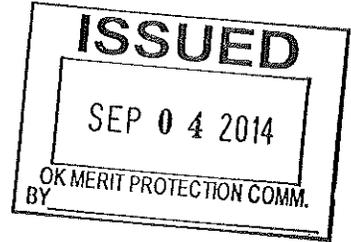


**OKLAHOMA MERIT PROTECTION COMMISSION
STATE OF OKLAHOMA**

NICHOLAUS OLIVER,)
)
 Appellant,)
)
 v.)
)
 OKLAHOMA DEPARTMENT OF)
 PUBLIC SAFETY,)
)
 Appellee.)

Case No. MPC-13-161



FINAL ORDER

This matter came on for hearing on the merits before the undersigned duly appointed Administrative Law Judge on the 18th day of August, 2014 and on the 21st day of August, 2014 at the Merit Protection Commission offices in Oklahoma City, Oklahoma. Appellant, Nicholaus Oliver (“Trooper Oliver” or “Appellant”), was present in person and by counsel, Gary James. Appellee, Department of Public Safety (“DPS” or “Appellee”) appeared by and through General Counsel, Stephen Krise, and Assistant General Counsel, Christina Cornish. Appellee’s table representative at the August 18, 2014 hearing was Captain Curtis Grady, who was replaced by Lieutenant Chris Bridges for the August 21, 2014 hearing.

Appellant, a permanent classified employee working for Appellee, was suspended without pay for fifteen work days beginning on March 25, 2013 pursuant to Merit Rules 455:10-11-14 and 455:10-11-15. Appellant timely appealed the disciplinary action.

The record was opened and the hearing began. Arguments of counsel were heard, and the sworn testimony of three witnesses for Appellee and four witnesses for Appellant was presented. Exhibits were introduced as Joint Exhibits 1-4, Appellee Exhibits 1 and 2, Appellant Exhibits 1,

2, 3, and 4, and Protected Exhibit 1, all of which are incorporated herein and made a part hereof. Protected Exhibit 1 was admitted as a Protected Exhibit and remains sealed as part of the record.

After careful consideration of the record, including all relevant evidence, testimony, and exhibits, the undersigned Administrative Law Judge issues the following case background, summary of testimony, findings of fact, conclusions of law, and order.

CASE BACKGROUND

At the time of the disciplinary action subject to this appeal, Trooper Oliver was a full time, classified employee of the Department of Public Safety. He had been a Trooper with the Oklahoma Highway Patrol for approximately seven years, and at the time of the incident leading to the disciplinary action, was assigned to Troop A. Trooper Oliver testified that he had consistently received positive evaluations, but admitted that his prior discipline included a forty day suspension without pay, a written reprimand, and three instances of informal disciplinary action.

Shortly after 6:00 a.m. on October 18, 2012, Trooper Oliver, after finishing his shift, noticed a truck making suspicious maneuvers that appeared to be designed to avoid Trooper Oliver's patrol unit. When Trooper Oliver moved his unit toward the suspicious vehicle, the truck drove off rapidly and a pursuit ensued. The pursuit exceeded speeds of 100 miles per hour on interstates and 80 miles per hour on city streets. During the felony pursuit, Trooper Oliver determined that the truck driven by the suspect, Jason Craig Curlee ("Curlee") was stolen. Eventually, Oklahoma City Police Officer William Ricketts (Sgt. Ricketts") joined in the chase, following behind Trooper Oliver. All witnesses agree that the pursuit turned into a serious and dangerous situation to Curlee, Trooper Oliver, Sgt. Ricketts, and members of the general public. During the chase, the truck swerved toward Trooper Oliver in a manner that Trooper Oliver and

Sgt. Ricketts both interpreted as Curlee's attempt to ram Trooper Oliver's vehicle. Trooper Oliver attempted three tactical vehicle interventions. The third TVI resulted in the suspect losing control of his vehicle and the truck coming to a stop sideways on a public street. When Curlee's truck came to a stop it struck and pinned a vehicle driven by Lucian Peter Paulus ("Mr. Paulus") between the front of the stolen truck and the street's curb. Trooper Oliver and Sgt. Ricketts both approached the stolen vehicle, guns drawn and pointed at Curlee, and shouting for Curlee to place his hands in the air and exit the vehicle. Curlee did not comply. When Trooper Oliver reached the driver's door of the stolen truck, he determined that the suspect was making movements that indicated he may have been reaching for a weapon. Though Trooper Oliver believed at this time that deadly force was authorized, he did not believe firing his weapon on the suspect to be a viable option because he determined shooting would pose a risk to the bystander, Mr. Paulus. Trooper Oliver attempted to open the driver's door of the suspect's vehicle, but found it to be locked. Trooper Oliver then attempted to break the driver's side window of the suspect's truck with his firearm, with the muzzle pointed directly at Curlee. On Trooper Oliver's first strike at the window, he almost dropped his gun. Trooper Oliver recovered the weapon and struck the driver's side window with the muzzle of the gun a second time. On the second hit, Trooper Oliver's sidearm accidentally discharged, shooting the suspect in the hand and injuring him. Trooper Oliver reached through the blown window of Curlee's truck, unlocked the driver's door, and removed Curlee from the vehicle. Trooper Oliver, assisted by Sgt. Ricketts, placed Curlee in custody.

