

FEDERAL MEDIATION AND CONCILIATION SERVICE

In the Matter of the Arbitration Between

AFGE LOCAL 2001,

Union,

OPINION & AWARD

-- and --

**FMCS NO. 12-55984-1
Suspension of R. Castellanos**

**U.S. DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF PRISONS,
FORT DIX, NJ**

Employer.

ARBITRATOR: James M. Darby, Esq.

APPEARANCES: For the Union:
Evan Greenstein, Esq.
AFGE Legal Rights Attorney

For the Bureau:
Jennifer Grundy Hollett, Esq.
Assistant General Counsel

This dispute arose when the U.S. Department of Justice, Federal Bureau of Prisons (“the Bureau”) suspended Corrections Officer Reginald Castellanos (“the Grievant”) for 21 days, for failing to properly supervise an inmate and endangering the safety of staff and others. On April 12, 2012, AFGE Local 2001

("the Union") filed a grievance alleging that the discipline was untimely and without just cause. The parties were unable to resolve the grievance.

By letter dated June 15, 2012, from the Federal Mediation and Conciliation Service, the undersigned was notified of his selection as Arbitrator of this dispute. Hearings were held on August 14 and 15, 2013, at FCI Fort Dix, Fort Dix, New Jersey, where the parties were afforded a full opportunity to present testimony, exhibits and arguments in support of their positions. The parties filed post-hearing briefs, which the undersigned received on December 23, 2013 (Union) and December 27, 2013 (Bureau), after which the record was closed. After fully considering all of the evidence and arguments presented, the matter is now ready for final disposition.

QUESTION TO BE RESOLVED

At the commencement of the hearing, the parties stipulated to the following issue to be resolved by the Arbitrator:

Was the adverse action taken against the Grievant, Reginald Castellanos, for just and sufficient cause? If not, what shall be the remedy?

(Transcript p. 8.)

RELEVANT CONTRACT LANGUAGE

Article 30 – Disciplinary and Adverse Actions

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

* * *

Section 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.

Section 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.

1. When an investigation takes place on an employee's alleged misconduct, any disciplinary or adverse action arising from the investigation will not be proposed until the investigation has been completed and reviewed by the Chief Executive Officer or designee; and
2. Employees who are the subject of an investigation where no disciplinary or adverse action will be proposed will be notified of this decision within seven (7) working days after the review of the investigation by the Chief Executive Officer or designee. This period of time may be adjusted to account for periods of leave.

(Joint Exhibit 1, pp. 70-71.)

REMEDY REQUESTED

The Union requests that: 1) the grievance be sustained; 2) the Grievant's suspension be reversed; 3) the Grievant be made whole through back pay, interest and all other benefits to which he is entitled (including missed overtime opportunities); 4) any record of his discipline be expunged from his official personnel file; and 5) the Union be awarded reasonable attorney's fees. (Union Brief p. 20.)

BACKGROUND

The Grievant was hired by the Bureau in March 2008 as a correctional officer ("CO") at the Federal Correctional Institution Fort Dix, New Jersey ("the Prison"). The Prison is the largest correctional institution within the Bureau and houses approximately 4,400 male inmates. The Prison does not provide medical services to inmates. Inmates requiring medical treatment are often transported to St. Francis Hospital ("the Hospital") in Trenton, N.J.

Both the Bureau and the Prison maintain policies for COs escorting inmates into the community, including trips for medical treatment. (Bureau Exhibits 4, 11.) Specifically, the Prison's "Special Instructions for Escort/Local Hospital Officer" (referred to as the "Post-Orders") provide that the "primary responsibility" for COs escorting an inmate to a local hospital "is the care, custody

and control of the inmate, while providing a safe and secure environment ... while under the Community Hospital's care (Bureau Exhibit 4, p. 1).

Additionally, the Post-Orders provide as follows:

Officers shall provide direct and constant supervision of the inmate(s) at all times.... The officer will place himself in a position to immediately provide assistance and protection in the event the inmate becomes violent or presents signs of imminent violence and danger to others....

In any case, one Officer must remain in the same room with the inmate(s) at all times. This shall include hospital room, operating room, x-ray, examination rooms, etc....

(*Id.* p. 20.) All COs receive annual refresher training on these rules. COs assigned to escort duties also receive Basic Prisoner Transport Training ("BPT").

On September 13, 2010, the Grievant was assigned to supervise Inmate TN, who was receiving medical treatment at the Hospital. CO Christopher Forte was the assigned "Armed Officer," who was responsible for guarding the entrance to the room. According to the "Escorted Trip Authorization Form" for TN's hospital visit, COs were required to "use caution" since TN had a history of "prior violence." The Form also required COs to "maintain constant visual supervision" and to "utilize hand restraints, Martin [body] chain, and leg restraints." (Bureau Exhibit 12.)

When the Grievant arrived at TN's hospital room on the morning of September 13, TN was lying in his bed with one hand cuffed to the bed rail. His feet were secured in flex cuffs and were attached to a metal leg restraint. The leg

restraint was secured to a Martin chain, which was padlocked to the frame of the bed. Shortly after the Grievant arrived, TN asked to use the bathroom. After entering the bathroom, TN slammed the door shut and locked it. The Grievant ordered TN to open the door several times, and TN complied. While in the bathroom TN knocked over a chair.

