capacity as a Police Corporal. Both Spitting Incidents involved a twelve-year old male juvenile with the initials "AE." For purposes of this Award, the juvenile will be referred to simply as, "the Juvenile."

Having been unable to mutually resolve the Grievance, in or about March 2025, the Parties requested that the Oregon Employment Relations Board (the ERB) appoint an arbitrator to hear the Grievance.

THE ERB RANDOMLY APPOINTS THE ARBITRATOR

On April 8, 2025, the ERB randomly appointed the undersigned Arbitrator Shianne Scott to serve as the designated arbitrator to arbitrate the above-captioned matter, pursuant to Oregon

Revised Statute (ORS) 243.706(3), ORS 243.808, and Oregon Administrative Rule (OAR) 115-040-0034.

This Award shall be final and binding amongst the Parties, as provided for in Article 16, Section 16.1 of the Agreement, subject to the provisions set forth in OAR 259-000-0020(1)(b) and OAR 259-000-0020(5).

THE HEARING

An in-person hearing was held before the Arbitrator on October 30, 2025 (Day 1), and October 31, 2025 (Day 2), in Grants Pass, Oregon (collectively, the Hearing). Chris L. Wyrostek appeared on behalf of the Union; Adam Collier appeared on behalf of the Employer. During the Hearing, the Parties had the full opportunity to present opening arguments, examine and cross-examine witnesses, and introduce exhibits for admission into the record. A transcript of the proceedings was provided.

A. The Witnesses

The following witnesses appeared and testified under oath at the Hearing, in the order listed below:

For the Employer:

1. Lieutenant John Moore
2. Chief Warren Hensman
3. Captain Tyler Lee
4. Captain Justin DeKruger

For the Union:

1. Craig Allen
2. Sergeant Michael Mace
3. Officer Jeff Craven
4. Sergeant Doni Hamilton
5. Officer [redacted]

B. The Parties' Stipulations

The Parties entered into the following stipulations during the Hearing:

- Joints Exhibits 1 through 30, Joint Exhibit 12A, and Joint Exhibits A through E are admitted.

- Union Exhibits 31 and 32 are admitted.

- The Grievance is procedurally and substantively arbitrable.

- The Arbitrator shall retain jurisdiction over this matter pursuant to OAR 265-005-0020.

- The court reporter will serve as the official custodian of record concerning the admission of the exhibits.

- The Employer has the burden of proof and the burden of production in this matter.

- The primary issue before the Arbitrator is: "Did Grants Pass have just cause to demote [redacted]

- The Parties stipulated to the following definitions of certain acronyms:

  1) OYA means Oregon Youth Authority (State juvenile corrections).
  2) PCU means Psychiatric Care Unit, now called Behavioral Health Unit.
  3) POMH means Police Officer Mental Hold.
  4) PSU means Psychiatric Services Unit, now called Behavioral Health Unit.
  5) BHU means Behavioral Health Unit (special unit in the Rogue River Medical Center in Medford, Oregon).
  6) TBI means Traumatic Brain Injury.
  7) DPSST means the Department of Public Safety Standards and Training.
  8) ICAT means Integrated Communication Assessments and Tactics.
  9) CBA means the Collective Bargaining Agreement.

- The Juvenile was very "mouthy."

- Use of the terms the "Union" and the "Association" are interchangeable.

- The Parties will submit Post-Hearing Briefs (the Briefs) for the Arbitrator's consideration.

- The Parties will meet-and-confer once they receive the transcript and will notify the Designated Arbitrator of the date agreed upon to submit Briefs.

- The Parties will submit their Briefs to the Designated Arbitrator in both Word and PDF format.

- The Parties will exchange their Briefs amongst themselves.

- Should the Parties cite to a case that is not published on Bloomberg or Westlaw, or that the Arbitrator cannot find online, the Parties will submit a full copy of that case to the Arbitrator with their Briefs.

- The Parties will brief the Arbitrator on how *Graham v. Conner*[1] and other long-established case law affects the statutory analysis the Arbitrator is required to make when there is an alleged unjustified use of force.

POST-HEARING MATTERS

Post-hearing, the Parties notified the undersigned that they agreed to submit Briefs by January 16, 2026, which was subsequently extended to January 23, 2026. The undersigned timely received electronic copies of both Parties' Briefs per the extension date agreed upon. The record was then closed. On February 23, 2026, the Parties agreed to a one-day extension to issue this Award. This Award is timely issued pursuant to the Parties' agreement to a one-day extension.

The undersigned has read and carefully considered each of the Parties' written arguments, along with the cases and other authorities cited in their Briefs, in conjunction with the testimony and the evidence presented at the Hearing. That said, the Arbitrator has focused her analysis on what she found *most relevant* to the outcome of this Award. Any point not expressly addressed was nonetheless considered; it simply did not play a significant role in the decision on the Grievance.

[1] *Graham v. Conner*, 490 U.S. 386 (1989).

THE ISSUES TO BE DECIDED

1. The Parties' Stipulated Joint Statement of the Issue to be Decided.

The Parties stipulated to the following "primary" joint statement of the issue to be decided: "Did Grants Pass have just cause to demote [redacted]

2. The Union's Proposed Additional Statement of the Issues to be Decided.

At the Hearing, the Union proposed an additional statement of the issues to be decided, which the Employer did not stipulate to. With that in mind, the Union's additional statement of the issues to be decided are:

> In addition to the stipulated issue, GPPA asks the Arbitrator to determine whether the City violated Articles 14.1, 14.2, 14.3, and 14.4 as alleged in GPPA's grievance (Exhibit 2). GPPA also asks that the Arbitrator determine whether the City has established proof of misconduct in accordance with ORS 243.808.

THE RELEVANT AGREEMENT PROVISIONS

The Employer and the Union are Parties to the Agreement, in effect, January 1, 2025, through December 31, 2027, which contains the following relevant articles:

ARTICLE 1 - RECOGNITION

1.1 Sole and Exclusive Agent

> The City recognizes the Association as the sole and exclusive bargaining agent for the purpose of establishing salaries-wages, hours and other conditions of employment for all regular part-time and full-time employees who are members of the bargaining unit. For the purpose of this Agreement, regular employees are those occupying established positions in the classifications listed below.
>
> The bargaining unit shall consist of the following classifications:
>
> A. Police Officer
> B. Police Corporal

ARTICLE 14 – DISCIPLINE AND DISCHARGE

14.1 Just Cause. No regular employee shall be disciplined or discharged except for just cause. Oral discussions are not considered to be discipline and shall not be subject to the grievance procedure.

14.2 Just Cause Standards. For the purpose of this Agreement, except for sworn police employees, just cause shall be determined in accordance with the following guidelines:

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> For sworn police employees, "just cause" for discipline shall be determined in accordance with HB 2930 (2021).

14.3 Forms of Discipline. Disciplinary action for just cause shall be limited to the following:

A. Written reprimand
B. Suspension
C. Demotion or reduction in pay
D. Termination

The City, in disciplining an employee, shall make reasonable effort to impose such discipline in a manner that will not embarrass or humiliate the employee before other employees or the public.

14.4 Investigation Due Process. In the event the City believes an employee may be subject to discipline, the following procedural due process shall be followed:

A. Within five (5) calendar days of the initiation of an investigation, the City shall give the employee under investigation and the Association written notice of the investigation. The notice shall describe the nature of the investigation and include information necessary to reasonably apprise the employee of the allegations, conduct or incident under investigation, and the policies potentially violated.

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C. Employees shall be advised in the notice of investigation if they are being interviewed as the subject of the investigation or a witness.

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ARTICLE 16 – SETTLEMENT OF DISPUTES

16.1 Grievance and Arbitration Procedure

The City and the Association agree that any grievance or dispute which may arise between the parties concerning the application, meaning or interpretation of this Agreement shall be settled in the following manner:

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For disciplinary grievances involving sworn police employees, arbitrator selection shall be in accordance with HB 2930 (2021).

The designated arbitrator shall hear both parties as soon as possible on the dispute matter and shall render a decision within 30 calendar days which shall be final and binding on the parties and the employee/Association. The arbitrator shall have no right to amend, modify, nullify, ignore, or add provisions to the Agreement, but shall be limited to consideration of the particular issue(s) presented to the arbitrator. The arbitrator's decision shall be: based solely upon the arbitrator's interpretation of the meaning of the Agreement; for disciplinary grievances involving sworn employees, consistent with HB 2930 (2021); and shall be final and binding on all parties. Expenses for the arbitrator shall be borne by the losing party who shall be designated by the arbitrator; however, each party shall be responsible for compensating its own representatives and witnesses.

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ARTICLE 18 – PERSONNEL FILE

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18.5 Removal

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Any suspensions without pay shall be removed from the employee's personnel file after 36 months if no similar conduct has occurred within that time.

FINDINGS OF FACT

After a thorough review and careful consideration of the testimony, the evidence, and the arguments presented by the Parties, both at the Hearing and in their Briefs, I make the following Findings of Fact:

The Parties

The City of Grants Pass (the City) is located in Josephine County, Oregon.[2] The Department "provides law enforcement services in the City, which has a population of approximately 39,000."[3] The Department is one of few police departments in Oregon that houses a 911 dispatch center.

Police Chief Warren Hensman (the Chief or Chief Hensman) credibly testified that he has nearly 27 years of experience in law enforcement. Chief Hensman has served as the Chief of Police at the GPPD since February 2019. The Chief served as the ultimate decision-maker concerning the imposed Demotion. The Chief reports to Aaron Cubic (Mr. Cubic), the City Manager.

The Chief credibly testified that the Department is "a very busy organization," and that his responsibilities include directing, managing and leading "an organization of amazing men and women." In essence, the Chief's portfolio encompasses a broad range of responsibilities within the Department.

Before he began working as the Chief of Police at the GPPD, Chief Hensman worked as the Deputy Police Chief for the City of Ashland, Oregon, as a Police Officer and Detective for the Las Vegas Metropolitan Police Department, and as a Police Officer in Alpharetta, Georgia. The Chief also served in the United States Air Force for nine years before entering law enforcement.

The undersigned is impressed with the Chief's professional background, knowledge, and experience, and concludes that he serves the City and the Department with notable capability.

[2] *See* https://www.grantspassoregon.gov/m/faq
[3] Employer's Brief at page 9, summarizing Chief Hensman's testimony on Day 1 of the Hearing.

Moreover, the undersigned finds that the Chief's testimony was both truthful and sincere as to the reasons why he determined that Officer [redacted] should receive the Demotion.

Per Article 1 of the Agreement, the Union is the "sole and exclusive bargaining agent for the purposes of establishing salaries-wages, hours and other conditions of employment for all regular part-time and full-time employees who are members of the bargaining unit." The Police Officer and Police Corporal classifications are included in the bargaining unit.

Officer [redacted] Work History at the Department

Officer [redacted] is a "law enforcement officer" as defined in ORS 243.808. Officer [redacted] has been employed by the Department since August 2016. Officer [redacted] entire law enforcement career has been at the Department. Originally hired as a Police Officer, Officer [redacted] was promoted to the Police Corporal classification in or about August 2022. Officer [redacted] by virtue of his rank as a Corporal, functioned as a supervisor.

In the undersigned's opinion, Officer [redacted] though not nearly as experienced as the Chief, appears to be just as dedicated to his law enforcement career as the Chief is. For example, at the Hearing, Officer [redacted] testified that he has a "passion" for "investigating domestic violence, and I'm good at it." I found that testimony to be credible, and note that Officer [redacted] tone and demeanor while offering this testimony reflected a sincere and unmistakable passion for this aspect of his work.

As of his Demotion, Officer [redacted] was compensated at Step 7 of the Corporal salary range. He is currently compensated at Step 7 within the Police Officer salary range.

Officer [redacted] Training at the Department

The Chief credibly testified that Officer [redacted] has a "ton of training." I agree with the Chief, as the record reflects six full pages of training courses Officer [redacted] has completed, as reflected in his DPSST[4] training record.

Aside from Officer [redacted] DPSST training record, given that, as of the Demotion, Officer [redacted] held multiple collateral assignments—including service on the Special Weapons and Tactics (SWAT) team, work as a field training officer (FTO), and roles as a firearms and survival-skills instructor, among other instructional duties—more likely than not, Officer [redacted] underwent advanced, specialized training as a prerequisite to those assignments.

Despite Officer [redacted] substantial training and collateral-assignment experience, the Parties nonetheless agree that Officer [redacted] received no instruction or training on how officers should respond when a suspect spits on them. Both Parties also agree that the Department did not offer any such training.

The Employer's Use of Force Policy

Unlike Officer [redacted] lack of training on how to respond when a suspect spits, there is no comparable gap in Officer [redacted] training on the Employer's Use of Force Policy. Rather, Officer [redacted] credible testimony reflected his clear understanding of the factors the Employer is required to consider when determining whether excessive use of force has occurred under the Employer's Use of Force Policy.

[4] As stipulated to by the Parties, the acronym, "DPSST" stands for the Department of Public Safety Standards and Training.

Further, there is no evidence that, prior to the Spitting Incidents, Officer [redacted] ever failed to adhere to the Employer's Use of Force Policy. Lastly, there is no evidence that the Union ever filed a grievance or otherwise challenged the reasonableness or enforceability the Employer's Use of Force Policy. More likely than not, the Use of Force Policy is both reasonable and enforceable

Officer [redacted] Job Performance

There are two job performance evaluations in the record. The first evaluation was for the period of August 1, 2019, through August 1, 2020. In that evaluation, the Employer indicated that Officer [redacted] was a "top performer." The second performance evaluation covered the period of August 14, 2022, through August 14, 2023. Officer [redacted] was again rated as a "top performer." Notably, the second evaluation encompassed the first year Officer [redacted] was promoted to the Corporal classification.

While the remainder of Officer [redacted] performance evaluations, if any, are not included in the record, given the absence of any direct evidence of poor work performance, as well as Officer [redacted] promotion to the Police Corporal classification, more likely than not, Officer [redacted] was still considered a "top performer" prior to the Demotion. More importantly, on direct, the Chief credibly testified about Officer [redacted] overall work record and job performance:

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12 So I don't have to read anything about [redacted]
13 [redacted] [redacted] is a good trooper. I know he's
14 a good cop, he's a good officer, he's a good man. I
15 know this already. That's why this was tough for me.

The Chief's unequivocal praise of Officer [redacted] underscores his view that, though the decision to demote Officer [redacted] was "tough," more likely than not, Officer [redacted] has been a consistently strong and reliable performer for the Department.

Officer [redacted] Previous Discipline

The record reflects that Officer [redacted] received a suspension, sometime between 2017 and 2019. In that regard, Article 18, at Section 18.1 of the Agreement provides, in relevant part:

> *Any* suspensions without pay *shall* be removed from the employee's personnel file after 36 months if no similar conduct has occurred within that time.[5]

As specified in *How Arbitration Works*, considered the "*Bible of Labor Arbitration*"[6] since at least 1957:

> Arbitrators often have ruled that, in the absence of a showing of mutual understanding of the parties to the contrary, the usual and ordinary definition of terms as defined by a reliable dictionary should govern.[7]

This Arbitrator is in alignment with those arbitrators that rule that the plain and ordinary definition of terms as defined by a reliable dictionary should govern.

Here, the word "*any*" in Article 18, Section 18.1, is defined by a "reliable dictionary" to mean: "used to refer to one or some of a thing or number of things, no matter how much or how many."[8] Additionally, *Black's Law Dictionary*—widely recognized as the "leading legal dictionary in the United States"[9]—defines the word "*shall*" to mean: "a word of command, and one which

[5] Emphasis added.
[6] St. Antoine, Theodore J., *The Bible of Labor Arbitration: Tribute to Professor Frank Elkouri*. Oklahoma Law Review 65, no. 3 (2013): xiv-xvi.
[7] Elkouri and Elkouri, *How Arbitration Works*, Chapter 9, Section 9.3.A.I.B., "Use of Dictionary Definitions," page 12 (8th ed. 2018), Supp. 2020 (emphasis added).
[8] *Oxford English Dictionary* (12th ed. 2011).
[9] https://guides.loc.gov/law-secondary-resources/definitions

has *always* or which *must* be given a compulsory meaning: denoting obligation."[10] Based on the plain and ordinary dictionary definition of the words "*any*" and "*shall*," the above language in Article 18 at Section 18.1 functions as a "clean-slate"[11] provision, meaning that "*any*" prior discipline—and in particular, a suspension—outside of the 36-month period (i.e., three years) "*shall*" be removed from an employee's personnel file when no similar conduct reoccurs within that same timeframe. It follows, then, that a suspension cannot be considered when determining discipline in the future, nor can it be considered as an aggravating factor when evaluating whether an employee's conduct allegedly violated any of the Employer's policies and rules.

There is no preponderant evidence that Officer [redacted] prior suspension is related to the conduct over which Officer [redacted] received a Demotion. Moreover, while the undersigned is the first person to admit that she is *terrible* at math, what the undersigned can say, unequivocably, and with certainty, is that, whether the suspension occurred in 2017, 2018 or 2019, the suspension occurred *more* than three years before the Spitting Incidents.

Indeed, Chief Hensman credibly testified that when he made the decision to issue the Demotion, "I was *diligent* in my thought process to specifically stay within the three-year window."[12] The undersigned concurs with Chief Hensman's decision not to consider Officer [redacted] previous suspension. As the undersigned stated on the record on Day 2, evidence of prior discipline outside of what the Chief credibly testified to as "the three-year window" is not relevant, is more prejudicial than probative, and will not be considered in this instance.

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[10] *Black's Law Dictionary* (12th ed. 2024) (emphasis added).
[11] *See e.g., City of Springfield & Springfield Police Officers Ass'n*, 131 Lab. Arb. (BNA) 1153, 1158 (Daly, 2013) (holding that discipline outside the contractual retention period "falls away" and may not be used to support or aggravate new discipline, consistent with a clean-slate provision).
[12] Emphasis added.

Accordingly, the undersigned's analysis concerning the issues to be decided are confined to the negotiated terms of the Agreement, the relevant statutory scheme and relevant caselaw, and *no weight* has been given to any alleged discipline that falls outside the three-year window.

The Legal Considerations that Affect the Outcome of this Award

Before turning to the specific facts that led to Officer [redacted] Demotion, the undersigned first notifies the Parties that her decision is guided by the following important legal considerations.

