IN THE MATTER OF ARBITRATION
BETWEEN

United Government Security Officers of America, Local, 1637, Union,	)	
And	)	**FMCS No.: 15-560808-3** **Walker Suspension**
U.S. Department of Justice, Federal Bureau of Prisons Federal Correctional Institution Seagoville, Texas Employer.	)	

Before:	**Vicki Peterson Cohen, Arbitrator**
Appearances:	**Melchizedek Shelp, Treasurer, AFGE, Local 1637, for the Union,**
	Jennifer M. Merkle, Assistant General Counsel, U.S. Department of Justice, Federal Bureau of Prisons, for the Employer.
Date of Hearing:	**April 21, 2016**
Briefs Filed:	**June 28, 2016**
Hearing Location:	**Seagoville, Texas**

AWARD

The grievance is sustained. The disciplinary action was not taken for just and sufficient cause. The Grievant shall be made whole, and the discipline shall be removed from the Grievant's records.

Vicki Peterson Cohen August 10, 2016

I. STATEMENT OF THE CASE

The Federal Bureau of Prisons is responsible for providing suitable quarters, safekeeping, care, and subsistence for all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise; and is required to provide for the protection, instruction, and discipline of all persons charged with or convicted of offenses against the United States, among others. 18 U.S.C. § 4042 (b) & c).

The Seagoville Federal Correctional Institution operates a low security level facility, a satellite camp, and a Federal Detention Center, also called a jail. The Federal Detention Center is an administrative security facility which houses approximately 280 inmates awaiting trial, sentencing, or being held over until their transfer to another facility. All staff working inside the Federal correctional facilities are federal law enforcement officers who are trained at the Federal Law Enforcement Training Center located in Georgia.

On October 6, 2013, the Grievant, Joel Walker was working as a Federal law enforcement officer on the morning watch shift from midnight to 8:00 a.m.. The Grievant was assigned to a custody post at the Federal Detention Center which is a jail-type facility. At approximately 7:10 a.m., the Grievant used physical force on an inmate in the common area of the jail unit during breakfast time.

A security video shows the Grievant and the inmate exchanging words and the inmate walking away from the officer holding a food tray. The Grievant catches up to the inmate, reaches across the inmate's body, and puts him on the ground, and grabs the food tray out of the inmate's hand. After the incident, the Grievant walked away and immediately reported the

incident to the Operations Lieutenant. The Operations Lieutenant sent staff to the Federal Detention Center to take the inmate to medical services to be screened for any injuries, and then to the Special Housing Unit.

After any use of force incident, policy requires that an After Action Review be conducted. The After Action Review committee determined an incident of "Abuse of an Inmate" occurred which was referred to the Office of Internal Affairs for further investigation on October 9, 2013. The Office of Internal Affairs assigned a misconduct case of physical abuse of an inmate for local investigation on November 15, 2013.

The local investigation was completed and sent back to the Office of Internal Affairs for approval on May 1, 2014. The Office of Internal Affairs approved the investigation, and the investigative materials were sent to the Human Resources Manager for the administrative processing of any discipline. The Human Resources Manager drafted a proposal letter which was issued to the Grievant on February 7, 2015. The letter proposed a 7-day suspension for excessive use of force on an inmate in violation of Program Statement, Standards of Employee Conduct 3420.09, 9 c. The Grievant provided both a written and oral response to the proposal. The Warden reviewed the Grievant's response and all the materials in the discipline file, and decided a 1-day suspension for "Excessive Force" would have the desired corrective effect. The decision letter was issued on June 12, 2015.

The Union filed a Notice of Intent to Invoke Arbitration on June 16, 2015 under Article 30, Section a, and Article 31, Section H. The parties agreed that the issue is properly before the Arbitrator.

II. ISSUE

Was the disciplinary /adverse action taken for just and sufficient cause, or if not, what shall be the remedy?

III. RELEVANT AGREEMENT LANGUAGE and PROGRAM STATEMENT

Article 30- Disciplinary and Adverse Actions Section

a. The provisions of this article apply to disciplinary and adverse actions which will be taken for just and sufficient cause and to promote the efficiency of the service, and nexus will apply.

c. The parties endorse the concept of progressive discipline designed primarily to correct and improve employee behavior, except that the parties recognize that there are offenses so egregious as to warrant severe sanctions for the first offense up to and including removal.

d. Recognizing that the circumstances and complexities of individual cases will vary, the parties endorse the concept of timely disposition of investigations and disciplinary/adverse actions.