The Grievant returned TN to the bed and re-applied his restraints. After a nurse refused TN's request to sit in a chair so he could watch TV, TN became angry, stating that he was going to "tear this motherfucker up." He picked up his crutch and attempted to operate the TV by poking at it with the crutch. The Grievant ordered TN to stop. TN refused and began swinging the crutch. The Grievant then directed CO Forte to notify the Prison that TN was "acting out." TN then grabbed a can of soda from the nightstand and threatened the officers with it.

Soon thereafter, TN got out of the bed and flipped it over on its side. He then attempted to push the overturned bed towards the door in an attempt to barricade himself in the room. He proceeded to throw the can of soda through the window, which sprayed glass into the room. At some point during this incident, TN was able to slip his restrained hand out of the handcuff. He grabbed a piece of the glass from the broken window and lunged at the Grievant, threatening to "slit his throat." With Forte's assistance, the Grievant was able to wrestle TN onto the bed and disarm him. The Grievant secured TN back onto the

bed, this time “four-pointing” him by restraining both of his hands and feet to the bed.

Several Prison officials were called to the scene, including Lieutenant Elizabeth Blount and Special Investigative Agent Danine Adams. TN was interviewed and Adams took photographs of the room. The Grievant was asked to write a statement, which he prepared that same day (Joint Exhibit 10). On September 24, 2010, Warden Donna Zickefoose referred the matter to the Bureau’s Office of Internal Affairs (“OIA”).

Thereafter, OIA referred it back to the Prison for investigation. On January 19, 2011, Adams interviewed the Grievant and, based on his statements, prepared a sworn affidavit (Joint Exhibit 9). In the affidavit, the Grievant averred that he did not believe that TN’s behavior in the bathroom warranted his applying increased restraints on TN when he returned to the bed. He also stated that at no time did he exit TN’s room. (*Id.* ¶¶14, 33.) The Grievant also averred as follows:

At the time this incident occurred, I made the best decision I could. Looking back I should have insured I was inside while inmate [TN] was using the bathroom. I also believe I should have taken action when [TN] picked up the soda can and threatened Forte and myself, above the direct orders I gave him.

(*Id.* ¶34.)

Adams completed the investigation on January 29, 2011 and OIA approved the same and furnished the investigation results to the Prison on February 14,

2011. The file was then referred to the Prison's Personnel Office for the purpose of evaluating whether discipline was appropriate. ¹

On October 11, 2011, the Bureau issued a "Proposal Letter" to the Grievant. The Letter proposes a 30-day suspension "for Failure to Properly Supervise an Inmate and Endangering the Safety of Staff, violations of the Standards of Employee Conduct...." (Joint Exhibit 6.)

Specifically, the Proposal Letter states, in pertinent part, as follows:

... On two consecutive occasions, you did not maintain constant supervision of the inmate. [TN] was able to enter the bathroom, shut the door and secure it. [TN] also became irate and flipped over his bed because he wasn't allowed to sit in the chair and watch T.V. Once this happened, you and the Armed Officer stepped out of the room and closed the door, removing yourself from having constant supervision and control of the inmate. Your actions allowed the inmate to attempt to barricade himself in the room. When he realized he could not, he grabbed a soda can and threw it at the window shattering the glass and brandishing a weapon.

... As a Correctional Officer assigned to this critical post, it is of utmost importance that you keep the inmate under constant observation. Your failure to properly supervise an inmate jeopardized the safety of the inmate, fellow escort staff, the public, and caused extensive damage to hospital property.

(*Id.* p. 2.)

With respect to the charge that the Grievant "Endanger[ed] the Safety of Staff and Others," the Proposal Letter states, in pertinent part, as follows:

¹ Adams also interviewed, and obtained sworn affidavits from Forte and Lieutenant Lybrant Wright (the operations lieutenant who Forte spoke to when he called the Prison during the altercation with TN).

Specifically, on September 13, 2010, while assigned to St. Francis Hospital, you failed to properly re-apply restraints to [TN] after he finished using the hospital bathroom. [TN] admitted in a Memorandum of Interview that he was re-restrained to his hospital bed, but because the handcuffs were so loose, he was able [sic] slip one of his wrist [sic] from the restraints. He became upset and verbally assaultive, stating 'I'm gonna tear this mother fucker up!' He then flipped his bed on its side, moving it towards the hospital door to be used as a barricade. [TN] picked up a can of soda and threw it at the hospital window which shattered it and brandishing a weapon stating 'If you come near him he was going to slit your throat.' [TN] was able to remove his other wrist from the restraints because you loosely secured that one as well. In your affidavit dated January 20, 2011, you state you did not see any need to apply additional restraints when you re-secured the inmate to the bed. Per the escorted paperwork dated September 1, 2010, 'use caution, inmate has prior history of violence, hand restraints, martin chain and leg restraints required.'

* * *

The inmate locked himself in the bathroom and destroyed hospital property. However, you did not apply the necessary required restraints. The inmate had a history of prior violence as indicated on the Escorted Trip documentation dated September 1, 2010.... Your actions in this matter demonstrated your lack of sound correctional judgment. Your actions could have resulted in the inmate causing serious harm to himself, staff and the public. Additionally, the inmate could have escaped.