DPS subsequently appointed a Shooting Review Board to investigate the incident. After investigating, the Board unanimously found that Appellant had violated Department policy by carelessly handling his firearm and classified the matter as a Class II shooting. The review board

determined that the matter did not constitute a use of force, but was simply an accidental shooting resulting from Trooper Oliver's use of his weapon to break Curlee's window. The review board recommended the Commissioner impose a twenty day suspension without pay.

On February 22, 2013, DPS notified Trooper Oliver that Commissioner Thompson was proposing a fifteen working day suspension without pay. (Joint Exhibit 2). The basis of the proposed discipline, as stated in the notice, was violation of OHP Policy 3.14.1, Use of Weapons, on the ground that Trooper Oliver's "use of a pistol to break out a vehicle window demonstrated poor judgment and is imprudent..." (Joint Exhibit 2, Page 2, ¶ 3). Commissioner Thompson agreed with the Review Board that OHP policies related to use of force and use of deadly force did not apply because Trooper Oliver did not intend to fire his weapon. Commissioner Thompson determined that Trooper Oliver's violation amounted to a Category E violation pursuant to the Department's disciplinary matrix, Chief's Directive No. 2010-03 (the "Discipline Matrix"). (Joint Exhibit 4). The notice of proposed discipline identified three instances of prior informal discipline, and two instances of prior formal discipline. The notice set forth both mitigating and aggravating circumstances the Commissioner considered in determining the proposed discipline.

On March 3, 2013, Trooper Oliver responded to the notice of proposed discipline by memorandum to Commissioner Thompson. (Joint Exhibit 3). In his response, Trooper Oliver asserted that the proposed discipline was inappropriate because OHP Policy 3.14.1 does not prohibit using a firearm to break a window, Trooper Oliver believed on the scene that deadly force was authorized, and believed he could break Curlee's window with minimal risk to all parties. He stated that he believed he was within OHP policy by using his firearm as an impact weapon as a last resort, and that such is authorized by OHP Policy 3.14.7. Trooper Oliver stated

that he had never been trained not to use a gun as an impact weapon and believed troopers had, in the past, been trained to use guns as impact weapons. Trooper Oliver also urged that the alleged violation, which he denied, did not amount to a Category E violation under the Discipline Matrix. Finally, Trooper Oliver acknowledged two of the prior disciplinary actions noted in the notice of proposed discipline, but denied the three informal disciplinary actions identified in the notice.

On March 13, 2013 DPS issued its Notice of Suspension Without Pay (Joint Exhibit 1), in which it suspended Trooper Oliver for fifteen work days without pay (the “Disciplinary Action”). The Disciplinary Action was, according to the notice, based on Trooper Painter’s violation of OHP Policy 3.14.1, Use of Weapons, which provides:

*Members shall not use or handle weapons in a careless or imprudent manner.
They shall use weapons only in accordance with law and this policy.*

As it did in the notice of proposed discipline, DPS classified the violation as a Category E violation under the Discipline Matrix and applied various mitigating and aggravating factors, as clearly stated in Joint Exhibit 1.

The issue presented by this appeal is whether there was sufficient cause to impose the Disciplinary Action and, if so, whether the discipline imposed was just and appropriate under the circumstances.

SUMMARY OF TESTIMONY

The testimony of seven witnesses, properly sworn and under oath, was taken and was made part of the record.

Donald Heath Meyer

Lieutenant Heath Meyer (“Lt. Meyer”) has been a Trooper with the Oklahoma Highway Patrol for approximately nine years. After serving approximately six and a half years with Troop

A in Cleveland and McClain Counties, Lt. Meyer was assigned to Troop Z. Lt. Meyer testified that Troop Z's exclusive role is to investigate potential criminal conduct for the purpose of presenting a report to the District Attorney for review. Troop Z does not make findings regarding criminal violations or violations of Department policy. The former is determined by the appropriate District Attorney; the latter by the Patrol's Office of Professional Standards. In addition to the present shooting by Trooper Oliver, Lt. Meyer has been the lead investigator on other Trooper-involved shootings.

In the present matter, Lt. Meyer conducted a portion of the investigation into the incident and assembled the final report for presentation to the District Attorney. Lt. Meyer was on the scene of the incident less than an hour after the shooting, and the suspect was gone from the scene. Troop Z interviewed Trooper Oliver, Oklahoma City Police Officer Sgt. Ricketts, and Mr. Paulus. Based on Troop Z's investigation, Lt. Meyer determined that Trooper Oliver's sidearm accidentally discharged when Trooper Oliver attempted to break the suspect's window with his gun the second time.

Based on the investigation, Lt. Meyer determined that the car chase had been dangerous and felonious and that, during the chase, Curlee had attempted to assault Trooper Oliver by swerving his vehicle toward Trooper Oliver's. Lt. Meyer stated that had he been in Trooper Oliver's position, he would have determined Curlee was dangerous based on the circumstances of the chase.