Article 31- Grievance Procedure

h. Unless as provided in number two (2) below, the deciding official's decision on disciplinary/adverse actions will be considered as the final response in the grievance procedure. The parties are then free to contest the action in on (1) of two (2) ways:

1. by going directly to arbitration if the grieving party agrees that the sole issue before the arbitrator is, "Was the disciplinary/adverse action taken for just and sufficient cause, or if not, what shall be the remedy?"; or

2. through the conventional grievance procedures outlined in Article 31 and 32, where the grieving party wishes to have the arbitrator decide other issues.

Program Statement- P5566.06 - 11/30/2005 - Use of Force and Application of Restraints

1. Purpose and Scope 552.20. The Bureau of Prisons authorizes staff to use force

only as a last alternative after all other reasonable efforts to resolve a situation have failed. When authorized, staff must use only that amount of force necessary to gain control of the inmate, staff and others, to prevent serious property damage, and to ensure institution security and good order. . . .

2. Program Objectives. The expected results of this program are:

a. Force will ordinarily be used only when attempts to gain voluntary when attempts to gain voluntary cooperation from the inmate have not been successful.

b. When force is used, it will only be the amount of force required to subdue an inmate or preserve or restore institution security and good order.

Standards of Employee Conduct - 3420.09 - 2/5/199

9. Personal Conduct.
It is essential to the orderly running of an Bureau facility that employees conduct themselves professionally. The following are some types of behavior that cannot be tolerated in the Bureau.

c. Additional Conduct Issues.

. . . . .

(2) An employee may not use brutality, physical violence, threats or intimidation toward inmates, or use any force beyond which is necessary to subdue an inmate.

IV. SUMMARY OF THE TESTIMONY

The first witness presented by the Agency was Lieutenant Joseph Leap. Since 2013, Lt. Leap's responsibilities include special investigation supervisor. As a special investigation supervisor, Lt. Leap conducts investigations that have been referred from the Office of Internal Affairs for local investigations of staff misconduct. Leap has conducted staff misconduct investigations for about six years total, for which he received special training.

Leap described staff misconduct as actions done by an employee that are outside the

Bureau of Prison's Policy and the Standards of Employee Conduct. When there is a report of possible staff misconduct, Lt. Leap prepares a referral for the Office of Internal Affairs. The Office of Internal Affairs sends the case to the Inspector General through the Department of Justice. The Office of Inspector General decides whether they will accept the case for investigation or send it back to the Office of Internal Affairs. If the case is sent back to the Office of Internal Affairs, that Office will make a determination of whether it will conduct the investigation or refer it down for a local investigation.

Lt. Leap first became aware of the October 6, 2013, use of force incident involving the Grievant the day after it occurred. At that time, Lt. Leap reviewed all memoranda, medical assessments, and video of the incident before preparing the After Action Review for the committee. On October 8, 2013, an After Action Review was conducted by a committee of the warden, the associate warden over correctional services, health services administrator, the captain and other staff (including Lt. Leap and a psychologist). Lt. Leap's also prepared an Incident Report charging the inmate with refusing an order and interfering with staff performance, and a Detention Order placing the inmate in the Special Housing Unit

According to Lt. Leap, officers are authorized to use force as a "last resort" in certain circumstances, and there are two types of force, immediate and calculated. Lt. Leap described calculated force as a safer option, while the immediate use of force is used only when staff perceives an immediate serious threat to themselves, an inmate, property or the institution's security

As part of his testimony, Lt. Leap narrated the video of the incident. The video focused on the open area in the housing unit where tables are located for the inmates to eat. Inmates'

cells are located on the second floor with a catwalk around the perimeter of the area with stairways on both ends to the open area. There is one officer for the unit stationed on the second floor in the corner in a secured office.

