

Minutes

Merit System Board Meeting and Hearing of Jason Giardino

December 17, 2008

Minutes of the Merit System Board meeting held on December 17 2008, at 8:30 p.m., in the Don Cassano Community Room at the Tempe Transportation Center at 200 E. Fifth Street, Tempe, Arizona.

Board Members Present:

James P. Foley, Chairman
Wayne E. Hochstrasser, Board Member
Dr. Russell Schoeneman, Board Member

City Staff Present:

Jon O'Connor, Acting Secretary to the Merit System Board
M. Colleen Pacheco, Staff to the Merit System Board
Kara Stanek, Assistant, City Attorney
Angel Carbajal Assistant Chief, Police Department

Others Present:

Jason Giardino, Appellant
Kathryn Baillie, Attorney-at-Law, Michael Napier P.C. Law Firm
Gary Vigneault, AZ Dept of Gaming
Daren Mowrey, Tempe Police Department
Officer Nick Barabatis, Tempe Police Department
Sergeant Kevin Renwick
Sergeant Trent Luckow
Officer Kevin Kelch
Officer Jason Giardino
Officer Mike Dobson
Officer Susan Schoville
Lieutenant Ed Ouimette
Commander Fran Santos
Assistant Chief Angel Carbajal
Laura Guerrero, Risk Management Manager
Police Chief Tom Ryff

Merit System Board Chairman James Foley called the meeting to order at 8:37 a.m.

Agenda Item 1 - Consideration of Meeting Minutes (from February 6, 2008) for Discussion and Approval.

Board members reviewed minutes from the February 6, 2008 meeting. Dr. Schoeneman made a motion to approve minutes as written, Dr. Hochstrasser seconded, and the motion was passed unanimously to approve minutes.

Agenda Item 2 - Discuss and Approve Proposed Revisions to the City of Tempe "Personnel Rules and Regulations" (see attached documents)

Mr. Jon O'Connor, Deputy HR Manager, presented a paragraph to be added to the City of Tempe's Personnel Rules and Regulation considering the City's current fiscal situation. He explained that this addition would allow the City Manager flexibility in times of financial crisis to move employees whose positions are being eliminated to positions which are not being eliminated. This would be added to Rule 3 Section 302. A draft of this has been provided to City Council and the employee organizations and they support this addition. A draft of an example of a type of policy the City Manager may come up with was included, but Mr. O'Connor explained that the intent of this addition is to provide flexibility to the City Manager, not to put a specific plan in place. After brief questioning by the Board, Chairman Foley asked if there was any further discussion, and there was not.

CONSENSUS – Chairman James Foley asked for a motion to approve addition as it stands. Mr. Hochstrasser so moved, Mr. Schoeneman seconded and the motion passed unanimously at 8:42 a.m.

Agenda Item 3 - Hearing on the appeal of Jason Giardino

Purpose of Hearing:

Chairman Foley reminded all parties present that even though it is a Public Hearing, there is still a level of confidentiality, and asked the witnesses present not to discuss their testimony with each other while the Hearing is in session. He reported that the purpose of today's hearing is to take testimony and make a recommendation to City Manager Charlie Meyer on Mr. Jason Giardino's appeal of a disciplinary action. This Hearing is an informal fact-finding process. All participants are expected to act respectfully and considerate throughout the Hearing. The Board is not bound by technical rules and procedures of evidence. Therefore, Ms. Baillie, Counsel for Mr. Giardino, has the burden of proof and will make the first presentation. Each party shall have the right to introduce documentary evidence into the record, and object to the admission or exclusion of evidence and to the extent or limitation of examination or cross-examination.

Chairman Foley stated that during testimony, the Board may rule on objections, as it is not governed by formal rules of evidence. The Board will not debate or pass judgment on the facts already in evidence stemming from participating events. Rather, it is the Board's responsibility to ascertain whether or not the City of Tempe followed established procedures throughout the disciplinary process and subsequent termination of Mr. Giardino.

Mr. Giardino requested that this Hearing be conducted in Public Session.

The Board will also determine if conclusions reached as a result of the disciplinary process are supported by the facts in evidence, and if the disciplinary action taken is so disproportionate to Mr.

Giardino's conduct as to be considered shocking to one's sense of fairness. Relevant testimony addressing the aforementioned issues should be the focus of both parties in this Hearing.