Lt. Meyer found the information given by Trooper Oliver and Sgt. Ricketts to be consistent. Both Trooper Oliver and Sgt. Ricketts reported that Curlee was revving the engine of his truck while it was lodged against Mr. Paulus' vehicle. Lt. Meyer testified that Mr. Paulus reported seeing Curlee reach toward the floor of his vehicle with his left hand, and that Trooper

Oliver could not see one of Curlee's hands. Although Lt. Meyer agreed on re-direct that no one at the scene saw Curlee reaching for a weapon, he concluded that Trooper Oliver believed Curlee was looking for a weapon. Lt. Meyer also testified that not being able to see Curlee's hands in the circumstance could be perceived as an immediate threat to an officer's safety, and stated that he would see such an action as a threat to his safety in such a circumstance. Lt. Meyer testified that the District Attorney found Trooper Oliver's use of force was justified and that he did not disagree with the DA's findings.

Lt. Meyer testified that he left his Academy with the perception that a Trooper should not use a gun as an impact weapon. On cross-examination, however, Lt. Meyer reviewed a portion of the Oklahoma Highway Patrol 2013 Handgun Training ("Training Guidelines"), which states as follows:

WEAPONS USED AS TOOLS TO BREAK WINDOWS:

Firearms should not be utilized as an impact weapon/tool or to strike and/or break automotive window/windshield glass. If exigent circumstances exist where using a firearm as an impact weapon/tool is your only option, all general firearms safety rules shall be followed.

(Appellant Exhibit 1, Page 2, ¶ 4.) Lt. Meyer testified that this guideline would lead him to believe he could use an impact weapon to break a window and, given certain safety constraints, he would use his gun as an impact weapon.

The undersigned found Lt. Meyer to be a credible witness.

Patrick Mays

Major Patrick Mays ("Major Mays") is a Zone Commander with the Oklahoma Highway Patrol. During his three decades of law enforcement service, Major Mays has been a police officer, and has served in internal affairs, homeland security, and executive security during his tenure at OHP. Major Mays convened and ran the shooting review board (the "Board") following

Trooper Oliver's accidental shooting of Curlee. The Board was comprised of Major Mays and four other OHP members, including two firearms instructors, and was charged with classifying the shooting and determining whether Trooper Oliver violated any Department policy.

After its review, the Board determined the shooting was a Class II shooting, and concluded that this case did not involve a use of force because Trooper Oliver did not intend to fire his weapon. Rather, the Board viewed the shooting as negligent. The Board unanimously found that Trooper Oliver violated OHP policy by handling his firearm in a careless and reckless manner because (1) Trooper Oliver's finger was in the trigger guard; and (2) use of the firearm as an impact weapon was improper. Major Mays testified that the Board looked at whether Trooper Oliver's actions were made in a careless way, not whether he should have broken the window with his sidearm.

The Board's review consisted of interviewing Trooper Oliver, reviewing the evidence from the Troop Z investigation, and looking at OHP policies. In addition, Major Mays testified that he personally consulted with twenty-five to thirty firearms instructors and asked whether any of them had ever trained using firearms to break windows. Major Mays stated that one or two of the instructors stated that they had trained Troopers to use firearms to break windows, but stated that the same is not part of the formal training curriculum and that nothing in the handgun training outline used before this incident addressed using handguns to break windows. In addition to testifying that at least one firearms instructor told him such training had been provided, Major Mays testified that the agency (OHP) does not train using firearms to break windows. On cross-examination, Major Mays stated that the instructors told him the subject has never been addressed in training because "we never dreamed anyone would do it". Major Mays

stated that Trooper Oliver positively asserted to the Board that he had personally never been trained to use a firearm to break glass.

Major Mays testified that he personally requested the addition of the new training guideline regarding using weapons to break windows that is shown in the record at Appellant Exhibit 1, Page 2, Paragraph 4. He stated that he added the new guideline specifically because it appeared that using firearms as impact weapons or tools was not addressed in any OHP training guideline. Major Mays testified that even with the new training guideline, guns may be used to break glass only if all firearms safety guidelines are followed and that Trooper Oliver should have kept his finger off of the trigger and should not have allowed the gun muzzle to cover anything he was not willing to destroy.

Major Mays testified that the Board was aware that Trooper Oliver had been cleared by the District Attorney, but stated that had no impact on the Board's review. The Board was aware of the danger of the pursuit, but Major Mays stated that he was not aware of any evidence that Curlee was reaching for a weapon during the incident. Major Mays believes that Trooper Oliver would have been authorized to use deadly force and could have been justified had he intentionally shot Curlee. Major Mays stated that if he were in the same circumstance and believed Curlee was looking for a weapon, he would have shot Curlee. Major Mays testified that while a Trooper is authorized to use force if he believes his life or someone else's is in danger, Trooper Oliver told the Board only that the situation made him concerned and did not articulate that he felt threatened by Curlee. Major Mays testified that Trooper Oliver should have shot Curlee if he was in fear for his life, but agreed on cross-examination that if Trooper Oliver believed that shooting Curlee would place Mr. Paulus in danger, it was not unreasonable for Trooper Oliver to refrain from shooting. Major Mays was aware that Sgt. Ricketts was concerned

for Mr. Paulus' safety. Major Mays testified that Trooper Oliver's proper course of action, other than shooting Curlee, was to remain at his vehicle and continue to give commands to Curlee. Major Mays agreed that when officers use force it is "not uncommon for things to not go as planned".