The video shows the Grievant standing by some tables in the open area with the inmate holding a food tray in his right hand. The incident started over the inmate's pants falling down and the Grievant ordering him from the second floor to pull up his pants. According to the Grievant, the inmate ignored him, so the Grievant went down the stairs and is seen confronting the inmate. Lt. Leap believed that the Grievant told the inmate to put the food tray down and go to his cell, and then the Grievant walked back upstairs. The inmate did not go back to his cell and picked up another food tray in his hand, so the Grievant proceeded back down the stairs. The inmate walked away from the Grievant, then there is a pause and verbal exchange, attracting the attention of other inmates in the area. The Grievant was attempting to take the food tray from the inmate who held the tray over his head and away from the Grievant's grasp. The Grievant then physically placed the inmate on the ground, but did not restrain him, and took the food tray. Lt. Leap then observed the inmate holding up his pants, which have no belt, after he got up. The inmates began returning to their cells at that time as ordered by the Grievant.

On cross-examination, Lt. Leap agreed that inmates are not allowed to ignore staff orders or walk away from staff giving them orders. Lt. Leap believed, based upon the video, that the inmate was verbally challenging the Grievant as he walked away from him. Lt. Leap also agreed that one could perceive the inmate as "winding up" with the food tray, and the Grievant had a "split-second" to make a decision on how to react. Lt. Leap agreed that it looked like the Grievant controlled placing the inmate on the ground and did not throw him down. Lt. Leap

would hope that his officers would call for assistance in a case like this and maintain control over the inmate until other staff arrived. The entire incident took approximately 13 minutes, or until the entire inmate unit was back in their cells.

After the case was referred back from the Office of Internal Affairs for a local investigation, Lt. Leap was assigned as the investigator on or about November 15, 2013. Once Lt. Leap completed his investigation, he prepared a Report of Investigation. Lt. Leap concluded that the use of force was not authorized. The inmate was not trying to attack the Grievant, and the Grievant referred to "slamming" the inmate down in his affidavit, which he considered more of an abusive type situation. The Grievant never indicated that he thought the inmate was going to hit him with the food tray or threaten him in any other way.

Lt. Leap submitted his investigative packet to the Human Resources manager charging the Grievant with "physical abuse of an inmate." This is the charge that Lt. Leap and the Office of Internal Affairs sustained and approved. Lt. Leap did not believe it was the Grievant's intent to hurt the inmate, but believed the Grievant got mad when the inmate disrespected him and put him on the ground.

Lt. Leap recognized a document identified as a memorandum from Kathleen Kenny, Assistant Director/General Counsel, Bureau of Prisons, dated October 31, 2006. The memorandum was addressed to "All Chief Executive Officers." On page 3, under "Time Guidelines" the memo states, in relevant part, that for classification 3 allegations, "the local investigations should be completed and the investigative packet forwarded to the Office of Internal Affairs prior to any disciplinary action being taken and within 120 days of the date the local investigation was authorized by the CEO." Lt. Leap testified that it took him six months

and two weeks to complete the local investigation, which was usual.

Lt. Leap was aware that the initial charge of abuse of an inmate was later changed to excessive force on the Proposal Letter. Lt. Leap agreed that a staff member needs to know what the charge is in order to properly defend themselves.

The second witness presented by the Agency was Latanya Cottrell, Human Resource Manager. According to Manager Cottrell, once Lt. Leap completed his investigation, the case is sent to her to complete the administrative process. The Human Resource Department reviews the investigative file and drafts the Proposal Letter, which is sent to the Regional Office for review, and the employment law attorney for review, before returning to Human Resources for distribution. After the Proposal Letter is distributed, the staff member has ten days to respond in writing or orally before the entire case file is reviewed by the warden.

According to Human Resource Manager Cottrell, the Proposal Letter prepared by her office recommended a seven-day suspension based on the Standards of Employee Conduct, as she no similar cases for comparison.

The third witness presented by the Agency was Eddy Mejia, retired warden of FCI Seagoville. Mejia became the warden at FCI Seagoville in October 2012 and he issued the discipline to the Grievant. Mejia wrote the Decision Letter which was signed by the acting warden after his retirement. When mitigating the recommended 7-day suspension to a 1-day suspension, Mejia considered the Grievant's 15 years of service, no discipline during the two-year reckoning period, the length of time that had lapsed since the incident, the video and the severity of the incident. Mejia concluded that the Grievant potentially put other staff at risk and some discipline was needed, yet 7-days served no purpose for the Agency. Mejia also took in

consideration that the Grievant took responsibility for the incident and recognized that he did not handle the incident in the best way. Mejia was aware of 2004 Office of Inspector General's Report regarding guidance as what should be considered as a timely staff investigation.