1. This Award Is Informed by the Legislative History of HB 2930 (2021) and the Corresponding Oregon Administrative Rules (OARs)

First, the Agreement requires the undersigned to determine whether just cause exists in accordance with the guidelines outlined in HB 2930, now codified as ORS §§ 243.808–.812.[13]

HB 2930 was enacted during the 81st Oregon Legislative Assembly (2021 Regular Session), to promote consistency and public trust in law-enforcement discipline.[14] Legislative testimony reflected concern that arbitration practices had produced inconsistent outcomes, prompting the Legislature to adopt the "arbitrary and capricious" review standard and to limit an arbitrator's ability to modify disciplinary decisions when doing so would conflict with the public interest.[15]

OAR 265-005-0020 was adopted as part of the permanent rules implementing HB 2930 (2021), which created the Commission on Statewide Law Enforcement Standards of Conduct and Discipline.[16]

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[13] *See* Article 14, Section 14.2.
[14] H.B. 2930, 81st Legis. Assemb., Reg. Sess. (Or. 2021) (establishing uniform statewide standards for law-enforcement conduct and discipline to enhance consistency and strengthen public trust in disciplinary processes).
[15] H.B. 2930, 81st Leg. Assemb., Reg. Sess. (Or. 2021), codified at Or. Rev. Stat. §§ 243.808–.812.
[16] DPSST Administrative Order 1-2010 (2010) repealed former OAR ch. 256 rules and re-adopted them in OAR ch. 259).

A three-step analysis is required under OAR 265-005-0020(1).[17] First, an arbitrator must determine whether the employer proved each allegation by a preponderance of the evidence.[18] Second, for allegations that are proven, the arbitrator must assess whether the resulting discipline complies with ORS 243.808—meaning it must fall within the agency's disciplinary matrix and cannot be arbitrary, capricious, or unsupported by substantial evidence.[19] Lastly, in a mixed-finding case, OAR 265-005-0020(1)(b)(C) requires arbitrators to rescind discipline on any allegation not proven and to refer the matter back to the employer for reconsideration based solely on the allegations the arbitrator finds were proven.[20]

Importantly, there is *no language* within the rule that requires an arbitrator to refer the matter back to the employer if the arbitrator finds that *none* of the allegations were proven. In sum, the referral mechanism outlined in OAR 259-000-0020(1)(b) is a limited, conditional remedy, triggered only in mixed-finding cases—not when an employer fails to prove any allegation.

2. The Oregon Statutory Scheme Applicable to this Case Did Not Change the Analysis for Determining Whether a Use-of-Force Incident Was Excessive

Neither ORS 236.350 nor ORS 243.808 alters the substantive framework for evaluating whether an officer's use of force was excessive. While the statutory scheme governs the

[17] OAR 265-005-0020(1) (DAS Admin. Order 23-2022) (eff. Jan. 1, 2022) (establishing the three-step framework for arbitrator review of law-enforcement discipline under HB 2930).
[18] OAR 265-005-0020(1)(b)(A) (DAS Admin. Order 23-2022) (eff. Jan. 1, 2022) (requiring the arbitrator to determine whether the employer proved each allegation by a preponderance of the evidence as the first step in the statutory review process).
[19] OAR 265-005-0020(1)(b)(B) (requiring arbitrators to determine whether discipline for proven allegations complies with ORS 243.808); ORS 243.808(2) (requiring discipline to be consistent with the agency's disciplinary matrix and supported by substantial evidence).
[20] OAR 265-005-0020(1)(b)(C) (requiring arbitrators to rescind discipline based on unproven allegations and remand the matter to the employer for reconsideration based only on proven allegations).

employer's burden of proof, the definition of just cause, and the standard for reviewing the level of discipline, it does not modify the traditional objective-reasonableness analysis used to assess the underlying force.

Indeed, Federal courts applying Oregon law have consistently held that state statutes and agency policies do not displace the established constitutional use-of-force standard. In other words, the governing standard remains the traditional objective-reasonableness test.[21]

3. This Award Turns, in Part, on the Legal Significance of Spitting on a Law Enforcement Officer

Next, the legal significance of a suspect spitting on a law enforcement officer directly affects the outcome of this Award. Here, although the record establishes that Officer [redacted] did not receive training on how to respond when a suspect spits on him, as more fully addressed below, *both* Officer [redacted] and the Juvenile were fully aware, during both Spitting Incidents, that spitting on an officer is a Class C felony.

In that regard, ORS 163.208 provides, in pertinent part:

> (1) A person commits the crime of assaulting a public safety officer if the person *intentionally or knowingly* causes physical injury to the other person, knowing the other person to be a peace officer, corrections officer, youth correction officer, parole and probation officer, animal control officer, firefighter or staff member, and while the other person is acting in the course of official duty.[22]
>
> (2) Assaulting a public safety officer is a Class C felony.

[21] *See Glenn v. Washington County*, 673 F.3d 864, 871–72 (9th Cir. 2011); Lowry v. City of San Diego, 858 F.3d 1248, 1256 (9th Cir. 2017) (en banc)((held internal policies and state-law frameworks do not change the excessive-force analysis).

[22] Emphasis added.

Oregon appellate courts have long recognized that spitting constitutes "offensive physical contact" and therefore qualifies as an assaultive act.[23] Federal case law in Oregon likewise treats spitting on a law-enforcement officer as assaultive and offensive conduct.[24]

Further, although saliva is not itself classified as a bloodborne pathogen, the Occupational Safety and Health Administration (the OSHA) recognizes that it may constitute "other potentially infectious material."[25] Indeed, as credibly testified to by more than one witness at the Hearing, the Department's policy in this instance is to treat bodily fluids as "infectious." Additionally, in a custodial setting, an officer may reasonably perceive spitting as an exposure risk and may lawfully use force to prevent a suspect from spitting again.[26]

More recently, in *State v. Snodgrass*, the Court of Appeals reaffirmed the principle that spitting on a law enforcement officer constitutes the crime of Aggravated Harassment.[27] The *Snodgrass* Court concluded that spitting on a police officer—even when the saliva contacts *only* the officer's uniform—satisfies the physical-contact element of Aggravated Harassment under ORS 166.070.[28]

Finally, the Ninth Circuit Court of Appeals, which has appellate authority over Oregon federal cases, has repeatedly held that the assaultive nature of a suspect's conduct does *not* depend

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[23] *See, e.g., State v. Keller*, 40 Or App 143, 145–52 (1979) (holding that spitting constitutes offensive physical contact)(emphasis added); *State v. Sallinger*, 11 Or App 592, 597–98 (1972) (same).
[24] *See, United States v. Boyce*, D. Or. (Oct. 7, 2025) (defendant charged with felony assault after spitting on a federal officer; *see also, United States v. Lewellyn*, 481 F. Supp. 2d 1101, 1103–04 (D. Or. 2007) (held: spitting constitutes offensive physical contact).
[25] *See* OSHA, Bloodborne Pathogens Standard, 29 C.F.R. § 1910.1030(b)
[26] *See City of Portland & Portland Police Association*, AAA Case No. 75-390-00636-18 (Lindauer, 2018) (upholding an officer's use of force to prevent a subject from spitting, finding that spitting constitutes assaultive conduct and presents a legitimate exposure-risk concern).
[27] *State v. Snodgrass*, 323 Or App 392, 394–98 (2023).
[28] *State v. Snodgrass*, 325 Or. App. 234, at 244.

on the suspect's age or size.[29] While those cases are not specifically referring to spit as an assault, those cases unanimously hold that it is the *nature* of the contact rather than the *characteristics* of the actor that determines whether an assault occurred. Thus, a suspect's age or size is *legally* irrelevant in the analysis when determining whether an "assault" occurred.

In sum, taken together, these cases establish that spitting on an officer is an assaultive act, and that law enforcement officers may lawfully use force to prevent spitting, even *if* the suspect is younger and smaller than the officer.[30]

4. Witness Craig Allen Is Qualified as an Expert Witness; His Testimony Assists the Undersigned as the Trier of Fact

With that framework in mind, on Day 2 of the Hearing, the Union presented Craig Allen (Mr. Allen) to offer expert testimony concerning Officer [redacted] use of force in response to the Juvenile's spit during the Second Spitting Incident. Mr. Allen is currently the Director of Training and Senior Instructor with the Force Science Institute (Force Science). Force Science's instruction focuses on the justification and application of police use of force.

Oregon Evidence Code (OEC) 702 provides:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.

[29] *See, e.g., Blankenhorn v. City of Orange*, 485 F.3d 463, 478–80 (9th Cir. 2007) (rejecting argument that a smaller suspect poses less danger when engaging in assaultive or resisting conduct); *Young v. County of Los Angeles*, 655 F.3d 1156, 1163–66 (9th Cir. 2011) (same); *T.W. v. City of Los Angeles*, 22 F.4th 1014, 1026–28 (9th Cir. 2022) (juvenile status does not diminish the seriousness of assaultive behavior).

[30] *See* ORS 161.205(5) (authorizing reasonable force to prevent the commission of a crime); *see also*, *State v. Keller*, 40 Or. App. 143, 145–52 (1979) (spitting constitutes "offensive physical contact"); *State v. Snodgrass*, 323 Or. App. 392, 394–98 (2023) (spitting on an officer satisfies the physical-contact element of aggravated harassment); see also ORS 161.205(5) (authorizing reasonable force to prevent the commission of a crime).

Put another way, a witness may testify as an expert if:

- Their scientific, technical, or other specialized knowledge will assist the trier of fact; and
- They are "qualified as an expert by knowledge, skill, experience, training, or education."

Here, the undersigned finds that Mr. Allen is qualified to testify as an expert under OEC 702. Mr. Allen's 30 years of law-enforcement experience—29 of them with the Hillsboro Police Department—together with his service at the rank of Police Commander overseeing the Patrol and Training Divisions, reflect specialized knowledge well beyond that of a layperson.

Moreover, Mr. Allen's extensive law enforcement background, including assignments in patrol operations, field training, SWAT, undercover narcotics investigations, detective work, internal affairs, and supervisory and command roles, demonstrates substantial knowledge, skill, experience, training, and education within the meaning of OEC 702.

Given Mr. Allen's "scientific, technical or other specialized knowledge" in the field of law enforcement use-of-force cases, the undersigned finds that Mr. Allen's expert testimony assists the Arbitrator as the trier of fact.[31]

The discussion now turns to Officer [redacted] conduct during the Spitting Incidents.

The Spitting Incidents

The following findings are derived from the body-worn camera (BWC) footage, the in-car video footage, the exhibits, the various reports, and the testimony presented at the Hearing.

The court reporter stated off the record that she would not be transcribing the statements made in the videos admitted at the Hearing. For that reason, the undersigned has attempted to transcribe portions of the statements captured on the videos (as much as she could, under time

[31] As an aside, the Employer did not object to Mr. Allen's testimony as an expert witness.

constraints) in order to provide the context of events happening during the Spitting Incidents. However, the undersigned advises the Parties that she is *not* a certified court reporter, and her transcription of those statements is probably close, but is not necessarily verbatim.

1. The First Spitting Incident.

On October 27, 2024, Officer Drew Beard (Officer Beard) and Officer [redacted] responded to the residence of Cory Eicher, hereafter referred to as the Father. Officer Beard acted as the responding officer; Officer [redacted] acted as the supervising officer. Officer Beard did not testify in-person at the Hearing. While firsthand testimony would have been preferable, Officer Beard's BWC footage and police report are admissible and will have to suffice.[32]

The officers were responding to the Father's 911 call reporting that the Juvenile had been crushing and snorting pills and needed to be taken to a psychiatric facility. The Father reported that the Juvenile had already been in the PCU[33] "six times already." The Father's mother, the Juvenile's maternal grandmother (the Grandmother), was also present when the officers responded to the call.

Officer Beard arrived at the scene first. Upon his arrival, Officer Beard spoke with both the Father and the Juvenile while the Father and the Juvenile were standing on the front porch. The Father told Officer Beard that the Juvenile was "suicidal." The Juvenile said, "I'm not, sir."

The Father then said words to the effect of:

> So, I'd like him to go. Okay? Because if not, because he's unsafe to himself and he's unsafe to others right now. And, and this little four-hour hold at the juvenile shit's not helping. Okay? You know, I mean, he's gonna hurt somebody very badly out here, and it's not because he's a criminal. It's because he has mental health

[32] See, OEC 803(8), the public-records exception to the hearsay rule.
[33] As stipulated to by the Parties, "PCU" is an acronym that stands for the Psychiatric Care Unit, now called the Behavioral Health Unit.

> [unintelligible] that's untreated. Okay? He has a diagnosis, you know. He's on waiting lists for different psych res's. And he's just not got in.

The Father identified the psychological residential treatment centers where the Juvenile was currently on the waiting list.

Officer Beard then asks the Juvenile, "Okay. Um... So...What was your plan with the pills? Why were you crushing them up?" The Juvenile replied, "To snort them." The Father then states:

> He's fuckin', I, I just, all my medication's gone, all his medication's gone. You know? I can't, I can't lock it up. He breaks into my fuckin' bedroom. You know? I can't hide it. I don't know what to do. I cannot keep him safe.

Next, in response to Officer Beard's question if DHS[34] had been contacted, the Father stated that the Juvenile has an "open DHS assessment" and a current juvenile Probation Officer. Officer Beard then asked the Father if he could talk to the Juvenile alone. The Father obliged, and left the porch area.

After the Father left the porch, Officer Beard patted the Juvenile down to determine if he had knives or other weapons. The Juvenile told Officer Beard that his Father caught him crushing up pills. When Officer Beard asked the Juvenile why he was crushing up pills, the Juvenile responded, "to get high." The Juvenile denied that he was suicidal or that he wanted to hurt his dad.

Officer Beard asked, "Why is your dad saying these things?" The Juvenile responded, "Because he wants to get me sent to the PCU right now." Officer Beard asked, "Why do you think he wants to do that?" The Juvenile said, "I don't know." When asked why he (the Juvenile) wanted

[34] The Parties did not stipulate what the acronym "DHS" means. More likely than not, DHS stands for the Department of Human Services.

to get high, the Juvenile said, “To get an escape.” Officer Beard asked, “Escape? From your dad?” The Juvenile stated, “I feel unsafe here. I don’t like it here.”

When asked why he wanted to escape, the Juvenile stated the Father “flipped out” after catching the Juvenile crushing pills, and “got up in my face” when they were both sitting on the couch, where the Father allegedly slapped him. The Juvenile further stated that after the incident on the couch, he (the Juvenile) went into the kitchen and the Father pushed a table into him. The Juvenile stated that he wanted to go to the JJC[35] on a “four-hour hold.”

Officer Beard stated that he wanted to wait until his partner got there, and that the Juvenile was not giving him (Officer Beard) a reason to arrest the Juvenile—that he needed to have “cause” to arrest the Juvenile. The Juvenile responded, “I’ll give you a reason right now.” The Juvenile did not explain what he meant by that. The Juvenile asked Officer Beard, “What do you know?” Officer Beard replied, “You crashed into some mailboxes and then you ran from us. I know that. That was me and my partner.” At that point, Officer [redacted] arrived, and Officer Beard told the Juvenile to “stay here.”

Officer Beard briefed Officer [redacted] on the situation. After the briefing, Officer Beard stated words to the effect of, “He wants to get away from here. He wants me to lodge him at JJC. But... It'd be... I don't have cause to lodge him at JJC.” Officer Beard stated that he needed to talk to the Juvenile more.

Next, Officer [redacted] briefly spoke with the Father and the Grandmother while Officer Beard continued talking to the Juvenile. Officer Beard told the Juvenile, “We're not taking you anywhere. We're not going to take you anywhere. Okay? This isn't a... This isn't... This isn't a

[35] Per the Parties’ stipulation, the acronym “JJC” stands for the Juvenile Justice Center.

police problem. We're not taking you anywhere. Okay man? But I want to know, leaving here, you're not going to do something...dumb."

Meanwhile, as Officer [redacted] talked to the Father and the Grandmother, he understood that the Father and Grandmother feared that the Juvenile might stab or kill the Father, and that the Juvenile posed a danger to himself. Specifically, the Father stated words to the effect of:

> Well, you know, he went to the psych ward one time because he was Googling how to kill his fucking parents, you know? Yeah, I mean, yeah. I have a genuine reason to be afraid.

The Father then stated that the Juvenile had recently stolen a rental car that the Father was using while his car was in the shop, and that the Juvenile "went out and fucking tried to run from the cops, wrecked it."

Next, Officer [redacted] approached the Juvenile, who was still standing on the front porch. Officer Beard stepped away to speak with the Father and the Grandmother, and Officer [redacted] remained with the Juvenile. According to Officer [redacted] police report, as of October 27, 2024, the Juvenile was four feet, eight inches tall, and weighed 80 pounds. Officer [redacted] credibly testified that he was not sure if the description of the Juvenile's height and weight in his report is accurate, because those sections on a police report are typically taken from a suspect's "jacket," meaning that "once someone enters someone into the system it creates a jacket for him, and you can export that jacket straight to your report."

Bearing in mind that the Juvenile's height and weight listed in Officer [redacted] police report may not be 100% accurate, the description in Officer [redacted] report is somewhat consistent with how the Juvenile appeared on the BWC footage. In other words, the Juvenile was clearly much smaller and much shorter than Officer [redacted] who, according to the Oregon State

Police (the OSP) Incident Report (the OSP Report), is approximately six feet, two inches, and weighs about 260 pounds. Officer [redacted] height and weight description in the OSP Report comports with the undersigned's percipient observation of Officer [redacted] at the Hearing.

In an attempt to gain rapport with the Juvenile, Officer [redacted] engaged in a conversation with the Juvenile. Excerpts of Officer [redacted] and the Juvenile's conversation include:

> **Officer [redacted]** So if we leave here, what are you going to do? Are you going to run away? Are you going to be destructive? Are you going to be out of control? When we leave, what are you going to do? Any idea? You can listen to your dad.
>
> It's in your best interest with everything going on that you do listen to your dad. Okay. Those charges that you got upstairs, it's charges, too.
>
> If you pick up more charges, that's going to add on to whatever they decide what they're going to do with you. Do you want me to talk to them about what I'm going to do?
>
> **The Juvenile:** No. I don't have time for all this.
>
> ***
>
> **Officer [redacted]** I know you've been to JJC but you haven't been lodged at OYA[36] before, have you?
>
> **The Juvenile:** No, but I'm going as soon as I can.
>
> **Officer [redacted]** Yeah. And when you get there, man, you're going to wish that you weren't there.
>
> **The Juvenile:** I won't.
>
> **Officer [redacted]** You won't? You won't wish you weren't there?
>
> **The Juvenile:** I won't. JJC is not that bad.
>
> **Officer [redacted]** You're going to be waiting for the day that you get out. The that's hard to understand right now, but once you're there, you're not going to like

[36] The Parties stipulated that the acronym "OYA" stands for the Oregon Youth Authority.

it. I'm sorry. I'm sorry, man. Okay? Dude, just don't act like that. Okay? Seriously. What are you going to do about it?