Major Mays testified that OHP policy does not require troopers to carry impact weapons. He stated that nothing in OHP policy allowed Trooper Oliver to use his gun to break the window. He testified that no policy prohibited the practice because "you can't put everything in policy".

Michael C. Thompson

Michael C. Thompson ("Commissioner Thompson") issued the final discipline as the appointing authority in this case. Commissioner Thompson testified that he reviewed the Board's unanimous findings in the case and agreed that Trooper Oliver violated OHP Policy 3.14.1 by handling his weapon in a careless manner. Commissioner Thompson testified that Trooper Oliver's use of his weapon to break the window was not allowed by OHP Policy in place at that time.

After determining that Trooper Oliver violated OHP Policy, Commissioner Thompson applied the Discipline Matrix and classified Trooper Oliver's policy violation as a Category E violation. Commissioner Thompson determined that Category E applied because Trooper Oliver's action had an adverse impact on public safety (Curlee was shot in the hand), and because any accidental shooting brings the professionalism of the Department into question.

Commissioner Thompson testified that he was familiar with the conditions of the high speed chase and the events leading up to the accidental discharge of Trooper Oliver's gun. Although he stated that he was never aware that Curlee had attempted to ram Trooper Oliver's unit with the stolen truck, he believed the situation to be very serious. Although Commissioner

Thompson stated that Trooper Oliver's rushing up and beating on Curlee's window with a gun "is not something we teach" and is reckless, he ultimately testified that Trooper Oliver "did all the right things up to the point that he used his weapon as a tool to break the window" and shot Curlee in the hand.

Commissioner Thompson testified that whether Trooper Oliver feared for his safety or that of the public, he did not consider the shooting a use of force determination because Trooper Oliver did not intentionally shoot his gun. Rather, he stated, this is an accidental shooting. He testified that if Trooper Oliver feared for himself or the public, deadly force would have been authorized, but stated that Trooper Oliver did not articulate such a fear.

Commissioner Thompson testified that in imposing Trooper Oliver's discipline, he did not consider whether OHP teaches Troopers to use guns to punch out windows. He stated that he does not know whether Troopers are taught to punch out windows with firearms in Academies, but is aware that the training guidelines changed after Trooper Oliver's shooting of Curlee. Commissioner Thompson testified that no one told him that two or three Department firearms instructors reported that punching windows with guns was taught in Department training, and he was unaware whether the Board was told that. Commissioner Thompson stated that even if punching glass with a gun is allowed, Trooper Oliver still had to do it safely – not in a way that resulted in an accidental shooting. Commissioner Thompson testified that if there is an accidental shooting and someone is injured, there's going to be discipline.

The undersigned found Commissioner Thompson to be a credible witness.

Mark Kevin Walters

Trooper Mark Walters ("Trooper Walters") has been a law enforcement officer for thirty-two years and has served thirty of those years in the Oklahoma Highway Patrol. Trooper Walters

has been a firearms instructor with OHP since 1990, and estimates that he has been involved in about one thousand hours of firearms training. Trooper Walters has taught firearms in more than half the Academies since 1990, and is an instructor on the Troop level for OHP. He spends about forty formalized training days a year as a firearms instructor.

Trooper Walters testified that there is no written curriculum for Academy firearms training and that Academy curriculum varies from year to year because OHP doesn't have its own firing range. Accordingly, training must be tailored for the range that is available. Trooper Walters testified that he has been present in training when cadets are trained to break windows with rifles, but stated that he has never trained anyone to break a window with a loaded pistol, and is not aware of any OHP instructor who has. Trooper Walters also testified that he had never trained a Trooper not to use a pistol to punch a window and that there was no provision for the matter in training guidelines until Major Mays requested insertion of a new training guideline after Trooper Oliver shot Curlee. Trooper Walters testified that, under some circumstances, use of a firearm to break a car window would be desirable to give a Trooper more time to respond to a threat from an armed suspect, and referenced a shooting of Pennsylvania Troopers as an example. Trooper Walters testified that, in his opinion and experience as a firearms instructor, using a firearm to break a window is not against any OHP policy. Trooper Walters also stated that OHP provides no training on extracting a suspect from a locked vehicle with its windows up, and that a Trooper must rely on his own experience in the situation.

Trooper Walters testified on cross-examination that firearms training focuses on four general safety rules, and identified those rules as:

1. Treat every weapon as if it is loaded;
2. Don't let the weapon's muzzle cover anything you're not willing to kill or destroy;

3. Keep your finger off the trigger until you're ready to fire; and
4. Be sure of your target and what's behind it.

Trooper Walters testified that he has been involved in at least 30 high speed pursuits in his career, and stated that though a Trooper tries to plan what he's going to do when the pursuit is over, it never goes the way he plans. Trooper Walters considered Trooper Oliver's pursuit of Curlee to be a dangerous felony pursuit. Factors that made Walters believe the pursuit to be a dangerous situation included that: (a) Curlee was driving a stolen vehicle, so was known to have already committed a crime; (b) Curlee demonstrated he had no regard for safety of self or others; (c) Curlee appeared intent on hurting Trooper Oliver as shown by attempting to ram Trooper Oliver's unit during the pursuit; and (d) one of Curlee's hands was not visible, raising a concern that he might be reaching for a weapon.