On cross-examination, the Mejia testified that he was not aware of the Kenny Memorandum from 2006 regarding the guidance for timely investigations, yet he was aware of the parties' Master Agreement language regarding the timely completion of investigations.

The final witness presented by the Agency was Captain James McCarty. Captain McCarty gave the Proposal Letter to the Grievant and was the proposing official. McCarty described immediate force as force you use when you do not have time to notify your supervisor. McCarty believed that immediate use of force is based on a staff member's perception and "good order" would be the perception of a threat which gives the staff member the authority to protect himself. McCarty believed that the incident with the inmate could have been handled differently by the Grievant. Captain McCarty testified that he was not familiar with the Douglas Factors.

The Union rested at the conclusion of the Agency's case and presented no witnesses.

IV. ARGUMENTS OF THE PARTIES

Agency

The Agency's action was taken for just and sufficient cause.

The rule or order the Grievant violated was related to the safe, orderly and efficient business operations. As a Federal Correctional Officer, the Grievant was entrusted with the authority to use force against inmates immediately, without seeking specific approval first, in limited situations. *The Bureau of Prisons authorizes staff to use force only as a last alternative*

after all other reasonable efforts to resolve a situation have failed. The policy is designed to "provide guidance and instruction on appropriate procedures when confronted with situations that may require the use of force to gain control of an inmate. CPD/CSB P5566.06 Jt Exhibit 6 at 1 and 2. The Agency has made it clear that the use of physical force is a last resort. The authorization of force in limited circumstances is critical to ensuring the safety of all persons.

The employee was given advance notice of the performance issue or work rule, along with the possible consequences of failing to change his behavior. All law enforcement officers receiving training at the Federal Law Enforcement Training Center, and annual training thereafter where the use-of-force is taught. All staff receive a copy of the Standards of Employee Conduct which explicitly notifies them that they are prohibited from using "brutality, physical violence, or intimidation toward inmates, or use any force beyond what is reasonably necessary to subdue an inmate."

Before disciplining the Grievant, the Agency investigated to determine if he actually violated a rule or performance standard. A full and fair investigation was conducted including security surveillance, government records, and taking statements and affidavits from individuals involved and/or responding to the incident.

The investigation was conducted in a fair and objective manner by a trained and seasoned investigator. The Grievant was given notice of his rights and the opportunity to have a representative present prior to being interviewed. The written referral to the Office of Internal Affairs was sent with 24 hours. The investigation was concluded within a reasonable amount of time, in a little more than 180 days. The Master Agreement states only that "the parties endorse the concept of timely disposition of investigations." The deciding official took into account

"among other factors," the "length of time that had lapsed since the incident."

The investigation found overwhelming evidence to support the misconduct allegation. The video shows that the inmate walked away from the Grievant two times prior to the Grievant escalating the verbal exchange to a physical exchange. The inmate walking away with a food tray did not pose a threat that warrants resort to the Agency's last alternative, the immediate use of force. The Grievant acknowledged that it was not a "direct attack" on him or would warrant him pushing his body alarm or calling for help.

The Agency applied its rules and penalties equally to all employees. The Agency's Standards of Conduct includes a prohibition which states that "An employee may not use brutality, physical violence, or intimidation toward inmates or use any force beyond what is reasonably necessary to subdue an inmate." The list of offenses under this prohibition includes "physical abuse of an inmate," which carries a range of discipline from an official reprimand to removal for the first offense. The Agency considered similar charges where the corrective action ranged from 5-14 days suspensions. When deciding to impose a 1-day suspension, the Warden considered the Grievant's 15 years of service, no past disciplinary record, the length of time since the incident occurred, the severity of the incident and the Grievant taking responsibility.

The disciplinary action was appropriate for the Grievant's action and his overall performance record. The Grievant endangered himself, others and there could have been serious consequences.