Mr. Giardino was terminated from employment with the City of Tempe Police Department effective September 17, 2008, for violation of the following City of Tempe Police General Orders and Personnel Rules and Regulations:

The City of Tempe Police Department sustained allegations that he violated the Police Department General Order regarding Use of Force (General Order 3.403.A.12).

- *Specifically, multiple incidents regarding use of force: In March 2006, October 2006, July 2007 and September 2007.*

The City of Tempe sustained allegations that Mr. Giardino violated the following Personnel Rules and Regulations:

- Rule 406.B.2 - "The employee is unsafe to himself/herself, other employees, the public, or city property in the performance of duties and responsibilities; or the employee has frequently violated safety rules or practices."
- Rule 406.B.3 - "The employee has been abusive in attitude, language, behavior, or conduct toward a fellow employee, a supervisor, or the public; or their action has resulted in physical harm, injury, or fear of it to such persons."

Specifically, incidents in March 2006, July 2007 and September 2007 when he injured suspects or prisoners in his custody."

Chairman Foley asked those present at the main table to provide their names and titles for the record.

Rules of Procedure:

Chairman Foley stated that both parties will be allocated 3.5 hours each to present their respective opening statements, examine and cross-examine witnesses, and present their closing statements. Time devoted to the Board's questioning of witnesses will not be charged against either party's time. Both parties may waive their right to give Opening or Closing statements. At any time during the Hearing either party may request a time check to determine how much time they have used toward their respective time allotments. Breaks will be provided as needed.

At this point, Ms. Baillie, Counsel for Appellant Jason Giardino, asked if she may interject. The Board allowed, and she stated that one of her key witnesses was unable to make it today under what she alleged were suspicious circumstances, and would like the Board to allow an "identical" witness, Gary Vigneault, to testify in his place as an expert witness rather than asking for a continuance to the Hearing. The City had no objections, so the Board allowed.

Those acting as potential witnesses were sworn to tell the truth by Chairman Foley, and then dismissed from the Hearing room until called.

Pre-Hearing Motions:

Chairman Foley stated that he had already ruled on Pre-Hearing motions, and summarized the motions for the record:

Motion 1: The Appellant moved to change his Hearing from Private to Public, which the City did not object to and was allowed.

Motion 2: The Appellant moved to shift the Burden of Proof from himself to the City citing A.R.S. 38-1101 (I). Chairman Foley found, after reviewing the Tempe Officer's Association Memorandum of Understanding, that as a sworn officer of the Tempe Police Department, Mr. Giardino was a member of this bargaining unit. This MOU incorporates the City of Tempe's Personnel Rules and Regulations, including Section 105 (E) which states that "[...] the appealing employee has the burden of proof[...]", therefore the provision of A.R.S. 38-1101(I) are not controlling in this appeal, and the motion was denied.

Opening Statements, Testimony and Closing Statements:

Chairman Foley asked that everyone remember that a court reporter was present to record testimony and to speak clearly and loudly. He invited Ms. Baillie to give her Opening Statement at 8:59. Ms. Baillie reported that she would present testimony and information regarding AZPOST's allowable defensive tactics and Officer Giardino was allowed to use the tactic which caused injury to a suspect and ultimately resulted in his termination. She concluded her remarks at 9:03 a.m.

Ms. Stanek reported that there is no dispute of the facts, but this termination was a result of the duty of Public Safety to treat citizens safely. The question is if this most recent incident was the minimum amount of force needed. The City also stated that Mr. Giardino was terminated due to a pattern of unsafe behavior demonstrated by multiple incidents.

Direct Examination by Ms. Baillie for the Appellant

First Witness: Mr. Gary Vigneault was called as the Appellant's first witness at 9:09 a.m. Mr. Vigneault is currently a Police Officer with AZ Department of Gaming, and was at one time with the Phoenix Police Department and is considered an expert regarding Defensive Tactics (hereforth referred to as DT). He was an advanced DT instructor for many years, following and assisting in drafting the AZPOST lesson plan and testified as to different types of "takedown" maneuvers and what circumstances would make a takedown maneuver reasonable. He stated that in his opinion, Mr. Giardino was fully authorized to use a takedown since the suspect kicked (assaulted) him.

Cross Examination: Ms. Stanek cross-examined the witness to clarify what techniques are actually taught and authorized by AZPOST, emphasizing that the double handcuffed takedown is not taught. The leg sweep technique was also discussed as a technique that is not taught by AZPOST due to possibility of injury to suspect.