The Juvenile: I'm not going to do anything about it.

Officer [redacted] I'm telling you in your best interest, dude. You're not going to want to be there for very long. If you're going to add extra charges, you're going to only pick yourself up for a longer period.

The Juvenile: Fine.

Officer [redacted] I know you're saying that, but it's not fine. Especially for when you do get older. When you get older, when you're 18, you're an adult, all this stuff comes with you. When you are actually free to leave your dad and get out of the house, and you want to build a life for yourself, I'm assuming that's what you want to do eventually, right?

The Juvenile: Yeah.

Officer [redacted] Okay. Um... So, this one looks like... I don't have probable cause, dude.

The Juvenile stated that he wanted to go to the JJC because his "homie" was there and he did not want to be around the Father. It was clear on the BWC footage that the Juvenile knew and understood that the Department did not have probable cause to arrest the Juvenile, which is why the Juvenile repeatedly told Officer [redacted] that he would give him "PC" to arrest. Like Officer Beard, the Juvenile did not explain what he meant by that.

Next, the Juvenile stepped off the porch and attempted to goad Officer [redacted]

The Juvenile: Take one step forward. Come here. Come here. Take one step forward. As a matter of fact, I dare you. I dare you.

Officer [redacted] Step back on the porch.

The Juvenile: No, I'm good. I'm right here.

Officer [redacted] Step back on the porch.

The Juvenile: What are you gonna do about it? I'm right here. I ain't doing nothing to you. Take one step forward. I fucking dare you. Come here, real quick. Take one step forward for me. I dare you. You ain't shit without that uniform and that badge, bro. I dare you to take one step forward right now. It's gonna be a bad day for me, but a good day in the long run. Just take one step forward. Come here. I know you want to. I know you're tempted. Just fuck around and find out. I'll do something right now. It's a warning.

Officer [redacted] Man, I don't know what's happened to you. I'm sorry it happened to you, though.

The Juvenile: That was the wrong words, bro.

Officer [redacted] This is not a good way to live your life.

The Juvenile: It's alright, bro.

Officer [redacted] What's that?

The Juvenile: It's alright, bro.

Officer [redacted] I just... I don't know how you got to where you're at. It's an opinion. I don't know how you got to where you're at like this, man. You've got a long, a long life in front of you. And this is...

The Juvenile: It's all I know.

Officer [redacted] This is how you want to spend it?

In the undersigned's percipient observation, Officer [redacted] demeanor and the tone of his voice during the above conversation was kind and could even be described as fatherly (or at least perhaps what an uncle or other caring male adult would say).

After the Juvenile "dared" Officer [redacted] to "step forward," Officer [redacted] did not approach the Juvenile and in fact took a step back to get further away from the Juvenile. At that point, the Juvenile leaned forward and spit on the lower half of Officer [redacted] body. At the Hearing and in his police report, Officer [redacted] described the spit as a "cloud." I find that

testimony to be completely credible, as the BWC footage clearly shows a *literal* "cloud" of saliva directed at Officer [redacted]

In response, Officer [redacted] pushed the Juvenile against the exterior wall of the home, guided him to the ground, and handcuffed him. Officer [redacted] asked Officer Beard to assist him. Officer Beard approached while the Juvenile remained prone and restrained on the ground. Despite being on the ground with handcuffs on, the Juvenile attempted to spit on Officer Beard's legs and shoes, prompting the Father to say, "Stop spitting on them, son!" The Grandmother said words to the effect that the Juvenile was doing the same thing he (the Juvenile) does to the Father.

The Father asked the officers not to hurt the Juvenile, because he has "mental issues." The Father also stated words to the effect of, "Don't throw him around, okay? That's excessive force." At some point shortly thereafter, the Father yelled in anger, "They're a fucking bunch of coward piece of shit punk cops." The Grandmother attempted to calm the Father down.

As the officers escorted the Juvenile to the patrol vehicle, Officer [redacted] pulled the Juvenile's hood over his face to prevent further spitting. The Grandmother agreed that this was necessary, but that action made the Father more upset. Officer [redacted] calmly explained that he was doing that to prevent the Juvenile from spitting again, and that the Juvenile could still breathe.

As Officer [redacted] escorted the Juvenile to the patrol vehicle, the Juvenile yelled, more than once, "I told you I would give you probable cause!" The Juvenile also said words to the effect of, "I'm gonna make this town my bitch."

Once inside the patrol vehicle, the Juvenile stated that he knew he would be charged with Aggravated Harassment, correctly identifying the cloud of saliva he directed at Officer [redacted] as

a Class C felony. This was the Juvenile's first of many incriminating statements against interest in the record.[37]

The undersigned finds that *all* of the Juvenile's incriminating statements against interest is influential to the outcome of this Award, as each of those statements establishes that the suspect—despite his young age—*knew and understood* the legal significance of spitting on a law enforcement officer. Essentially, the Juvenile admitted that he *knew*, and that he *understood*, that he committed a Class C felony each time he spit on Officer [redacted] As previously stated, the Juvenile's young age and small stature is not relevant when determining whether his conduct constitutes an assault on a police officer.

Next, Officer [redacted] transported the Juvenile to the JJC. During the drive, the Juvenile apologized for spitting, stating that Officer [redacted] did not "deserve" it. The Juvenile added that he spit on Officer [redacted] so he would be taken to the JJC. He also acknowledged that he knew force could be used against him as a result of spitting on Officer [redacted] another incriminating statement against interest.

Officer [redacted] Police Report No. 2024-00040239

On October 27, 2024, following the First Spitting Incident, Officer [redacted] filed Police Report No. 2024-00040239. In relevant part, the Officer [redacted] report states:

> On 10/27/24 at about 2057 hours I was dispatched to 131 Lewis Ave #B. The caller was Cory Eicher, father of [the Juvenile]. Cory reported his son was crushing up pills and needed to go to the psych facility in Medford.
>
> During the investigation, [the Juvenile] *intentionally* spit on me so I would arrest him. He was arrested and lodged at JJC for aggravated harassment.[38]

[37] *See* OEC 804(3)(c).
[38] Emphasis added.

> Case is closed by arrest. This report is to be forwarded to JJC for filing of charges. All evidence was uploaded to evidence.com.

Officer [redacted] description of the First Spitting Incident comports with Officer Beard's and Officer [redacted] BWC footage taken on the same date (October 27, 2024).

At the Hearing, the Chief—albeit somewhat reluctantly—agreed that the force Officer [redacted] used during the First Spitting Incident was "appropriate," though he added that the Juvenile was "tiny" and that the Juvenile did not need to be "thrown to the ground." In any event, the overall record reflects that Officer [redacted] use-of-force against the Juvenile during the First Spitting Incident was not considered excessive by the Department.

Officer [redacted] received a "victim packet" following the First Spitting Incident. As credibly testified to by Officer [redacted] a victim packet is a "packet of information that comes from the DA's office that explains your rights as a victim of a crime in Oregon."

2. The Second Spitting Incident.

On Halloween, October 31, 2024, Officer [redacted] was dispatched to the JJC after receiving a report that the Juvenile was attempting to harm himself by punching the wall of his cell, running into the wall at "full force," and striking his head against the wall. Staff at the JJC reported that the Juvenile had been fighting with other inmates and described the Juvenile as both "suicidal" and "homicidal."

Sergeant Scott Williams (Sergeant Williams) and Officer Estaban Quintero (Officer Quintero) also responded to the call. Sergeant Williams was at the JJC, but left before the Juvenile was transported to the Three Rivers Medical Center (the TRMC or the Hospital), to assist on another call. Unfortunately, Sergeant Williams and Officer Quintero did not appear to testify at

the Hearing, which is unfortunate, but again, the BWC video and police reports will have to be sufficient.

Inside the JJC, Officer [redacted] spoke with the Juvenile, noting the Juvenile's right hand injury around his pinky area. Officer [redacted] handcuffed the Juvenile for transport to the Hospital. The Juvenile was cooperative, and Officer [redacted] appeared to be extremely careful so as not to re-injure the Juvenile's hand. Sergeant Williams had a spit hood[39] available in case it was needed.

As he was handcuffing the Juvenile, Officer [redacted] said, "Please don't spit on me this time. I have a spit hood but I really don't want to put that on you, okay?" The Juvenile chuckled, then replied that he would not spit on Officer [redacted] pointing to his Aggravated Harassment charges from the First Spitting Incident.

At the Hearing, Officer [redacted] credibly testified why he elected not to use the spit hood on the Juvenile: "It just felt that immediately putting a spit hood on him would probably have a pretty deleterious effect on our relationship, so I elected not to do that."

Officer [redacted] above testimony was credible and reflected a genuine attempt to sustain a good rapport with the Juvenile, in continuation of the rapport he forged with the Juvenile during the First Spitting Incident.

As Officer [redacted] prepared to transport the Juvenile to the hospital, JJC staff radioed that the Juvenile had told other youths he intended to run from the TRMC.

[39] In accordance with the Employer's policy, "spit hoods are temporary protective devices designed to prevent the wearer from biting and/or transferring or transmitting fluids (saliva and mucous) to others."

While seated in the patrol car, the Juvenile stated that his Father was supposed to visit him but didn't, and that he had never been without his Father "on a holiday." It is clear that, in that moment, the Juvenile is emotional and upset. While I couldn't be sure, the Juvenile may have even been crying at that point. Of all the BWC footage, that is the one time the undersigned observed the Juvenile to act his age.

While driving to the Hospital, the following exchange took place between Officer [redacted] and the Juvenile:

Officer [redacted] Did you just spit in my car?

The Juvenile: What?

Officer [redacted] Did you just spit in my car?

The Juvenile: No, I just had the... Okay. What, you want me to?

Officer [redacted] What? I'm not using cameras.

The Juvenile: I sure as hell did not.

Officer [redacted] I'm just asking, man. It sounded like you spit, so I was asking.

The Juvenile: Shit, you want me to? What the fuck?

Officer [redacted] I checked them both for proper fit, man.

The Juvenile: What'd you say?

Officer [redacted] I checked them both for proper fit.

The Juvenile: Explain what that means.

Officer [redacted] That means that there's space between your wrist and the handcuff. I don't hear you. Go ahead.

The Juvenile: That's my question. That's my question.

Officer [redacted] What's the question?

The Juvenile: Where's the hospital? Yeah, I just asked that on the [unintelligible].

Officer [redacted] Oh, really?

The Juvenile: Yeah. Don't ask the old, really fucking dumb fucks.

Officer [redacted] I don't know why I'm the dumb one when you're asking where the hospital is.[40]

The Juvenile: What do you mean? Okay, fuck that. Fucking bitch. Don't you ever call me dumb again, bro.

Mr. Allen provided the following credible testimony about Officer [redacted] "dumb one" comment:

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Q. Okay. There's been a lot of focusing on the single comment by [redacted] "I don't know why I'm the dumb one." And the City tends to, in the investigative or in the discipline, says this one comment basically means you're in violation of policy.
In your review of totality of the circumstances, what is your view of the role that one comment played?
A. Well, again, I don't think it's a big deal. From my hundreds, if not thousands of use of force cases or I've looked at de-escalation tactics, sometimes used well, sometimes not used at all, okay, it's important when we're assessing de-escalation that you do look at the totality of the officer's conduct, not a fleeting, I

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called it a sarcastic quip. I mean Corporal [redacted] was it ideal? Probably not. But if we're going to hold officers accountable for sarcastic quips, I mean that happens just in the normal art of communication.

[40] According to Officer [redacted] police report, the Hospital was right in front of them when he made that statement.

I agree with Mr. Allen's testimony, and find that, more likely than not, Officer [redacted] made that comment as a "sarcastic quip," without *any* intent to humiliate the Juvenile, or to disrespect the Juvenile in any way.

While still seated in the patrol vehicle, the Juvenile asked Officer [redacted] if he could call his father from the Hospital. Officer [redacted] stated that would be "against protocol," but agreed that he (Officer [redacted] would contact the Father to update him.

As he indicated he would do, after parking in front of the Hospital, Officer [redacted] contacted the Father to inform him that the Juvenile had been taken to the TRMC. The Father asked Officer [redacted] "Yep, and then... Is he okay?" Officer [redacted] replied, "I mean, he's cussing at me and calling me a bitch, so yeah, he seems like he's in good spirits."

At the end of the conversation between Officer [redacted] and the Father, the Father said: "Sorry, I apologize for his behavior." Officer [redacted] replied, "That's all right." The Father then asked: "Okay, will you please just tell him I love him and just stop giving his power away, please?" Officer [redacted] replied, "Yep."

Once the call with the Father concluded, the following conversation took place between Officer [redacted] and the Juvenile:

> **Officer [redacted]** Your dad says he loves you.
>
> **The Juvenile:** Go ahead and sit back. You're a lucky fuck, bro.
>
> **Officer [redacted]** What's that?"
>
> **The Juvenile:** I said you're a lucky fuck.
>
> **Officer [redacted]** How so?
>
> **The Juvenile:** Because I don't want to catch another charge right now so I'm not going to spit on you. You're a lucky fuck. If I caught you outside of here any day

of the week, I'm... Oh, yeah. Fucking faggot. Just put [unintelligible] in your power, you fucking bitch.

Officer [redacted] and Officer Quintero then escorted the Juvenile into the Hospital. Officer [redacted] informed staff at the front desk area of the Juvenile's stated intent to run away from the Hospital. The Juvenile called Officer [redacted] a "fuckin' little bitch" and a "lucky fuck," and repeated that he would *not* spit on Officer [redacted]

Staff directed the officers to take the Juvenile to Room 2, an open treatment room without security features. At the Hearing, Officer [redacted] credibly explained why he was concerned that the Hospital directed the officers to Room 2:

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20 And I said Room 2?
21 Room 2 is an open treatment room. There's no closed
22 doors, there's no security doors. They have a mental
23 health wing that's at the end of the hallway that has
24 two lockable doors, with a third sort of -- I don't
25 know -- vestibule door that locks. Typically on a POMH[41]

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1 you take them into the secure part and you put them in
2 the doorway, take the handcuffs off there, they step in,
3 close the door and you lock it and now you free up one
4 officer to go do your business and write your paperwork.
5 So when they said Room 2, I was confused. He's a flight
6 risk, he said -- at least the information I had from JJC
7 was he intended to run. It complicates it to be in an
8 open room because now you have to handcuff them to a
9 gurney and/or someone has to stay, or you release them
10 to their custody and run the chance that they run away.

Inside Room 2, Officer [redacted] tried to avoid re-injuring the Juvenile's hand while beginning to remove one of the handcuffs so that Officer [redacted] could handcuff the Juvenile to

[41] The Parties stipulated that POMH stands for "Police Officer Mental Hold."

the bed. The Juvenile resisted and turned his head toward Officer [redacted] Anticipating that the Juvenile might spit on him, Officer [redacted] grabbed the Juvenile's hair, and turned the Juvenile's head away from his body. Officer [redacted] warned the Juvenile not to spit.

The following conversation occurred between Officer [redacted] and the Juvenile while the events described above enfolded:

The Juvenile: You're a fucking little bitch.

Officer [redacted] All right. Room two.

The Juvenile: You're a lucky fuck, bro. You're a lucky fuck. You're a lucky fuck.

Officer [redacted] Which hand is it? Your right hand?

The Juvenile: Yeah.

Officer [redacted] Would you lean forward so I can get your handcuff?

The Juvenile: Yeah, sure.

Officer [redacted] Lean forward. Okay, stop.

The Juvenile: What are you doing?

Officer [redacted] I'm going to get the handcuff off you. Do not spit on me.

The Juvenile: Yo, I'm not going to spit on you. I'm looking at you. You're actually grabbing my hair like that. I suggest you stop, sir. You're abusing your power, my boy.

Officer [redacted] No, I just don't want to get spit on again.

The Juvenile: I'm not going to spit on you. I already told you about this, my boy. Okay. So when I tell you don't look at me, you don't look at me. I'll look at you whenever the fucking time I want, you fucking faggot. Little bitch.

The Pivotal Moment

At that point, Officer [redacted] had used a handcuff key to remove one handcuff, and was holding the handcuff key in his right hand, when the following happened:

The Juvenile was helped onto the bed and, while sitting up, suddenly turned toward Officer [redacted] and spit on him. It is unclear whether Officer [redacted] was saying something to the Juvenile when the Juvenile spit. In any event, the Juvenile's saliva struck Officer [redacted] left eye, traveled down his face and onto his lips. The Juvenile's spit also landed on Officer [redacted] uniform, although Officer [redacted] did not realize that until he viewed Officer Quintero's BWC footage. One of the witnesses described the saliva as "a good sized loogie."

Officer [redacted] reacted almost immediately, striking the Juvenile with the back/side of his closed right hand—still holding the handcuff key—before pinning the Juvenile's face away from him and onto the bed. As Officer [redacted] used his hand to push the Juvenile's face away from him, Officer [redacted] said: "Are you kidding me? Are you kidding me? Are you kidding me?"

The Juvenile said, "You just punched me," "Think you broke my jaw," and, "I can't breathe, man" (not necessarily in that order). Hospital staff thereafter restrained the Juvenile to the bed.

When asked, "how much time did you have to ponder your reaction to being spit on," Officer [redacted] credibly testified: "*I did not ponder it.*"[42] Officer [redacted] testimony was corroborated by Mr. Allen, who, after performing a frame-by-frame analysis, estimated that about "a third of a second" went by between the point where the Juvenile spit on Officer [redacted] and the point where Officer [redacted] used his hand to push the Juvenile's face away from him, via the

[42] Emphasis added.

aforementioned strike. I find Mr. Allen's testimony to be both credible and helpful as the trier-of-fact.