Trooper Walters testified that Mr. Paulus was in a precarious position and in danger of being shot if Trooper Oliver attempted to shoot Curlee. Trooper Walters further believed that this situation prohibited Trooper Oliver from taking a textbook approach and calling out Curlee from a safe distance because he needed to get Curlee out of the truck to diminish the danger to Mr. Paulus. Trooper Walters testified that, under the circumstances, Trooper Oliver's use of his gun as a tool to enter the vehicle was a reasonable option, and stated that there were clearly exigent circumstances authorizing the use, including: (a) the safety of Mr. Paulus required Trooper Oliver to gain entry to the car to retrieve Curlee; (b) Trooper Oliver had no time to return to his car to obtain another tool to break the glass; (c) the safety of Trooper Oliver and Sgt. Ricketts; and (d) the need to put an end to the pursuit.

Trooper Walters testified that, in his opinion, it was not reckless of Trooper Oliver to use his firearm to break the window, and stated that Trooper Oliver's use of the pistol to break the

window was justified under the circumstances. Trooper Walters stated that there are times an officer points his weapon at an individual that he doesn't intend to shoot. He stated that Trooper Oliver's pointing his gun at Curlee as he struck the window was reasonable because using the butt of the weapon would put Mr. Paulus at risk, and using the gun like a hammer would put Sgt. Ricketts and Trooper Oliver at risk.

The undersigned found Trooper Walters to be a credible witness.

Tim Tipton

Lieutenant Tim Tipton ("Lt. Tipton") has been with OHP for twenty-five years and currently serves as a Troop A Supervisor for Oklahoma County. He is a certified firearms instructor who has participated in what he describes as thousands of hours of firearms training over the past twenty-five years. Lt. Tipton was assigned to OHP training for ten years and has taught firearms and defensive tactics in all but the last two Academies during the past twenty-five years, and recalls that he was a firearms instructor in Trooper Oliver's Academy. Lt. Tipton has been certified by state and federal civil and criminal courts as an expert witness on firearms and defensive tactics, and has testified as an expert on behalf of the Department. Lt. Tipton admitted on cross-examination that he has a grievance pending against the Department, but stated that his pending grievance does not impact his testimony in this case.

Lt. Tipton testified that the Department does train Troopers on using firearms to break windows. He stated that the tactical team is trained to use guns to break windows to gain entry into cars "in extreme circumstances", and that the option of using a gun to break a window is discussed in the Academy classroom as "pistol punches". He stated that such training teaches Troopers the dangers of using a pistol punch and that in exigent circumstances it might need to be used. Lt. Tipton testified on cross-examination that CLEET firearms training curriculum

discusses using a firearm as an impact weapon in exigent circumstances. He stated that in years past, the matter was discussed only in the classroom because the Department did not provide glass for demonstrative training, but that demonstrative training is now provided because Trooper Cornell brings his own windshields for training. Lt. Tipton testified that no curriculum says to always strike glass with the muzzle or the butt of the weapon, and stated that he is unaware of any literature by gun manufacturers regarding the proper techniques to be used. He stated that, absent such criteria, a review board would have to apply common sense and practical experience to determine whether a gun was used properly or improperly to break glass in a particular case. Lt. Tipton testified that he is not aware of any OHP policy that prohibits using a pistol to break a window.

Lt. Tipton was one of the twenty or thirty firearms instructors Major Mays questioned about OHP training to break glass with firearms. He stated that when Major Mays posed the question, he was unaware that Major Mays was running the Board reviewing the shooting. Lt. Tipton recalls that three instructors – who he identified as three of the longest serving instructors – responded that such training was provided, and that no other firearms instructor objected to their answer or told Major Mays that such training was not provided. He stated that the exchange was not that three out of twenty instructors said the training is provided and the rest of the instructors said it was not. According to Lt. Tipton, no instructor informed Major Mays at the impromptu meeting that OHP does not train on the subject.

Lt. Tipton heard Trooper Oliver's pursuit of Curlee happening on the radio in real time. He reached the conclusion that the pursuit he was hearing was a dangerous felony pursuit, and was escalated when Curlee attempted to ram Trooper Oliver's unit. Lt. Tipton arrived at the scene after the pursuit ended, witnessed the location of each vehicle at the scene, and testified

that the diagram of the scene included in the Troop Z Report, (Protected Exhibit 1, Page 41 of 115), accurately depicts the scene as he saw it.

Based on his observation of the location of the vehicles at the scene, Lt. Tipton was of the opinion that it was reasonable for Trooper Oliver to approach Curlee's vehicle because Mr. Paulus would have been at risk if Trooper Oliver had allowed Curlee to stay in the truck. In addition, Lt. Tipton testified that Mr. Paulus report that Curlee's hand went down indicated a situation that was absolutely dangerous and that Trooper Oliver was in peril until he gained control of Curlee's hands. Accordingly, Lt. Tipton stated that use of force was justified, and stated that if an officer decides to use a gun to punch a window in the circumstances that were facing Trooper Oliver, the decision would be reasonable. Lt. Tipton testified that under the circumstances it would not have been a reasonable option for Trooper Oliver to return to his unit to obtain an alternate tool to break the window, because he was dealing with "seconds at best". Lt. Tipton testified that Trooper Oliver did not use his weapon in a careless or imprudent manner. He stated that use of the gun to break the window was simply the force option he employed. Lt. Tipton testified that in the use of force, things don't always go as planned and people can get hurt. He stated that some unintentional acts that occur in law enforcement and cause harm are, nonetheless, within a proper use of force. Lt. Tipton testified that if the Board determined this was not a use of force incident, he would disagree with the determination.