(Joint Exhibit 6, p. 2.)

On November 1, 2011, the Union submitted to the Warden its response to the Proposal Letter. The Union argued that the proposed discipline was untimely. It also maintained that the Grievant complied with Bureau policy at all times, and that the Proposal Letter contained inaccurate factual assertions.

(Joint Exhibit 7.) The Grievant had an opportunity to meet with the Warden to

argue his case. Thereafter, on March 5, 2012, the Warden issued the final Bureau decision. She concluded as follows:

During your oral response, you admitted that you should have been in the bathroom with the inmate. In addition, you previously acknowledged that you should have taken action above the direct orders that you gave to the inmate when he picked up the soda can and threatened the armed officer and yourself. Your failure to properly supervise the inmate caused a significant amount of damage to hospital property....

After careful consideration, I find the charges fully supported by the evidence in the adverse action file. Each charge, standing alone, could warrant the proposal penalty, given the egregious nature, and the potential harm to the public. Your suspension is warranted and in the interest of the efficiency of the service. In determining the appropriate penalty, I considered among other factors, your performance has been at an acceptable level and you have no prior discipline. However, these mitigating factors do not fully shield you in this matter. Therefore, it is my decision you be suspended for twenty-one calendar days. This suspension should have the desired corrective effect....

(Joint Exhibit 8.)

At the hearing, SIA Adams testified that when she went to the Hospital on September 13, 2010, she did not go there to investigate the Grievant or any other staff member. Rather, she was there only to take pictures and interview TN. Adams added that the room was in “disarray,” with overturned furniture, a food tray on the floor and “hospital materials were scattered about” (Transcript p. 41). Adams testified further that she had anywhere between 20 and 50 staff investigations to complete at the time. She stated further that she strives to

complete her investigations within the “recommended” 120-day period (Transcript p. 51.)

Adams explained that the first mistake the Grievant made was allowing TN to lock himself in the bathroom. Pursuant to the “Post Orders” it is the Grievant’s responsibility to maintain constant eye contact, and remain in the same room, with the inmate (Bureau Exhibit 4). Adams testified that the Grievant reviewed these procedures on September 7, 2010 (Bureau Exhibit 5).

Adams also noted that TN was able to “wave his crutch around the room,” and threaten the officers and shatter the window with the can of soda (Transcript p. 68). She testified that TN damaged the chair in the bathroom when he overturned it – the leg frame was separated from the seat (Bureau Exhibit 1D). Referring to the Bureau’s “Use of Force” policies (Bureau Exhibits 6-7), Adams testified that the Grievant should have intervened earlier and done more than just direct TN to cease and desist.

On cross-examination, Adams was asked if the Grievant used the appropriate type of restraints when returning TN to the bed, after he left the bathroom. She responded that “[a]t that point if he thought he was calm enough to – that would have contained the inmate, he has the right to make that call” (Transcript p. 127). However, she stated that the wrist restraint was not secure enough, inasmuch as TN subsequently slipped out of it.

Adams also testified that the Grievant should have attempted to grab the crutch from TN after he refused to put it down. Adams subsequently stated that a crutch can be considered a “deadly weapon,” depending on how it is being used. She testified further that TN could have escaped even if his foot was shackled to the bed. Adams explained: “The inmate was able to defeat his hand restraints; there was no reason to think he couldn’t defeat his leg restraints” (Transcript p. 132).

Warden Zickefoose testified that the Grievant should have been in the restroom with TN when TN entered it to use the toilet. She also stated that he should have increased the restraints when he returned TN to the bed after TN had “becom[e] more actively resistant” (Transcript p. 182). The Warden maintained that restraints also should have been increased after TN began to swing the crutch and later, after he picked up the soda can and slipped out of the wrist restraint. According to Zickefoose, TN could have used the piece of glass to defeat the leg restraints and jump out the window and escape.

The Warden also testified that she considered all of the *Douglas* factors before deciding the appropriate discipline. This included the following considerations: 1) the incident occurred in the community “where certainly our reputation is on the line”; 2) TN could have escaped and harmed hospital staff or the public; 3) the Grievant was trained in basic prisoner transportation and general institutional protocol; 4) the Grievant failed to take additional measures

resulting in TN defeating his restraints; 5) the hospital room was damaged; and 6) the Grievant's lack of any prior discipline and his "acceptable" work record. (Transcript pp. 194-196, 200.)

On cross-examination, Zickefoose explained that the Hospital informed the Prison that TN caused "several thousand dollars" in damages, but never provided an actual bill to the Prison (Transcript pp. 217-218). The Warden testified that a bed was made part of the Use of Force portion of the annual training course after the September 13, 2010, incident, but that it had nothing to do with what occurred between the Grievant and TN.

Regarding the delay in disciplining the Grievant, the Warden stated that the Grievant was out on Workers' Compensation leave between February and September 2011. She did not know why it took from September 1, 2011 until October 11, 2011 for the Proposal Letter to issue.

