

POLICE OFFICER PAUL STEPHENS,
Appellant

BEFORE

v.

RICHARD R. BRANN

CITY OF SAN MARCOS POLICE
DEPARTMENT

HEARING EXAMINER

APPEARANCES:

For Officer Paul Stephens:

Tom A. Stribling
Staff Attorney
CLEAT
400 W. 14th Street, Suite 200
Austin, TX 78701

**For the City of San Marcos Police
Department**

Michael J. Cosentino
City Attorney
City of San Marcos
San Marcos, TX 78666

OPINION AND AWARD OF THE HEARING EXAMINER

I. BACKGROUND

Howard Williams ("Williams"), Chief of Police for the San Marcos Police Department ("SMPD") handed Police Officer Paul Stephens ("Stephens") on October 2, 2009, a Letter of Indefinite Suspension dated September 29, 2009.¹ That letter states "Effective October 2, 2008, you are hereby indefinitely suspended without pay from your duties with the City of Sam

¹ Ex. 1.

Marcos Police Department.”² The indefinite suspension³ is based on the “grounds, charges and specifications” set out in the seven-page letter.⁴

Williams charges Stephens with (1) using unnecessary force on an unidentified female subject at approximately 2:10 a.m. on August 18, 2009, (2) being untruthful (a) in his written documentation on the SMPD Use of Force Form and (b) in certain responses to questions during an investigation of the August 18 incident and (3) violating a written order “not to discuss” “this IA, the details of the call for service . . . , or any other information related to this incident with anyone” except Commander Terry Nichols (“Nichols”) or a legal representative and later being dishonest when asked whether he “had talked to or discussed this incident with anyone.”

Stephens timely appealed his discharge to an independent, Neutral Hearing Examiner. A two-day hearing was held in San Marcos, Texas on March 3-4, 2010. Thirteen witnesses testified. The parties, by agreement, also introduced 19 exhibits (some with several subparts). Exhibit 14 (A-E) consists of a computer flash drive which contains the following:

1. Digital recording of radio traffic SMPD Channel 1 incident on 08-18-09;
2. Thirteen still photographs taken from the COBAN MVR 8-18-09 recording;
3. Digital audio recording of an interview by Nichols of Stephens at 9:30 p.m. on August 23, 2009;
4. Photos of Sidewalk, Alley and Planter Box at location where use of force occurred;

² The reference to “Effective October 2, 2008” is a mistake; it should be “Effective October 2, 2009.”

³ Indefinite Suspension is the equivalent of termination of employment.

⁴ Williams candidly explained at the hearing that in deciding to indefinitely suspend Stephens, “all of this is taken together”. Williams explained that “it’s got to be the entire picture”, i.e. it was the cumulative effect of everything Stephens was charged with—not just one—that caused Williams to impose the most severe penalty available, discharge.

5. COBAN MVR video taken from patrol car operated by Stephens for a period of approximately 2:10 a.m. until 2:22 a.m. on 08/18/10.⁵

The Hearing Examiner has carefully read all 629 pages of the Two-Volume Transcript of testimony and has read (and re-read) every Exhibit and watched the COBAN MVR video numerous times (in real time, in slow motion, and frame-by-frame) and has listened many times to the digital recording of Nichols August 23 interview of Stephens. Finally, the Hearing Examiner has carefully considered the arguments in the City of San Marcos' Post-Hearing Brief, Officer Paul Stephens' Post-Hearing Brief, and the City of San Marcos' Reply Brief.⁶

While the force used by Stephens which led to the investigation of his conduct on August 18, occurred in a matter of seconds, the parties' competing interpretations of the facts are hotly debated. The record is replete with great detail regarding both the chaotic disturbance which surrounded the use of force and the resulting investigation of the force used. The record includes the testimony of witnesses as well as several memoranda written near the time of the incident by several witnesses reporting what they saw, heard, and said at times relevant to the matter in dispute.

II. EVENTS OF AUGUST 18, 2009

The events surrounding the use of force by Stephens have been described in both the memoranda and live testimony by five SMPD officers who were either at or near the scene on August 18. Their descriptions and perceptions are insightful:

OFFICER STEPHENS

Soon after the use of force on August 18, Stephens completed a Use of Force Form⁷ summarizing his perception of the events in his own handwriting as follows:

⁵ The Hearing Examiner placed this video recording on a disk, so it could be played, as it was at the March hearing, on software allowing the video to be viewed frame-by-frame.

⁶ Stephens filed no Reply Brief.

⁷ Ex. 4.

On 8/18/09, at approx 0210 hours, I responded to 127 E Hopkins (Dillingers) in reference to a fight in progress. Two officers were already on the scene. Had multiple subjects at Taser-point but subjects were still fighting. I observed approx 10 subjects fighting and attempted to disperse [sic] the group. Due to the # of subjects I immediately chose to use my ASP Baton. I opened the Baton towards the ground in a show of force and made repeated commands to stop and get back. Female subject moved towards me attempting to get to other female. The female was approx one foot away from me leaving me little time to react. I moved my Baton to a horizontal overhand grip and pushed the female back both to give myself more of a reactionary gap and to disperse [sic] the crowd. The female stumbled backward and fell when she tripped over the curb, not from the impact of me using my baton to push her back. The female continued to fight others and was taken away by other friends before she could be identified.

On the front of this Form, Stephens identified the "Level of Resistance by Subject" as "Psychological Intimidation (Non-Verbal cues indicating the potential for physical resistance)" and "Active Aggression (Physical Actions/Assaults Against the Officer or another person with less than deadly force. Ex: Advancing, challenging, punching, kicking, or wrestling)."

Five days later, on August 23, Stephens described the entire incident as follows during an interview and questioning by Nichols⁸

Nichols: Okay. And they put out a call "large disturbance?"

Officer: Yes sir.

Nichols: And you responded?

Officer: Yes sir.

Nichols: Walk me through responding, what you saw and what you observed.

⁸ This interview and related interrogation by Nichols is the most spontaneous, comprehensive description of the events by Stephens. Exs. 5 & 14(c). Nichols describes Stephens' oral interview as "a running dialogue" during which Stephens was "very forthcoming" and "so open and forthcoming." Tr. Vol. II, 111 & 98. The Hearing Examiner agrees with Nichols' description of the interview.

Officer: Okay. I was in the parking lot across from Nephews blacked out, you know usually sit there, bar closing . . . just . . . so I'm there if anything happens. And so I was watching Officer Guerra and Sgt. Winkenwerder were on a traffic stop just up the road . . . umm . . . I hear I believe it was Officer Kennedy Cpl. Kennedy on the radio call out with a large disturbance and then dispatch asked well is it verbal or physical and he said physical and then . . . umm . . . (clears throat) You know I could tell by the tone of his [Kennedy's] voice that it was pretty urgent and then he said multiple subjects at Taser point at which point uh you know I turn on my sirens uh respond to the area and as I'm on LBJ (clears throat) preparing to turn left and I was Looking up at Dillingers and I can't really see much of what's going on but I can see . . . uh . . . fists flying I see people actively fighting each other. I come around the corner and best I can tell probably because of the lights and sirens they separate for the most part and they start to walk away . . . uh . . . well as I'm pulling into the driveway there's this one female I think it's on my video . . . uh . . . she refuses to move even though I have my lights and sirens on.

So I get out of the car and as I'm getting out of the car, she walks back up to the group that was fighting and all of the sudden the group comes back together. So I get out of the car and you know in my mind I'm like . . . uh uh . . . you know the only reason I'm there is to protect Officer Kennedy and Officer . . . uh . . . Saavedra who were . . . uh . . . detaining somebody at that point I was trying to keep everybody off their back and I was the only officer there. So . . . you know my OODA⁹ loop is going on like I'm okay well I can't use the Taser cause there's just too many people so I decided I pulled out the baton . . . uh . . . approached the crowd and as I'm walking up I'm . . . I can't recall specifically what I said but I'm giving everybody needs to start moving, you know fights over, everybody start walking, move, move, move. Uh . . . then everybody pretty much separates for the most part, but . . . uh . . . the one female, I could tell that she's the main aggressor in the group so I just looks like she's the one . . . uh . . . causing all the problems and she's still running her mouth she won't move. Uh . . . at which point . . . uh . . . I stepped in front of her, I grabbed my baton in a baton retention hold . . . uh . . . my hands down, I stepped in front of her and I gave her another verbal order to move at which point I pushed her back . . . uh . . . my intent was not to knock her down or anything like that . . . just to physically push her back to gain

⁹ "OODA" is an acronym for "Observe, Orient, Decide & Act." Tr. Vol. 2 at 276.