The Agency's action promoted the efficiency of the service. The use of force in excess of that authorized can seriously impair the Agency's ability to provide a safe, secure and humane environment for individuals committed to the custody of the Agency and working for the

Agency. Failure of the Agency to enforce its limitations on the use of force rules could jeopardize the trust of the inmates and endanger staff. The Agency believes the 1-day suspension would provide the corrective actions it needed to take to ensure that the Grievant understands the policy on the use of force and how to handle a similar situation differently.

The only issue before the Arbitrator is provided in the parties' collective bargaining agreement.

The discipline was reasonably timely. The Grievant never raised the issue of timeliness of the disciplinary action or the investigation in his written or oral response. The Union attempted to connect a dated Office of Inspector General's report from 2004 to impose a statute of limitations on an administrative proceeding. This document is merely a recommendation. There is no Agency policy which requires an imposed time frame to complete an investigation nor disciplinary process. The Union did not establish that the Grievant was harmed by the length of the investigation which took about six months to complete, and the Arbitrator has no authority to add to, subtract from, disregard, alter or modify any of the terms of the parties' Agreement.

The Grievant was given adequate notice of the charges he was facing during the investigative process. The Warning and Assurance to Employee form signed by the Grievant prior to providing an affidavit stated the substance of the investigation was "Physical Abuse of Inmate" which is a more serious offense then excessive use of force. The Grievant suffered no harm or prejudice by being charge with an offense that sounds less serious than the one being investigated.

Union

Applicable Legal Standard. The Agency bears the burden of proof to support the charges. Cases cited. A charging agency's burden of proof is comprised of three separate components: 1) the elements of administrative charge(s); 2) the reasonableness of the penalty; and 3) the nexus between the discipline and the efficiency of the federal service. *U.S. Dept. Of Navy Inventory Control Point Mechanicsburg PA and AFGE Local 1156, 59* FLRA *126 (2004).*

When determining the reasonableness of a particular agency penalty, arbitrators consistently employ what are commonly referred to as the "Douglas Factors." In *Douglas v. Veterans Administration, 5* MSPR *580, (1981),* the Merit System Protection Board isolated twelve factors from pre-existing cases and policy that it considered relevant to finding the appropriateness of an agency's penalty. When an agency fails to properly consider mitigating circumstances while applying progressive discipline or to consider the effectiveness of alternative sanctions, then the agency's decision should be rescinded, or in the least mitigated down to an appropriate progressive penalty. *VanFossen v Dept of Housing and Urban Development, 748. 2*d 1579 (Fed Cir 1984).

The purpose and scope - 28 CFR 552.20. The Bureau of Prisons authorizes staff to use force to enforce Bureau rules and regulations and or to gain voluntary cooperation from a non-compliant inmate. Staff must use only that amount of force necessary to gain control of the inmate, to protect and ensure the safety of inmates, staff, and others, to prevent serious property damage and to ensure institution security and good order.

Immediate use of force - 28 CFR 552.21-Type of Force. Staff may immediately use force and/or restraints when the behavior described in § 552.20 constitutes an immediate, serious

threat to the inmate, staff, others, property, or to institution security and good order.

Principles governing the use of force and application of restraints - CFR 552.22.

(a) Staff ordinarily shall first attempt to gain the inmate's voluntary cooperation before using force.

(b) Force may not be used to punish an inmate.

(c) Staff shall used only the amount of force necessary to gain control of the inmate. Situations when an appropriate amount of force may be warranted included, but are not limited to:

(1) Defense or protection of self or others:

(2) Enforcement of institutional regulations: and

(3) The prevention of a crime or apprehension of one who has committed a crime.

Union's Summary Argument. A major concern for the Union is that the dark mark of excessive force will linger on far longer on the Grievant's record than the one-day suspension. The stigma of excessive forces is a never ending pall that covers every aspect of law enforcement. Arbitrators have ruled that those charged with the duties of judging whether there has been an incident of excessive force, must rely on the intent of the officer; whether the officer lost control while using force; and whether the force policy was violated.

The Agency made an initial allegation of "Abuse of an Inmate" on October 9, 2014. The Agency concluded in its proposal letter issued on February 7, 2015 that the Grievant used "Excessive Force" against an inmate. The video shows a noncompliant inmate walking away from and ignoring the Grievant. It was not until the inmate became actively resistant to the Grievant that he used the exact amount of force necessary to bring compliance to the inmate, and

restore order to the housing unit. The use of force lasted 12 seconds. There was no injury to the inmate and the Grievant did not continue to apply force once the inmate became compliant. The Grievant used exactly the amount of force necessary to regain compliance as he was trained.