More likely than not, Officer [redacted] did not "ponder" his reaction to being spit on, because, in that moment, Officer [redacted] was in "flight-or-fight" mode. The fight-or-flight response is a well-established physiological survival mechanism that rapidly heightens strength, speed, and instinctive reactions when a person perceives a threat, a phenomenon recognized in law-enforcement literature and illustrated in documented officer-assault cases.[43]

Here, based on the preponderance of the evidence, more likely than not, Officer [redacted] near immediate reaction to the Juvenile physically assaulting him, through "a good sized loogie," prompted Officer [redacted] while in flight-or-fight mode, to push the Juvenile's face away from him to prevent any further attacks.

Officer [redacted] provided credible testimony concerning the impact his right hand made to the Juvenile's face:

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THE ARBITRATOR: How hard of an impact did your hand make with the juvenile's face?
THE WITNESS: Essentially, the best way that I can describe it, it was the weight of my arm. There was very little force behind it. There was no engagement out of my core. And I'm telling you this because I've watched the video, not because I cognizably can remember exactly what I did. There was no engagement of my core, there was no driving of my hips, there was no turning, tensing my legs. I didn't generate any power beyond the movement of my arm.
THE ARBITRATOR: And the purpose of that,

[43] *See Graham v. Connor*, 490 U.S. 386, 397 (1989) (recognizing that officers must make "split-second judgments" in "tense, uncertain, and rapidly evolving" circumstances, conditions that correspond to the physiological fight-or-flight response); *see also, Brown v. City of Golden Valley*, 574 F.3d 491, 499 (8th Cir. 2009) (noting that sudden, high-stress encounters trigger instinctive reactions consistent with the fight-or-flight reflex).

making that contact was for why, what reason?
THE WITNESS: Well, I'll say this. I did not make this as a conscious decision, but the movement served the purpose of preventing him from spitting on me again.

Again, Mr. Allen offered credible testimony that corroborates Officer [redacted] above testimony:

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Q. What was the need to use force here?
A. To redirect [the Juvenile's] head or to keep him from -- quit spitting on him.
Q. So prevent continued attack?
A. Correct.
Q. And you said single strike, right?
A. Single strike.
Q. Any injury from your review of the records?
A. No injury. And I think it's worth spending a little bit of time looking at the strike. There's

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multiple ways to strike a person. You could do a closed fist, knuckle right to the face, --
Q. Yeah.
A. -- where you're having your systemic strength under your body, like a boxer strength. This is more along the lines -- we've all see it, the video. The video, I suppose, speaks for itself in that regard. It's a, you know, a side --
THE ARBITRATOR: Describe what you're doing now.
THE WITNESS: I know. It's a side swing, where the left side of Corporal [redacted] hand, which is now a closed fist, strikes [the Juvenile] on the cheek. So it would be a side swing hit to the cheek. It would be more closely aligned, I feel, with like a slap as opposed to a bare knuckle punch to the face. If you're looking at the spectrum of strikes, closed knuckle fist to the face is up here on the higher end because of the propensity for injury. And at the lower end you have slaps, redirections, the configuration that Corporal [redacted] used, which was a side, a side swing striking

22 [the Juvenile's] face.
23 And you can even look at the ergonomics of
24 Corporal [redacted] He wasn't squared up at [the Juvenile]. He
25 was actually standing aside to him, and that has some

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1 bearing. Because when you're punching a person or
2 you're using focus blows, in order to produce systemic
3 strength, which comes from your legs and your core, you
4 need to be squared up with the persons. That's why when
5 you look at boxers, they fight squared up at people. So
6 he wasn't even in a position to create the utmost
7 systemic strength in doing what he did. It's a single-
8 handed strike.

Next, in compliance with Department protocol, Officer [redacted] called Sergeant Williams, stating, "He just spit in my face." Officer [redacted] asked Sergeant Williams to bring a spit hood in case they needed it.

A nurse attempted to put a mask on the Juvenile to prevent additional spitting, but the Juvenile pushed the mask away. Once Officer [redacted] advised that a spit hood would be used instead, the Juvenile became anxious and asked for the mask, stating he did not want a spit hood.

The Juvenile then proceeded to taunt Officer [redacted] offering comments along the following lines (not necessarily in this sequence and with other conversations occurring in between the Juvenile's statements):

- You made a mistake, okay? You just made a mistake, sir. You're a dead man.
- Officer [redacted] I know your name, my boy. You just made a mistake. You just punched me.
- Oh, you're a dead man. Oh, you're a dead man.
- You're about to lose your job, my boy. Uh, TBI. Traumatic brain injury. Do you know what that is? Do you know what a TBI is, sir?

- You're a dead man, [redacted] I'm going to explain this. A TBI is a traumatic brain injury. I got hurt. I got really bad hurt when I was young. If I have some shit wrong with my brain system, that's your fault.
- Oh, shit. Oh, shit. My dad's going to love to hear about this. Oh, dude.
- Oh, you're a dead man. Oh, shit. Oh, shit.
- You're a dead man for that, [redacted] Oh, yeah, you're a dead man.
- Get in line. Can't wait to tell my dad about this.
- You just hit me... You just hit me right in the [unintelligible], sir.

Officer [redacted] did not respond, either verbally or physically, to any of the Juvenile's taunts. After cleaning his face with a wipe, Officer [redacted] left the room and had no further contact with the Juvenile.

Officer [redacted] Supervisory Interview

Sergeant Williams arrived and conducted a supervisory interview of Officer [redacted] During his investigatory interview, Sergeant Williams stated that during that supervisory interview on Halloween, Officer [redacted] told him what happened during the Second Spitting Incident:

> [The Juvenile] sat on the bed, and Corporal [redacted] said without warning, provocation, anything, he just hocked -- looked at him and hocked a loogie right into his face, caught the upper part of his vest carrier and some on his face. Corporal [redacted] said, out of reaction, he reached over with the back of his hand because he had a handcuff key in his hand, and he didn't want to poke him with that, that he caught him in the -- contacted him in the left side -- or excuse me, right side of [the Juvenile's] cheek, turned his face the opposite direction, and pinned his face against the bed.

When asked: Did you sense that he was minimizing what had happened? Sergeant Williams replied, "no."

When asked if there was any change in Officer [redacted] demeanor between when he saw Officer [redacted] at the JJC, and when he saw Officer [redacted] at the Hospital, Sergeant Williams replied:

> It's the same [redacted] that I know. I saw no change in demeanor, no change in attitude. You know, he called me right away, said, "Yeah, this happened. And, you know, I'm calling you right now because that's what I'm required to do, and that's what I got to do."

Sergeant Williams Interviews the Juvenile

Sergeant Williams also interviewed the Juvenile. The Juvenile made another incriminating statement against interest to Sergeant Williams, stating he "hocked a loogie" in Officer [redacted] face. Sergeant Williams stated that the Juvenile "showed no remorse" and "showed no concern," and that the Juvenile stated, "*I would do it again*."[44]

The Juvenile is Medically Cleared

The Juvenile complained that he had a headache and that Officer [redacted] "broke" his jaw. However, based on the preponderance of the evidence, including the photographs Officer Quintero took that documented no injuries, Nurse Pershing's e-mail and the statements in the Oregon State Police (OSP) Report, discussed below, Officer [redacted] did *not* injure the Juvenile by using his closed fist while holding the handcuff key to guide the Juvenile's head away from him to prevent the Juvenile from spitting again.

Hospital staff proceeded to medically clear the Juvenile. According to Officer Quintero's police report, as the Juvenile was being medically cleared, he spoke with Nurse Haley "Teal"

[44] Emphasis added.

Pershing (Nurse Pershing), who told Officer Quintero that she heard the Juvenile cursing at, and threatening, Officer [redacted]

After the Juvenile was medically cleared, Officer Quintero transported him back to the JJC. As noted in the OSP Report, the Juvenile was handcuffed and wearing a spit hood when he was transported back to the JJC.

Officer [redacted] Police Report No. 2024-00040796

On October 31, 2024, Officer [redacted] filed a police report concerning the Second Spitting Incident. Officer [redacted] description of the Second Spitting Incident closely compares to his testimony at the Hearing, with the BWC footage and with his interviews for the OSP and the internal investigations.

In his police report, Officer [redacted] noted that the Juvenile told Sergeant Williams that he spit on Officer [redacted] in the Hospital because Officer [redacted] allegedly called him "dumb" and the Juvenile felt "disrespected."

The Juvenile was seated in the patrol car when Officer [redacted] made the "dumb" comment. Obviously, the Juvenile didn't spit on Officer [redacted] until he was seated on the bed in the Hospital. In his report, Officer [redacted] opined that the Juvenile's statement to Sergeant Williams indicated that the Juvenile "waited about nine minutes and pre-meditated [sic] the aggravated harassment on me."[45]

I agree with Officer [redacted] and find that, more likely than not, the Juvenile's incriminating statement against interest to Sergeant Williams establishes that the Juvenile

[45] Emphasis added.

premeditated and *deliberately* spit on Officer [redacted] in the Hospital in retaliation for his perception, though misguided, that Officer [redacted] called him "dumb."

Again, given the Juvenile's *knowledge* that spitting on a police officer constitutes a Class C felony, more likely than not, the Juvenile understood the seriousness of his conduct and nevertheless *chose* to engage in the deliberate, retaliatory act of assaulting Officer [redacted] by spitting on him.

The Juvenile was Very "Mouthy"

Based on the Juvenile's behavior and his choice of words during both Spitting Incidents, the Parties stipulated that the Juvenile was very "mouthy." While the Parties did not stipulate what "mouthy" means, a reliable dictionary defines that word to mean "marked by bombast or back talk."[46]

Initially, the undersigned found the Juvenile's level of mouthiness somewhat shocking in light of his young age. However, a complete review of the BWC footage supports the inference that the Juvenile's "mouthiness"--including use of *very* profane language--was likely influenced by the Father's example. In any event, the undersigned finds that the Juvenile was not only mouthy, but he was also at times rude, and behaved in an overall disrespectful manner toward Officer [redacted]

Despite the Juvenile's back talk, vulgar language, and general disrespectful behavior toward Officer [redacted] based on the undersigned's percipient observations of the BWC footage, the undersigned finds that Officer [redacted] remained entirely professional and did not react

[46] *Merriam-Webster's Dictionary* (New ed. 2022).

inappropriately or misuse his authority in response to the Juvenile's mouthiness, including during the Second Spitting Incident.

Nurse Pershing E-mails Her Supervisor

In the early morning hours of November 1, 2024, Nurse Pershing e-mailed her supervisor to seek guidance after she witnessed the interaction between Officer [redacted] and the Juvenile in Room 2 at the Hospital. In the e-mail, Nurse Pershing expressed concern that "unnecessary force" had been used, though she observed "no residual marking left on the patient's jaw after incident."

Nurse Pershing's e-mail to her supervisor is consistent with her interview during the OSP investigation, where she stated that she checked the Juvenile following the Second Spitting Incident and did not see any injuries to the Juvenile.

Lieutenant Mike Miner E-mails the Chief and the Command Staff

On November 1, 2024, at approximately 8:05 a.m., Lieutenant Mike Miner (Lieutenant Miner) e-mailed the Chief and the command staff concerning the Second Spitting Incident. The e-mail contained a link to Officer Quintero's BWC footage of the Second Spitting Incident, with a timestamp pinpointing where the Second Spitting Incident occurred. Lieutenant Miner's e-mail states:

> I was called last night about a use of force at TRMC involving Corporal [redacted] I reviewed the video today from Officer Esteban's [sic] camera and I am suggesting you watch it as well. I am concerned about what I observed.

The Employer's Initial Reaction to the BWC Footage of the Second Spitting Incident

In response to Lieutenant Miner's above e-mail, the Chief, Lieutenant John Moore (Lieutenant Moore), and Captain Justin DeKruger (Captain DeKruger) reviewed Officer Quintero's BWC footage that very day, November 1, 2024. Captain Tyler Lee (Captain Lee) was

out of town with no cell service as of November 1, 2024, but reviewed the BWC footage when he returned to work on or about November 5, 2024.

At the Hearing, the Chief conceded he did not initially review the full BWC footage of the Second Spitting Incident.[47] Even so, the Chief credibly testified that, upon his initial review of Officer Quintero's BWC footage, he was "absolutely incredibly disappointed," he was concerned that Officer [redacted] might face criminal charges, and he "knew" he had, "more likely than not, a policy violation in front of me." The Chief further credibly testified, "This was a major mistake. You don't strike a *child* that way."[48]

Lieutenant Moore likewise provided credible testimony about his initial reaction after reviewing the BWC footage on November 1, 2024: " I actually was -- why did he just punch the *kid* in the face? And it was -- I didn't *feel* that it was an *appropriate* action.[49]

Captain Lee and Captain DeKruger similarly provided credible testimony concerning their view of the use of force Officer [redacted] used during the Second Spitting Incident. Both captains testified that in their opinion, Officer [redacted] should have been terminated for excessive use of force.

Like the Chief, Captain DeKruger did not review the entirety of the Second Spitting Incident, before he came to the conclusion: "We just -- we absolutely do *not* put our hands on *kids* in that fashion under those circumstances."[50] Lastly, when asked what he found "egregious

[47] The record is unclear whether the Chief ever viewed the entirety of the BWC videos.
[48] Emphasis added.
[49] Emphasis added.
[50] Emphasis added.

about this situation," Captain Lee credibly testified: "Well, when the -- obviously the *optics* of it. When you see that video, *it doesn't look good at all*."[51]

Importantly, these same witnesses all acknowledged under oath that spitting on an officer is a Class C felony. However, these same witnesses minimized the Juvenile's assault on Officer [redacted] testifying that the Juvenile's deliberate "loogie" was "*de minimis*,"[52] was not an "*attack*"*—particularly because the spit was by a "child,*"[53] was not a "*high severity of crime*,"[54] and that, one of the witnessed was "concerned…*because of the nature of the use of force and what it looked like.*"[55] In particular, Lieutenant Moore's testimony caught my attention, because he has a paramedic background; he testified:

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Q. Do you have a background as a paramedic?
A. I do.
Q. Yet you still don't consider being spit on to be an attack?
A. Correct.
Q. Have you always felt that way?
A. Do I think spitting is inappropriate and -- yes. Do I feel it is an attack on me? No.
Q. So you would not arrest somebody for splitting on you?
A. I didn't say that. I said that it is a criminal act, so it can be arrested.
Q. Okay.
A. Or a person can be arrested. Do I feel it is an attack to where I'm going to use force outside of that specifically? Not necessarily.
Q. What is your basis for your belief that it's not an attack?

[51] Emphasis added.
[52] Chief Hensman.
[53] Lieutenant Moore.
[54] Captain DeKruger.
[55] Captain Lee.

25 A. I guess my experiences and training, I guess use

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1 of force training and so forth.
2 Q. Okay. Do you know from your investigation that
3 the Juvenile was aware that spitting on a police officer was a
4 Class C felony? He knew that, right?
5 A. Yes.
6 Q. Okay. And when a person is spit on, any person,
7 they're a victim of that crime, right?
8 A. Correct.
9 Q. Did you, as an investigator in this case, ever
10 view Corporal [redacted] as a victim of The Juvenile?
11 A. Yes. He was -- he had been spit on, he arrested
12 the Juvenile for aggravated harassment, so yes.
13 Q. So if you don't consider spitting an attack, if
14 somebody -- if a civilian spits on another civilian, you
15 don't consider them to have been attacked?
16 A. Not necessarily. I guess it's on your definition
17 of an attack, so I don't consider that an attack, so...
18 Is it a criminal offense? Potentially. But I don't
19 consider it as an attack.
20 Q. Okay. Well, use of force allows self-defense to
21 repel an attack, would you agree?
22 A. Yes.
23 Q. So are you saying that you'd arrest someone for
24 defending themselves against someone spitting on them
25 because they weren't attacked?

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1 A. No. You can use a level -- you can use,
2 depending on the force, you can use a reasonable amount
3 of force, but I don't consider -- I mean we're going off
4 of, again, hypotheticals and not on what happened, so...

Although the Employer's witnesses testified credibly, their characterizations of the Juvenile's conduct are given limited weight, as they do not, under the relevant legal framework, convey the full seriousness of the Juvenile's knowing and intentional assaultive behavior.

As Mr. Allen credibly testified:

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7 Q. Is there any difference in -- let me back up.
8 One of the *Graham* factors is severity, right?

A. Correct.
Q. To characterize a spit from a 12-year-old as de minimis, what is your thought about that?
A. Well, it's not de minimis.[56] De minimis, in terms of use of force language, is like guiding a person over to your car or guiding a person somewhere. De minimis is like zero force. So no. I think you could anecdotally pull ten people and saying being spat upon, do you feel that nonconsequential or de minimis, I think most people would say "No. I find that offense." And so does the Oregon federal court deem it as offensive.
Q. The investigative report refers to it several times by saying, you know, being spit on by a 12-year-old is de minimis. Is there a difference between being spat on by a 12-year-old versus an adult?
A. No. *I mean spit's spit, right? It carries the same risk of biohazard.*[57]

The word "optics" means:

the way in which an event or course of action is *perceived* by the public

- "what we really need in this circumstance is to make smart decisions in the best interest of student safety—not simply make changes that win political points for optics"[58]

Based on the overall record, the Chief, Lieutenant Moore, Captain DeKruger and Captain Lee all reacted primarily to the "optics" of what they viewed on the BWC videos of the Second Spitting Incident, based *solely* on the suspect Juvenile's size and age, and *not* based on the totality of the circumstances, including what happened during the First Spitting Incident.

The Department Refers the Matter to the OSP and Places Officer [redacted] on Leave

That same day (November 1, 2024), the Department referred the Second Spitting Incident to the OSP to conduct a criminal investigation, and placed Officer [redacted] on paid administrative

[56] The transcript misspells the word "de minimis" and "de minimus."
[57] Emphasis added.
[58] *Oxford English Dictionary* (12th ed., 2011) (emphasis added).

leave, through Lieutenant Jeff Hattersley (Lieutenant Hattersley). When Lieutenant Hattersley advised Officer [redacted] he was being placed on leave, Lieutenant Hattersley stated: "At the end of the day, you punched a 12-year-old." Officer [redacted] remained on leave through January 29, 2025.