ground for me to operate so she wasn't so close to me and to gain her attention because she also wasn't listening to my words at which point she stumpled backwards and fell down. Uh . . . I then moved . . . (sigh) into the corner up against the wall so I could see everything that was going on so I knew nobody was behind me . . . and then uh . . . as she's over here . . . (clears throat) . . . yet another fight breaks out on the other side of my patrol car which you can't see. So I go to that side to take care of that . . . (clears throat) and uh as I'm dealing with that, she's still over here still running her mouth still trying to start the fight. I think her friend drags her away or back from the patrol car I think at that point you know how (inaudible) needs some more units cause they want to cross the street and start to fight again at which point I went across the street at that point I you know holstered the baton. Went across the street chased 'em there and then they ended up down in front of Nephew's like it was just a long drawn out fight . . . uhm . . . In my mind (sign) . . . officer presence I had my lights and sirens on, there was no doubt who I was . . . uh . . . I was giving several verbal orders everybody move which everybody for the most part seemed to get the idea . . . um . . . I pulled out the baton . . . uh . . . as a . . . uh . . . you know . . . uh . . . displayed the weapon . . . uh . . . which wasn't effective and either because she was just focused on fighting or if she was intoxicated or whatever the case was she just wasn't complying . . . um . . . and I knew I wasn't justified in hitting her with the baton so at which point . . . uh . . . I was kinda of in limbo, I was like well I can't really holster my baton at this point 'cause I still need it out so . . . I did what I thought was appropriate and stepped in front of her and . . . and . . . uh . . . used . . . um . . . you know . . . used . . . uh . . . soft empty hand controls as far as pushing her back to gain her attention.

Nichols: You think you struck her with your hands or was it with that baton?

Officer: (Talking over Nichols . . . inaudible) hands were pretty close together and then when I hit her . . . well I didn't hit her . . . but when I pushed her it was right there in front of me . . . and it . . . I didn't strike her with the baton.

Nichols: From the time you got out of the car to the time you pushed her. How long do you think it was?

Officer: No more than 10 seconds.

Nichols: It happened pretty quick.

Officer: Yes sir. (Pause) In my mind I was the only officer there and I ju . . . I knew I had to gain control of the situation. Uh . . . both for my sake and for the officers safety who calling for assistance.

* * * *

Officer: Uhh . . . I'd like to say when I was pulling up or while I was taking that left I . . . I saw a lot of people fighting I didn't see who was fighting (inaudible) though.

* * * *

* * * *

Nichols: . . . So this female subject moved toward you attempting to get at another female? Was she going to assault somebody?

Officer: That was my belief . . . 'cause . . . she was yelling at the other female and you can see on the video the other female comes back up and they start arguing and then she starts to leave and she's still arguing with her as I'm approaching so that's why I stepped in front of her and uh . . . my belief was is that uh . . . she was gonna . . . she was trying to get to the other female. Well that was what this whole fight was about was between the two of them.

Nichols: So she tripped over the curb not from the impact of the baton?

Officer: Yes sir.

Nichols: You sure about that?

Officer: Yes sir.

Nichols: Okay.

Officer: I didn't . . . I mean . . . both . . . uhh . . . I haven't watched the video detail but from my recollection. I . . . I . . . know for a fact I didn't push her that hard and I didn't strike her with the baton, it was more of a Uhhh pushing it up and extending my arms mor . . . instead of stepping towards her and hitting her with it . . . uhmm . . . 'cause like I said I wasn't justified in hitting her with the baton and that wasn't what I was trying to do my . . . uh . . . you know I was trying to push her back. To

get her away from me to gain my ground you know to establish my area and to ge . . . gain her attention . . . hey I said move.

Nichols: You gained your ground, but you walked right in the middle of them.

Officer: But I was trying to get to the other officers who were on the other side.

* * * *

Officer: (Interrupted Nichols . . . inaudible) Where they're arguing at is in the middle of the sidewalk which is where I have to go to get to the other officers, [Kennedy & Saavedra] but my intent was to . . . to . . . break this crowd up for their safety, for their safety.

Nichols: Makes sense.

* * * *

Nichols: Okay, Questions for me? Like I said, I'm gonna knock this thing out quick I mean . . . *inaudible) Not much to it.

Officer: I understand these things are a formality and they have to happen anytime something like that happens and what it looks like is not always what it is . . . uh . . . and you know I don't have the luxury of looking back on it and saying well this is what should have happened and this is what I could have done . . . I'm there to assist another officer who's involved in a large altercation, I have to make a decision, I have to make it fast, I have to do something 'cause doing something is better than doing nothing . . . and . . . I gave verbal commands which were not effective . . . which point. I used . . . I pushed her which would fall under empty hand control to gain her compliance it seemed to work, she left, the officers didn't get hurt, we all got to go home at the end of the night.

* * * *

Officer: She was just the one when I got out of the car. . that she stuck out in my mind . . . as she looked like . . you know . . . just like uh . . . when you go to crowd control and they say take out . . . you can't take out everybody so take out the people who look like they are instigating everybody else . . . or something similar and she looked like the one that was

running her mouth the most and fighting or uh . . . trying to fight the most and so . . . uh . . . that's why I focused on her . . . that's . . . for whatever reason when I got out of the patrol car she was the one that stuck out in my mind . . . uhh . . . like I said I don't you know I've watched the video not umm . . . I stand by my decision I think I made a choice . . . uhh . . . she didn't get hurt . . . her compliance was gained and the officers didn't get hurt and umm . . .

Nichols: You think it was reasonable?

Officer: Yes sir I do . . . Ummm I didn't tase her, I didn't strike her with the baton I simply pushed her, which it looks like I hit her with the baton, which I didn't . . . uhhh . . . you know holding the baton in my hand I have do something . . . uhhh . . . so I just raised it just like in . . . uhh . . . you know PPCT Baton Retention Crowd Control and effectively pushed her back away from me to gain her attention which it seems to be effective. Like I said I don't think she fell because I pushed her. . . 'cause . . . I didn't push her that hard, I think she fell because she was intoxicated: . . .

After his August 23 oral interview, Stephens responded in writing to 15 questions written questions later posed by Nichols. In his written responses,¹⁰ he describes the scene and events of August 18 as follows:

My observations as I was arriving on scene were as such. I was situated at the corner of S Guadalupe St. and W San Antonio facing north. I heard via police radio Cpl. Kennedy call out with a disturbance in front of Dillinger's (127 E Hopkins). I then heard him advise dispatch that it was a physical disturbance, and that he had multiple subjects at Taser point. This was a clear communication that an officer needed assistance, As I came to the intersection of S LBJ and E Hopkins preparing to turn left, I observed a very large crowd of subjects in the alleyway next to Dillingers. From this vantage point I saw several people throwing punches at each other, and could tell that they were actively fighting. I cannot recall specifics as far as who was assaulting who, because I was trying to see where Cpl. Kennedy was located to assist him. However, it was very obvious that there was a physical altercation taking place.

* * * *

¹⁰ Ex. 6. These written responses appear to have been prepared with the help of legal counsel because they refer to the U.S. Constitution and other statutory and case law. Stephens is not a lawyer.

I chose to deploy my ASP baton for what I believed to not only be a physical altercation but could easily be defined as a riot according to the Texas Penal Code 42.02:

* * * *

The large number of persons involved posed an immediate danger to myself, and though they were not actively fighting on my in car video, if this same group had been physically assaulting each other, dispersed, and even in the midst of police presence gathered again and started to threaten harm to each other; this would lead almost any reasonable and prudent person to believe that they would start to physically assault each other again at any moment. This posed an immediate danger to me because I was the only officer on scene. However, I felt not only a professional but a moral obligation to act instead of react, and to disperse this group before it got out of control.

* * * *

Yes, I exited my patrol car, extended my baton, and began to give verbal commands as taught in PPCT. I cannot recall exactly what I said, but to the best of my recollection I recall that I gave order similar to "start moving," and everybody needs to "move back", "move away", and "go home."

* * * *

I cannot recall with certainty, but to the best of my recollection, and because I am not being allowed to review my in car video, I identified the female in question as one of the main aggressors. She was actively yelling and cursing, making comments that led me to believe she was trying to entice an altercation. Again because I recall that everyone else started to move away and responded to my presence and verbal orders. I approached toward her, still giving commands, and recall that she did not move back and continued to yell at what I believed was another female involved. I then stepped in front of this female, and because she was verbally non compliant I escalated my use of force against her by pushing her back which would fall under an empty hand control technique.

I did not strike this female with my baton, and in no way did I utilize my baton in any striking technique on her. Because I was already holding my baton, I could not re-holster it because I was now in the middle of the crowd, so I grabbed my baton in a baton retention hold technique with an overhand grip, and raised it to my chest level. This grip allowed me to both defend myself, and operate in the close quarter proximity. I then PUSHED the female back with my

baton, and clearly did NOT STRIKE her. This level of empty hand control was utilized to accomplish two objectives, one to move the female away from me so that I could gain a reactionary gap, and two to gain her attention and stop her from enticing an altercation.