Ms. Baillie re-questioned the witness to emphasize that according to the City of Tempe Use of Force Continuum, the "takedown" technique is authorized if assaulted, and as Mr. Giardino was assaulted by the suspect on September 29, 2007, it is authorized.

The Board asked clarifying questions regarding Mr. Vigneault's title, different DT techniques, causes and objectives of a takedown maneuver, and the authority AZPOST gives to officers. Mr. Vigneault was excused at 11:00 a.m.

Chairman Foley recessed for a break at 11:00 a.m.

Second Witness: Officer Darren Mowrey from the Tempe Police Department was called to testify at 11:10 a.m. Officer Mowrey provided his background information and current status as a DT instructor. He provided testimony on Tempe's Use of Force Continuum, demonstrated several DT maneuvers, and explained the different types of resistance a suspect may demonstrate. Officer Mowrey also played a video for the Board which demonstrated how a suspect with both hands handcuffed behind their back can still seriously injure and/or kill someone. Officer Mowrey presented further testimony regarding what Level of Force is reasonable depending on the suspect's actions. He felt that Mr. Giardino's takedown was reasonable because the suspect assaulted him.

Cross examination: Ms. Stanek cross-examined Officer Mowrey, clarifying that the person in the video had advance instruction in some type of martial arts, and was not an average person. She also asked Officer Mowrey to clarify if would use the same level of force on different types of people (e.g. elderly, children, etc.) and he agreed that he would not use the same level on all suspects.

Ms. Baillie came back again and reiterated that the September 29, 2007 takedown was reasonable and did not violate Tempe PD policy or AZPOST.

Ms. Stanek came back again and clarified that the totality of the circumstances have to be considered when using DT.

The Board asked clarifying questions regarding different DT, and Officer Mowrey demonstrated another DT. The Board also questioned Officer Mowrey regarding possible injury during DT. Officer Mowrey was excused at 12:38 p.m.

The Board took a lunch recess at 12:38 p.m.

The Board returned at 1:15p.m, and at this time, Ms. Stanek made an objection and asked for an exclusion of witness, because a member of the public observing these proceeding spoke out of turn, causing the Board to question the effectiveness of a DT. The Board allowed the patron to remain, but instructed her to remain silent for the rest of the Hearing.

Third Witness: Ms. Baillie called Sergeant Kevin Renwick to the stand, and he began testimony at 1:31 p.m. He provided his title and background, that he was a former supervisor of Mr. Giardino, and testified as to Mr. Giardino's character. He does not feel Mr. Giardino is unsafe to himself, others, or the public, and that he would have Mr. Giardino back on his squad if he were to return to the Tempe PD.

Cross examination: Ms. Stanek questioned Sgt. Renwick regarding his involvement in Mr. Giardino's disciplinary history, and of which he was only involved in a traffic accident, but was aware of others. He was excused at 1:34 p.m.

Fourth Witness: Officer Nick Barabatis was called to testify at 1:35 p.m., provided name and title. He provided testimony regarding another takedown that occurred on September 29, 2007 with another officer which resulted in injury. The other suspect also assaulted the officer, and he provided information regarding injuries of both suspects as he was at the hospital and saw both of them. He testified that Mr. Giardino's suspect had to be restrained in the hospital because she was aggressive.

Cross examination: Ms. Stanek cross-examined him regarding the differences in the two assaults that occurred, clarifying that Mr. Giardino received one shoeless backward kick to the knee, while the other officer received a high heeled front kick to the groin, and she was attempting a second kick when he took her down.

The Board asked Officer Barabatis to clarify if he saw either takedown, which he did not, and he was excused at 1:52 p.m.

Fifth Witness: Sergeant Trent Luckow was called to testify at 1:54 p.m., and provided name and title. He testified that he is familiar with the Giardino takedown, because he looked into this matter after he was assigned to Mr. Giardino's squad after the incident. He testified that Sergeant Russ Good was at the scene that night, and referred to an email to him from Sgt. Good where Sgt. Good said he felt takedown was reasonable and necessary. Sgt. Luckow contacted three civilian witnesses who were at the scene, and they all said they thought the takedown was excessive and unreasonable, but they were not aware that Mr. Giardino had been assaulted, and seemed to waver in their stories. Sgt. Luckow believes the takedown was reasonable.