The Department Declines Subject Matter Expert (SME) Review

Lieutenant Moore and the Chief both acknowledged that the Department's standard practice was to have use-of-force incidents reviewed by a subject matter expert (SME). Per protocol, the SME evaluates the officer's actions and offers an opinion as to whether the conduct complied with the Department's Use of Force Policy and the factors set forth in the seminal United States Supreme Court use-of-force case, *Graham v. Connor*.[59]

Sergeant Doni Hamilton (Sergeant Hamilton) and Sergeant Michael Mace (Sergeant Mace) are the designated use-of-force SMEs at the Department. Sergeant Hamilton, who testified on behalf of the Union, credibly testified that SME review is "nine times out of ten" requested when there is an alleged use-of-force incident.

At the Hearing, the Employer implied that, because Sergeant Hamilton and Sergeant Mace are bargaining-unit members (effective as of January 2025), they might have been biased had they been selected to serve as SMEs for this particular case. While the undersigned understands why the Employer may hold that concern, the undersigned finds that, more likely than not, neither sergeant would have approached Officer [redacted] case with bias, based on the following testimony.

Sergeant Hamilton testified:

[59] *Graham v. Connor,* 490 U.S. 386 (1989).

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Q. Do you consider it a conflict of interest for you to be reviewing the actions of officers that could result in their discipline?

A. I do not.

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Q. Why is that?

A. Well, first off, I've been doing this job for 25 years. I've turned in multiple officers for misconduct, ethical issues, and anything else you want to talk about, including his best friend.

THE ARBITRATOR: When you say "his best friend," you pointed at the grievant?

THE WITNESS: The grievant.

Sergeant Mace similarly testified:

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Q. Let me just ask you, do [sic] consider that a potential conflict of interest for the sergeants who are represented by the same union as the officers to be

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reviewing these use of force incidents involving the police officers?

A. No.

Q. No?

A. No. I -- no. Here again, it's one of those answers that how I look at it when I stepped in as a sergeant, or a corporal, any supervision, I take that seriously. I love my people, you know, top to bottom, bottom to the top. And that's the only way I do things. I lead by heart, not by words on a page. So if I looked at something and I give my honest opinion, I give that. It has nothing to do -- I'm not swayed one way or the other by whether I'm in an association or not.

I find both Sergeant Hamilton's and Sergeant Mace's testimony to be truthful and credible.

On November 4, 2024, five days after the Second Spitting Incident occurred, Sergeant Hamilton raised the need for SME review directly with Chief Hensman, even suggesting use of an

outside SME. The Chief acknowledged Sergeant Hamilton's suggestion, but did not follow-up, and did not appoint Sergeant Hamilton, Sergeant Mace, or an outside SME to review the Second Spitting Incident.

At the Hearing, Captain DeKruger—himself a former SME—testified that the command staff and the Chief discussed SME involvement and "didn't feel it was appropriate." Lieutenant Moore likewise testified that "it was decided" not to use a SME. Neither offered any reasoning or rationale for that decision.

However, when asked why no SME was involved in this case, the Chief credibly testified, in relevant part: "*I can see and I don't need an SME to tell me what I saw*."[60] The rationale for declining SME review became even more clear once Sergeant Hamilton testified that, at a March 3, 2025, Union meeting, the Chief stated words to the effect of, "*I didn't need an SME in this case. I am an SME*."[61]

That said, although he identified himself as the SME, the Chief candidly acknowledged that his review of the investigative file was partial: he "skimmed" much of the OSP report and "listened" to others, read the DA decline memo, and viewed portions of the BWC footage, but he did not review all reports or all video and does not recall examining every item before making his disciplinary decision.

While the undersigned respects the Chief's decision to act as the SME (as was his prerogative), I concur with Mr. Allen, who testified that having a use-of-force SME "routinely"

[60] Emphasis added.
[61] Emphasis added.

review such cases is "best practice." Indeed, the outcome of this Award may have been materially different had the Department chosen to seek SME review.

In any event, respectfully, and with complete deference to the Chief, the overall record supports the conclusion that the Chief and his command staff declined SME input because they had *already* concluded—based on the *optics*—that Officer [redacted] use of force was excessive and potentially criminal.

The bottom line is, mere *days* after the Second Spitting Incident, the Chief and his command staff swiftly reinforced their conclusion that Officer [redacted] use of force was excessive, and possibly criminal:

- Without *first* requesting and receiving SME input, per standard protocol;
- *Prior* to the conclusion of the criminal investigation conducted by the OSP;
- *Prior* to the completion of the Department's internal investigation;
- On the *very first day* they initially reviewed the BWC footage; and
- Without considering the *totality of the circumstances*.

The Chief Assigns Lieutenant Moore to Conduct an Internal Investigation

Because the Chief's duties are extensive and he cannot personally undertake every investigative task, he delegated the responsibility to Lieutenant Moore to conduct an internal investigation concerning Officer [redacted] use of force during the Second Spitting Incident.

Lieutenant Moore was hired at the Department in May 2010. Lieutenant Moore has worked as a police officer, an officer in charge, a field training officer, a corporal, a sergeant, and a lieutenant at the Department. Lieutenant Moore was promoted to the Corporal classification in August 2024. Lieutenant Moore also has a background as an Emergency Medical Technician (EMT). Lieutenant Moore was a bargaining unit member until sometime after he was promoted to sergeant.

As addressed in detail in the Decision section below, even with Lieutenant Moore's substantial and commendable background and experience, after carefully considering his sworn testimony, the undersigned, was left with significant concerns about the adequacy of his investigation and ultimately, his Final Investigative Report (the Final Report).

Lieutenant Moore did not initiate the internal investigation immediately, because the Chief made the decision to delay the internal investigation until the criminal investigation by the OSP was complete and the District Attorney's office made a final decision concerning possible criminal charges against Officer [redacted]

The OSP Investigation

Following the Department's referral requesting a criminal investigation, on November 4, 2024, OSP Detective Christina Nibblett (Detective Nibblett) was assigned to investigate whether Officer [redacted] engaged in a criminal act during the Second Spitting Incident. Detective Nibblett reviewed the BWC footage, the police reports, and interviewed several witnesses as part of her investigation. Her final investigative report (the OSP Report) is thorough and accurately summarizes what happened during both Spitting Incidents.

1. The Father's Interview.

On November 6, 2024, Detective Nibblett interviewed the Father as part of her investigation. The Father advised Detective Nibblett that the Juvenile was on probation "due to spitting on an officer while being arrested for criminal mischief after tearing up a classroom at school."

The Father's statement likely explains why the Juvenile was on probation and was assigned a juvenile probation officer as of the First Spitting Incident. More likely than not, the Juvenile's

previous arrest for spitting also explains how the Juvenile knew the legal significance of spitting on an officer. The Father's statement provides preponderant evidence that the Juvenile had a *history* of spitting on police officers.

2. The Juvenile's Interview

Detective Nibblett also interviewed the Juvenile on the same date, November 6, 2024. Detective Nibblett stated that she personally observed that the Juvenile had "no bruising on either side of his face near his jaw," but that she observed "what appeared to be acne that had been picked at along his jaw and chin."

The Juvenile told Detective Nibblett that he spit on Officer [redacted] during the Second Spitting Incident because he "felt disrespected and therefore it made it ok." The Juvenile's statement to Detective Nibblett comports with, and corroborates, the statements against interest the Juvenile made to Sergeant Williams.

3. The Hospital Staff's Interviews

On November 20, 2024, Detective Nibblett interviewed several Hospital staff members as part of her investigation. In the interest of time, the undersigned focuses only on the staff members who appear to have relevant information. For example, Detective Nibblett interviewed nurse Connie Bologna, who stated that she was managing work flow in the emergency department and did not see anything. I did not find that information to be helpful or relevant. That said, there were a few staff members that did have relevant or helpful information, as follows:

a. Security Officer Mike Schmidt

Although Security Officer Mike Schmidt (Mr. Schmidt) was not present during the Second Spitting Incident, Mr. Schmidt stated that he had a conversation with Officer [redacted] on the same

date as the Second Spitting Incident, when Officer [redacted] brought a second custody to the Hospital after the Second Spitting Incident with the Juvenile occurred. In that conversation, Officer [redacted] told Mr. Schmidt that the Juvenile spit in his (Officer Johnson's) face. Mr. Schmidt indicated that he often worked with Officer [redacted] and he had never seen Officer [redacted] "get out of control." Matter of fact, consistent with the Chief's testimony, Mr. Schmidt praised Officer [redacted] as "one of the best officers."

Mr. Schmidt also reported that he had a conversation with Officer Quintero, who stated that Officer [redacted] just "reacted" to [the Juvenile] spitting in his face. Mr. Schmidt further stated that he had heard from someone--he could not remember who it was--that told him that Officer [redacted] had pushed [the Juvenile's] face into the side of the bed. Importantly, Detective Nibblett compared Mr. Schmidt's statements with Officer [redacted] written report, and Detective Nibblett determined, "they were consistent."

b. Nurse Helena DeCasas.

Nurse Helena DeCasas (Nurse DeCasas) was in Room 2 during the Second Spitting Incident. Nurse DeCasas stated that she heard back and forth "arguing" between Officer [redacted] and the Juvenile, and that she heard the Juvenile say he would cooperate with the nurses, but not with the officers. Nurse DeCasas heard the Juvenile say that he would *not* spit,[62] but then witnessed the Juvenile spit on Officer [redacted] Nurse DeCasas stated she "felt like it was a difficult situation," and she was "sure there was a lot going on between [the Juvenile] and the officers that the staff missed."

c. Nurse Pershing.

[62] Emphasis added.

Nurse Pershing's statement was similar to the November 1, 2024 e-mail she sent to her supervisor, but with much more detail. Nurse Pershing stated that the Juvenile was "being aggressive" toward Officer [redacted] and that she heard Officer [redacted] tell the Juvenile not to spit on him "multiple times."

Nurse Pershing stated that she witnessed the Juvenile acting noncooperative when Officer [redacted] was attempting to take off the Juvenile's handcuff. Nurse Pershing stated that she heard the Juvenile using "threatening language" with Officer [redacted] and that she "did not want to say the things [the Juvenile] had been saying." Nurse Pershing indicated that Officer [redacted] "did not respond to the threats or rude things [the Juvenile] was saying to him."[63] Based on the undersigned's percipient observation of the BWC footage taken on October 31, 2024, I agree with that statement.

Nurse Pershing stated that she was working on something, and looked up in time to see the Juvenile spit on Officer [redacted] face, including his eye, and on his vest. Nurse Pershing described the spit as a "good sized loogey." Nurse Pershing stated that Officer [redacted] "struck [the Juvenile] and pushed [the Juvenile's] face down, and that she "couldn't tell" if Officer [redacted] hand was open or closed when he struck [the Juvenile].

Nurse Pershing stated that she checked the Juvenile afterwards, but she did not see "any injuries as a result of being struck." Nurse Pershing provided towelettes to Officer [redacted] to wipe his face, and stated that Officer [redacted] seemed "stoic" after the incident. Nurse Pershing indicated that she often worked with Officer [redacted] in the emergency room, and that Officer [redacted] reaction to the Juvenile spitting on him seemed "out of character" for him, adding that

[63] Emphasis added.

she was "very shocked by the situation." The undersigned has no doubt that Nurse Pershing was "very shocked by the situation."

d. Rachael Mueller

Emergency Room Tech Rachael Mueller (Ms. Mueller) was also in Room 2 during the Second Spitting Incident. Ms. Mueller indicated she was focused on her tasks, but did observe the Juvenile was struggling and resisting Officer [redacted] and that she heard the Juvenile making "threats" to Officer [redacted] Ms. Mueller indicated that she thought it was "odd" that the Juvenile was resisting, "due to the difference in size" between Officer [redacted] and the Juvenile. Ms. Mueller heard the Juvenile using profanity and saying to Officer [redacted] "You're a dead man."

Ms. Mueller heard the Juvenile say that he would "behave" and that Officer [redacted] told the Juvenile not to spit. After the Juvenile was seated on the bed, Ms. Mueller witnessed the Juvenile spit on Officer [redacted] In Ms. Mueller's observation, Officer [redacted] looked both "pissed" and "surprised." While Ms. Mueller did not testify at the Hearing, I do not doubt that is what Ms. Mueller perceived at that moment.

Ms. Mueller indicated that she saw Officer [redacted] "punch" the Juvenile, but she "couldn't tell if it was an open hand or closed fist," and then she witnessed Officer [redacted] pushed the Juvenile's head to the side "to keep from being spit on again."

Ms. Mueller stated that it looked like Officer [redacted] "started catching himself about halfway through," with a look on his face, as if Officer [redacted] was thinking, "What did I do?" Like Nurse Pershing, Ms. Mueller did not see any injuries or marks on the Juvenile.

4. Sergeant Williams' Interview

On November 21, 2024, Detective Nibblett interviewed Sergeant Williams. Detective Nibblett's report states that when she interviewed Sergeant Williams, Sergeant Williams stated that as Officer Quintero took pictures during the Second Spitting Incident, Sergeant Williams asked the Juvenile "if [the Juvenile] thought it was wrong to spit in someone's face," and the Juvenile said, "Yep."

Detective Nibblett further noted that when Sergeant Williams asked the Juvenile if he "would do it again when he felt disrespected," the Juvenile said that he would. Sergeant Williams' statements to Detective Nibblett is further corroborating evidence of the Juvenile's previous incriminating statements against interest.

5. Officer [redacted] Interview

Detective Nibblett interviewed Officer [redacted] on November 26, 2024. Detective Nibblett's summary of her interview with Officer [redacted] states, in pertinent part:

> Cpl. [redacted] said he was surprised that [the Juvenile] actually spit on him because he had said so many times that he was not going to. Cpl. [redacted] said that looking back at the situation it was stupid for him to not anticipate being spit on at the time. Cpl. [redacted] said he didn't even think he had a spit hood in his car when this incident happened. Cpl. [redacted] explained that he didn't initially put a spit hood on [the Juvenile] at JJC, because after the first incident of [the Juvenile] spitting on him, [the Juvenile] had apologized. [The Juvenile] said that Cpl. [redacted] did not deserve to be spit on. [The Juvenile] told him he just didn't want to be with his father the night [the Juvenile] spit on Cpl. [redacted] the first time, and that was the reason he had spit on Officer [redacted] Cpl. [redacted] went on to say he was trying to build some rapport with the Juvenile and he felt putting the spit hood on would have been counterproductive.
>
> Cpl. [redacted] said that when he struck [the Juvenile] the first thought that went through his mind was, "Shit, I hope that handcuff key didn't hit him." Cpl. [redacted] said he did not want to smash [the Juvenile] in the face or cut him. Cpl. [redacted] said his intent was to keep [the Juvenile] from spitting.
>
> ***

> Cpl. [redacted] said when he saw that [the Juvenile] wasn't hurt and wasn't bleeding he said he felt relieved and he was glad that [the Juvenile] wasn't hurt. Cpl. [redacted] emphasized that his intention was not to strike [the Juvenile], that it was to prevent [the Juvenile] from spitting on him again. Cpl. [redacted] said he had never been trained on how to deal with someone spitting on him, so his instinct was to "re-direct" [the Juvenile's] face so that [the Juvenile] could not spit on Cpl. [redacted] or Off. Quintero again.
>
> ***

Detective Nibblett also noted:

> Cpl. [redacted] also recalled that [the Juvenile] had been quoting the statute regarding Aggravated Harassment being a Class C Felony, which indicated to Cpl. [redacted] that [the Juvenile] was well aware of what he was doing when he spit on him. Cpl. [redacted] also said that [the Juvenile] pointed out his court paperwork regarding the Aggravated Harassment charges when he was taking him into custody at JJC.

I find Detective Nibblett's summary of Officer [redacted] interview to be consistent with Officer [redacted] police reports, his investigatory interviews and his testimony at the Hearing. For example, when asked at the Hearing why he was holding the Juvenile's head down and to the side during the Second Spitting Incident, Officer [redacted] credibly testified: "To prevent him from spitting on myself or Officer Quintero."

Upon completion of her report, Detective Nibblett referred the matter to the Jackson County District Attorney's office for further consideration.

The District Attorney's Declination Memorandum

On December 10, 2024, Josh Eastman, the District Attorney for Jackson County (DA Eastman), wrote a memorandum declining to pursue a criminal case against Officer [redacted] (the Declination Memo). The Declination Memo states, in pertinent part:

> Given the nature of this incident, I wanted to write you a more detailed explanation of our declination of the above case as "NANAC-no action, no apparent criminal conduct."

***

> My role is to determine whether there are criminal charges. Policy, protocol, etc. are beyond my purview. Here, the only "conceivable" charge would be harassment, but it does not apply. Cpl. [redacted] used force--pushing [the Juvenile]'s face away after being spit on. This conduct and his use of "force" is with the backdrop of the previous/similar incident in mind. This is not criminal conduct, and even with the size difference, given [the Juvenile]'s volatile and repeatedly alarming behavior and the "loogy," Cpl. [redacted] use of force (or offensive physical contact) would be justified by self-defense. While [the Juvenile] is much smaller in stature than Cpl. [redacted] he had spit on him before, made threats before, was making threats again, and spit on him again, so using hand/fist in a way (closed) along with other hand to hold [the Juvenile]'s spitting face away from him would be justifiable "offensive" physical contact and not criminal conduct.

Of note, DA Eastman evaluated the Second Spitting Incident as a neutral third party, and considered the totality of the circumstances--including the First Spitting Incident--when he reached the conclusion that Officer [redacted] use-of-force was "justified by self-defense."

Although Officer Quintero did not testify at the Hearing, he appears to be in agreement with DA Eastman, as he stated during his interview during the Employer's internal investigation that he did not believe that Officer [redacted] used "excessive amount of force." Officer Quintero, who, unlike Officer [redacted] *did* receive training on how to respond when a suspect spits, stated:

> The main thing is to control the head to prevent any additional spits on officers or other bystanders. And that's a quick movement to grab the head, control the head, whether it be hair pulled, face hold, just technique just to hold. But it's got to be quick because follow-up additional spit -- additional spit, obviously, you want to avoid any body fluids hitting you or somebody else. Obviously the fear of any communicable diseases that occur when spit hits your eyes or any open wounds or anything like that. So you want to make it fast, control the head, and prevent any additional spit flying out.