Zickefoose added that when disciplining the Grievant, she considered that the Grievant kept the nurses out of TN's room during the incident. She testified that the Prison was considering a 45-day suspension for Forte before he resigned in May 2011. The Warden also stated she did not consider Forte's statement (in his affidavit) that when Lieutenant Blount arrived, she told the Grievant and Forte: "I'm glad you were here. I think you did an excellent job" (Bureau Exhibit 3). The Warden also stated that she thought the Grievant was credible and remorseful in his oral response to her.

The Grievant testified that his three-day BPT training did not include any scenarios in a hospital room or with a hospital bed. He stated that he had previously been to the St. Francis Hospital between 40 to 50 times. The Grievant had also guarded TN at the Hospital for eight hours about a week to ten days before this incident. He stated that TN was compliant on that earlier occasion, except for using profanity.

According to the Grievant, when he arrived at TN's hospital room on the morning of September 13, 2010, he first checked TN's restraints. The Grievant testified that he had seen the Escorted Trip Authorization Form and knew that he was to "use caution" when guarding TN due to his incidents of "prior violence" (Transcript pp. 435-436).

The Grievant averred that before releasing TN's restraints to use the bathroom, the Grievant entered the bathroom to make sure that there was nothing in the room that could be used as a weapon or anything else out of the ordinary. He then released the Martin chain so TN could walk to the bathroom. The Grievant testified that after TN entered the bathroom, "half [the Grievant's] body was inside the bathroom, half his body was outside having a vision of the front entrance of the room and having a vision of the inmate at both times" (Transcript p. 438). He explained that he wanted to be a safe distance from TN in the event he "decides to throw a bowel movement at me or urinate on me..." (Transcript p. 439).

The Grievant testified that suddenly TN kicked the door shut. As a “normal reaction,” the Grievant “moved back away from the door” (Transcript pp. 439-440). The Grievant gave TN two direct orders to open the door and TN did so. TN was behind the closed door for approximately 20-30 seconds.

According to the Grievant, he escorted TN back to the bed and “double locked” all of the restraints in which he had previously been placed. He also put his finger in between the wrist restraint and TN’s skin. He added: “[T]hat’s the way we’re taught.” The Grievant explained he did not place TN in additional restraints because he was compliant and “the situation was de-escalated.” The Grievant noticed that the chair in the bathroom had been knocked over, presumably when TN kicked the door shut. (Transcript pp. 441-443.)²

Next, the Grievant testified that TN became angry after the nurse stated he could not sit in the recliner chair to watch TV. TN ordered the Grievant to turn on the TV, which the Grievant refused to do because of the manner in which TN told him to do so. According to the Grievant, TN grabbed his crutch and poked at the TV to try to turn it on. He was not attempting to damage the TV. The Grievant stated that he gave TN a direct order to put the crutch down, but he did not comply. The Grievant notified Forte who was standing guard outside of the

² The Grievant stated that when TN was in the bathroom he was not “throwing anything around.” He was just complaining that he wanted to go back to the Prison. When giving the direct orders, the Grievant told TN that after he was back in the bed they could discuss his medical status “and see where you’re going to go” (Transcript p. 440).

room (the door was open) to contact the Prison to let them know what was going on. TN began to “wav[e] the crutch around” and the Grievant ordered TN again to put down the crutch down. TN refused to do so. (Transcript p. 451.)

According to the Grievant, at this point he considered the crutch a weapon. If he tried to increase the restraints it could have led to either or both the Grievant and TN being injured. He knew that TN was restrained to the bed and could not go anywhere. The Grievant stated that he thought it was better to contain the area, keep hospital staff out of the room and wait for backup. TN then dropped the crutch, picked up the soda can and threatened “to crack [the Grievant] in the head with the soda can” (Transcript p. 454). The Grievant explained that he did not attempt to get closer to TN or restrain him because he was threatening him with a “weapon.”

The Grievant added that during this entire time Forte was outside the room attempting to reach the Prison by phone. TN then threw the soda can at the window. It shattered the glass but did not go through the window because there was a screen behind the glass. The Grievant continued: “[TN] just flips the bed to the side, basically separating myself and him.” He added that he remained in the room the entire time, but at that point he could not restrain TN. TN then picked up a hand towel, grabbed a piece of glass and “brandish[ed] it as a weapon.” The Grievant added that TN was “threatening me to slice my throat if I was to come near him.” (Transcript pp. 456-457.)

The Grievant explained that he could not use deadly force at that time because he did not have a weapon. “I’m still in the room containing the situation. I knew the inmate wasn’t going nowhere, he was still restrained to the hospital bed” (Transcript pp. 456-457). The Grievant ordered TN to drop the glass, then flipped the bed “right side up” onto its wheels and lunged at the Grievant. The Grievant grabbed TN’s arm that was holding the piece of glass and forced him down onto the hospital bread. Ten seconds later Forte entered the room and they “four-pointed” TN on the bed. The Grievant testified that the whole incident lasted about 10 to 15 minutes.

According to the Grievant, after Lieutenants Blount and Hansen arrived they told the Grievant and Forte “you guys did a great job,” and told the Grievant “you handled the situation well” (Transcript p. 461). When he returned to the Prison he went to the Health Service Department because he felt pain in his right knee. He then was directed to write a memorandum about the incident (Bureau Exhibit 13).