Cross examination: Ms. Stanek clarified that Sgt. Luckow was in his first week as supervising Sergeant when this incident happened. After the email from Sgt. Good, the two met and discussed the incident, but Sgt. Luckow did not witness it. He described how he became involved in the report, and testified to a July 2007 incident which resulted in a disciplinary action.

The Board asked clarifying questions as to the disciplinary action process and timelines. Ms. Stanek described the three parts of a disciplinary action for the Board's benefit. Sgt Luckow was excused at 2:15 p.m.

Sixth Witness: Sergeant Robert Johnson was called to testify at 2:17 p.m., provided name and title, and conveyed his experience as a DT instructor for Tempe. He testified that he was familiar with the takedown of September 2007, and provided testimony as to teaching different DT. He stated that everything was conceptual –he taught officer's the tools and let them decide when to use them. Sgt. Johnson supervised Mr. Giardino on bike squad on Mill, and testified that Mill Avenue officers have more contact with suspects than officers on patrol. He stated he was familiar with several takedown techniques, and testified that if an officer is kicked in the kneecap, that officer would have the authority to use the technique which Mr. Giardino utilized on September 29, 2007.

Cross examination: Ms. Stanek summarized another disciplinary action of Mr. Giardino's, when in March 2006 he violated Tempe Police Department's Use of Force policy, and was given a 10 hour suspension. She also stated that citizens have complained about Mr. Giardino's rude behavior, one example being when he pulled a patron toward him at Fumbles bar because she couldn't hear him. Sgt. Johnson testified that in his opinion, anytime an officer puts their hands on anyone it is considered a use of force. He also testified that as a part of Mr. Giardino's disciplinary action, he was put on a Performance Improvement Plan, and was asked to tape record his conversations with citizens. Sgt. Johnson also stated that he and Sergeant Powell had a conversation with Mr. Giardino suggesting he move back to patrol, because he may be getting burned out on bike squad. Sgt. Johnson testified that downtown is a hard place to work and it is easy to get burned out. Sgt Johnson also testified that there are other ways to get a subject to the ground, and that it would also be appropriate to ask another nearby officer to help control a subject.

Ms. Baillie clarified that when Mr. Giardino pulled the female to him at Fumbles bar it was not a use of force violation, rather a rudeness complaint.

Ms. Stanek asked Sgt. Johnson what constitutes force, and he reiterated that in his mind, it is a use of force anytime you put your hands on someone.

The Board asked if the City had a progressive discipline process and Mr. O'Connor confirmed. The Board asked clarifying questions of Sgt. Johnson regarding arrest procedure, and Sgt. Johnson was excused at 2:40 p.m.

Chairman Foley recessed for a break at 2:40 p.m.

Seventh Witness: Officer Kevin Kelch was called to testify at 2:48 p.m., and provided his name and title for the record. He described the September 29, 2007 incident as he responded to the call at Four Peaks Brewery, and was the arresting officer for the subject which Mr. Giardino performed the takedown maneuver. He testified as to the suspect's intoxicated belligerent demeanor, how she resisted arrest with defensive resistance. He observed the suspect violently thrust kick back into Mr. Giardino's knee, and demonstrated the kick he saw happen. He testified that he saw her foot hit his knee and his knee then buckled, and Mr. Giardino instantaneously performed the takedown maneuver. He testified that the takedown did not surprise him, and the situation was volatile and getting worse as a crowd was forming from the bar, and they were upset with Mr. Giardino for the takedown. Officer Kelch testified as to the suspect's size, and the fact that suspect was shoeless did not make him think she should not be taken down. Size should not preclude her from being taken down. He felt that Mr. Giardino's actions were appropriate, and it was a reasonable use of force. In his IA statement he called the suspects actions "active resistance", but he clarified that he meant "active aggression". He said that under IA questioning, he reasoned there may have been other options, but that is in hindsight, and at the time and still today he thinks the takedown was reasonable.

Cross-examination: Ms. Stanek asked him how many officers were on the scene, and Officer Kelch reported there were five total, including 1 officer in training. He testified as to the length of time he has known Mr. Giardino and they worked together as partners for a time. He testified that during the IA investigation, Lieutenant Ed Ouimette told him about the criminal charges against Mr. Giardino, & he was concerned about what Lieutenant Ouimette wanted him to say. He was concerned about the lawsuit, and did state that there could have been other reasonable options, but if you look back, you can make any change, but you are not there when it happens.