Importantly, as a fellow officer who was present during the Second Spitting Incident, Officer Quintero qualifies as a "reasonable officer on the scene," in accordance with the *Graham* case.[64]

The Chief credibly testified that the Employer did not agree with DA Eastman's conclusions in the Declination Memo. That position is understandable given the Chief's firm view that Officer [redacted] use of force during the Second Spitting Incident was excessive—summed up in the Chief's belief that "you don't strike a *child* that way."[65]

The Employer Conducts an Internal Investigation and Issues a Final Investigative Report

Sometime after DA Eastman issued the Declination Memo, Lieutenant Moore initiated the internal investigation. Lieutenant Moore had participated in three other internal investigations as of the date he commenced the investigation. Lieutenant Moore acted as the lead investigator; Lieutenant Miner was assigned to assist Lieutenant Moore.

At the Hearing, the Chief acknowledged that the policies the Employer investigated could be considered "stacked charges," likening it to the standard police practice of charging criminal defendants with more than one charge stemming from the same incident. However, the Chief also testified that he would have imposed the same level of discipline whether it was one policy violation or multiple policies. I took the Chief's testimony into consideration when determining the outcome of this Award.

That said, it is well-established under basic due-process principles that a bargaining unit employee *must* be afforded notice and an opportunity to be heard before being disciplined.[66] As will be addressed in detail below, the undersigned was left with significant concerns due to

[64] *Graham v. Connor*, 490 U.S. 386 (1989).
[65] Emphasis added.
[66] Elkouri & Elkouri, *How Arbitration Works*, Chapter 8, Section 8.4.C., page 14 (8th ed. 2018), Supp. 2020.

questionable and improper decisions Lieutenant Moore made throughout the investigation process, and when issuing the Final Report. The most consequential deficiency was Lieutenant Moore's *intentional* omission of any investigation, questioning or totality-of-the-circumstances analysis regarding the First Spitting Incident.

The Proposed Discipline and the Loudermill Hearing

On January 30, 2025, Chief Hensman issued the proposed discipline. He held a *Loudermill* Hearing on February 3, 2025, before issuing the Demotion. At the *Loudermill* hearing, Officer [redacted] provided a written statement for the Chief's consideration, which states, in pertinent part:

> The important facts of this case are the following:
> • [The Juvenile] committed a felony against me.
> • I reacted immediately and used force that "shocked" the hospital staff but caused no injury to [the Juvenile] and by ORS standards, was "offensive physical contact."
> • [The Juvenile] was not injured. Nor was there even a red mark on his face and that was noted by the hospital staff, Sgt Williams, and documented in photos taken in by Ofc Quintero,
> • DA Eastman called my actions "Self-defense" and stated I did not "punch" [the Juvenile].
> • Ofc Quintero, the only officer present, believed my actions were reasonable.
> • No Use of Force SME either internally or externally has been allowed to review this case and offer an opinion.
> • Neither investigator is a use-of-force SME, or a trainer in any use-of-force discipline.
> You told me that I needed to trust you and you needed to trust me. We have that as a shared desire and goal. I have to know that I will be provided with a *fair and balanced opportunity* for review of this incident, and I am willing to make necessary concessions to work toward our common goal.[67]

Officer [redacted] above listed bullet-pointed facts *underscore* the necessity of a fair, balanced, and informed review of the Second Spitting Incident—one that would have afforded Officer [redacted] the same level of objective assessment that any employee is entitled to receive.

[67] Emphasis added.

However, the preponderance of the evidence establishes that, more likely than not, the Employer did not afford Officer [redacted] a *fair and balanced* review.

The Final Discipline: the Demotion

On February 5, 2025, Chief Hensman issued the final imposed Demotion, determining that Officer [redacted] should be demoted from the Police Corporal classification to the Police Officer classification. Chief Hensman agreed with the sustained charges in the Final Report, for the same reasons. While the undersigned cannot be completely certain, it appears that the charges portion of the Final Report were directly cut and pasted into the Demotion notification.

Chief Hensman considered Officer [redacted] positive employment history and the fact that Officer [redacted] was "motivated by public interest or wellbeing of others" as mitigating factors. The aggravated factors Chief Hensman considered included:

1. Significant impact on the department's reputation and relationship with the community
2. Extensive professional training
3. Supervisory position

In addition to the Demotion, Chief Hensman gave Officer [redacted] the option of removal of all collateral assignments for a period of 18 months, or Education-Based Discipline (EBD). As I stated at the Hearing, I found the EBD option to be "very novel."

Officer [redacted] Selects the EBD Option

On February 7, 2025, Mike Vorberg on behalf of the Union notified Chief Hensman via e-mail of the option Officer [redacted] chose. The e-mail states, in pertinent part:

> The GPPA and Officer [redacted] wish to make it clear that we retain the right to grieve and/or potentially arbitrate the discipline you have imposed, and further, that responding to the order to choose one option or the other does not constitute acceptance of the discipline or waiver of any rights set forth in the CBA. If you are

in agreement with those conditions, Officer [redacted] has chosen to select the Education-Based Discipline option.

The Comparator Evidence

Police Officer Jeff Craven (Officer Craven) testified concerning a use of force incident he was involved in on September 15, 2025 (the Craven Incident). Officer Craven is currently a patrol canine officer and has been employed with the GPPD for 12 years.

Officer Craven, like Officer [redacted] used force to impact a female 15-year-old juvenile's face with his hand to prevent the juvenile, who was intoxicated, from spitting on him. Officer Craven credibly testified that he did so in *self-defense*, and that he "a*bsolutely*" considered the juvenile's spit to be an "assault"—as well he should, since that is the law. Officer Craven also credibly testified that saliva can transmit communicable diseases regardless of the spitter's age, a point Mr. Allen, the expert witness also made when he testified: "I mean spit's spit, right?"

BWC footage of the Craven Incident was played during the Hearing which corroborated Officer Craven's testimony.

The Union provided a comparison chart in its Brief, which the undersigned duplicates here:

	Craven/Annabel Teal	[redacted] the Juvenile]
Juvenile Age:	Sixteen	Twelve
Restraint	Both hands cuffed behind back; one officer utilizing physical control	One hand cuffed, one officer utilizing physical control
Impairment (Drugs or Alc.)	Yes	No
Police Officer Mental Health Hold	Yes	Yes
Number of Officers Present	4 (2 police, 2 security)	2
Location	Parking lot	Hospital room
Witnesses	None	Nurses

Injury resulting from UoF	None	None
Threats made to officer	Yes	Yes
Considered flight risk	No	Yes
Potential access to means of harming a person	No	Yes
Intent of Strike	Stop additional spitting	Stop additional spitting

At the Hearing, the Chief praised Officer Craven, testifying that Officer Craven and his fellow officers took the time to strategize in advance to determine how to handle the situation if the juvenile were to spit as anticipated. While I did not disbelieve the Chief, and found his testimony to be entirely credible, while both the Craven Incident and Second Spitting Incident were similar, there were three differences between the Craven Incident and the Second Incident:

1. First, in the Craven Incident, Officer Craven used an open hand strike to the juvenile's face; whereas, Officer [redacted] hand was at least partially closed, because he was holding the handcuff key.

2. Second, and probably *most importantly*, the juvenile in the Craven Incident was much *larger*—standing approximately five feet three inches, and weighing somewhere between 170 and 180 pounds—whereas, the Juvenile in the Second Spitting Incident was under five feet tall, and weighed around 80 pounds. This leads the undersigned to conclude that, more likely than not, the Employer did not have the same reaction to the use of force in the Craven Incident as it did in the Second Spitting Incident, simply because of the *optics:* The use of force on the much larger juvenile *simply did not look bad.*

3. Lastly, in the Craven Incident, the juvenile was handcuffed in the patrol vehicle while the officers were discussing the situation in the parking lot, giving those officers time to strategize

about what to do once the juvenile was removed from the patrol vehicle. Moreover, as credibly testified to by Officer Craven, the juvenile never assured him that she would not spit on him.

In contrast, Officer [redacted] was in an unsecured hospital room—with no security doors, and with potential medical instruments that could be used against him—accompanied by a juvenile who posed a potential flight risk, but who nevertheless *repeatedly* reassured Officer [redacted] that he would *not* spit on him. By the undersigned's count (and acknowledging that math is not her forte), the Juvenile gave Officer [redacted] at least *five* such assurances that he would *not* spit on Officer [redacted]

Based on the totality of the circumstances, and given the rapport Officer [redacted] had developed with the Juvenile during both Spitting Incidents, more likely than not, Officer [redacted] perhaps *naively*, believed the Juvenile's assurances. Even Captain DeKruger credibly testified that, upon reviewing the BWC footage of the Second Spitting Incident, "I thought—I honestly thought there was somewhat of some rapport starting to take place again between the two, between Officer [redacted] and [the Juvenile], and then unexpectedly he spit on him."

In his interview with Detective Nibblett, Officer [redacted] stated he was "surprised" that the Juvenile actually spit on him because the Juvenile had said so many times that he was not going to, and that, looking back, Officer [redacted] thought it was "stupid" for him to not anticipate being spit on at the time. While Officer [redacted] statement that he felt "stupid" for believing the Juvenile's assurances is understandable, however, as the United States Supreme Court held in

Graham v. Conner, Officer [redacted] naivety should not be assessed using 20/20 hindsight, but according to the circumstances as they appeared in the moment.[68]

When asked to compare the two incidents, Mr. Allen credibly testified:

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20 Q. And, in your mind, is that level of force equal
21 with Corporal [redacted] on 10/31/24?
22 A. Correct, I do believe it is.
23 Q. Okay.
24 A. I would just add to that, as again the federal
25 district courts look an [sic] injuries, sustained injury, and

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1 there was no injury in both cases.
2 Q. Okay. Regardless of whether it looks like a
3 punch or not?
4 A. Correct.

Again, I find Mr. Allen's above testimony to be credible and helpful in this instance.

Viewed as a whole, the comparative evidence—supported by credible testimony, BWC footage, and expert analysis—establishes that Officer [redacted] actions were in line with the level of force reasonably employed by Officer Craven, when confronted with similar assaultive conduct.

The Grievance

On February 12, 2025, Corporal John Lohrfink (Corporal Lohrfink), GPPA President, filed the Grievance on behalf of the Union and Officer [redacted] at Step 1. The Step 1 Grievance alleges:

> On February 5, 2025, the City issued a Notice of Disciplinary Action to then-Corporal [redacted] in relation to investigation EVT-00000494. The Notice sustains multiple alleged policy violations, including General Standards (319.4), Conduct (319.5.9), Purpose and Scope (420.1), DeEscalation (431.6), Use of Force (300), as well as Article IV of the Workplace Behavior/Conduct rules, and the Criminal Justice Code of Ethics. Pursuant to the Notice, the City demoted then-Corporal [redacted] and gave him the option of either (1) removal from all collateral assignments for a minimum of 18 months; or (2) "Education-Based Discipline"

[68] *Graham v. Connor*, 490 U.S. 386, 396 (1989))(held the 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.")

> which requires [redacted] to become an ICAT trainer, develop a spit-training for law enforcement officers, and write a research paper concerning expectations on progressive policing tactics. The City agreed that by selecting between the two options, GPPA and [redacted] were not accepting the discipline or waiving any rights under the CBA. [redacted] elected the "Education Based Discipline."

The Grievance further alleges that the City violated Articles 14.1, 14.2, 14.3, and 14.4 of the Agreement. The remedies requested are:

> That the discipline be rescinded; that all reference to this matter be removed from [redacted] personnel files to the maximum extent permitted by law; that [redacted] be made whole for all lost wages, benefits, seniority and other accoutrements of employment, together with interest; and such other relief be awarded as may be appropriate under the circumstances.

On February 19, 2025, Chief Hensman denied the Grievance on behalf of the City and the Department at Step 1. The Union advanced the Grievance to Step 3 on February 19, 2025. On February 25, 2025, Mr. Cubic denied the Grievance at Step 3. The Parties were unable to resolve the Grievance; for this reason, the Parties requested that the ERB appoint an arbitrator to hear the Grievance and to issue an award.

As specified above, the Hearing was held on October 30, 2025, and October 31, 2025. The Parties submitted their Briefs on January 23, 2026. The record was then closed. This Award is timely issued pursuant to the Parties' agreement to a one-day extension.

DECISION

The Just Cause Standard

In labor arbitrations, the "just cause" standard is the standard for determining whether a particular disciplinary action was justified.[69] Here, the Agreement provides, in Article 14:

[69] Mittenthal, Richard and Vaughn, M. David, *Just Cause: An Evolving Concept*, Arbitration 2006, at page 32.

> 14.1 Just Cause. No regular employee shall be disciplined or discharged except for just cause. Oral discussions are not considered to be discipline and shall not be subject to the grievance procedure.
>
> 14.2 Just Cause Standards. For the purpose of this Agreement, except for sworn police employees, just cause shall be determined in accordance with the following guidelines:
>
> ***
>
> For sworn police employees, "just cause" for discipline shall be determined in accordance with HB 2930 (2021).[70]

ORS 236.350(2) defines "just cause" as a cause "reasonably related to the public safety officer's ability to perform required work, including a willful violation of reasonable work rules, regulations, or written policies."

In *Clackamas County Peace Officers Association and Clackamas County*, Arbitrator Michael T. Loconto held: "ORS 236.350(2) can be read in harmony with traditional notions of just cause as applied in labor arbitration."[71] I agree with Arbitrator Loconto, as HB 2713B, now codified at ORS 243.808(1), demonstrates the legislature's intent to create consistent procedural and substantive protections for law enforcement officers statewide.[72] Consequently, here, the definition of just cause in ORS 236.350(2) will be applied under the "traditional notions" of just cause.

Numerous arbitrators continue to acknowledge the relevance of the Seven Tests of Just Cause to determine whether the discipline imposed was justified.[73] That said, contemporary arbitral awards reflect a prevailing tendency among arbitrators to apply only those elements that are

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[70] As specified above, HB 2930 is now codified as ORS §§ 243.808–.812.
[71] *Clackamas County Peace Officers Association and Clackamas County,* Arbitration Opinion and Award, p.39 (Loconto, 2024); : https://www.oregon.gov/erb/Documents/Grv-CCPOA-ClackCo(Suspension)Loconto-LO.pdf.
[72] HB 2713B (2019).
[73] *Enterprise Wire Co*, 46 Lab. Arb. (BNA) 359, 362 (Daugherty, 1966).

directly relevant to the specific facts and context of the dispute. [74] This tailored approach has been recognized in both arbitral commentary and judicial precedent. [75]

For example, in *City of Seattle and Seattle Police Officers' Guild*, Arbitrator Howell L. Lankford held:

> While the Seven Tests provide a helpful structure for evaluating disciplinary actions, they are not a rigid checklist. The arbitrator must consider the totality of the circumstances and apply only those elements that bear directly on the facts presented. [76]

Consistent with long-standing labor-arbitration principles, just cause requires that the employer provide clear notice of the rules, conduct a fair and thorough investigation, apply its policies consistently, base its conclusions on substantial evidence, and impose discipline proportionate to the proven misconduct. [77]

Together, these traditional and statutory components form a unified just-cause standard that requires both procedural fairness and evidentiary sufficiency before discipline may be upheld. Put simply, the determining factor in the just cause analysis is what was *reasonable*, given the totality of the circumstances of the particular case. [78]

The Burden of Proof

It is axiomatic that the burden of proof resides with an employer when determining whether there is just cause for disciplining an employee. [79] The employer bears this burden of proof both

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[74] *See* Dunsford, John E., *Arbitral Discretion: The Tests of Just Cause" (1989); see also,* Schwartz, Robert M., *Just Cause: A Union Guide to Winning Disciplinary Cases*.
[75] *See* Dunsford, John E., *Arbitral Discretion: The Tests of Just Cause" (1989); see also,* Schwartz, Robert M., *Just Cause: A Union Guide to Winning Disciplinary Cases*.
[76] *City of Seattle and Seattle Police Officers' Guild*, AAA No. 75 390 00181 05 (Lankford, 2006).
[77] Elkouri & Elkouri, *How Arbitration Works*, Chapter 15, Section 15.3A (8th ed. 2018), Supp. 2020.
[78] *State of Alaska*, 114 LA 1305 (Gaba, 2000).
[79] *State of Alaska*, 114 LA 1305 (Gaba, 2000).

with respect to proving the alleged violation, and with respect to demonstrating the appropriateness of the penalty.[80]

In this instance, given that the City has accused Officer [redacted] of what could be considered "stigmatizing behavior"—typically, the undersigned would apply the "clear and convincing" standard of proof, as stigmatizing behavior often warrants a higher burden of proof.[81]

However, here, the undersigned does not have discretion to determine the quantum of proof; by statute, she is required to apply the preponderance of evidence standard. A preponderance of the evidence standard is defined as:

> The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.[82]

Put another way, the Employer must establish that, more likely than not, (A) Officer [redacted] engaged in the alleged misconduct, and (B) any resulting discipline was imposed with just cause as defined in ORS 236.350.[83] This requires a showing that Officer [redacted] conduct violated a specific, reasonable rule or policy, and that the violation was willful or otherwise inconsistent with the officer's duties.

In addition, ORS 243.808 requires the arbitrator to determine whether the level of discipline imposed was arbitrary or capricious. Oregon appellate courts have long defined "arbitrary and capricious" to mean a decision made without a rational basis, inconsistent with the

[80] *Pepsi-Cola Co*., 104 LA 1141 (Hockenberry, 1995).
[81] Elkouri & Elkouri, *How Arbitration Works*, Chapter 15, Section 15.3.D.Ii.A. page 11 (8th ed. 2018), Supp. 2020.
[82] *Black's Law Dictionary* (12th ed. 2024).
[83] ORS 243.808(1)(a).

evidence, or reflecting an unreasoned exercise of discretion.[84] Arbitrators applying ORS 243.808(1)(b) have adopted this same standard.[85]

Together, these statutory requirements establish the framework for determining whether the Employer has met its burden to prove misconduct and just cause.

Did the City Violate Article 14, at Section 14.4 as Alleged in GPPA's Grievance?

Yes. The City asserts:

> The Association…will likely argue that Lt. Moore's investigation was not fair and objective and use that as a reason to claim that the discipline should be overturned. However, while the City acknowledges that the investigation was not flawless and there were things Lt. Moore could have done better as an investigator, the fact of the matter is that Grievant knew exactly why he was under investigation and there is no dispute whatsoever regarding the facts of what occurred during either the October 27 or October 31 spitting incident. The Association cannot point to a single piece of "missing" evidence that would have impacted the outcome of the investigation.[86]

Respectfully, though well-written, the undersigned disagrees with that argument, as the record establishes, by a preponderance of the evidence, that *both* the investigation, and the Final Report were *seriously flawed* and did not provide basic due process rights to Officer [redacted] In the interest of time and brevity, and without going through every nuance and detail of all the multiple flaws in the investigation process, as well as in the issued Final Report, the undersigned lists the *major* areas of concern below.