I believe I identified a main actor involved in a large altercation, escalated my force as necessary, preventing a volatile situation from escalating any further.

* * * *

On my use of force form I cannot recall what I wrote on the report, but to the best of my recollection and because I am not being allowed to view my report, I recall indicating active aggression because the female was involved in a physical altercation. I recall the female making threats towards other, and she indicated by her body language that she was advancing/challenging another. I also recall the female make some sort of movement towards me which would have been an attempt to assault the other female. I cannot see how a subject involved in a physical altercation, wouldn't be a level of active aggression.

* * * *

I cannot recall her exact behavior because I am not being allowed o watch my in car video. However I do recall specific actions by the female after she had been pushed which clearly indicated that she was trying to "fight" someone and that she had to be held back by another female. See video for further.

Stephens' testimony on March 4, 2010, was consistent with the information he provided on the Use of Force Form, and his more detailed explanation during his August 23 oral interrogation and his August 24 written responses. Much of Stephens' testimony at the hearing involved debating with counsel for SMPD over the meaning of the word "fight" and whether a "fight" must include physical contact or whether a "fight" might describe a heated confrontation or quarrel and exactly, who he saw "fighting" as he drove to the scene and after he arrived at the scene.¹¹

¹¹ No one disputes that Stephens, and other officers near the scene, personally saw more than was actually captured by the limited view of the video camera.

JESSE SAAVEDRA

Officers Kye Kennedy ("Kennedy") and Jesse Saavedra ("Saavedra") had been trying to detain a male subject who had been seen throwing a beer bottle into the crowd. While Kennedy was detaining the male and handcuffing him, Saavedra was protecting Kennedy from the encroaching, unruly crowd. Both Kennedy and Saavedra had their tasers displayed in an effort to control the detainee and keep the encroaching crowd at bay.¹²

On Monday, August 24, six days after the event, Saavedra described what he saw and did as follows.¹³

Cpl Kennedy and I were in front of Jimmy John's where we chased down the male subject who threw a beer bottle at the subject he was arguing with in front of Dillinger's. As we ordered the subject down to the ground at tazer point I observed the crowd of approximately 40 people, who were all involved in the disturbance, approach our location, now highly agitated that we had a subject at tazer point. I turned to face the crowd and I ordered them to stay back. I was confronted by a large, heavy Hispanic male subject who refused to step back. As the situation intensified I heard and saw as Officer Stephens approached in his patrol car on East Hopkins (I'm not sure what direction he came from). I observed Officer Stephens attempt to place his vehicle in the alley next to Dillingers to assist in dispersing the crowd. I heard as Officer Stephens used the PA horn to get people to make room for his vehicle. The crowd would not disperse and remained highly agitated. My attention was focused on the male subject in front of me but I could see to the right of him as I kept scanning the crowd for anyone else who might attempt to stop the apprehension of the subject who threw the beer bottle. I could clearly see two female subjects arguing and pushing each other in front of Officer Stephens' patrol car.

* * * *

Once the scene was declared secure over the radio, I remained on scene with Cpl Kennedy while we arranged to release the detainee to a sober, responsible person who could get him home safely. Officer Stephens and Cpl Lee left the area. Soon after their departure I heard Officer Stephens advise communications he had struck someone with his baton.

¹² Saavedra testified that he had his taser "in [a large gentleman's] chest. I "had . . . my taser in his chest and I was pushing him back." He was pushing—they were pushing against me." Tr. Vol. 1, at 300-01, 305.

¹³ Ex. 10-F.

Saavedra testified that to this day he has never watched the video of Stephens' use of force against the unidentified female.¹⁴

KYE KENNEDY

In his written response¹⁵ to questions during the investigation, Kennedy described the August 18 events as follows:

Officer Stephens arrived with lights and siren activated and stopped in the alleyway entrance next to 127 E. Hopkins. His vehicle was stopped just short of the sidewalk. There was a large crowd of people that were still engaged in verbal disturbances with each other. Initially approximately 30 people were involved. I first noticed his position when the subject fell to the ground and at that time Officer Stephens had the baton deployed and extended. At the time it was at waist level.

* * * *

There were multiple people between me and Officer Stephens. Officer Saavedra was with me and was giving verbal commands with his to people as they were coming at us. At that time Officer Saavedra had his Taser deployed to prevent the subjects from interfering or assaulting us.

* * * *

I don't recall Officer Stephens say anything to me about it on scene. He only came to me and asked if I was all right and then continued to disperse the crowd while I interviewed the subject I handcuffed. Once the scene was secure Officer Stephens left.

In his testimony at the March 4, 2010 hearing, Kennedy described the scene as follows:

A. It was late in the evening. Approximately 2:00 a.m., somewhere around there. Officer Saavedra and I were on foot patrol downtown. It's our district. We work the downtown area. And we were coming from the area of LBJ and Hopkins, walking west towards Dillinger's, which is in the middle of the block -- the 100 block of East Hopkins, and we saw a large group of people -- 30, maybe -- 30, 40 people arguing.

¹⁴ Tr. Vol. I, 304. Therefore, Saavedra's report of what he saw and did is based entirely on his personal observations from his unique perspective.

¹⁵ Ex. 10-1.

It was apparent there were two separate groups of people yelling and screaming at each other. And as we approached I noticed a Hispanic male in a white shirt. Out of the entire group, he was the only one that had anything in his hand and he had a beer bottle in his hand.

And he was facing east -- he was facing towards us, so I was face to face with him when we were coming up to him. And I thought, "He's going to throw that beer bottle and start this fight." And sure enough, he throws the beer bottle into the group, which basically set off a tinder box, if you will. And this group of people started getting into it.

Well, we were right there and we started, you know, yelling that we were the police. Most people stopped and he turned and ran. I don't know if he heard us say that we were the police or if he even knew we were the police at that time.

He ran away towards the area of Jimmy John's, which would have been west, and we gave chase after him.

Q. You caught up with him?

A. We caught up with him. I pulled my Taser out and I yelled that I had a Taser. He turned around and he looked at me and he saw me with a Taser in my hand.

At that point he gave up. He laid down -- face down. Officer Saavedra and I approached him. I holstered my taser to handcuff him.

At that point a group of people started encroaching upon us. And, of course, I had called out on the radio that there was a large fight. Officer Saavedra used his taser to keep everybody at bay and I called out that we had multiple people at taser point and continued to handcuff that subject.¹⁶

Later that day, Kennedy watched the COBAN MVR video of the use of force. In that regard, he testified as follows:

A. I watched it -- I guess it would have been the same calendar day.

Q. Okay.

A. That night, when Officer Stephens came in, I went to the police department because I wanted to make sure that he was going to do a Use of Force report, as we're required to do, that night. And he already had the video cued up when I went into the report writing room. . . .

¹⁶ Tr. Vol. 1 at 286-87.

Q. So you watched the video, you said, two or three times while you were in the room as Officer Stephens was reviewing it; is that correct?

A. Yes, sir.

Q. Now, what was your position with regard to Officer Stephens at that time when you were watching the video?

A. I believe I was over his shoulder.

Q. So you're standing there right over his shoulder watching the video?

A. Yes, sir.

Q. All right. Any possibility that he wouldn't have know you were there?

A. Yes, sir.¹⁷

CORPORAL LEE LEONARD

In his memo dated August 24, 2009¹⁸ to Nichols, Leonard describes the scene and events of August 18, 2009 as follows:

On August 18th, 2009 at approximately 0200 Hrs. I Cpl. L. Leonard was on foot patrol in the downtown area. I was standing on the sidewalk near Nephews bar observing a large crowd that had just left the bar. While on scene I heard Cpl. K. Kennedy advise via radio that there was a large fight starting in front of Dillinger's. As I began to walk toward the area I could hear numerous subjects yelling and screaming from the area of Dillinger's which was at least 150 yards from my location. Cpl. Kennedy then excitedly advised that he was out with the fight and had multiple subjects at taser point. At this time I began to run toward the area arriving a few seconds later on the sidewalk directly to the left of the front door of Jimmy Johns Sandwich shop. Upon my arrival I observed Cpl. Kennedy attempting to handcuff a very large Hispanic male who was struggling on the ground. I assisted Cpl. Kennedy with handcuffing the male then held on to the male while Kennedy resumed attempting to control the large crowd. . . . There were approximately 45 to 60 people gathered around the immediate area with numerous additional subjects standing in or near the roadway. As I stood by with the male I observed an additional fight starting in the roadway directly in front of the courthouse. Cpl. Kennedy had returned to my location at this

¹⁷ Tr. Vol. I at 291-92.