Ms. Baillie again addressed Officer Kelch, asking if he thought Mr. Giardino was out of control after yelling at the suspect, and Officer Kelch testified it is normal to yell at subject if the officer was assaulted, that he has frequently seen officers yell at other subject in same manner. He also reported that when the injured suspect was in the hospital, she did not know what happened and denied assaulting the officer.

Ms. Stanek asked the Board members if they had listened to the recorded audio of the takedown, which they all reported they had.

The Board asked clarifying questions regarding the Use of Force continuum, and where yelling would be located. The Board questioned Officer Kelch regarding the position of where Giardino was standing

& where Officer Kelch was in relation to him and clarified if Officer Kelch saw the kick as well as normal arrest procedures. Officer Kelch was excused at 3:19 p.m.

Eighth Witness: Mr. Jason Giardino was called to testify at 3:21 p.m., and gave his name and Tempe Police Department title for the record. He gave testimony to the events that led up to the September 29, 2008 takedown. He responded to Four Peaks Brewery when he heard it over the radio, and Officer Kelch had arrested the female subject and went to get his police car to put her in. She was resisting, so Mr. Giardino stayed with her, she was struggling, so Mr. Giardino stepped behind her and she kicked him in the knee, and he performed the takedown maneuver. He testified that he had performed this maneuver before, as it was the one he was most comfortable with, and there had been injuries with other incidents as well. He stated that he did not intend to harm suspect, his intention was to put her on the ground, as he thought she would continue to harm us until he made her stop. He testified that he felt a lot of pain after the assault, and was afraid she had injured his knee. Ms. Baillie brought forth his performance evaluation of March 2008, which was completely positive. He testified as to multiple commendations he has received from the Department, and how he had also been in charge of new officers (OIT) when he was a Field Training Officer (FTO) for eight months.

Cross examination: Ms. Stanek questioned Mr. Giardino regarding how he learned the double handcuff takedown technique if he was not taught it by Tempe. He stated that an officer would adapt an existing technique they had been shown to use the amount of force necessary to put them on the ground. He testified that his past takedowns have been mainly un-handcuffed, but some have been handcuffed. He stated the technique he used was reasonable, because this technique is taught face first without precautions taken. Ms. Stanek reviewed a May 2007 performance evaluation in which his “work product” was rated unsatisfactory.

Ms. Baillie responded to this that the takedown was immediate after Mr. Giardino was kicked, and Mr. Giardino stated that he was not notified prior to the lawsuit that he did anything wrong, and that the County Prosecutor has not charged him.

The Board questioned gaps in performance evaluations, and it was explained that Mr. Giardino switched detail/supervisors four times which may have accounted for the gap. The questioned him regarding other options he may have taken, such as lifting her up, but Mr. Giardino responded that this was generally not used. Mr. Giardino stated that he did not receive a medical evaluation after the assault as the bulk of the pain subsided after 10-15 minutes.

Ms. Baillie reiterated that Mr. Giardino was the victim of aggregated assault.

Ms. Stanek questioned Mr. Giardino if he pressed charge against her, and Mr. Giardino testified that he agreed to a plea bargain, and she was convicted of misdemeanor assault.

Direct Examination by Ms. Stanek for the City

First Witness: Officer Mike Dobson was called to testify at 4:16 p.m., and stated his name and title for the record, and gave testimony that in his career as a police officer he has never done a takedown. He has had belligerent, actively aggressive, belligerent subjects, but has utilized alternative techniques

depending on the situation He stated that if he has a suspect handcuffed he has always been able to get them in the car and control the situation. He was excused at 4:18 p.m.

Second Witness: Officer Susan Schoville was called at 4:20 p.m., stated her name and title for the record, and gave testimony that she has never had to do a takedown which result in injury in her 24 years with the Police Department, rather she has been able to effectively use reasoning, or talk with suspects to control them. She gave testimony as to intoxicated suspects, that she tries to be more patient with them because they cannot comprehend what is happening sometimes. She was excused at 4:27 p.m.