Lt. Tipton testified that overall, OHP firearms policy allows using a gun for an impact weapon as a last resort, and that it would be bad policy to exclude it. He stated that current OHP training guidelines allow use of guns to break glass in exigent circumstances and is of the opinion that exigent circumstances existed in the present case that made Trooper Oliver's use of his weapon acceptable.

The undersigned found Lt. Tipton to be a credible witness.

William Ricketts

Staff Sergeant William Ricketts (“Sgt. Ricketts”) has been a patrol officer with the Oklahoma City Police Department for fifteen years. In addition to his patrol duties, Sgt. Ricketts supervises police officers when they come out of the Academy. Prior to the current incident, Sgt. Ricketts did not know Trooper Oliver.

Sgt. Ricketts heard Oliver’s pursuit of Curlee reported on the radio, realized the chase was headed his direction, and fell in behind Trooper Oliver to offer assistance and backup in the pursuit. Sgt. Ricketts followed Trooper Oliver and observed approximately eight miles of the pursuit. During this time, Sgt. Ricketts reached the conclusion that Curlee was dangerous. He believed that Curlee being in a stolen vehicle escalated the seriousness of the chase, and stated that Curlee sped in excess of ninety miles per hour, passed vehicles on the shoulder, and was a clear danger to the public. Sgt. Ricketts stated that he observed Curlee intentionally trying to hit Trooper Oliver with his car and there was no doubt that Curlee’s action amounted to assault with a deadly weapon.

Sgt. Ricketts stated that when the pursuit ended, he was fearful of Curlee and saw him as a threat because Curlee had clearly shown his intention to become violent. He did not have a clear view inside the truck. He could see Curlee’s right hand, but not his left. He saw nothing to make him doubt that Mr. Paulus and Trooper Oliver saw Curlee lower one hand. Sgt. Ricketts was concerned that if Curlee came out of the truck shooting, Mr. Paulus was not safe. He could hear Curlee revving the truck engine and trying to get his vehicle into gear and was concerned that if he drove forward, Mr. Paulus would be in danger, and if he drove in reverse, he and Trooper Oliver would be at risk. Sgt. Ricketts and Trooper Oliver were yelling at Curlee to exit

the vehicle, and Curlee was not complying, leading Sgt. Ricketts to believe that Curlee was not giving up and was still attempting to flee.

Sgt. Ricketts believed he and Trooper Oliver needed to get Curlee into custody and stated that his primary concern was the safety of Mr. Paulus. He testified that rushing a suspect's vehicle is no longer standard police procedure, but believed that under the circumstances, the officers' best course of action was to approach Curlee's vehicle. Sgt. Ricketts testified that Trooper Oliver's act of breaking the window was good police procedure; that Trooper Oliver's action was necessary under the circumstances. He did not observe Trooper Oliver act recklessly. He stated that Trooper Oliver's actions had to be taken and that "in his shoes, I would have done the same thing". He believes Trooper Oliver's use of his firearm to break the window was reasonable because the gun is what Trooper Oliver had available at the time.

The undersigned found Sgt. Ricketts to be a credible witness.

Nicholaus Oliver

Trooper Oliver has been a Trooper with OHP for over eight years and, at the time of the incident, served in Troop A. Trooper Oliver recalls receiving firearms training in the 56th Academy that included how to use a gun as an impact weapon to strike a human being. He does not recall receiving training on using a firearm to break a window, but testified that he knows he wasn't trained not to use a weapon to break a window.

Trooper Oliver described his pursuit of Curlee as a dangerous pursuit at high speeds. He testified that Curlee attempted to ram his vehicle, that the pursuit was a felony pursuit, and that the public was in danger from Curlee's actions. He testified that knowing Curlee drove a stolen vehicle altered the pursuit and made the situation more dangerous.

Trooper Oliver testified that when his third TVI succeeded in bringing Curlee's vehicle to a stop against Mr. Paulus' car, Trooper Oliver was unable to drive behind Curlee or get on the driver's side of Curlee's truck. Trooper Oliver stated he would have preferred to perform a felony stop "by the book", but was unable to because "that requires a compliant suspect" and Curlee wasn't compliant. Trooper Oliver concluded that charging Curlee's vehicle was his only choice because protecting Mr. Paulus was his greatest concern. He believed Mr. Paulus was in peril because he was only a hood's length from Curlee and Curlee could have shot him, taken Mr. Paulus' car to flee, or hit Mr. Paulus with his truck. In addition, Mr. Paulus was in Trooper Oliver's line of fire if Trooper Oliver fired on Curlee. As he approached Curlee's vehicle, shouting for Curlee to exit, Trooper Oliver saw Curlee reach toward the floor and believed he was reaching for a gun.