¹⁸ Ex. 10-C.

time and I advised him to stay with the detained male while I dealt with the additional disturbance. At this time I walked out into the roadway giving verbal commands to persons who were now only yelling at each other that they needed to leave. The group was belligerent and very unwilling to cooperate.

* * * *

I did watch the COBAN video recording at approximately 0630 Hrs. in the report writing room. Officer J. Guerra was present as well as Officer B. Ellingson. Officer Stephens was reviewing the video while he completed his use of force form. I watched the video as I was interested in what his in car had captured of the melee downtown.

At the March 4 hearing, Leonard testified at length about the events of that evening, including his viewing the COBAN video of Stephens' use of force against the unidentified female.

In part, he describes the scene and events as follows:

Q. So you heard – did you hearing something over the radio traffic that made you go?

A. Yes, sir. There was large fight.¹⁹

* * *

Q. Okay. Now, once – after he arrived, though, did you lose sight of him as some point?

A. Yes, sir, I saw him drive up and then the crowd pretty well enveloped his car around him and then I couldn't see him anymore.²⁰

* * *

Q. But did you watch the video with Officer Stephens?

A. Yes, sir.

Q. In the presence of officers Guerra and Ellingson?

A. Yes, sir.

Q. And he showed it to you?

¹⁹ Tr. Vol. I at 183.

²⁰ Tr. Vol. I at 184.

A. Well, it was more just he was watching the video and we're all standing around, working on paperwork and whatnot. So we stopped what we were doing and watched it.²¹

* * *

Q. Why were you giving those kind of verbal commands?

A. Because the people were starting to kind of come in on the scene where we were. It was still a very hostile, volatile crowd and, you know, it was far from being under control.²²

* * *

Q. You also describe the group as being belligerent and very unwilling to cooperate. Can you describe for me a little bit how they were uncooperative?

A. Screaming and yelling. Every time we told them that they needed to back away and move on, they refused. They kept coming back into our space that we had tried to kind of clear out.

Q. How do you know that they heard your orders?

A. Well. I mean, we were screaming at the top of our lungs. And we had a whole group of officers out there telling them the same thing.²³

* * *

Q. After watching the video did you go to anyone to report that Officer Stephens had used excessive force?

A. No, sir.

Q. Do you realize it is a policy of your Department that you are to report another officer if you feel that they have used excessive force?

A. Yes, sir.

Q. So why didn't you report him for using excessive force when you viewed the video?

²¹ Tr. Vol. 1 at 185-86.

²² Tr. Vol. 1 at 188.

²³ Tr. Vol. 1 at 190.

A. The portion of the video that I watched I think was taken out of context. And from what I saw and after being involved in the scene, I didn't feel it was excessive.²⁴

* * *

Q. Have you ever – in 14 years of experience, have you ever shoved someone to the ground for – to get their attention? Just to get their attention?

A. Many times, if I've been in a situation where someone is about to fight someone else and they raise their hands or they begin approaching the second person, yes, I've taken people to the ground for that.²⁵

* * *

Q. Officer, I was interested in your response to one of the questions about having taken people to the ground. If a person – thinking back to that night and you're in that kind of situation where there's been fights all around you, would you consider it reasonable to take someone to the ground if they began to advance upon another party that they had been in an argument with previously?

A. Yes, sir.²⁶

SGT. BRANDON WINKENWERDER

Sgt. Winkenwerder is a twelve-year veteran of SMPD, having been promoted to Sergeant in 2008, about a year and nine months before he testified at the March 4 hearing. Winkenwerder was not in the immediate vicinity of the spot where Stephens used force on the unidentified female. He was nearby and could hear the radio traffic and commotion at the scene. As a supervisor over Stephens, Winkenwerder listened to Stephens' personal account of events, watched the video and read Stephens' Use of Force Form. Winkenwerder testified that he "initially watched the video to see what was going on and then [he] got the report a couple of days later."²⁷

²⁴ Tr. Vol. 1 at 193. Another officer, Jesse Guerra, also watched the video and opined that the use of force "didn't look like a big deal" to him. Tr. Vol. 2, at 46. Guerra is admittedly a good friend of Stephens.

²⁵ Tr. Vol. 1 at 197-98.

²⁶ Tr. Vol. 1 at 199-200.

²⁷ Tr. Vol. 1, at 272.

Winkenwerder's memorandum²⁸ describes his role²⁹ in responding to the physical/verbal disturbances reported by Kennedy:

I was working a minor traffic accident at the corner of Guadalupe and San Antonio. I decided to help out and complete the crash report. Officer Guerra was assisting me with the investigation. During this time I heard Corporal Kennedy announce on the radio that there was a disturbance at Dillinger's. After a short time dispatch advised that the disturbance was physical and I heard multiple units call that they were responding. Corporal Kennedy also advised that he had multiple subjects at Taser point. I could hear from the radio background noise that the crowd was a large group and sounded agitated. As other officers proceeded to the scene and as they arrived I could hear the crowd get louder from where I was working the accident at Guadalupe and San Antonio Streets.

4. Did Officer Stephens discuss his use of force against a female subject with you? When and where did this conversation take place? What did he say? Who else was present? Be as specific as possible regarding exactly what he told you regarding the circumstances of his use of force and how he used force.

Yes he did discuss it with me. It occurred later that morning in the hallway near report writing. The conversation was between him and I and I do not know if anyone over heard what was said.

Officer Stephens informed me that the video looked bad but there were subjects fighting to the right and this subject was involved. He further explained that as he was arriving he was delayed by a subject standing in the way and not moving even when he was using the horn. He then got out and gave an order to leave and there was no compliance. The female he stated was a main instigator so he moved her back away from the crowd because of the fight that she was involved in as he was arriving. He did not want to strike her with the baton so he pushed her with both hands across the chest and holding the baton between his hands but not hitting her with it. He advised that she stumbled back and stumbled into a curb and that was what looked bad. He also informed me that the audio was not working on his mic further making it look bad because you do not hear what was going on. I asked what was wrong with it and

²⁸ Ex. 10-H.

²⁹ Winkenwerder was himself the subject of an administrative investigation for not reporting the use of force by Stephens as unnecessary. However, the charge against Winkenwerder was found to be "unsubstantiated," with Williams directing Winkenwerder's chain of command "to discuss with [him] what [Chief Williams] believed to be poor exercise of judgment and discretion in this incident." Ex. 10-H, last page.

he advised that his mic was not lighting up or working and the video did not have audio.

6. Did you watch the COBAN MVR recording of Officer Stephens' actions during this incident? If so, when and where did you watch it? How many times did you watch it? Identify everyone who was present. What was the circumstance for the video to be shown? How many times was the video played in your presence?

I did watch the recording. I do not remember the time but it was after Officer Stephens spoke with me about the incident looking bad. I was in my office and watched it 2 or 3 different times and only watched the first few minutes each time. No one was present but I do not know if someone was looking in on me from the door or hall. I wanted to see what Officer Stephens meant by looking bad. Just 2 or 3 times for myself.

8. Do you believe the force used by Officer Stephens against the female subject was "reasonable and necessary"? Explain your answer in detail.

Yes.

Near the end of [my] completing the accident report Corporal Kennedy and Officer Saavedra came up to me and asked what we had. I told him that it was an accident with a wrong way driver. I completed the accident and spoke with them again. They started to tell me about the incident. I remember telling them that it sounded bad from where I was standing at Guadalupe and San Antonio. They explained to me that they had a group of 30 to 40 subjects involved in a physical disturbance and the group members were displaying gang signs. They had multiple subjects at Taser point. The part that worried me was when he mentioned that a beer bottle was thrown. After hearing this I realized that the situation there was worse than what I initially thought and could have easily been worse.

I took Officer Stephens word that he told the subject to move out and there was a fight occurring as he was driving up. I gave Officer Stephens the benefit of the doubt on this information. I also could not tell if the subject falling down was from the push, her level of intoxication, the unevenness of the ground, the planter, or any combination of these factors.

Based on the all the information that I was provided from Corporal Kennedy, Officer Saavedra, Officer Stephens, how extremely aggressive the crowd was, what I heard coming from the area of the physical disturbance, what I heard on the radio, and the observed behavior of the

subjects I contacted leaving the area of the physical disturbance, I believe that the push was not excessive for the failure to comply with commands, the level of involvement in the physical disturbance, and the totality of the circumstances surrounding the situation.

III. THE INVESTIGATION

Soon after August 21, 2009, Williams directed Nichols to conduct an investigation (an "IA") to determine whether Stephens violated any SMPD rules, including specifically General Order 200 on the Use of Force. In the document notifying Stephens of the charge, Williams says, "In viewing the recording of the incident, it appears that Stephens may have acted without reasonable cause or justification in his use of force".