The Grievant qualified for Workers’ Compensation benefits as a result of sustaining a torn meniscus and contusion on his knee (Union Exhibit 11). He testified that he was out of work for two surgeries between February and September 2011. The Grievant was also removed from prisoner transport duties after this incident. He stated that this reduced his overtime opportunities.

On cross-examination, the Grievant testified he could not recall if he checked the drawers in TN's room when he initially inspected the room. He also stated that it did not matter that the crutches were left within TN's reach, because the room was very small and his Martin chain was long enough for TN to get up and move around. Although he stated that it would not have been easy for TN to use a piece of the broken chair in the bathroom as a weapon, the Grievant acknowledged that inmates have been known to make weapons out of many objects.

The Grievant stated that when TN flipped the bed over the Grievant was still in the room, but by the entrance to the room. The Grievant averred that as TN pushed the bed towards the door, the Grievant was never completely outside the room. He kept his foot in the doorway so the door could not close. The Grievant disagreed with Forte's representation in his affidavit (Bureau Exhibit 3) that the door was shut and Forte and the Grievant were outside the room. He testified that he was fully inside the room by the time TN grabbed the piece of glass. The Grievant stated: "I did everything at that time possible to contain the situation" (Transcript p. 560).

The Grievant also testified that he did not ask the Bureau for clearer copies of the pictures taken by Adams of the hospital room, after he received copies of pictures that were too dark to make out. On redirect, the Grievant testified that

Forte told him during the altercation with TN that Lieutenant Wright told Forte that he and the Grievant should not enter the room if TN had a weapon.

POSITIONS OF THE PARTIES

The Bureau maintains that the Grievant's 21-calendar day suspension was for just and sufficient cause. It asserts that the discipline imposed here satisfies all of the *Douglas* factors. *See, Douglas v. Veterans Administration*, 5 MSPR 280 (1981). Specifically, the Bureau submits that the Grievant was on notice of the Bureau's expectations regarding inmate supervision, since he underwent substantial training, including BPT training. The Bureau's rules regarding supervising inmates are also reasonable. Specifically, escort staff's primary responsibility is the "care, custody and control of the inmate" while in the Hospital's care and they must be "in a position to immediately provide assistance and protection in the event the inmate becomes violent..."

Next, the Bureau argues that the incident was investigated and was done so in a fair and objective manner. The Bureau conducted numerous interviews and obtained sworn affidavits. The Grievant received notice of the charges, was advised of his rights and afforded Union representation. In her testimony, SIA Adams adequately explained why the Grievant's interview was delayed. The Bureau also insists that it presented substantial proof of the Grievant's misconduct. Specifically, the Grievant admitted he should have taken additional

action when the inmate became aggressive a second time, prior to his brandishing a piece of glass. The Bureau also points to the damage to the bathroom as further evidence of the Grievant's misconduct.

The Bureau also contends that this was a unique situation, and there is no evidence of unequal treatment. It observes that CO Forte would have received a 45-day suspension had he not resigned. The Bureau also submits that the level of punishment imposed was appropriate. While considering all of the *Douglas* factors, Warden Zickefoose was especially concerned that this incident occurred in a local hospital and involved "substantial damage" to the hospital room. The 21-day suspension was appropriate considering "the situation, the Grievant's position and his work history."

Additionally, the Bureau rejects the Union's claim that it was required to complete its investigations within 120 days. The Bureau has adopted certain "expectations" in this regard in response to a 2004 OIG Report ("the Kennedy Memo"), but this does not amount to a firm time-limit. *See, AGGE Local 2001 v. BOP, FCI Ft. Dix*, FMCS Case No. 11-53658 (2012). It emphasizes there is no Bureau policy imposing a statute of limitations for completing an investigation, and the Collective Bargaining Agreement does not set forth a precise deadline for doing so. The Bureau notes that 18 months from the start of the investigation through the final adjudication "is not an unreasonable passage of time."

The Bureau submits that, in any event, the Union has presented no evidence that the Grievant was prejudiced by the delay. If anything, any potential for prejudice was mitigated by the Warden's reducing the discipline to 21 days. The Grievant's inability to work overtime was caused by his unavailability due to his injuries, not because of any delay in the discipline process. The Bureau also maintains that the Union's complaint about the poor quality of the pictures it was provided during the investigation cannot be sustained, because the Union never asked for clearer copies.

Additionally, the Bureau rejects the Union's claim that the Grievant's due process was violated because his interview was delayed. The Grievant submitted a memo of the events at the time of the incident, and was thereafter unavailable for an interview due to his being out on injury leave. In any event, the Bureau notes that the Grievant was not involved in any other incidents with inmates prior to his interview that might have caused his memory to falter.

Finally, the Bureau insists that the penalty imposed was reasonable and the undersigned should give deference to the Bureau's managerial discretion in this regard. The Bureau considered all the relevant factors and the level of discipline was within the permissible range established under the Bureau's Table of Penalties. *See, Fowler v. U.S. Postal Service*, 77 M.S.P.R. 8, *review dismissed*, 135 F.2d 773 (Fed Cir. 1997). For all of these reasons, the Bureau maintains that the grievance must be denied.

