

**FEDERAL MEDIATION AND CONCILIATION SERVICE
LABOR ARBITRATION ROSTER**

IN THE MATTER OF:

**AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
LOCAL NO. 506**

AND

**Re: Suspension of Patrick Connelly
FMCS CASE NO. 12-57692**

**DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL COMPLEX
COLEMAN, FLORIDA**

OPINION AND AWARD OF ARBITRATOR

Arbitrator: Thomas G. McConnell Jr.

Briefs Filed: October 20, 2014

Appearances:

For the Agency:

**Tara Chen, Esq.
Assistant General Counsel**

For the Union:

**Ken Pike
Medium Vice-President/Arbitration Specialist**

PROCEDURAL HISTORY

The arbitration hearing in the above-captioned matter was held pursuant to Article 31, Section h.1 of the Master Agreement between the Council of Prison Locals, American Federation of Government Employees (Union) and the Federal Bureau of Prisons (Agency). A hearing was held on September 11, 2014, at which time the parties were afforded a full opportunity to present their cases. The parties filed timely post-hearing briefs on October 20, 2014. The parties granted the arbitrator an extension to issue this award.

ISSUES

The parties have stipulated to the issues in this matter: Whether the suspension was taken for just and sufficient cause? If not, what shall the remedy be?

CITED REGULATIONS AND POLICIES

USE OF FORCE AND APPLICATION OF RESTRAINTS

1. [PURPOSE AND SCOPE SECTION 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 the 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 good institutional security and good order....

5. TYPES OF FORCE SECTION 552.21

[a. Immediate Use of Force. Staff may immediately use force and/or apply restraints when the behavior described in Section 552.20 constitutes an immediate, serious threat to the inmate, staff, others, property, or to institution security and good order.]

[b. Calculated Use of Force and/or Application of Restraints. This occurs where an inmate is in an area that can be isolated (e.g., a locked cell, a range) and where there is no immediate direct threat to the inmate or others. When there is time for the calculated use of force or application of restraints, staff must first determine if the situation can be resolved without resorting to force.

[c. Use of Force Team Technique. If use of Force is determined to be necessary, and other means of gaining control of an inmate are deemed inappropriate or ineffective, then the Use of Force Team Technique shall be used to control the inmate and to apply the ambulatory leg restraints. The Use of Force Team ordinarily involves trained staff, clothed in protective gear, who enter the inmate's area in tandem, each with a coordinated responsibility for helping achieve immediate control of the inmate.]

[d. Exceptions. Any exception to procedures outlined in this rule is prohibited, except where the facts and circumstances known to the staff member would warrant a person using sound correctional judgment to reasonably believe other action is necessary (as a last resort) to prevent serious physical injury or serious property damage which would immediately endanger the safety of staff, inmates, or others.]

6. [PRINCIPLES GOVERNING THE USE OF FORCE AND APPLICATION OF RESTRAINTS

SECTION 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 use only that amount of force necessary to gain control of the inmate. Situations where an appropriate amount of force may be warranted include, but not are limited to:
 - (1) Defense or protection of self or others;
 - (2) Enforcement of institutional Regulations;
 - (3) The prevention of a crime or apprehension of one who has committed a crime.
- c. When immediate use of restraints is indicated, staff may temporarily apply such restraints to an inmate to prevent that inmate from hurting self, staff, or others, and/or to prevent serious property damage. When the temporary application of restraints is determined to be necessary, the after staff have gained control of the inmate, the Warden or designee is to be notified immediately for a decision on whether the use of restraints should continue.]
- h. Restraint equipment or devices (e.g., handcuffs) may not be used in any of the following ways:
 - (1) As a method of punishing an inmate;

(2) About an inmate's neck or face, or in any manner which restricts blood circulation or obstructs the inmate's airways;]

(3) In a manner that causes unnecessary physical pain or extreme discomfort.

7. [CONFRONTATION AVOIDANCE PROCEDURES SECTION 552.23. Prior to any calculated use of force, the ranking custodial official (ordinarily the Captain or Shift lieutenant), a designated Mental health professional, and others shall confer and gather pertinent information about the inmate and the immediate situation. Based on their assessment of that information, they Shall identify a staff member(s) to attempt to obtain the inmate's voluntary cooperation and, using the knowledge they have gained about the inmate and the incident, determine if use of force is necessary.]

GENERAL POST ORDERS

USE OF FORCE: Staff can use necessary force when defending themselves or during forced cell moves.

- a) CALCULATED: This type allows for a plan or response to be formulated. While the situation may be of a serious nature, staff have time to prepare themselves and are instructed as to what type of actions will be attempted or undertaken. This response is to be filmed in its entirety and a member of the Medical Department will review the medical records of the inmate involved. This is done to determine whether the individual has any conditions which Would be detrimental should Use of Force be actually used.
- b) IMMEDIATE: In situations where it is determined that a delay in bringing a situation under control would cause a greater hazard to the inmate, staff or others, or result in a major disturbance or serious property damage, immediate action may be taken to stop a situation from escalating. Extreme good care and good judgment must be used during these times to avoid compounding the initial problem. Notifications will be made immediately after the Immediate Use of Force.