Nichols promptly commenced an investigation by personally questioning Stephens at 9:30 p.m. on August 23, 2009. That interview was digitally recorded and the recording was transcribed. Both the recording and its transcription³⁰ were introduced into evidence.³¹

After the August 23 oral interview, Nichols asked Stephens to prepare responses to certain written questions regarding the incident. Those questions and answers were introduced into evidence.³² Nichols' written questions include Question 15 which was not part of the August 23 oral interview:

15. Since 2115 hours on Saturday, August 22, 2009 when you were served with written notice of the initiation of an internal investigation, have you talked to or discussed this incident with anyone? If so, who (other than your legal counsel or POA President Danny Arredondo) did you discuss it with, where and why?

No. Other officers saw I had been served with an IA notice and already knew what it was in reference to. Other officers then began to discuss their view point on the incident.

³⁰ Ex. 5 quoted earlier in this Opinion.

³¹ Ex. 14(c) & Ex. 5.

³² Ex. 6 also quoted earlier.

Nichols added this extra question because over the lunch hour on August 24, 2009, he says he overheard a conversation in the gym during which Officer Erik Spriegel was discussing with someone else his views of the incident. When Nichols then called Spriegel aside and asked him how he knew about the incident, Spriegel reported that at about 10:00 p.m. on August 22, 2009, Stephens told him that he was being "IA'ed." Spriegel's August 24 written report³³ of the August 22 conversation is as follows:

What specifically (to the best of your memory) did Officer Stephens say regarding an internal investigation which he was involved in?

Upon returning to PD from working Tax Free at approximately 2200 hours on Saturday, August 22, 2009, I observed Officer Guerra sitting in his marked patrol unit. I made contact with Officer Guerra and we had a casual conversation when Officer Stephens pulled up in his marked unit and parked two spaces away. Officer Stephens walked up and joined in our conversation and although I do not recall exactly what was said, Officer Stephens had made mention that he was being "IA'ed." As it was the first I had heard of the investigation, I asked Officer Stephens what he was being investigated for and he advised that it had to do with a girl being pushed. I do not recall the specifics, but what I understood it to be from his explanation is that he was being investigated for pushing a female subject with his ASP. Officer Stephens advised that he was holding it horizontally across his person and that he lightly pushed her back with it and due to her intoxication she lost her balance and fell over something.

Simply stated, Spriegel says that Stephens told him that he was being "IA'ed" and when Spriegel asked why, Stephens answered with the above-referenced explanation.

When Stephens failed to disclose this conversation with Spriegel³⁴ in answer to Question 15, Nichols labeled the response as dishonest. Thus, the investigation evolved into whether Stephens had been "insubordinate" in direct violation of the "do not discuss" order he

³³ Ex. 10-A.

³⁴ Spriegel describes the 10:00 p.m. August 22nd encounter as a "casual conversation" and when asked whether Stephens offered a characterization of the level of force or the way that he administered the push on August 18th, Spriegel replied, "No." Tr. Vo. I at 174 & 177. Exhibit I refers to this conversation occurring at "11:00 P.M." That, too, appears to me a mistake.

received forty-five minutes earlier on August 22, and whether he had been "dishonest" in his reply to Question 15.

Nichols never asked Stephens (on August 24 or any time thereafter) specifically whether he had spoken with Spriegel on August 22 about the investigation and, if so, what he said. Stephens was, however, repeatedly grilled about this August 22 conversation at the March 4 hearing. His explanation, in part, was as follows:

Q. Now, Officer Stephens, you did, in fact, have a conversation about this – about the facts of this case and the IA that same night, didn't you?

A. Not the facts of the case, no, sir, or any details.³⁵

* * *

A. I had told Erik – Corporal Spriegel that I was under investigation for excessive force.

Q. And he asked you, didn't he, "What for?"

A. Well, what part of excessive force, yes.

Q. What did you tell him?

A. For pushing a girl with my baton.³⁶

* * * *

A. Yes, sir. You had asked me what I interpreted "discuss" to mean. You never let me answer. But if you tell me not to discuss something with somebody, in my eyes I'm not to go have a long, detailed conversation of exactly what happened.

And the reason for giving this order is so that I – I clearly understand what this order is for. This order is so that I don't go speak to somebody about what happened and we get together what our testimony is going to be and interfere with the investigation.

So when I answered these questions I recalled clearly talking to Erik Spriegel. But I put that I had not discussed it because, in my mind,

³⁵ Tr. Vol. 1 at 81.

³⁶ Tr. Vol. 1 at 82.

what I told him, to me, did not interfere with the investigation in any way. And to me, I didn't feel that I went into any details about anything that happened. I just simply told him I was under investigation and what for.³⁷

* * *

A. Again, when they asked me the question that they did in the investigation, I answered it the way I did considering what I had told him did not discuss any details of the investigation and I didn't feel it interfered with the investigation. So I didn't disclose it and I've never been asked since then about it.

Q. Have you given an account of your conversation with Officer Guerra and Officer Spriegel to any investigating officer during the IA investigation?: Did you ever give an account of it?

A. No sir. I never had the opportunity.

Q. Did you ever acknowledge or admit that you talked to Officer Spriegel about – that you had pushed a woman with a baton?

A. I was never asked.³⁸

* * * *

Q. ... how is your statement "No" not a false statement?

A. When I read this question – and these questions are – I'm reading them there by myself so, therefore, I have to interpret them the way I view it. When you ask me a question, it's – it's how the person receives the question.

He asked me if I had talked to or discussed it with anyone. And still, today, I don't believe that I have talked to or discussed it with anybody. I have told somebody I was under investigation, but that's not what the question asked.

So if he would have asked have I told anybody that I was under investigation – I just believe it's a matter of how I interpreted that question.³⁹

* * *

³⁷ Tr. Vol. 1 at 83.

³⁸ Tr. Vol. 1 at 86.

³⁹ Tr. Vol. 1 at 88.

Q. But how was Commander Nichols to know that in your mind – or how is this Arbitrator to know that in your mind that that question – the question that he asked you was ambiguous; or that your answer, when you answered “No,” could be misconstrued? How is that possible.

A. Again, I think if he just would have – simply like you’re asking me today. If he would have asked me several months ago the same way you just asked me, I would have given him the same answer. I never had that opportunity.

* * *

A. I understood the question. Again, my answer – my response was—my response was “No” because I did not feel that I had talked to anybody about it because I did not feel that I divulged any details or interfered with the investigation in any way.

Simply, to me, that’s just telling another officer I’m under investigation and what for. I mean, if you ask any officer in that department it would – they would give you the same answer.⁴⁰

IV. STATEMENT OF CHARGES

After the investigation was completed, Williams issued the September 29, 2009

Letter of Indefinite Suspension⁴¹ based on the following three charges:

1. **Charge No. 1:** By engaging in the above-described actions, you violated Paragraph 12 of Section 10.01 of the Rules of the City of San Marcos Fire Fighters’ and Police Officers’ Civil Service Commission and Section 143.051(12) of the Texas Local Government Code, which allow disciplinary action to be taken against a police officer based on “[v]iolation of an applicable . . . Police Department rule or special order.”

Your above-described actions violated the above-quoted Civil Service Rules in that your actions violated the provisions of Police Department General Orders 200.IV.A, which reads:

GENERAL ORDER 200 — USE OF FORCE

IV. USE OF FORCE GENERALLY

- A. In any individual event, the use of force is restricted to that force necessary to control and terminate unlawful resistance, to effect a lawful arrest, to prevent injury to

⁴⁰ Tr. Vol. I at 90-91.

⁴¹ Ex. I.

any person, or to prevent the escape of a person in custody.

- 2. **Charge No. 2:** By speaking with other members of the Department, after you had received from Sergeant Tureaud a written directive not to discuss the investigation with anyone except legal counsel, you violated paragraphs 8 and 12 of Section 10.01 of the Rules of the City of San Marcos Fire Fighters' and Policy Officers' Civil Service Commission and Section 143.051(8) and (12) of the Texas Local Government Code, which allow disciplinary action to be taken against a police officer based on "conduct prejudicial to good order" and "[v]iolation of an applicable . . . Police Department rule or special order." Your actions violated the above-quoted Civil Service Rules in that your actions violated the provisions of Police Department General Order 102.VI.E., which reads:

GENERAL ORDER 200 — AUTHORITY AND ACCOUNTABILITY

VI. OBEYING ORDERS

- E. Employees will promptly obey any lawful order from a supervisor of higher rank. This applies even though the supervisor is not in the employee's normal chain-of-command.
 - 2. Employees are required to obey any lawful order of a supervisor regardless of the method of conveyance.