The Union argues that the Bureau did not have just and sufficient cause to suspend the Grievant. Initially, it submits that the Bureau has the burden to prove its case by a preponderance of the evidence. The Union points out that the Bureau did not produce a single eyewitness to the incident to rebut the Grievant's credible description of the material events. The Bureau's reliance solely on affidavits cannot replace live testimony that can be cross-examined. Thus, the Union maintains that the Bureau has failed to meet its burden of proof and the grievance must be sustained. *See, AFGE Local 221 and Dep't. of Veterans Affairs*, 113 LRP 37983 (2013).

Additionally, the Union asserts that the Bureau has failed to satisfy three of the "seven prongs" for deciding whether just cause exists. It argues that the Bureau conducted a "subpar" investigation by waiting four months after the incident to interview the Grievant. The Union also contends that there is no substantial evidence that the Grievant engaged in any misconduct. At the time the inmate voluntarily opened the bathroom door he was compliant, therefore it was not necessary for the Grievant "to elevate his use of force beyond the 'blue range' noted in [the Use of Force Model]."

The Union also maintains that after the inmate began to "act out" with the crutch, Forte told the Grievant that Wright advised them not to enter the room if the Grievant had a weapon. Therefore, the Grievant "made a good faith attempt to manage the situation in the most effective way that he knew." The Union

insists that the Grievant should not be penalized for staying near the door, since he was merely following orders.

Next, the Union argues that the discipline was imposed in an untimely manner. In the OIG's "scathing" 2004 Kennedy Memo, the Bureau was criticized for a suspension that was imposed after 395 days. In that instance, an arbitrator overturned the suspension based on the determination that a 14 month process was not a "timely disposition" as required by the Agreement. In this case it took the Bureau 540 days (18 months) to issue the discipline. The Union contends that the Bureau has not adequately justified this unreasonable delay. It waited 40 days after the Grievant returned to work to issue the proposed suspension in October 2011, and then another 83 days for the Warden to issue the final decision.

The Union also argues that the Bureau violated Article 30, Section c of the Agreement, inasmuch as the 21-day suspension was not progressive and too severe for a first offense. It also maintains the discipline must be set aside because the Bureau relied on color photographs to suspend the Grievant that were never provided to the Union. *See, Lopes v. Dep't. of the Navy*, 116 M.S.P.R. 470 (2011). The color photos were part of the investigative file, yet the Union only received black and white copies of poor quality. The Union asserts this was a critical error because the Bureau relied on the photos to establish there was damage to the hospital room, which was never documented by the Bureau.

In any event, the pictures do not show the extent of damage to the room and should be disregarded.

The Union asserts that the discipline imposed was not “within the tolerable limits of reasonableness.” First, the alleged misconduct is overstated by the Bureau since (contrary to Adams’ and the Warden’s testimonies), there was no way the inmate could have escaped from the room while restrained. Additionally, the Union characterizes as “absurd” the Warden’s assertion that the Grievant should have used deadly force under these circumstances. It also points out that another CO who engaged in more serious misconduct (left the hospital for 10 minutes with his weapon) only received a 7-day suspension. Additionally, the Bureau admits that it started using hospital beds as part of the annual training after the Grievant’s incident, demonstrating that COs were not adequately trained on dealing with situations like the instant incident.

For all of these reasons, the Union submits that the Grievant’s suspension be “heavily mitigated,” and reduced to a letter of reprimand or a counseling.

DISCUSSION

A. Procedural Issues

Before addressing the “just cause” issue, the Union’s procedural contentions will be addressed.

First, the Union claims that the discipline imposed on the Grievant was untimely. The only provision in the Agreement that addresses this issue is found at Article 30, Section d. This provision states that “[r]ecognizing that the circumstances and complexities of individual cases will vary, the parties endorse the concept of timely disposition of investigations and disciplinary/adverse actions.” Nowhere in this provision does it state that the Bureau must complete an investigation and mete out discipline within a specific number of days.

Furthermore, it is undisputed that the Bureau has not adopted any policies or regulations that imposes on itself a limitations period for issuing discipline. The Union relies heavily on the 2004 “Kennedy Memo” (Union Exhibit 1) in which the Bureau established certain time “expectations” for completing investigations and “general guidelines” for completing timely adjudications. The Memo does *not* impose any strict, enforceable time limits on the Bureau.

Had the Union wanted to make these guidelines an enforceable contractual requirement, it could have negotiated the same into the Agreement. It did not do

so.³ Finally, considering that the Grievant was out of work for seven months, the total time it took the Bureau to investigate this case and to adjudicate it did not excessively exceed the Bureau's own guidelines. For all of these reasons, the Union cannot use the Kennedy Memo guidelines as a basis to overturn the instant discipline. *See, AFGE Local 2001 v. BOP Ft. Dix*, FMCS Case No. 11-53658 (Nagy, J., Arb., 2012)

The Union also claims that the Grievant was deprived of due process because the Bureau waited too long to interview him. Adams credibly explained why she did not interview the Grievant on the day of the incident. She was not there to investigate the Grievant. Adams visited the Hospital to investigate TN's misconduct, including the damage he caused to the hospital room.