Third Witness: Lieutenant Ed Ouimette was called at 4:28 p.m., stated his name and title for the record, that he is currently assigned to Internal Affairs (IA). He gave testimony as to the purpose of an IA investigation. He gave history as to how this investigation came to attention of IA, and testified as to the course of his Investigation, which included taking statements from other PD employees and citizens, and pulling other police reports. He stated that his findings were independent and that he was not told what conclusion to reach or what to look for. He determines all facts with regard to General Orders and Personnel Rules & Regulations violations. Regarding tape recording of takedown, he said this information was helpful as the audio showed crowd “ooohing” in unison and & Mr. Giardino giving verbal commands. He stated he interpreted Mr. Giardino’s tone of voice as being angry, and noted that the photos were helpful in showing where Mr. Giardino’s injury was located. Lieutenant Ouimette testified that he interviewed Mr. Giardino twice, and believed that the takedown was an emotional response. He noted differences in other takedown cases, notably the other September 29, 2007 takedown, and said that in this case, the subject fell while attempting a second kick. He believes that Mr. Giardino’s actions were not reasonable or necessary – he was not in danger of being injured as he stepped to the left after the first kick. He alleged that Mr. Giardino said he wasn’t hurt at the scene, but then later said he was hurt.

Cross examination: Ms. Baillie stated that there were several things missing in Lt. Ouimette’s report, including Officer Rittman and Luckow’s interviews, as well as a sketch Officer Kelch. She stated that Lt. Ouimette’s report would go to Commander Perkovich, his boss, who would rely heavily on this report. She pointed out discrepancies between audio interviews and Lt. Ouimette’s wording on report, specifically the type of kick, where it was placed, the resulting buckling, and that the situation was volatile. Lt. Ouimette stated he did not see differences in what Ms. Baillie was calling discrepancies. Ms. Baillie stated that her point is the higher ups did not see a lot of information on this report and the people who read the report should not have based the termination on Lt. Ouimette’s report.

Ms. Stanek questioned Lt. Ouimette again, asking about the missing interview and sketch, and Lt. Ouimette responded that the question he was trying to answer in his IA investigation was if the takedown used was within policy. He also did not feel that Officer Kelch’s sketch showing his own position in relation to Mr. Giardino did not affect the question of if the takedown was an allowable maneuver. He reiterated that he was not out to sustain the allegation, and his investigation had nothing to do with discipline.

The Board asked a series of questions regarding the IA investigation. Lt Ouimette stated that the takedown came to IA’s attention due to the notice of claim, and that when an officer does a takedown, they need to be aware of what happens to suspect. As of this time forward, all notice of claims will end up in IA.

Ms. Stanek asked if a second investigation was done once IA found out there was a notice of claim, and Lieutenant replied there was not.

Ms. Baillie asked if Lt. Ouimette was a DT instructor, to which he replied he was not.

The Board clarified the events that led to the IA investigation, and then Lt. Ouimette was excused at 5:16 p.m.

Fourth Witness: Commander Mark Perkovich was called at 5:17 p.m. stated his name and title for the record. He gave the history of how this incident came to his attention, namely that Bill Amado, Police Legal Advisor, told him there was a notice of claim. He testified that an IA investigation had not previously been done, but that the Use of Force form had been completed, and there was a supervisor's investigation that was followed up on. He outlined that a notice of claim is important as it outlines potential Use of Force violations. It warrants investigation because if any officer causes injury to a citizen, it should automatically call for review by the Policies and Procedures. Commander Perkovich gave testimony as to his role in the IA investigation, that he was the one who assigned the case to Lieutenant Ouimette and he was the one who reviewed it upon completion. He explained that IA is an independent fact finding body, and after it is finished the report is sent to the employee's direct supervisor along the chain of command. He stated that his opinion is that Sgt. Good failed to perform supervisory duties in the brevity he paid the situation, which, in his opinion, consisted of a street-side determination that everything done was within policy. Commander Ringo, who was the previous Commander, was retired by the time Commander Perkovich received the IA investigation. Commander Ringo did nothing with the information provided, and in his opinion this was inappropriate due to the serious physical injury that occurred. He stated that an officer must keep themselves safe, but cannot do so with disregard to the subject.

Cross examination: Ms. Baillie asked if Commander Perkovich was a DT instructor, to which he replied he was not.

The Board asked clarifying questions regarding the pathway of the IA report. Commander Perkovich stated that Sgt. Good & Commander Ringo would have been looked at for lack of supervision if they had not retired. Commander Perkovich was excused at 5:34p.m.