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[84] See *AFSCME Council 75 v. City of Lebanon*, 360 Or 809, 825 (2017); *Jenkins v. Bd. of Parole*, 313 Or 234, 241 (1992).
[85] *Columbia County Deputy Sheriffs' Association v. County of Columbia,* Arbitration Opinion and Award (Cloughesy, 2025), Grv-CCDSA-ColumbiaCo(11.20.25Term)Cloughesy-E.pdf
[86] City's Brief at pages 47-48.

1. The Notice of Investigation Did Not Inform Officer [redacted] of the Specific Allegations the Employer Intended to Investigate.

We begin with the Notice of Investigation (NOI), dated December 16, 2024. A NOI is typically issued to notify an officer of the specific allegations under review and the potential policy violations that will be investigated.[87] Here, the "Summary of Incident" section of the NOI states:

> On 10/31/24, Cpl [redacted] responded to the Juvenile Justice Center regarding a juvenile in the facility causing self-harm. The juvenile was subsequently taken into custody on a peace officer mental hold and transported to Three Rivers Medical Center (TRMC). While at TRMC the juvenile spit on Cpl [redacted] and force was used against the juvenile.
>
> Oregon State Police have investigated the incident, which was referred to the Josephine County District Attorney's (DA) office for review. The DA has reviewed the case and returned with a No Action, no apparent criminal conduct.
>
> Based on a review of the video, and reports that have been submitted, the following policy areas have been identified and will be looked at during this investigation to determine if there was a violation[.]

The NOI then lists the policies Officer [redacted] was alleged to have violated.

There are several flaws in the NOI. First, other than the "Summary of the Incident" section outlined above, the NOI does not describe with *any* kind of specificity how Officer [redacted] was alleged to have done that violated each policy, effectively depriving Officer [redacted] of any meaningful *notice* of the conduct the Department intended to investigate.

Second, the NOI does not even list Policy 300 – the Use of Force Policy, which is puzzling, since that should have been the *primary* issue to be investigated. That said, in fairness, Officer

[87] *See, Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985) (holding that due process requires that a public employee receive "notice of the charges" before discipline may be imposed); *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976) (notice must be "reasonably calculated" to inform the individual of the issues to be addressed); *Enterprise Wire Co*, 46 Lab. Arb. (BNA) 359, 362 (Daugherty, 1966) (identifying "forewarning or foreknowledge of the probable consequences of the employee's conduct" as a core element of just cause).

[redacted] could probably have inferred that the Use of Force Policy was at least relevant to the Department's investigation.

Third, the NOI did not list Article IV - Workplace behavior/Conflict, yet, Lieutenant Moore listed that policy in the Final Report, effectively giving Officer [redacted] *no meaningful opportunity* to address whatever the alleged violation was before the Final Report was issued.

Lastly, the NOI cites ORS 161.233—a *criminal* statute plainly *irrelevant* to determining whether Officer [redacted] violated the Department's internal Use of Force Policy. Although Lieutenant Moore testified that he made an "error" by including ORS 161.233 on the NOI, he nevertheless questioned Officer [redacted] about an alleged violation of ORS 161.233 during Officer [redacted] investigative interview.[88] This inconsistency raises an unavoidable question: was it truly a simple "error," as Lieutenant Moore testified, or did Lieutenant Moore in fact *erroneously* believe that ORS 161.233 applied to an internal policy-violation investigation? Unfortunately, there is no answer to that question in the record.

That said, given the plethora of missteps and poor investigatory choices Lieutenant Moore made, one cannot help but also wonder if Lieutenant Moore simply lacked sufficient training to complete a *thorough u*se-of-force internal investigation. For this reason, though offered as *dicta*, the undersigned *highly recommends* that the Department provide specific, thorough training to all members of its force assigned to conduct use-of-force investigations.

In sum, adequate notice is a fundamental component of just cause, and an NOI that fails to identify the specific conduct under review cannot satisfy that requirement. The omissions and inaccuracies in the NOI materially hindered Officer [redacted] ability to understand the scope of

[88] *See* Officer [redacted] investigation interview at pages 34-35.

the allegations and to prepare a meaningful response. Including an inapplicable criminal statute risked misleading him about the nature and potential consequences of the inquiry, and adding new policy allegations only after the fact undermined the fairness and integrity of the process. Taken together, these deficiencies reflect not a minor oversight, but a systemic failure to provide the clarity and specificity required for a fair investigation.

2. Lieutenant Moore Neither Investigated the First Spitting Incident nor Incorporated it into a Totality-of-the-Circumstances Analysis in the Final Report

Next, the record establishes that Lieutenant Moore *purposefully* did not investigate the First Spitting Incident, and that he *purposefully* failed to incorporate the First Spitting Incident into a totality-of-the-circumstances analysis in the Final Report. Moreover, Lieutenant Moore *purposefully* decided not to ask Officer [redacted] the questions he had prepared about that first incident during his interview of Officer [redacted] Because prior contacts are an essential component of any reasonable use-of-force analysis, the First Spitting Incident was not merely relevant but indispensable to a competent investigation.

When asked why he chose not to ask Officer [redacted] questions about the First Spitting Incident during Officer [redacted] investigatory interview, held on January 14, 2025, Lieutenant Moore answered:

> 113
> 18 I *don't recall* the exact reason. I know
> 19 it was done during the interview, but I don't recall the
> 20 exact reason why it was decided -- or I decided not to.[89]

In the undersigned's opinion, given the serious nature of the allegations against Officer [redacted] not recalling something so central to determining whether Officer [redacted] violated the

[89] Emphasis added.

use-of-force policy significantly undermines the reliability of Lieutenant Moore's testimony, as well as his reasoning behind why he deliberately chose not to focus on the First Spitting Incident when he interviewed Officer [redacted]

Further, when asked why he did not include any analysis concerning the First Spitting Incident in his Final Report, Lieutenant Moore answered:

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21 Because it was -- it had *nothing* to -- the
22 incident that we were investigating was the incident at
23 the hospital, and that incident and not the previous
24 incident.
25 Q. Are you aware that use of force case law

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1 discusses prior contacts with the subject as relevant to
2 the reasonable use of force analysis?
3 A. Uh-huh (affirmative response).
4 Q. Okay.
5 THE ARBITRATOR: Is that a yes?
6 THE WITNESS: Yes.
7 THE ARBITRATOR: Thank you.
8 MR. WYROSTEK: Thank you.
9 Q. Okay. With that in mind, why didn't you include
10 that in your report?
11 A. Again, *I didn't feel that it was relevant* to this
12 incident as far as this use of force being done.
13 Q. Why?
14 A. Uh... *I just didn't feel it was relevant at the*
15 time, I guess.[90]

Lieutenant Moore's testimony above seriously befuddled me and left me questioning how he could simultaneously acknowledge the *relevance* of prior contacts to a use-of-force analysis yet *purposefully* omit *any* discussion or analysis concerning the prior contact from his investigation and Final Report, claiming that said prior contact was *not relevant*. That testimony literally made

[90] Emphasis added.

no sense. Again, given that prior contacts are a required component of any reasonable use-of-force assessment, this omission was not a discretionary judgment call, but a fundamental investigative *failure*. Taken together, this inconsistency renders Lieutenant Moore's explanation unreliable and confirms that his investigative conclusions cannot be afforded weight.

In addition to these glaring omissions, when Officer [redacted] independently referenced the First Spitting Incident during his interview, Lieutenant Moore *purposefully* left out Officer [redacted] reference to the First Spitting Incident in his Final Report. When questioned why he did that, Lieutenant Moore testified, "I don't recall." In fact, whenever Lieutenant Moore was confronted with errors or lapses in his investigative judgment, his default response was "I do not recall" or similar words to that effect.[91] Repeated failures of recollection on matters central to the investigation weigh heavily against the reliability of a witness under well-established arbitral credibility standards.[92] These repeated lapses in recollection—particularly on matters *central* to the accuracy and completeness of his own investigative report—significantly undermines the reliability of *any* of Lieutenant Moore's conclusions in the Final Report.

By failing to include the First Spitting Incident in his investigation and analysis, Lieutenant Moore deprived the Chief as the final decision-maker of critical mitigating context necessary to evaluate the reasonableness of Officer [redacted] use-of-force during the Second Spitting Incident.

[91] The undersigned had the ambition to count how many times Lieutenant Moore gave that answer under oath, but abandoned that idea due to the sheer amount of time it would take.

[92] See Elkouri & Elkouri, *How Arbitration Works* § 12.III.B (8th ed. 2018) Supp. 2020. (noting that arbitrators may discount testimony where a witness "fails to recall significant events," particularly when those events are central to the disputed conduct); see also *Enterprise Wire Co*., 46 LA 359, 362 (Daugherty 1966) (identifying a witness's ability to recall events accurately and consistently as a key credibility factor).

The deliberate nature of these omissions elevates them beyond mere oversight and calls into question the objectivity and thoroughness of the investigation itself.

Because the Employer bears the burden of proving just cause, such investigative gaps materially impair its ability to meet that burden. Viewed in conjunction with the broader investigative deficiencies in the record, these omissions form a consistent pattern that further erodes confidence in the reliability of the Final Report.

The undersigned finds that if Lieutenant Moore had *properly* investigated and addressed the significance of the First Spitting Incident in his Final Report, more likely than not, he would have identified mitigating circumstances that would have materially informed the assessment of Officer [redacted] use of force during the Second Spitting Incident, and probably could have *exonerated* Officer [redacted] completely.

3. Lieutenant Moore Did Not Apply the Appropriate Standard When Concluding that Officer [redacted] Violated the Use of Force and Other Department Policies.

Having addressed the significant investigative omissions and credibility concerns arising from Lieutenant Moore's omission of any analysis of the First Spitting Incident, the undersigned next turns to another central flaw in the Final Report: Lieutenant Moore relied heavily on the Hospital workers' statements and reactions to the use of force at the Hospital, concluding that Officer [redacted] actions were "over the line," "harsh," and "shocking." Lieutenant Moore's reliance on the subjective impressions and reactions of hospital staff to characterize Officer [redacted] use of force reflects a further departure from established use-of-force analytical standards and underscores the broader pattern of evaluative errors that permeated the investigation.

Longstanding case law makes clear that the relevant standard is what a *reasonable officer* on the scene would do under the circumstances—*not* how a bystander hospital employee might react.[93] Subjective reactions from untrained observers have no place in a constitutional or administrative use-of-force analysis, and reliance on such impressions represents a fundamental misunderstanding of the governing standard.[94]

As already specified, the "reasonable officer" during the Second Spitting Incident was Officer Quintero, an officer who had been trained on how to respond when a suspect spits on him. Importantly, Officer Quintero stated during his investigative interview that Officer [redacted] use of force was *not* excessive, yet Officer Quintero's opinion as a "reasonable officer on the scene" was *not* applied to Lieutenant Moore's analysis. This selective disregard of the only trained, on-scene officer's assessment—while elevating the subjective reactions of untrained hospital staff—further illustrates the inconsistent and unreliable methodology that characterized Lieutenant Moore's investigation.

Given Lieutenant Moore's *purposeful* decision to leave out the First Spitting Incident, and his reliance on a standard that, to the undersigned's knowledge, does not exist *anywhere* in use-of-force jurisprudence, again, the undersigned is left with serious concerns about the accuracy and reliability of *any* of Lieutenant Moore's investigative conclusions. Viewed in the context of the

[93] *See Graham v. Connor*, 490 U.S. 386, 396–97 (1989); *Tennessee v. Garner*, 471 U.S. 1, 7–8 (1985); *Deorle v. Rutherford*, 272 F.3d 1272, 1279–80 (9th Cir. 2001); *Bryan v. MacPherson*, 630 F.3d 805, 816–17 (9th Cir. 2010).
[94] *See Graham v. Connor*, 490 U.S. 386, 396 (1989) (holding that use-of-force reasonableness must be judged "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight," thereby rejecting evaluations based on the reactions of untrained bystanders); *see also Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994) ("[O]fficers are not required to use the least intrusive degree of force possible… the inquiry is whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them.").

broader investigative deficiencies already discussed, this additional analytical error reinforces the conclusion that the Final Report cannot be afforded meaningful weight.

4. The Myriad of Other Problems with the Investigation and Final Report

The pattern of investigative shortcomings continued in several other respects, each of which further eroded the undersigned's confidence in the reliability of the Final Report. For example, Lieutenant Moore paraphrased—rather than accurately quoted—Officer [redacted] statement about his lack of training on how to respond to someone spitting on him, thereby narrowing Officer [redacted] statement: "I've never received training on how to react to someone spitting on me," into the far more specific claim that he had "never been trained to *strike* a person who spits on an officer."[95] He also misquoted Officer [redacted] by reporting that Officer [redacted] stated that "no commands" were given before the Second Spitting Incident, despite Officer [redacted] clear statement in his interview that he told the Juvenile, "Don't spit on me," before using force. More likely than not, the statement "Don't spit on me" constitutes a command, as a "command" is simply an authoritative order.[96] Such inaccuracies—particularly when they narrow, alter, or mischaracterize an officer's statements—are not minor drafting errors; they materially distort the factual record on which disciplinary decisions are based.

Moreover, Lieutenant Moore failed to identify the specific subsections of each policy Officer [redacted] was alleged to have violated—information Lieutenant Moore did not identify until *the Hearing*. That allegation *alone* establishes that the Employer did not give Officer [redacted] adequate notice of all of the charges against him. Lieutenant Moore also inaccurately reported that

[95] Emphasis added.
[96] *Oxford English Dictionary* (12th ed. 2011).

"[Sergeant] Williams believed Officer [redacted] was minimizing the incident," when, in fact, that was the *opposite* of what Sergeant Williams said. Yet, when confronted about that misstatement, Lieutenant Moore appeared to shrug his shoulders and testified that the misquote was a "typo."

Given the seriousness of the allegations against Officer [redacted] the undersigned was confused why Lieutenant Moore was seemingly so careless about the information he included in his Final Report. Misquotations of this nature—especially when they invert the meaning of a witness's statement—raise significant concerns about the accuracy and neutrality of the investigative process.

Moreover, notwithstanding the contract language in Article 18, Section 18.1 that *strictly* prohibited him from doing so, Lieutenant Moore nevertheless considered Officer [redacted] prior discipline as an aggravating factor. Further, the *only* mitigating factor Lieutenant Moore considered was Officer [redacted] employment history.

However, had Lieutenant Moore conducted a thorough use-of-force investigation that included an analysis of the First Spitting Incident in the context of the totality of the circumstances, and had Lieutenant Moore applied the correct standard, i.e., what *a reasonable officer on the scene* would do, more likely than not, Lieutenant Moore could have concluded there were many more mitigating factors, and again, may have even *exonerated* Officer [redacted] This selective treatment of aggravating and mitigating factors further illustrates the inconsistent and incomplete methodology that permeated the investigation. As it stands, the overall record establishes that Lieutenant Moore's actions deprived Officer [redacted] of his basic due process rights.

There are additional issues with the Final Report, but the undersigned need not catalogue each one here. What is clear is that the cumulative effect of these errors—both major and minor—

reflects an investigation and Final Report that is *severely* flawed in method, execution, and analytical integrity. Taken together, these deficiencies renders the investigation and the resultant Final Report unreliable and unfit to serve as the basis for *any* disciplinary action.

5. Captain DeKruger and the Chief Either Did Not Recognize, or Did Not Address, the Fact that Lieutenant Moore Omitted the First Spitting Incident From His Investigation and His Final Report.

These investigative failures did not occur in isolation; they were further exacerbated by the lack of meaningful oversight from the command staff. At the Hearing, Captain DeKruger testified that he "oversaw" Lieutenant Moore's investigation, yet also credibly testified that he had but *one conversation* with Lieutenant Moore about the investigation, and that was to provide advice on how Lieutenant Moore should draft the Final Report.

Captain DeKruger also testified that he reviewed Lieutenant Moore's Final Report, but by the time he viewed it, the Final Report had been finalized and distributed. Captain DeKruger further testified that when he reviewed the Final Report, he noticed minor errors such as misspellings, but did not direct Lieutenant Moore to make *any* corrections. That testimony was *very* concerning, as it indicates that Captain DeKruger did not recognize Lieutenant Moore's deliberate decision to omit the First Spitting Incident from the analytical portion of the Final Report. Effective oversight requires more than a cursory review for typographical errors; it requires ensuring that the investigation is *complete, accurate, and grounded in the correct analytical framework*.[97] Captain DeKruger's testimony reflects none of those hallmarks.

[97] Elkouri & Elkouri, *How Arbitration Works* §12.III.A–B (8th ed. 2018) Supp. 2020 (explaining that employers bear the responsibility to conduct a "full and fair investigation" and that investigative adequacy requires accuracy, completeness, and proper analytical framing, not superficial or perfunctory review); *see also Enterprise Wire Co*., 46 LA 359, 363 (Daugherty 1966) (noting that just-cause principles require an employer to conduct a reasonably thorough investigation before imposing discipline).

In fact, on Day 2 of the Hearing, Captain DeKrueger testified about exactly *when* he became aware that Lieutenant Moore excluded the First Spitting Incident from his investigation and Final Report:

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Q. Okay. Sorry. I've got to remember too.
You realize that Moore's report did not include anything about the 10/27 incident, right?
A. That's correct. I'm aware of that *now*, yes.
Q. You're aware of that now?
A. Yep.
Q. Why did you insert the word "now" in there?
A. Well, it's been brought to my attention that's been part of contention that we didn't interview, didn't mention the 10/27 incident.
Q. Okay. Is that a problem to you?
A. Yes. We made a *mistake* and we'll move forward. We'll grow from that.
Q. I'm not going to belabor the point much more than one more question. But you agree prior contacts with a subject and officer are relevant to the totality of the circumstances use of force analysis?
A. That is correct versus -- *Graham versus Connor*, yes, we use that analysis.
Q. Okay. Just making sure I got everything here.