In any event, it is undisputed that the Grievant prepared a lengthy memorandum on the same day of the incident setting forth his version of the events. After the decision was made by the Warden to conduct an internal investigation of the Grievant's and Forte's handling of the incident, Adams conducted a thorough investigation, including obtaining a sworn affidavit from the Grievant. The Grievant also had a full opportunity to respond to the Proposal Letter and to meet with the Warden to discuss the same. Under these

³ It is noteworthy that where the parties desired to impose a time limit, they expressly did so. *See*, Article 30, Section d(2) ("employees who are the subject of an investigation where no disciplinary or adverse action will be proposed will be notified of this decision within seven (7) working days ..." (Joint Exhibit 1, pp. 70-71).

circumstances, I cannot conclude that the Grievant was deprived of due process because he was not interviewed by Adams sooner.

The Union also cites to the Bureau's failure to provide the Grievant with clear, readable color copies of the investigation photographs. Indeed, the photos the Grievant received from the Bureau are completely dark and not viewable. There is no evidence that the Bureau was aware at the time that it furnished the Grievant with useless photos.

The Grievant or the Union could have easily rectified this problem by contacting the Bureau and requesting better copies in advance of the arbitration hearing. They were furnished clear color copies of the photos at the arbitration hearing and had the opportunity to cross-examine Adams and the Warden about them. By waiting until the hearing to complain about the quality of the photos, the Grievant waived any right to now claim a due process violation.

B. The Merits

The Bureau disciplined the Grievant for failing to properly supervise TN and for endangering the safety of staff and others. The Proposal Letter relies on the fact that the Grievant failed to maintain constant supervision of TN while he was in the bathroom and when TN forced him out of the room with the bed and closed the door. The Letter also claims that the Grievant failed to apply additional restraints to TN after he was returned to the bed and failed to properly re-apply TN's hand restraint. According to the Bureau, these failures allowed TN

to flip the bed, use the soda can to break the window, and use the broken window glass as a weapon. I will address each of these alleged failures.

1. The bathroom and failure to increase restraints

The undersigned agrees that the Grievant failed to exercise appropriate supervision over TN when he positioned himself so as to allow TN to slam the bathroom door shut and lock himself in. Although TN was only locked in the bathroom for less than a minute and had no means of escape, it still resulted in the Grievant losing eye contact with the inmate. Regardless of whether the chair was broken by TN or was previously damaged,⁴ it is plausible that TN could have used the chair, or a broken portion of it, as a weapon upon exiting the bathroom.

However, I do not agree that the Grievant failed to properly supervise TN by failing to add additional restraints to TN after returning him to the bed. It is undisputed that although TN was upset while in the bathroom because he wanted to leave the Hospital, the Grievant properly de-escalated the situation by convincing TN they would address his concern once he exited the bathroom. As a result, TN became compliant and left the bathroom without incident. With “20/20” hindsight it is easy to argue that had the Grievant increased the restraints at this juncture the subsequent altercations would not have occurred.

⁴ The Grievant states in his affidavit that “the chair in the bathroom was overturned and broken. The chair was not like that prior to him entering the bathroom” (Joint Exhibit 9, ¶13).

However, the record shows that at the time TN left the bathroom, it was not unreasonable for the Grievant to believe that the existing restraints would suffice.

2. The crutch and soda can

It is apparent that an inmate with a history of violence should not have had such easy access to the crutch. The fact that TN's Martin chain was long enough, and the room small enough, to permit TN to get out of bed and access the crutch from anywhere in the room, is no excuse for leaving the crutch within arm's reach of the bed.

The evidence shows that TN was first attempting to use the crutch to operate the TV, and then began to swing it around. The Grievant claims he did not attempt to grab the crutch from TN after he refused to put it down because he believed the crutch was a weapon. He also found TN's refusal to comply serious enough to direct Forte to contact the Prison. Additionally, it is undisputed that just prior to picking up the crutch, TN stated he was going to "tear this motherfucker up."

In light of these undisputed facts, the Grievant's contention that he had no reasonable basis at that time for increasing TN's restraints is not persuasive. Indeed, under the Use of Force guidelines submitted by the Bureau, COs are to use "controlling/defensive tactics" when they perceive "assaultive/bodily harm" from an inmate. If the Grievant actually believed the crutch to be weapon, he

should have taken more affirmative steps to address TN's aggression, such as securing the crutch and restraining his free hand.

If there was any doubt in the Grievant's mind as to whether he should have taken steps to increase restraints in response to the TN's swinging crutch, such doubt should have been removed once TN grabbed the soda can and threatened to harm both the Grievant and Forte. As with the crutch, the can of soda should have never been left within arm's reach of TN. The Grievant admitted in his affidavit that "I also believe I should have taken action when [TN] picked up the soda can and threatened Forte and myself, above the direct orders I gave him." This could have included the Grievant and/or Forte taking possession of the can and restraining TN's free hand so that he could no longer use the soda can as a weapon.⁵

3. Flipping the bed

With "20/20 hindsight" it is easy to claim that had the Grievant increased TN's restraints after he grabbed the crutch and/or the soda can, TN never would have been able to flip the bed and escalate this incident into a life-threatening altercation. But the record does not fully support such a conclusion.