Chairman Foley recessed for a break at 5:34 p.m.

Fifth Witness: Commander Fran Santos was called at 5:43 p.m. stated her name and title for the record. Commander Santos testified that she was involved in drafting the Part I of the Disciplinary Action for the violation of the police General Orders. She explained the purpose of Part I and corresponding flow of Part II (employee's response). Commander Santos testified that she did not find anything persuasive in Mr. Giardino's response, that he took care to address everything in the General orders, but she did not find the mitigating factor to justify the amount of force used on the September 29, 2007 incident. Based on size, technique, totality of circumstances, and available alternatives to this tactic, she found the use of force excessive. She testified that she also reviewed his history with two prior sustained Use of Force allegations. She stated that she does not trust Mr. Giardino, and would not put him back on the street. She testified that she knows of no other officer with this type of history when they apply force. She also testified as to other alternative such as sitting her on the ground, and felt that the face first takedown was

an unreasonable response. She stated that if this was an isolated incident. The discipline would have been different, but his history lead her to believe he cannot be trusted.

The Board asked Commander Santos to clarify her position with regard to the Use of Force Continuum, and she stated that officers have to take into account totality of the circumstances. The Continuum is a guideline because every situation is different and there cannot be examples of everything. She stated there are different levels of aggression, and while kicking an officer is act of aggression, the suspect did not continuously kick Mr. Giardino, she stopped. She stated that an officer's duty is to control the subject, not to severely injure them. The Board asked Commander Santos if she knew of any IA reports where the recommendation was reversed, which she did not. Commander Santos stated that it was the pattern in Mr. Giardino's history which is the cause of the termination, not this event in itself. She stated that it was her opinion that the incident in itself was unreasonable, but if it was a sole event with no prior offenses, it would have resulted in a lower level of discipline.

Ms. Stanek questioned Commander Santos regarding the Range of the violation, to which she replied that it would have been a Range 2 violation without a prior pattern of this behavior.

The Board asked the City to clarify a notation on the Part III on the Disciplinary Action Form and then Commander Santos was excused at 6:18 p.m.

At 6:18 p.m., Ms. Stanek then asked the Board to allow an internal form which describes the categories of violations and correlating disciplinary actions table. Ms. Baillie briefly objected as this information was not brought to her attention prior to this Hearing. Ms. Stanek demonstrated that this was informational for the Board only, and Ms. Baillie's withdrew her objection and the Board allowed.

Sixth Witness: Assistant Chief Angel Carbajal was called at 6:18 p.m., and stated his name and title for the record. Assistant Chief Carbajal outlined his role in Mr. Giardino's case based on the IA investigations and chain of command as part of the Executive team. Assistant Chief Carbajal stated that he was a DT instructor for three years and ran the program at the Police Academy as well as helped to draft some policies which are still used today. He stated that any Use of Force depends on the Use of Force continuum, but there are also other factors such as the physical capabilities and gender of the officer and the suspect. He provided testimony that the Use of Force Continuum can go diagonally with less or more force depending on all of the circumstances. This is part of AZPOST lesson plan, and Tempe has also taught that mitigating factors changes the Use of Force Continuum table to go diagonal and not strictly horizontal. Assistant Chief Carbajal testified that in order to use force the officer has to have the factor of preclusion present - namely exhausting every other option. His opinion is that in the September 29, 2007 incident, the level of force used was excessive due to the items of preclusion and ability was not there. He stated the subject was smaller, weighed less, intoxicated and less coordinated, and handcuffed. He took into account all disciplinary history for the past three years, as well as un-sustained allegations.

Ms. Baillie objected to testimony which brings in un-sustained allegations, and the Board sustained her objection.

Assistant Chief Carbajal stated that he was concerned about Mr. Giardino's pattern of behavior and judgment, and he thought the Use of Force exerted the night of September 29, 2007, and it was his opinion that Mr. Giardino was angry and took physical action.

The Board asked clarifying questions regarding retention of disciplinary actions, and it was stated that there was a three year time frame allowed. Assistant Chief Carbajal stated that any complaint on excessive force needs to be documented properly, and that there are nine incident allegations in Mr. Giardino's history, and that is excessive. He testified that seven of the nine were sustained and within the reckoning period of 3 years.

Cross examination: Ms. Baillie asked Assistant Chief Carbajal clarifying questions.