Because Curlee was a risk to the public, was not complying and was showing that he did not intend to comply, Trooper Oliver determined that he had only two options. He either had to shoot and kill Curlee, or extricate Curlee from the locked vehicle and place him in custody. He chose the latter option in order to avoid the risk of Mr. Paulus being caught in the gunfire. Trooper Oliver stated that he had no other impact weapon available except his firearm. He punched Curlee's window with the muzzle of his gun, keeping the muzzle pointed at Curlee. Trooper Oliver testified that he pointed the muzzle at Curlee to punch the window because pointing the gun in any other direction would cause the muzzle to be pointed at Mr. Paulus, Trooper Oliver, Sgt. Ricketts, or the air. On Trooper Oliver's first punch, the almost dropped the gun. On the second punch, the gun discharged, hitting Curlee in the hand.

Trooper Oliver admits that the discharge of his weapon was accidental. He admits that no weapon was found in Curlee's truck. He also testified that there is no way to know if his finger

was on the trigger of his weapon or if the firearm went off from the impact with the glass. He testified that, to his knowledge, no one investigated whether his gun's discharged resulted from his finger being on the trigger or the impact of the weapon on the glass.

FINDINGS OF FACT

The parties stipulated that the Merit Protection Commission has jurisdiction over this appeal, that the Merit Rules apply, and that Trooper Oliver's appeal was timely filed. The parties also stipulated that Trooper Oliver was a permanent, classified employee of Appellee. The stipulations of the parties are incorporated herein as findings of fact.

Trooper Oliver was disciplined for a single violation of policy. Specifically, Trooper Oliver was suspended for violating OHP Policy 3.14.1 because the Board and Commissioner Thompson determined that he used his weapon in a careless or imprudent manner when he used it as a tool to break Curlee's window. Despite some testimony regarding the wisdom of Trooper Oliver's choice to "rush" Curlee's vehicle, it is clear that none of Trooper Oliver's conduct up to the point of breaking the window with his weapon is any part of the basis of the discipline imposed. As Commissioner Thompson testified, Trooper Oliver "did all the right things up to the point that he used his weapon as a tool to break the window". Whether there was sufficient grounds to discipline Trooper Oliver, then, comes down to one issue only. Was Trooper Oliver careless or reckless in using his gun to break Curlee's window?

No Department policy prohibits use of a gun as an impact weapon or tool to break a window. Whether using a gun to break glass is inherently careless or whether something about the way Trooper Oliver used the gun to break Curlee's glass was careless, then, cannot be gleaned from policy. The issue must be evaluated based only on the evidence presented at the hearing and considered in light of what actually happened after Curlee's vehicle came to a rest.

The weight of evidence presented at trial indicates that some training on using firearms to break windows has been provided directly by OHP to Troopers. Two long-time OHP firearms trainers, Trooper Walters and Lt. Tipton, testified directly that such training had been provided. Major Mays testified that when he asked a group of twenty to thirty firearms instructors about the matter, only one or two stated that such training had been provided and seemed to suggest that only one or two out of twenty or thirty meant any such training was rare at best. However, the testimony of Lt. Tipton paints a slightly different picture. According to his recollection of the event, the two or three most experienced firearms instructors in the room all said such training had been provided and no other trainer disagreed with them. Though some Troopers have received training from OHP on using firearms to break glass, Trooper Oliver is not one of them. By his own admission, Trooper Oliver was never trained to use a firearm to break a window, although he also never received training not to. Only Lt. Meyer testified that his training in Academy left him with the impression that he should not use his weapon to break glass. But Lt. Meyer also testified that he interprets the Department's current guidelines to mean that a gun can be used to break a window.

The Department's current training guidelines provide that guns should be used to break glass only as a last resort in exigent circumstances, and that even then safety precautions must be followed. Though the training guideline is not a policy, and though it was not in place at the time of the incident subject to this appeal, it has a relevant application. Major Mays requested the new training guideline in specific reaction to Trooper Oliver's use of his gun to break Curlee's window and after he became aware that OHP had trained Troopers on such use. How the Department trains Troopers is a good indication of what action it considers careless or reasonable. The new training guideline is relevant because it indicates that the Department

recognizes the use of a gun to break glass is not in and of itself inherently careless or reckless and may, under exigent circumstances, be necessary.

The Department does not, given its history of training some Troopers on using guns to break windows and, more importantly, given its current training guideline on the subject, have the luxury of resting its case on its determination that Trooper Oliver's use of his weapon was inherently careless or reckless. Rather, the Department must prove that the discipline was imposed either because exigent circumstances did not exist for Trooper Oliver to use his weapon as he did, or that something about the way Trooper Oliver broke Curlee's window with his gun was careless or reckless.

Of course, the Review Board, which included two firearms instructors, found that Trooper Oliver was careless. Commissioner Thompson reasonably stated that he was not inclined to second guess the Board. But the Board's finding does not resolve the issue of exigent circumstances. The Board may have evaluated whether exigent circumstances existed to authorize Trooper Oliver to use his weapon to break the glass. We will never know. The Board's findings were not admitted in the case. Though Major Mays clearly believed Trooper Oliver's use of his gun to break Curlee's window was reckless and careless, the only evidence of the Board's findings was his testimony that the Board determined Trooper Oliver was careless because Trooper Oliver's finger was in the trigger guard, and the use of the firearm as an impact weapon was improper. There is no evidence that the Board considered exigent circumstances at all.