The record shows that TN was able to flip the bed over only because the

⁵ I am unable to credit the Grievant's contention that Lt. Wright told Forte, who then told the Grievant, not to enter the room if TN had a weapon. The Grievant's testimony in this regard is double hearsay which Wright disputes in his affidavit (Union Exhibit 8, ¶9). In any event, the Grievant insists he never left the room.

Martin chain was long enough to allow him to get out of his bed. In order to conclude that the Grievant's inaction contributed to TN's being able to flip over the bed, the evidence must show that when TN swung the crutch and grabbed the soda can, the Grievant had reason to not only restrain TN's free hand, but also to shorten TN's Martin chain. The Bureau has not demonstrated or in any way explained how or why TN's earlier misconduct with the crutch and soda can should have prompted the Grievant to adjust TN's Martin chain at that time.

Furthermore, the record shows that it was highly unlikely anyone could have reasonably expected that TN would flip the bed over. The Grievant was never trained on inmates using hospital beds in such a manner to attempt to barricade themselves in a hospital room. Such training was added after the September 13, 2010 incident. If bed flipping was foreseeable conduct from a violent inmate such as TN, one would have expected the Martin chain to have been shorter. However, this restraint was the same length as when the Grievant arrived at the Hospital. For these reasons, I cannot conclude that the Grievant should have taken steps in advance to prevent TN from flipping over the bed.

4. Removal of wrist restraint

The Bureau reasonably concluded that the Grievant failed to properly secure TN's wrist restraint. Although the Grievant claims he applied the normal "one-finger" protocol when securing the wrist restraint, TN's own action in

slipping out of the wrist cuff is proof that the restraint was too loose.⁶ The Grievant's failure to properly secure TN's wrist helped facilitate TN's breaking of the window and using the shattered glass as a weapon.

5. Leaving the room

Based on the credible record evidence I cannot conclude that the Grievant left TN's room and closed the door, leaving TN alone in the room. The Grievant was unequivocally clear that he never left TN's room and that his foot prevented TN from closing the door. Although Forte's Affidavit claims otherwise, he did not testify at the hearing. Given other statements in his affidavit that are inconsistent with the Grievant's testimony, without the Union's ability to cross-examine Forte it would be unfair to credit Forte's Affidavit over the Grievant's live testimony.

C. Penalty

The question then becomes, in light of the foregoing, whether the penalty "fits the crime." As set forth above, the Grievant failed to exercise appropriate supervision over TN by failing to take steps to prevent him from closing the bathroom door, allowing him access to the crutch and soda can, neglecting to intervene after TN grabbed the crutch and threatened him with the soda can, and failing to adequately secure TN's wrist restraint.

⁶ There was testimony that inmates can escape a wrist restraint by breaking their thumbs. There is no evidence here that TN did so. In his interview with Adams, TN claimed his handcuff was "very loose" (Union Exhibit 5).

However, a large factor in the Bureau's decision to impose the instant discipline was its determination that the Grievant was at fault for not increasing TN's restraints when he returned TN to the bed (which led to TN flipping the bed over) and for leaving TN's hospital room during the altercation. As set forth above, there is insufficient evidence to support these findings.

Furthermore, the Bureau's assertion in support of the discipline that the Grievant's actions could have resulted in TN's escape, and therefore created a safety risk to the public, is not supported by the record. TN was at all times attached to the bed by the Martin chain. As a result, only under the most implausible scenarios could TN have exited the room through either the doorway or the broken window, especially with an armed CO present. It is undisputed that the Grievant at all times secured the area throughout this clash, including making sure that no Hospital staff entered the room.

The Warden commendably acknowledged that there were certain extenuating circumstances that justified reducing the discipline from 30 to 21 calendar days. The Bureau's inability to prove facts sufficient to support several of the Warden's bases for disciplining the Grievant warrants a further reduction of the discipline. However, in light of the Grievant's failure to meet several critical expectations, meaningful discipline is nonetheless warranted.

Accordingly, for all of the foregoing reasons, the undersigned concludes that the Bureau did not have just and sufficient cause to suspend the Grievant for

21 calendar days. The discipline shall be reduced to a twelve (12) calendar day suspension. The Bureau shall reimburse the Grievant an amount of wages, and adjust his personnel record, consistent with this remedy. The Union's requests for relief for lost overtime opportunities and attorneys' fees are denied.

Consistent with the foregoing discussion and findings, the Arbitrator renders the following

AWARD

The grievance is sustained in part and denied in part.

The Bureau did not have just and sufficient cause to suspend the Grievant for 21 calendar days. The discipline shall be reduced to a twelve (12) calendar day suspension. The Bureau shall reimburse the Grievant an amount of wages consistent with this remedy, and adjust his personnel record accordingly. The Union's requests for relief for lost overtime opportunities and attorneys' fees are denied.

A handwritten signature in black ink, appearing to read 'James M. Darby', written over a horizontal line.

JAMES M. DARBY
Arbitrator
Lancaster, Pennsylvania
April 28, 2014