After the inmate was compliant, the Grievant allowed him to stand, where he instructed the inmate and other inmates to return to their cells. The Grievant then went upstairs to his office to notify the Operations Lieutenant of the use of force. The entire unit was secured by the Grievant without assistance. The Agency can make of assertions as to what could have happened, but have no proof that any of these things would, could, or ever happened.

No witness gave testimony stating they believed the Grievant's "intent"was to cause harm; intimidate; be brutal; or to cause physical violence toward the inmate. Even Lieutenant Leap testified that he thought the Grievant controlled the inmate going to the ground. The Warden made up his mind when he first viewed the incident two days after it happened and before the investigation, which indicates a bias investigation, followed by a biased decision, which was a violation of the Grievant's due process rights.

The significant lack of timeliness cannot be ignored. Lieutenant Leap testified that this investigation was no more complex than any other, and he made no effort regarding meeting the time frames in the memorandum.

Arbitrators have continuously overturned disciplinary cases with the Agency, frequently citing timeliness as becoming punitive when the discharge of discipline exceeds reasonableness. FMCS Case No. 11-58573-1: *AFGE, Local 171 and Department of Justice, Federal Bureau of Prisons,* FCI el Reno, Oklahoma City, Oklahoma.

Procedural errors. Captain McCarty signed the proposal letter, yet took no part in

drawing it up, and did not know the original charge was changed until he read it. It is a massive due process violation when the proposing official is not allowed any part in drafting the proposal letter, and shows that the discipline decision had already been made.

Captain McCarty was not able to protect the Grievant's due process rights as he did not know what nexus was; what the Douglas Factors are; or apply any mitigating circumstances; or even know what efficiency of service means.

Warden Mejia's credibility as the deciding official is in question as well. The Warden showed a disregard for time frames when stating time frames was "whatever your definition of time is." The Warden must not only protect the Agency, and must also hold his own managerial staff accountable for violating due process violations.

Conclusion. The Union is requesting that the Grievant be made whole; expunge the 1-day suspension and the Grievant's record without prejudice. The Union further requests that the Arbitrator order the Agency to follow the requirements of the Back Pay Act and conform the Grievant's pay and personnel records to reflect the lesser sanction. The Union further petitions the Arbitrator to consider fee-shifting regardless of the parties' Agreement language based on the established "bad faith exception."

VI. DISCUSSION AND DECISION

The due process violations alleged by the Union will be addressed first.

The Grievant was aware that the October 6, 2013-incident with an inmate was being considered as a basis for potential disciplinary action. The charge being considered was changed from Abuse of an Inmate to Excessive Use of Force by Human Resources prior to issuing the Proposal Letter. Yet, there is no evidence, nor reason to believe, that the Grievant would have

responded any differently when providing his statement or affidavit during the investigatory/disciplinary process. Consequently, the Grievant suffered no harm due to the change of the disciplinary charge.

In regard to the Douglas Factors, it is true that neither Human Resources nor Captain McCarty systematically weighed, or even considered, such twelve mitigating factors when proposing discipline. In fact, it appears that Captain McCarty's role was merely that as a signatory, rather than a weigher of any mitigating factors concerning an appropriate disciplinary proposal. On the other hand, Human Resources did incidentally consider one Douglas Factor of comparable disciplines, of which it found none for the Abuse of an Inmate, so the charge was "mitigated" to the use of excessive force. Warden Mejia did a more thorough job of considering mitigating factors when he changed the proposed 7-day suspension to a 1-day suspension, even though he did not specifically follow the Douglas Factors as promulgated by the FLRA in *Douglas v Veterans Administration* 5 MSPR 580 (1981).

Finally, the entire disciplinary process, from the date of the incident, October 6, 2013, until the Decision Letter was issued on July 12, 2015, took 600 days, 20 months or almost two years. The circumstances in this case were not complex. Yet, the local investigation took twice as long as the 120 days repeatedly recommended and requested by management. Moreover, after the investigation was complete, the cumbersome administrative disciplinary process took an additional nine months before the Decision Letter was issued to the Grievant. In the meantime, the Grievant continued to work and carry on his life with a cloud over his head while the wheels of the Agency inefficiently turned and decided his fate.