The weight of evidence presented, including the testimony outlined above, clearly proves that Trooper Oliver found himself in circumstances that were exigent. Curlee's actions presented clear life-threatening risk to Mr. Paulus, Trooper Oliver, Sgt. Ricketts, and, if Curlee got back on

the road, members of the general public. The bulk of testimony from Troopers and Sgt. Ricketts suggests that Trooper Oliver's choice to use his gun to break Curlee's window was not only a good and reasonable choice, but likely his only choice. Because Trooper Oliver found himself in exigent circumstances, his choice to break Curlee's window with his gun was not inherently careless. It was the best of his bad options.

The Department, then, had sufficient grounds to discipline Trooper Oliver only if Trooper Oliver failed to follow appropriate safety precautions in the *manner* in which he broke Curlee's window with his gun. The Department's evidence in this regard is limited. Both Commissioner Thompson and Major Mays suggested that Trooper Oliver was obviously careless because the discharge of his weapon was accidental. The position has some attraction. Troopers are expected to be in control of their weapons and an accidental discharge with injury must indicate some problem. Yet it does not follow that every accidental discharge indicates negligence. The bulk of testimony from public safety professionals in this case is that things rarely go as planned, accidents happen, and people get hurt.

Did Trooper Oliver violate any of the four general safety rules? No evidence suggested that Trooper Oliver failed to treat his weapon as if it was loaded. Some testimony on behalf of the Department suggested that Trooper Oliver was careless because he let the muzzle of his gun cover Curlee when he didn't intend to shoot him. This logic fails. Sgt. Ricketts and Trooper Oliver both testified that Trooper Oliver kept his gun pointed at Curlee. Trooper Oliver was clearly authorized to shoot and kill Curlee. He intended to avoid shooting in order to protect Mr. Paulus, but the evidence is clear that Trooper Oliver was willing to shoot Curlee if necessary. In fact, Trooper Oliver testified that he pointed his gun in the only direction that was prudent –

directly at Curlee. In addition, the evidence is clear that Trooper Oliver was very sure of his target, Curlee, and what was behind it, Mr. Paulus.

The only possible grounds to support a finding that Trooper Oliver violated a general safety rule, then, is that he failed to keep his finger off the trigger until he was ready to fire. The board, according to the testimony of Major Mays, found just that. Major Mays testified that the Board unanimously found that Trooper Oliver violated OHP policy by handling his firearm in a careless and reckless manner because his finger was in the trigger guard. Yet, the Department provided no evidence at all that Trooper Oliver's finger was in the trigger guard of his weapon. The Board's unanimous finding, though interesting, is not evidence to support a finding by the undersigned administrative law judge that Trooper Oliver's finger was in the trigger guard. The only evidence on the matter was Trooper Oliver's testimony that he didn't know whether his finger was in the trigger guard and that the weapon might have discharged on impact.

CONCLUSIONS OF LAW

1. The Oklahoma Merit Protection Commission has jurisdiction over the parties and subject matter in the above-entitled matter.
2. Any findings of fact that are properly conclusions of law are so incorporated herein as conclusions of law.
3. Merit Rule 455:10-11-14 states that a permanent classified employee may be suspended without pay for a period not to exceed sixty (60) calendar days for misconduct, insubordination, conduct unbecoming a public employee, and any other just cause.
4. Merit Rule 455-10-9-2 states that the Appellee bears the burden of proof in an adverse action and must prove by a preponderance of the evidence that just cause exists for the action taken and that the discipline imposed was just.

5. The Personnel Act and Merit Rules provide that an employee must receive notice of the proposed action, which shall include the statute, rule, policy, etc., which was violated, the specific acts or omissions which are the cause of the suspension, an explanation of the evidence justifying the suspension, and the employee must be given an opportunity to respond to the proposed suspension either in writing or orally. 74 O.S. § 840-6.4; OAC 455:10-11-15.

6. OHP Policy 3.14.1 provides that “Members shall not use or handle weapons in a careless or imprudent manner. They shall use weapons only in accordance with law and this policy.”

7. Appellee has failed to meet its burden to prove, by a preponderance of the evidence, that Appellant, Nicholaus Oliver, violated OHP 3.14.1 by using his weapon in a careless or imprudent manner or in violation of OHP 3.14.1 as set forth in the Notice of Suspension Without Pay (Joint Ex. 1).

8. Appellee has failed to meet its burden to prove, by a preponderance of the evidence, that just cause exists to discipline Appellant as set forth in the Notice of Suspension Without Pay (Joint Ex. 1).

9. Because Appellee has failed to meet its burden of proof that just cause exists to impose any discipline on Appellant, no conclusion of law is necessary with regard to the justice of the discipline imposed under the circumstances.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Appellant’s appeal be and hereby is **SUSTAINED**.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the discipline imposed upon Appellant is rescinded.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Appellee shall
reinstate and pay all salary and benefits lost to Appellant by imposition of the suspension without
pay; Appellant's personnel records are to be expunged of all references to this disciplinary
action.

DATED this 3rd day of September, 2014.



Matt Hopkins, OBA# 16666
Administrative Law Judge
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