August 22, 2009, at 9:15 p.m., Sergeant Tureaud gave you a written order not to speak with anyone regarding the investigation. At 11:00 p.m. that same night, you engaged in a conversation about the allegations and the investigation with Corporal Spriegel and Officer Guerra.

- 3. **Charge No. 3:** By writing on your use of force form that the unidentified woman you pushed was fighting, by not identifying that you had shown the video of the incident to Officer Ellingson, to Officer Guerra, to Corporal Kennedy and to Corporal Leonard, and by not disclosing the conversation you had with Corporal Spriegel and Officer Guerra after you had been ordered not to have such conversations, you violated paragraphs 6 and 12 of Section 10.01 of the Rules of the City of San Marcos Fire Fighters' and Police Officers' Civil Service Commission and Section 143.051(6) and (12) of the Texas Local Government Code, which allow disciplinary action to be taken against a police

officer based on “acts showing a lack of good moral character” and “[v]iolation of an applicable . . . Police Department rule or special order.”

Your actions violated the above-quoted Civil Service Rules in that your actions violated the provisions of Police Department General Order 106.VII.A, which states:

GENERAL ORDER 106 — CODE OF CONDUCT

VII. INDIVIDUAL RESPONSIBILITY

A. Honesty.

1. All reports and written communications from any member of the Department will reflect the truth. Any statement or omission of pertinent information which intentionally, knowingly, or recklessly misrepresents facts or misleads others will be considered a false statement.
3. Employees will not attempt to conceal, divert, or mitigate their true culpability in a situation, nor will they engage in efforts to thwart or interfere with an internal or criminal investigation.

You violated this rule by writing on your use of force form that the woman you pushed was fighting, and then later admitting to Commander Nichols that the group was not fighting, and it was clear on the video recording that no one in the group was fighting. Additionally, by not disclosing some information, such as to whom you showed the video and to whom you spoke after being ordered not to speak of the investigation, you mitigated your culpability in the situation and interfered with Commander Nichols' investigation.

Williams explains his “justification for indefinite suspension” by noting that within the past fourteen months Stephens had received an oral warning for addressing an automobile driver stopped for speeding at 100 mph in “harsh and belittling terms” and that Stephens had received on October 23, 2008, a suspension of two days for telling Nichols that he was tardy for a subpoenaed court appearance in Comal County because he had experienced a death in the family when, in fact, Stephens had overslept.⁴²

⁴² Exs. 15 & 16. This prior discipline of Stephens was uncontested and is undisputed.

V. ANALYSIS AND DECISION

Having considered all the evidence, the Hearing Examiner must determine whether each charge has been substantiated by a preponderance of credible evidence. If any of the three charges are substantiated, the Hearing Examiner must then determine whether the substantiated charge or charges justify the discharge of Stephens from SMPD.

The Hearing Examiner will address the three charges in reverse order.

Charge No. 3 — Dishonesty.

The Statement of Charges accuses Stephens of dishonesty in three respects: (1) by writing on the Use of Force Form that the unidentified woman he pushed was “fighting,” (2) by not identifying that he had shown the video of the incident to Officers Ellingson, Guerra, Kennedy, and Leonard, and (3) by not disclosing the August 22 conversation Stephens had with Spriegel and Guerra 45 minutes after he had been ordered “not to discuss” the IA, the investigation or the events with anyone except Nichols and legal counsel.

A. After reading the Use of Force Form, viewing the COBAN video numerous times (in real time and frame-by-frame) and considering (1) the oral interview of Stephens, (2) Stephens’ written response to questions, and (3) the statements and live testimony of the four other officers who were at or near the scene, the Hearing Examiner finds that this allegation of dishonesty on the Use of Force Form has not been substantiated.

The wording Stephens uses on the Use of Force Form reasonably summarizes what he perceived happened, what the video captured in part, and what other officers describe as the chaotic and “out of control” disturbance Stephens was called to address on August 18, 2009. The wording Stephens uses on the Use of Force Form does not constitute statements or omissions of pertinent information which “intentionally, knowingly, or recklessly misrepresent facts or would mislead others.” He reports he saw people “fighting.” All the other officers report seeing people

fighting.⁴³ It is evident, even from the video, that the unidentified female was agitated, animated, and aggressive—as though she had just been fighting or in a heated quarrel. The video shows that at or about the time Stephens arrived, the unidentified female was in a confrontation with another female who quickly walked away and out of view of the camera when Stephens arrived. The agitated unidentified female continued her aggressive posturing despite attempts by a companion to restrain her.⁴⁴

B. The Hearing Examiner further finds that Stephens was not dishonest (*i.e.*, intentionally, knowingly, or recklessly misrepresenting the facts) when he failed accurately to recall and identify every officer who had seen his video during the early morning hours of August 18 or thereafter. The scene is consistently described as a busy, report-writing room where Stephens is repeatedly viewing his video in real time and discussing the events with other officers, while other officers are also watching the video, either at his invitation or unknowingly over his shoulder. Stephens attempts to identify two who watched the video, Winkenwerder and Corporal Lee. He is right about Winkenwerder, but mistaken about Lee.

During the investigation, Stephens later admits he could not recall who (*i.e.*, everyone) might have seen the video. There is no deliberate dishonesty in Stephens' understandable inability to recall with absolute precision every person who saw his video. He may have been mistaken, but the evidence fails to show that he was deliberately dishonest in this respect.

C. The evidence is that 45 minutes after receiving the document dated August 21, 2009 and identified as "Administrative Investigations Regarding Officer Paul Stephens,"

⁴³ Positioned nearby, Saavedra reported that he "could clearly see two female subjects arguing and pushing each other in front of Officer Stephens' patrol car." Ex. 10-F, Item 1. He, too, was not being dishonest in describing what he saw.

⁴⁴ Despite the semantical debate that occurred at the hearing, the Hearing Examiner believes that a reasonable definition of "fighting" includes not just physical altercation, but also a heated quarrel or aggressive confrontation and related tussling. The quarreling and "tussling" can be seen on the video. Stephens characterizing what he saw as "fighting" is not deliberately misleading. Indeed, no one disputes that Stephens saw more than the video recorded in its limited view.

he told Spriegel and Guerra that he was being "IA'ed" and, in response to Spriegel asking why, Stephens answered. It is also undisputed that Stephens did not disclose this casual conversation when Nichols asked him, in writing, whether he had "talked to or discussed this incident with anyone." Instead, Stephens said "No," that "other officers already knew what it [the IA] was in reference to" and had begun "to discuss their view point of the incident."

Stephens' explanation for not disclosing the conversation is that he thought the question went to whether he had ever discussed the facts in detail in the context of the purpose behind the "do not discuss" order, *i.e.*, preventing interference with the investigation by trying to influence or shape the testimony of another witness.⁴⁵ Stephens explains that if he had been asked during the investigation whether he spoke with Spriegel on the day in question, he would have then explained, as he did at the hearing, why he did not think that conversation to be a violation of the "do not discuss" order.

Stephens had just received the internal investigation notice. Unhappy over being investigated for what he thought was reasonable behavior under difficult circumstances, Stephens disclosed the fact of the investigation and, when asked, told why he was being investigated. With hindsight, Stephens was not as circumspect as he should have been.

The Hearing Examiner would be inclined to find that Stephens was dishonest if Stephens had been asked but denied any conversation with Spriegel about the incident. Nichols chose not to ask that question, but to ask a broader one, which Stephens says he understood not to

⁴⁵ No one says that Stephens ever spoke with anyone in an attempt to influence or otherwise shape their testimony or to interfere with the investigation.

include the casual conversation with Spriegel. Taking the evidence in its entirety, it does not appear that Stephens was being deliberately dishonest in his written reply.⁴⁶

Of the three charges that Stephens was dishonest, this one comes closest to being substantiated—at least in a rigid, technical sense. The Hearing Examiner can understand and appreciate both sides of this issue. Stephens could (and with hindsight should) have disclosed the conversation, along with his explanation why he thought the conversation was not a violation of the order. On the other hand, Nichols could have “drilled down” on the subject and asked him a follow up question specifically about the Spriegel/Guerra⁴⁷ conversation, a conversation that Nichols already knew about when he asked the general question. In any event, even if Stephens’ response to question 15 contains less than full disclosure, the Hearing Examiner finds that the debatable omission is not one that would justify the termination of Stephens’ employment.

Charge No. 2 — Insubordination.

Insubordination, *i.e.*, the failure to obey a lawful order, is related to Item 3 of Charge 3. This charge involves Stephens admittedly telling Spriegel (and Guerra) that he was being IA’ed and telling them why. Taken literally, Stephens telling anyone that he was being investigated or explaining why are technical violations of the “do not discuss” order. The Hearing Examiner, therefore, finds that Stephens’ conversation with Spriegel and Guerra on August 22nd is a technical violation of the “do not discuss” order. It is conduct that should not be encouraged or condoned.