The facts that Warden Mejia took into consideration the amount of time the disciplinary

process took, nor management's work load at the time, are not valid excuses or justifications for the delay in processing the investigation, reviews and ultimately issuing the discipline. A reasonable person would not endorse this 20 months as a timely disposition of the disciplinary process, even though the parties' Agreement only addresses the issue of a timely investigation. The untimely processing of the discipline becomes even more unjust as the Grievant would be required to serve another two-year reckoning period in addition to the almost two years he was waiting without incident for a disposition of his case.

In conclusion, the Agency's untimely disposition of the Grievant's discipline has due process violation implications that could rationally render the discipline void. Yet, there is no procedural necessity to render the discipline void based on the Agency's due process violations. The Agency did not prove by a preponderance of the evidence that the Grievant engaged in the excessive use of force on October 6, 2016, and the Grievant's disciplinary record must be substantially cleared of any wrongdoing.

What occurred between the Grievant and the inmate on October 6, 2013, is basically not in dispute by the parties.

In response to the inmate's open and repeated defiance, the Grievant used physical force to put the inmate on the ground so he could remove the food tray from his outreached hand. The inmate complied with the Grievant's repeated orders only after he was placed on the floor by the Grievant. The food tray was removed and the inmate held his pants up, after being put on the floor.

When the Grievant wrote his first statement on October 6, 2013, he stated "I put him on the floor." When interviewed by Lt. Stallings on October 6, 2013, Lt. Stallings recorded that the

Grievant said "I grabbed him and took him down." When the Grievant provided a more detailed affidavit on May 1, 2014, some seven months later, the Grievant again wrote that he "put him on the ground ," and subsequently wrote "when I slammed him" as he continued to describe his part in the incident. This is the first time the Grievant referred to his conduct as "slamming," a term previously used by the inmate when describing the incident.

Lt. Leap testified that the video showed the Grievant was under control when he put the inmate on the ground. Yet, Lt. Leap focused on the Grievant's one time referral to "slammed," in his affidavit some seven months later when responding to the inmate's allegations. Moreover, management reviewers of the video agreed that the Grievant used no more force than necessary to remove the tray and gain the Grievant's compliance with his instructions. Management, including Lt. Leap, saw no intent on the Grievant's part to harm or restrain the inmate. The Grievant did not lose control and attempt to cause any injury to the inmate. The Grievant used force as a last alternative under the circumstances, and then used only the force reasonably necessary to gain control of the inmate and ensure good order in the open area.

In retrospect, the Grievant responsibly agreed that he could have handled the incident differently. Yet, this admission does not establish that the Grievant used excessive force. The inmate was openly and repeatedly, verbally and physically, noncompliant in front of many other inmates in the open area. The situation escalated as the inmate continued to argue with and defy the Grievant's orders. The Grievant used only the amount of force necessary to gain control of the inmate and situation. The Grievant did not use excessive force to gain control of the inmate and the situation.

The what-ifs did not happen in this case. The inmate was not hurt, no riot broke out, and

the Grievant was not injured or placed in jeopardy. Nor were any staff members placed in jeopardy. What force the Grievant applied worked. The food tray was dropped, the inmate held his pants up, and returned to his cell, along with all the other inmates in the area. This may well indeed be a time to educate the Grievant and other officers regarding preferred alternative methods to handle a similarly defiant inmate in order to prevent the what-ifs. However, this was the first time in his 15 years of service that the Grievant encountered such an openly defiant inmate, and the incident occurred in an open area with other inmates observing the struggle for control. The Grievant used the amount of immediate force required to subdue the inmate and preserve or restore institution security and good order. Although the Grievant may now understand that the use of any force in a similar future situation is to be avoided, his use of force on October 6, 2013, was not established by a preponderance of the evidence to be excessive under the totality of the circumstances.

For all the reasons stated above, the grievance is sustained. The 1-day suspension for the use of excessive force will be expunged from the Grievant's file and he shall be made whole for all lost wages and benefits. The Union's request for an arbitration fee shifting is denied.