Okay. At what point did you become aware that there was that omission of the prior incident? Was that

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leading up to arbitration or was that at some earlier point?
A. I believe that was probably *yesterday.* Yeah, it was *yesterday*.[98]

Given Captain DeKruger's above credible testimony acknowledging that "prior contacts" must be considered in a totality of the circumstances use-of-force analysis, the undersigned finds

[98] Emphasis added.

that, in overseeing the investigation and the Final Report, Captain DeKruger knew, or at the very least, *should have known*, to *direct* Lieutenant Moore to include the First Spitting Incident in a totality-of-the-circumstances analysis in his Final Report. The undersigned determines that Captain DeKruger's failure was not merely a "mistake," but a significant lapse. Supervisory personnel are *expected* to identify and correct investigative deficiencies—not to passively accept them, or worse yet, to discover investigation deficiencies for the *first time* during arbitration.[99]

Equally concerning is that the Chief—the designated SME for this case—*also* did not direct Lieutenant Moore to include the First Spitting Incident in either the investigation or in his analysis in the Final Report. This is particularly notable and concerning, because, although the undersigned cannot be entirely certain, the Demotion notice appears to adopt the findings and conclusions set out in Lieutenant Moore's Final Report, *flaws and all*. While it may be that the Chief delegated the responsibility to prepare the Demotion to a member of his command staff, at a minimum, the failure to identify the fact that there is no analysis of the previous incident suggests that the oversight process may not have received the level of attention required.

Here, the cumulative deficiencies—from the initial investigative omissions to the absence of meaningful supervisory review—demonstrate a breakdown in the Employer's obligation to conduct a fair, thorough, and competent investigation. Taken together, these shortcomings reflect a level of oversight that *materially* undermines *any* confidence in the integrity and completeness of the Employer's investigation and in the analysis, findings and conclusions in the Final Report.

[99] Elkouri & Elkouri, *How Arbitration Works* §12.III.A (8th ed. 2018) Supp. 2020 (explaining that employers—and by extension supervisory personnel—must ensure that investigations are "thorough, fair, and complete," and that failures in oversight can undermine the just-cause analysis); see also *Enterprise Wire Co.,* 46 LA 359, 363 (Daugherty 1966) (noting that just-cause requires an employer to conduct a reasonably diligent investigation before imposing discipline, which necessarily includes supervisory responsibility to identify and correct investigative deficiencies).

Simply put, given the unreliability of the investigation and Final Report, the undersigned concludes that the Employer failed to establish that it conducted a fair and through investigation, thereby violating Article 14, Section 14.4.

That said, it is well-established that when, as here, an employer's investigation is seriously flawed and fails to provide basic due process, the arbitrator may sustain the grievance without addressing every remaining allegation, because a fair and thorough investigation is a basic element of just cause. [100]

Did the Employer Establish Proof of Misconduct in Accordance with ORS 243.808?

No. While the Employer's seriously flawed investigation *independently* warrants sustaining the Grievance, the undersigned also addresses the substantive allegation of excessive use of force to provide a complete resolution of the most critical issues presented by the Parties. In that regard, the Employer posits:

> The evidence clearly established that Grievant acted inappropriately after [the Juvenile] spit at him on October 31, 2024, by unnecessarily striking [the Juvenile] in the face with his closed fist. Chief Hensman's "Notice of Disciplinary Action" issued to Grievant on February 5, 2025, sets forth the reasons for Grievant's demotion. Specifically, the letter stated that Grievant "used unnecessary force on a juvenile male by striking him on the face while he was in custody on a peace officer mental hold at Three Rivers Medical Center."[101]

Respectfully, the undersigned disagrees, as the preponderance of the evidence establishes that the Employer reached the conclusion that Officer [redacted] use of force was excessive, and

[100] *Merritt v. Mackey*, 827 F.2d 1368, 1370–71 (9th Cir. 1987) (holding that discipline based on a fundamentally unfair or procedurally defective investigation cannot stand); *Walker v. City of Berkeley*, 951 F.2d 182, 184–85 (9th Cir. 1991) (finding that an incomplete or biased investigation violates due process and undermines the entire disciplinary action).
[101] Employer's Brief at page 35, references to exhibits omitted.

thus constituted misconduct, within mere *days* after the Second Spitting Incident, based solely on the "optics" of the BWC footage, and the other factors discussed in detail below.

1. The "Optics" of the BWC Footage

At the Hearing, the Chief acknowledged that he did not initially view the full BWC recording of the Second Spitting Incident. Nonetheless, he credibly testified that, upon reviewing Officer Quintero's BWC footage on November 1, 2024, he was "absolutely incredibly disappointed," because, in his opinion, "you don't strike a *child* that way."[102] Lieutenant Moore likewise testified that his immediate reaction on November 1, 2024, was, "Why did he just punch the kid in the face? … I didn't feel that it was an *appropriate* action."[103]

Additionally, Captains Lee and DeKruger echoed those views, each testifying that, in their opinion, the use of force warranted termination. Like the Chief, Captain DeKruger did not review the entire incident before reaching his conclusion that: "We just — we *absolutely* do not put our hands *on kids* in that fashion under those circumstances."[104] Lastly, when asked what he found "egregious," Captain Lee pointed to the video's "*optics*," observing that, on its face, the footage "*doesn't look good at all*."[105]

It would be one thing if command staff maintained these initial opinions and impressions that Officer [redacted] use of force was excessive after *first* obtaining SME input, after *first* taking into consideration the legal significance of the Juvenile's criminal actions—including the Juvenile's stated knowledge that he knew he committed Aggravated Harassment, after *first* taking

[102] Emphasis added.
[103] Emphasis added.
[104] Emphasis added.
[105] Emphasis added.

into consideration DA Eastman's opinion as a neutral third party, after *first* taking into consideration Officer Quintero's opinion, as a "reasonable officer on the scene" that Officer [redacted] use of force was not excessive, and after *first* completing a *full* and *fair* investigation that did not rob Officer [redacted] of basic due process right, taking careful consideration of the totality of the circumstances.

Based on the preponderance of the evidence, the Department's initial conclusions were premature, insufficiently vetted, and therefore susceptible to the inference that they were driven by their initial impressions in reaction to the "optics," rather than a thorough, objective evaluation. Moreover, the record shows the Employer *never* altered its position from the outset—reaching and maintaining its conclusion that Officer [redacted] used excessive force within *days* of the Second Spitting Incident. Put simply, command staff clung to their original position, and never changed their position, seemingly ignoring the Employer's *legal responsibility* to take into account the *totality of the circumstance*s.

Accordingly, we now turn to the first of many critical procedural failures: command staff did not obtain independent SME input before concluding that Officer [redacted] use-of-force was excessive.

2. The Department's Failure to Obtain SME Input

Both Parties agreed at that the Employer typically utilizes a SME to review use-of-force cases. However, the Employer did not rely on the Department's two SMEs for this particular case., nor did the Employer hire an outside SME, as suggested by Sergeant Hamilton, about five days after the Second Spitting Incident.

In its Brief, the Employer contends that the Union's criticism of the absence of a formal SME review is misplaced. It argues there is no policy or statutory requirement mandating an SME review, and that no deliberate decision was made to omit one. Command staff, the Employer says, collectively possessed substantial experience and expertise—effectively functioning as an SME cohort—so a separate formal SME review was unnecessary, particularly given the availability of comprehensive BWC footage. The Employer also notes potential conflicts of interest with the designated SME sergeants, who had joined the same labor organization as the Grievant, and therefore maintains that relying on internal command judgment was reasonable under the circumstances.[106]

While the Employer's arguments are valid, and there is no *per se* legal requirement to obtain SME review, as testified to by expert witness Mr. Allen, SME review is "best practice" in use-of-force matters. This is because it brings specialized, *neutral* expertise to technical questions of tactics, proportionality, and policy application; it helps ensure that conclusions rest on an *objective*, trained assessment rather than on immediate impressions or *"optics*"[107]; it guards against real or perceived conflicts of interest when internal reviewers have institutional or representational ties to involved parties; and it preserves the integrity and credibility of the investigative process by documenting that command decisions were tested against an independent professional standard.[108]

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[106] Employer's Brief at pages 49-50.
[107] *Graham v. Connor*, 490 U.S. 386 (1989); Police Exec. Research Forum, Guiding Principles on Use of Force (Mar. 2016); Int'l Ass'n of Chiefs of Police, Model Policy: Use of Force (2017).
[108] *Graham v. Connor*, 490 U.S. 386 (1989); Police Exec. Research Forum, Guiding Principles on Use of Force (2016); Int'l Ass'n of Chiefs of Police, Model Policy: Use of Force (2017).

In this case, more likely than not, SME review would have reduced the risk that early, emotionally charged reactions unduly shaped the Department's conclusions, would have forced consideration of the *totality of the circumstances* (including the Juvenile's assaultive conduct and the third-party neutral prosecutorial input), and would have insulated the City's final determinations from the appearance that it reached its conclusions prematurely or without adequate technical scrutiny.[109]

Accordingly, the City's failure to obtain an independent SME review—despite its recognized value in ensuring objective, technically grounded assessments—renders its conclusions susceptible to premature, emotionally driven bias and substantially undermines the Department's decision-making credibility.

The City's decision not to consult a SME is particularly consequential here because, as discussed below, Oregon and federal authorities treat spitting as offensive physical contact and an assaultive act, and the Ninth Circuit makes clear that the nature of the contact—*not the suspect's age or size*—controls the analysis.

3. The Department Failed to *Acknowledge* That, By *Law*, the Juvenile's Spit Constitutes a Class C Felony Assault

As fully discussed above, Oregon appellate and federal case law treats spitting on an officer as o*ffensive* physical contact and *an assaultive act.* Further, the Ninth Circuit Court of Appeals

[109] *Graham v. Connor*, 490 U.S. 386 (1989) (establishing the Fourth Amendment's objective-reasonableness standard for evaluating claims of excessive force); *Scott v. Harris*, 550 U.S. 372 (2007) (holding that objective video evidence may resolve competing factual narratives and can be dispositive where the recording contradicts the plaintiff's version); *Staub v. Proctor Hosp*., 562 U.S. 411 (2011) (holding that an employer's independent, unbiased investigation and decision making can sever the causal link between a biased subordinate's recommendation and an adverse employment action).

has repeatedly held that the nature of the contact, and *not the suspect's age or size*, controls an assault analysis.

However, at the Hearing, while the Employer's witnesses uniformly *acknowledged* under oath that spitting on an officer is a Class C felony, they repeatedly *downplayed* the Juvenile's deliberate "loogie" as "*de minimis*," as "not an "*attack*," as of *"low severity*" in part because the assailant was a *child*—and again, expressed concern mainly about the *appearance* of the use of force Officer [redacted] use to prevent a further attack. Lieutenant Moore's testimony was notable: despite his paramedic background and agreement that a person spat upon is a victim, he nonetheless described spitting as "inappropriate" but not an "attack."

The testimony offered by these witnesses does not comport with the legal standards; a result the undersigned did not anticipate from those sworn to enforce the law. For these reasons, while I find the witnesses' testimony credible concerning their *personal opinions*, I give their minimizing characterizations *limited weight* because they simply do not align with the law that establishes that the Juvenile's "loogie" was, in fact, a knowing, intentional *assault* on Officer [redacted]

In contrast, Officer Craven, who had recently been spat on by a juvenile, credibly testified that he "absolutely" considered being spat on an attack; he also explained that saliva can transmit communicable diseases *regardless of the spitter's age*. Notwithstanding, the juvenile in the Craven Incident was must bigger than the Juvenile in the Second Spitting Incident, inferring that the main reason the Employer did not find Officer Craven's use of force to be excessive is because she was not "tiny," as the Chief described the Juvenile in the Spitting Incidents.

Lastly, the undersigned gives full weight to use-of-force expert Mr. Allen's testimony that it is legally *incorrect* to characterize spitting as not an attack. Mr. Allen also testified that characterizing a spit from a 12-year-old as *de minimis* is incorrect; as "de minimis" in use-of-force terms "denotes essentially zero force," which spitting is not. He explained that most people find being spat upon as offensive, and that there is *no* meaningful difference between spit from a child and spit from an adult, because saliva carries the same biohazard risk. Specifically, he testified: "I mean spit's spit, right? And, taking in the totality of the circumstances, the Juvenile's spit during the Second Spitting Incident certainly wasn't the first time the Juvenile intentionally *attacked* Officer [redacted] in that manner.

Given Mr. Allen's credible, expert testimony, grounded in *law* (and not on *opinion* or as a *reaction* to the optics of the situation) I give Mr. Allen's testimony *full weight* as dispositive on the issue of the *seriousness* of spitting as an assaultive attack and its relevance to the *Graham* severity analysis.

4. The Department Disregarded the Legal Opinion of a Neutral Third Party and a Trained "Reasonable Officer" On the Scene

Not only did the Department fail to consider the legal significance of the law—that is, that spitting on a law enforcement officer is a Class C felony and an "attack"—*regardless* of the suspect's size or age—the Department also disregarded the third-party neutral, legal opinion of DA Eastman, who found that Officer [redacted] acted in *self-defense* and that his use of force was *not excessive.*

In addition, as already addressed above, the Department applied the perspective of a hospital bystander rather than the proper standard of a reasonable officer at the scene, when it

concluded that Officer [redacted] use of force was excessive. That error is especially troubling because Officer Quintero—an on-scene, trained officer—concluded that Officer [redacted] force during the Second Spitting Incident was *not excessive*. Based on this record, the reasonable inference is that the Department prioritized evidence that fits an optics-based narrative focused on the Juvenile's youth and size, rather than the totality of the circumstances.

Given the Department's failure to consider the totality of circumstances—including the DA's neutral finding of self-defense and Officer Quintero's on-scene assessment that Officer [redacted] use of force was not excessive—more likely than not, the Department's disciplinary decision was borne out of its reaction to the "optics" of the Second Spitting Incident rather than the totality of the circumstances required by *Graham v. Conner*.

5. The Totality of the Circumstances Supports the Conclusion that Officer [redacted] Use of Force was Within Policy

Under the Department's Use of Force Policy, force is justified when an officer reasonably believes it is necessary for self-defense or to prevent an imminent threat.

At the Hearing, Officer [redacted] credibly testified that he held the Juvenile's head to the side during the Second Spitting Incident "to prevent him from spitting on myself or Officer Quintero." Mr. Allen—an experienced use-of-force expert—confirmed the action was intended to redirect the Juvenile's head and prevent continued attack, involved a single strike, and resulted in no injury.

Applying the *Graham v. Conner* factors, the Juvenile's repeated spitting constituted immediate offensive physical contact and a biohazard risk that a reasonable officer could view as

an imminent threat. According to the undersigned's percipient observation, Officer [redacted] response to the Juvenile's spit was limited, targeted, and aimed at stopping the attack.

Further, Officer Quintero, the on-scene reasonable officer in this instance, opined that Officer [redacted] use of the force was not excessive. Both the expert and on-scene testimony, the absence of injury, and the Department's own policy treating bodily fluids as potentially infectious demonstrate that the Department's emphasis on the "optics" of the BWC footage, rather than the totality of circumstances required by *Graham*, was misplaced. In sum, based on the totality of the circumstances, more likely than not, Officer [redacted] use of force was necessary, proportionate, and within policy.

Did the Department Establish Just Cause to Demote Officer [redacted]

No. In *Marion County Law Enforcement Association and Marion County Sheriff's Office*, Arbitrator Michael Marr opined:

> The Arbitrator notes that ORS 243.808 makes it clear that law enforcement officers accused of misconduct must be ensured "an accountable, fair and just disciplinary process."[110]

Here, the Employer failed to ensure "an accountable fair and just disciplinary process" for multiple, independent reasons, outlined in detail above. For all of the foregoing reasons, the Employer has not proven, by the preponderance of the evidence, *any* of the allegations against Officer [redacted] For this reason, the Employer did not have just cause as defined in ORS 236.350, and acted arbitrarily and capriciously when it demoted Officer [redacted]

[110] *See Marion County Law Enforcement Association and Marion County Sheriff's Office,* p. 46 (Marr, 2024), *available at:* https://www.oregon.gov/erb/Documents/Grv-MCLEA-MarionCo(SheriffJustCause7.28.24)Marr_Redacted-LO.pdf

CONCLUSION

At the Hearing, the Chief was sincere and I truly understood the reasons why he made the decision he made. Though I fully appreciated the Chief's perspective, my conclusions rest on the totality of the *facts* and the *evidence* presented at the Hearing. For this reason, the Arbitrator makes it clear that this is not a case where the Arbitrator seeks to substitute her judgment for that of the Employer; rather, it is a case where the *facts* and the *evidence* simply do not support just cause for the Demotion. Both Parties' counsel conducted themselves with the utmost professionalism, and I deeply appreciate the trust both Parties placed in me to render a fair and reasoned decision.

THE AWARD

The Grievance is sustained, and the Demotion is rescinded in full. Because the Demotion is rescinded in full, the undersigned retains full remedial authority to make the grievant whole. Consistent with long-standing labor-arbitration principles, and absent any contractual limitation on arbitral remedies, the appropriate remedy is to restore Officer [redacted] to the position he would have occupied but for the improper discipline. Accordingly, the City shall:

1. Rescind the Demotion in its entirety and remove all references to the Demotion and the underlying allegations from Officer [redacted] personnel file and all related databases or internal systems.

2. Restore Officer [redacted] to his prior rank, including his prior pay grade, step placement, and all associated rights, privileges, and responsibilities.

3. Make Officer [redacted] whole for all lost wages, including:

- Base wages
- Premium pay
- Overtime opportunities he would have r received but for the demotion

- Any specialty, assignment, or certification pay lost as a result of the demotion
- Restore all lost benefits,
- Restore all seniority rights, including rank seniority, bidding rights, and any other seniority-based entitlements affected by the demotion.

4. Expunge all investigative materials related to the rescinded discipline from any file used for promotional, assignment, or disciplinary purposes, consistent with the CBA.

This make-whole remedy is necessary to return Officer [redacted] to the position he would have occupied absent the improper Demotion and to fully effectuate the rescission ordered under OAR 259-000-0020(1)(b).

The undersigned shall retain jurisdiction over this matter for up to 45 days, to allow the Parties an opportunity to address any issues associated with the remedy.

All fees and expenses charged by the Arbitrator shall be borne by the City, the losing Party, as provided for in Article 16, Section 16.1. The Arbitrator's fees and expenses *shall* be paid within thirty (30) days of today's date.

DATED this 24th day of February, 2026.

/s/ Shianne Scott
Shianne Scott, Arbitrator
Portland, Oregon