Although Stephens failed to adhere strictly to the literal words of the “do not discuss” order, it is clear (indeed, undisputed) from all of the evidence that Stephens never said or

⁴⁶ The Hearing Examiner can understand why Nichols believed that Stephens’ response was less than fully candid. However, the Hearing Examiner can also understand why Stephens might have sincerely thought that he was answering the question correctly without disclosing the Spriegel/Guerra conversation.

⁴⁷ At times, certain portions of the investigation appear less like an effort to learn the ultimate truth and more like an attempt to catch Stephens in some inconsistency between the words he used in his Use of Force Form and his later verbal and written statements. Perhaps the Hearing Examiner is mistaken or perhaps that is common in criminal investigations, but in either event the appearance smacks of unfairness.

did anything in violation of the spirit or purpose of the order; there is no evidence that he ever tried to influence or shape anyone's testimony or otherwise interfere with the investigation. Even Nichols and Williams acknowledge that Stephens telling Spriegel and Guerra (and perhaps others) that he was under investigation and why did not interfere with the investigation or attempt to change the facts in any way.⁴⁸

From all the evidence, therefore, the Hearing Examiner finds that while the charge of insubordination has been technically substantiated, this is not misconduct of a degree that would justify termination of Stephens' employment. Stephens plainly did not, for instance, do what Officer Chris Davila did in 2007. While under investigation and subject to a "do not discuss" order, Officer Davila (who resigned in lieu of discharge) approached Stephens and asked him what his testimony was or would be in the investigation. Stephens promptly reported Davila's conduct, and Officer Davila lost his job for violating the "do not discuss" order by attempting to interfere with the investigation. No one claims that Stephens did that in the case before this Hearing Examiner.

Stephens strayed from the literal terms of order by mentioning it existed and saying what he did to be accused of unnecessary force. However, he did not flaunt the order by attempting to shape testimony or otherwise interfere with the investigation. For this reason, his technical violation (while not to be encouraged or condoned) does not justify that he be discharged.

Charge No. 1 — General Order 200 — Use of Force

The Hearing Examiner now comes to the charge that prompted the internal investigation in the first instance, *i.e.*, that Stephens violated General Order 200 — Use of Force when he pushed⁴⁹ the unidentified female on August 18 with enough force that she fell backward to

⁴⁸ Even Williams says he does not "see any problem with saying 'I'm being IA'd'" even though the order expressly says "not to discuss this IA." Ex. 3, Tr. Vol. 2 at 212.

⁴⁹ The entire pushing incident transpires in less than 10 seconds (closer to 5 or 6 seconds) from the time Stephens exits his police car, with lights flashing, until he pushes the unidentified female. Stephens' personal

the ground. Upon first viewing only the video in real time, the Hearing Examiner can see why the charge may have been made in the first instance. However, the Hearing Examiner's concern over unnecessary use of force evaporates upon careful: (1) reading of all of the Use of Force Form, (2) carefully and repeatedly viewing the video in slow motion (preferably frame-by-frame),⁵⁰ (3) carefully listening to and reading Stephens' "very forthcoming" and unaided August 23 account of what he saw and did on the evening in question (including his spontaneous explanations for his conduct and his explanations for her fall), (4) carefully reading all of the witness statements and hearing the testimony of the officers who were at or near the scene of the use of force on August 18, and (5) considering the candid testimony of Corporal Donald Lee.

Don Lee's testimony is insightful. Lee is a veteran SMPD officer and, in fact, an instructor on use of force. He testified that he was initially "disappointed" upon first watching the video and reading Stephens' Use of Force Form. However, at the hearing after watching the video of the event frame-by-frame, Lee candidly testified:

Q. With regard to, again, the incident in question and what you have seen with regard to the video when you can see it in a slower format, would you agree with me that a reasonable officer could have perceived the turn of her body and the step of her left and right leg as being advancing toward the officer?

A. Especially when the close proximity is there, yes.⁵¹

* * * *

Q. I think we'd already established that she's clearly agitated, correct?

microphone is not working at the moment of the push, so everyone is disadvantaged by being unable to hear Stephens' exact commands to the crowd. He can only be heard yelling "hey" just as he exits the vehicle where another working microphone is on.

⁵⁰ One thing is clear from the video. The unidentified female, because of her obvious agitation or likely intoxication (or both) completely ignores Stephens' commands to move on and get out of the way. Defying his commands, the unidentified female continues "running her mouth" (as Stephens put it) at another unknown female—"yelling" at the other woman who Stephens perceived as the object of her aggression.

⁵¹ Tr. Vol. 1 at 258.

A. Yes.

Q. Could be angry with someone who had just pushed her? Would you agree with that?

A. Probably.

Q. And is physically demonstrating her anger, would you agree with that?

A. I would agree with that.

Q. Given that circumstance, would it be reasonable for an officer at that night, in position, to perceive that she possibly is a threat to the person or persons who had just pushed her?

A. Yes.⁵²

While holding the ASP baton in both hands, Stephens used his hands to push the unidentified female backwards; he did not "strike" her with the baton. Rather, he pushed her back and away from him (Stephens says to create "a reactionary gap") and away from where she was advancing, *i.e.* towards the woman who is not in view of the camera. When pushed, she fell; her advancing stopped.

The companion to the unidentified female who Stephens pushed is shown trying to restrain her from carrying out her aggressive action toward the female who is out of camera view. The companion can be seen restraining her and trying to calm her agitation.

Upon first viewing the video in real time, the Hearing Examiner was struck by how quickly the push occurred after Stephens exited the vehicle and by the sharpness of the push. However, after having watched the video numerous times, including many times in a frame-by-frame mode, it becomes clear that the unidentified female was agitated, quarreling, and non-compliant before and after Stephens exited the vehicle. It also becomes clear that his push is made to appear sharper because he is stepping in her direction at the same time she is moving in his

⁵² Tr. Vol. 1 at 262. Lee explains that he had worked with Stephens on some pretty high-risk calls and knows Stephens to be "a good decision maker." Tr. Vol. 1, at 225.

direction. She seems to be moving in his direction—not to assault Stephens—but to advance upon, challenge, or “go after” someone who is off camera to the right, *i.e.*, the bare-legged woman with whom she had been arguing upon Stephens’ arrival and who shoved the unidentified female just as Stephens’ patrol car arrives.⁵³

Certain portions of Stephens written and oral accounts of the events of August 18 are already quoted at length above. Reduced to its essentials, Stephens says that he perceived that he was being summoned to the aid of two other officers who had multiple subjects at taser-point in the context of a chaotic, disobedient crowd of rowdy people (some of whom were presumably intoxicated) and that upon arriving on the scene he witnessed multiple fights and quarreling. Stephens says he repeatedly ordered the unruly crowd to disperse. He says he gained compliance from everyone except the unidentified female who continued to “run her mouth,” struggle with her companion who was trying to restrain her. The woman then advanced in the direction of another unidentified female (who is not within camera view) in an attempt to assault her. Nichols specially asked:

Q. Was [the unidentified female] going to assault somebody?

A. That was my belief . . . cause . . . she was yelling at the other female and you can see on the video the other female comes back up and they start arguing and then she starts to leave and she’s still arguing with her as I’m approaching, so that’s why I stepped in front of her and uh . . . my belief was is that uh . . . she was gonna . . . she was trying to get to the other female. Well that was what this whole fight was about was between the two of them.

The unidentified female Stephens pushed was, in the Hearing Examiner’s view, engaged in what General Order 200 defines as “Active Aggression” which includes “physical

⁵³ Saavedra also “clearly” saw the two female subjects “arguing and pushing each other in front of Officer Stephens’ patrol car.” Ex. 10-F.

actions/assaults” against “another person with less than deadly force (e.g., advancing, challenging, . . .).”

The General Order on “Use of Force” that Stephens is accused of violating provides that in “any event the use of force is restricted to that force necessary to control and terminate unlawful resistance, . . . to prevent injury to any person . . .” The Order also expressly states that the “purpose of force is to control resistance and aggression and gain compliance with lawful objectives.”⁵⁴ The unidentified female who was pushed was, as stated, agitated and aggressive and was not complying with Stephens’ orders to disperse. Finally, and perhaps most importantly, General Order 200 expressly provides: “The degree of force used depends on what the officer perceives as reasonable and necessary, under the circumstances at the time he decides to use force.”⁵⁵

While officers on the scene, including all those who admittedly saw the video, acknowledge a duty to report another officer’s use of unnecessary force, no officer at or near the scene reported Stephens’ conduct as unnecessary or unreasonable. Winkenwerder, who was nearby but not at the immediate scene, heard Stephens’ description that day of what occurred, watched the video, and later read Stephens’ Use of Force Form and concluded that he believed (both then and at the hearing) that the force used by Stephens against the unidentified female was “reasonable and necessary.”⁵⁶ In summary, he explained::

“Based on all the information that I was provided from Corporal Kennedy, Officer Saavedra, Officer Stephens, how extremely aggressive

⁵⁴ Ex. 11-A. The policy also defines “Active Aggression” as including physical actions/assaults, using as examples “advancing, challenging.” Ex. 11-A.