Assistant Chief Carbajal was excused at 6:59 p.m.

Seventh Witness: Laura Guerrero, Risk Manager for Tempe, was called at 7:01 p.m., and stated her name and title for the record. She gave testimony as to the notice of claim Risk Management received against Mr. Giardino, and stated that in her opinion Mr. Giardino was a liability to the City of Tempe. She stated she did an audit on his history, and there were six motor vehicle accidents in seven years, and that witnesses indicated that Mr. Giardino lacked sensitivity and compassion to an injured person in one of the accidents. She also stated that there is currently one bodily injury claim still pending. She informed the Board that the City settled the case of the female subject who Mr. Giardino performed the takedown.

The Board asked Ms. Guerrero if an employee can incur liability without causing misconduct, and Ms. Guerrero testified that misconduct sometimes does not go to disciplinary action.

Ms. Guerrero was excused at 7:10 p.m.

Eighth Witness: City of Tempe Police Chief Tom Ryff was called at 7:12 p.m., and stated his name and title for the record. Chief Ryff stated that the role of the Police Department was to protect and serve, and that each officer needs to recognize the fact that they have the position as a direct result of community giving them this power as a symbol of trust. He stated that their Use of Force policy requires the minimum level of force that is reasonable. He stated that Mr. Giardino was terminated due to a demonstrated danger to citizens which cost Tempe hundreds of thousands of dollars. He stated that he cannot retain such an employee. Chief Ryff stated that Mr. Giardino's conduct has been detrimental to community, and that this most recent incident was only part of the reason for the termination. Chief Ryff testified that Mr. Giardino appealed the termination to him, and he upheld it due to other Use of Force violations where the subject was injured. He stated that he feels Mr. Giardino demonstrated at times that he has the capability of being a great officer, and other times he reduced this by consistently demonstrating poor judgment, which has resulted in injuries. He is concerned that Mr. Giardino would injure someone again. He stated that the community has to have trust in law enforcement and violations of the Use of Force policy diminishes the trust.

Chief Ryff was excused at 7:27 p.m.

At 7:31 p.m. both parties rested and Ms. Baillie gave her closing statement explaining that the takedown maneuver was within policy because the suspect assaulted him, and Mr. Giardino should not have been terminated.

At 7:44 p.m. Ms. Stanek gave her closing statement that Mr. Giardino was terminated from employment because of this incident as well as his prior disciplinary history

At 7:47 the evidentiary portion of the hearing closed.

Agenda Item 4 - Board Deliberation

Mr. Giardino elected to leave the Hearing room during the Board's deliberation. Therefore everyone, with the exception of the Board, Secretary, and Staff to the Board exited the room.

At 7:50 a motion was made to go into Executive Session and off the record for deliberation.

Agenda Item 5 - Board Recommendation

At 8:15 p.m. a motion was made to return to open session and on the record. Chairman Foley then announced the recommendation to uphold Mr. Giardino's termination of employment with the City of Tempe. The Board unanimously agreed that Mr. Giardino did violate the City of Tempe Police Department General Order regarding Use of Force (General Order 3.403.A.12), Personnel Rules and Regulations: Rule 406.B.2 - "The employee is unsafe to himself/herself, other employees, the public, or city property in the performance of duties and responsibilities; or the employee has frequently violated safety rules or practices." , and Rule 406.B.3 - "The employee has been abusive in attitude, language, behavior, or conduct toward a fellow employee, a supervisor, or the public; or their action has resulted in physical harm, injury, or fear of it to such persons."

Chairman Foley requested a motion to approve the Board's recommendation. Mr. Hochstrasser so moved, and Mr. Schoeneman seconded. All were in favor and the motion carried. Chairman Foley told Mr. Giardino that he still has the option to request an appeal from the City manager Charlie Meyer within three business days of the City Manager's notification. He stated that Ms. Pacheco will be drafting a letter to the City Manager which will be signed by Chairman Foley and delivered tomorrow.

Agenda Item 6 - Adjournment

Chairman Foley moved to adjourn. All were in favor and the motion carried.

Prepared by:

M. Colleen Pacheco, Human Resources Technician II,
and Staff to the Merit System Board

Reviewed by:

Jon O'Connor, Deputy Human Resources Manager,
and Acting Secretary to the Merit System Board

Authorized Signature