⁵⁵ Officer Lee answered “Absolutely, yes” when asked whether the officer’s perception is a part of the determination of what is reasonable force. Tr. Vol. 1, at 230.

⁵⁶ With all due respect to others involved, Sergeant Winkenwerder seems to have gotten it right in his original assessment of the August 18 incident. Despite being investigated himself for not reporting the August 18 pushing incident as a possible use of unnecessary force, Winkenwerder credibly stayed with his original assessment of Stephens’ conduct during his testimony at the hearing. He never recanted his original opinion that based on all surrounding circumstances the use of force was “reasonable and necessary” and “not excessive.”

the crowd was, what I heard coming from the area of the physical disturbance, what I heard on the radio, and the observed behavior of the subjects I contacted leaving the area of the physical disturbance, I believed that the push was not excessive for the failure to comply with commands, the level of involvement in the physical disturbance, and the totality of the circumstances surrounding the situation.”

With all due respect to those doing the investigation, the Hearing Examiner agrees with Winkenwerder’s conclusion and finds that the charge accusing Stephens of violating General Order 200 has not been substantiated by a preponderance of credible evidence. Other testimony also supports this conclusion.

When asked whether the force Stephens used would be justified if the unidentified female had made threats toward another person and had indicated by her body language that she was advancing or challenging another person, Williams agreed that “if that’s what had happened, it probably would be a justification.”⁵⁷ According to Stephens’ oral and written reports, that was exactly his perception of what was happening.

The unidentified female was making threats—verbal—toward the object of her displeasure and clearly indicated by her body language that she was advancing or challenging that person. Stephens’ push promptly stopped her advance.

Williams agrees that before Stephens gets out of his car the unidentified female was first shoved by someone else. (Williams —“you can see in the crowd in front. You can’t see who’s doing it, but you can see her kind of fall back like this a little bit and take a step back, out of the crowd, as if somebody had just pushed her; Somebody pushed her, yeah.”) TR Vol. 2, 252, p. 70-71. As stated, Saavedra saw the same thing.

⁵⁷ Q: Let me ask you this: If the female that we’re talking about, that was pushed, had made threats – verbal – towards another person in the crowd and had indicated by her body language that she was advancing or challenging another person, would that be a justification to use force?

A: [Chief Williams] If that’s what happened, it probably would be a justification.

TR Vol. 2 at 263.

SMPD is to be commended for scrupulously policing the behavior of its officers. No one wants a "rogue cop" abusing law-abiding citizens. On the other hand, law-abiding citizens expect police officers, when confronted with a chaotic, increasingly violent situation, to try to keep something worse from happening. Based on her yelling, cursing and "running her mouth," coupled with her obviously aggressive body language, Stephens credibly says he thought the unidentified female was "going after" the object of her wrath. In the heat of the moment, Stephens would have been remiss in doing nothing. He chose, instead, to push her away which resulted in her falling backward.⁵⁸ The preponderance of credible evidence has not shown that he used unnecessary force as that term is defined in General Order 200.

VI. CONCLUSION AND AWARD⁵⁹

The Hearing Examiner makes the following conclusions and award.

1. The charge of violating General Order 200 – Use of Force has not been substantiated by a preponderance of credible evidence.
2. The charge of violating General Order - Accountability and Authority VI Obeying Orders has been substantiated in the technical sense of Stephens failing to adhere tightly to the literal words of the order not to discuss the IA, the investigation, or the disputed events of August 18th with anyone after 9:15 p.m. August 22, 2010, but this technical violation did not

⁵⁸ His push might not have knocked down someone who was less intoxicated. Interestingly, after being pushed, the unidentified female promptly gets up and does not appear offended by Stephens, but continues to rail against the unidentified woman who is off-camera and who appears to be the target of her aggression. It is also interesting that no one in the crowd, including the unidentified female who is pushed, ever makes a complaint against the SMPD or Stephens for the force he used. The first report of the push is by Stephens himself, who calls the event into the dispatcher saying he "struck" an unnamed person with his ASP baton.

⁵⁹ The Hearing Officer finds the testimony of Stephens at the hearing to have been credible despite lengthy, rigorous and relentless cross examination by counsel for SMPD. The Hearing Officer also finds especially credible the hearing testimony of officers Saavedra, Lee, Leonard, and Winkenwerder. All of these witnesses, who were testifying under awkward and difficult circumstances, were candid and forthright in their accounts of what they saw, said and did.

This is not to say that the testimony of Williams, Nichols, and others lacks credibility, for it does not. It is just that these latter witnesses were placing their interpretations on facts provided by others, facts which when considered in their entirety, the Hearing Examiner views differently.

interfere with the SMPD investigation. Under all the circumstances of this case, it does not justify discharge.

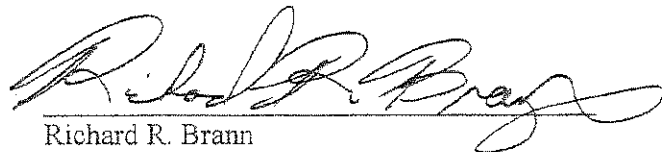
3. The charge that Officer Stephens violated General Order 106 - Code of Conduct by writing on his Use of Force Form that the unidentified woman he pushed was fighting has not been substantiated by a preponderance of credible evidence.

4. The charge that Officer Stephens was dishonest in violation of General Order 106 - Code of Conduct by not identifying that he had shown the video of the incident to Officers Ellingson, Guerra, Kennedy and Leonard has not been substantiated by a preponderance of credible evidence.

5. The charge that Officer Stephens violated General Order 106 - Code of Conduct has been substantiated by a preponderance of credible evidence in a technical sense, but has not been shown to be an act of deliberate dishonesty, but rather a sincere misunderstanding.

In summary, Stephens did not commit the primary offense at issue (violation of Use of Force Policy); he was honest and forthcoming in the immediate aftermath of the incident; he may have displayed poor judgment with regard to the "do not discuss" order (though there was clearly no intent to interfere with the investigation, and the Hearing Examiner finds no deliberate intent to deceive).

The substantiated charges against Officer Stephens do not justify him being indefinitely suspended, *i.e.*, discharged from employment. Rather, the substantiated charges justify, at most, a lesser penalty, which because of his prior discipline should be limited to a fifteen day unpaid suspension.



Richard R. Brann
Hearing Examiner
Houston, Texas
June 23, 2010

CASE NO. 70-390-00697-09

POLICE OFFICER PAUL STEPHENS,
Appellant

BEFORE

v.

RICHARD R. BRANN

CITY OF SAN MARCOS POLICE
DEPARTMENT

HEARING EXAMINER

HEARING EXAMINER'S STATEMENT OF FEE AND EXPENSES

Prepare for and preside at arbitration hearing in San Marcos, Texas on March 4 & 5, 2010, including traveling from Houston to San Marcos and returning to Houston; preparing immediately after the hearing a chronology of relevant events. 2.25 days \$2,025.00

Organizing and review of notes of testimony of 13 witnesses; carefully reading and re-reading all exhibits introduced into evidence at the hearing, including repeatedly listening to the digital recording of Office Stephens' August 23, 2009 interview and repeatedly watching the video recording of the August 18, 2009 incident; reading and making notes from the Post-Hearing Brief of the City of San Marcos, reading and making notes from the Post-Hearing Brief of Officer Stephens; reading and making notes from the Reply Brief of the City of San Marcos; reading the Transcript of the March 4-5, 2010 hearing and excerpting certain testimony; preparing and revising the Opinion and Award of the Hearing Examiner and transmitting the final Opinion and Award of the Hearing Examiner to the American Arbitration Association. 4.50 days \$4,050.00

Fee: \$6,075.00

Expenses: \$ 353.06¹

Total Fee and Expenses: \$6,428.06

Police Officer Stephens' Share: \$3,214.03

City of San Marcos Police Dept.'s Share: \$3,214.03

Hearing Examiner's Tax I.D. No. 426-82-6258

¹ 350 miles @ \$.50 = \$175.00; \$150.78 for hotel; \$25.04 for 3 meals in San Marcos; \$2.24 for postage to mail Opinion & Award to AAA.