USE OF FORCE TEAM: This team consists of five (5) or more properly trained staff who are dressed in protective clothing and equipment for the purpose of forcibly moving and/or restraining an inmate. The team is used in Calculated Use of Force

situations and is ordinarily supervised by a Lieutenant. Generally, the Team should not contain any staff who was involved in the actions which caused the need for the Calculated Use of Force. Members of the team receive specific instructions prior to implementing the needed actions.

MASTER AGREEMENT

Article 32, Arbitration

Section h. The arbitrator shall have no power to add to, subtract from, disregard, alter, or modify any of the terms of:

1. This Agreement; or
2. Published Federal Bureau of Prisons policies and regulations.

Joint Exhibit 1.

FACTUAL BACKGROUND AND PROFFERED EVIDENCE

On November 7, 2009, Prison management encountered a situation where two inmates refused to peacefully move to another prison cell. Prisoners are moved on a regular basis for security reasons. Prison management then made the decision to assemble a team to engage in a calculated use of force to remove the prisoners. A summary of the stipulated facts and evidence presented follows:

STIPULATED FACTS

1. On November 7, 2009 Grievant was responsible for applying restraints to the lower appendage of inmate Herbert Otey, Register Number #37077-037 during a calculated use of force.
2. The Grievant admits that on November 7, 2009 he struck inmate Herbert Otey, Register Number # 37077-037, three times with a set of leg irons he was holding in his right hand.
3. None of the staff involved in the November 7, 2009 calculated use of force incident personally saw the Grievant strike the inmate.
4. Program Statement 5566.06, Use of Force and Application of Restraints, is the applicable policy for all use of force conducted by staff.
5. Grievant received and was trained on Program Statement 3420.09, Standards of Employee Conduct, and Program Statement 5566.06, Use of Force and Application of Restraints, prior to November 7, 2009.

6. The investigation into the Grievant's conduct was completed October 14, 2011.
7. Grievant received a proposal of a seven day suspension on May 24, 2012 for Physical Abuse of an Inmate from Unit Manager Dale Grafton.
8. The Union requested a thirty day extension on May 31, 2012 for submitting a response to the deciding official.
9. On May 31, 2012 an extension was granted until June 14, 2013 to submit a response to the deciding official.
10. On June 12, 2012 the Grievant and Ronald Rodriguez, for Local 506, submitted written responses to the deciding official.
11. On June 14, 2012 the Union was informed that the deciding official would be Warden Jorge Pastrana.
12. On June 14, 2012 the Union was granted a further extension to respond to the deciding official until June 20, 2012.
13. The Grievant did not schedule or provide an oral response for the deciding official to consider.
14. Grievant received a decision imposing a mitigated two day suspension on July 31, 2012 for Physical Abuse of an Inmate from Warden Jorge Pastrana.
15. The inmates did not complain of any injury and no injuries were found by the nurse. *See* H.T. 155 (where additional stipulation was added at hearing).

Testimony of Case Manager Patrick Connelly

The grievant in this matter is Patrick Connelly. At the time the calculated use of force occurred, Mr. Connelly regularly worked in the position of case manager. In this position, he engages in such functions as assisting with resolving drug and alcohol issues, or making referrals as appropriate; helping to prepare inmates to transition back into society; and ensuring that inmates that need to be separated from each other remain separated. Mr. Connelly has been in the position of Case Manager for about eight years. Mr. Connelly had previously served as a Corrections Officer. He was qualified to be part of the calculated use of force team, and was asked if he wanted to be part of the team. Mr. Connelly then accepted the invitation to participate in the

calculated use of force team. Mr. Connelly had been a part of such teams approximately 20 times in the past, without incident. H.T. 17-18, 41-42.

In his testimony, Mr. Connelly stated that the team was aware that there were two inmates who were refusing to move to another cell. The mission was to ensure their compliance. The team was aware that the inmates had broken a sprinkler head and that the task would be made more difficult by that fact. Water, in fact, was spraying from the sprinkler head during the course of the team's assignment. Mr. Connelly testified that he had been involved in a number of such cell moves and that, while there is confidence that the mission will be carried out, and trust in fellow officers, there is always a degree of anxiety given that unexpected events can occur. H.T. 17-18

Mr. Connelly's assignment was to secure one inmate's legs. As the team went in, the inmates used a mattress to block the team from entering. After entering, the inmate Mr. Connelly was assigned to help restrain was kicking at an officer in front of Mr. Connelly. This caused that officer to actually move back into Mr. Connelly. Mr. Connelly moved that officer out of the way and, at that point, that inmate began kicking at Connelly. Mr. Connelly then hit the inmate three times, in the upper thigh, with the leg irons in his hand, and the inmate then was compliant. Mr. Connelly was then able to put the restraints on that inmate. There were no injuries to any member of the team, or to the inmates. Mr. Connelly testified that he was not intending to injure or punish the inmate in question, but rather was seeking to gain control in what he viewed as a reasonable manner. Mr. Connelly understood that the use of force policy permitted using as much force as necessary to gain control of the inmate. H.T. 17-21.

Mr. Connelly testified that he did receive training on the use of force policy. Mr. Connelly testified that, in such training, it was impossible to provide precision as to

what to do in each situation, as each situation is different. Mr. Connelly testified that, in such training, employees are not advised of specific tactics or techniques which cannot be used. H.T. 22.

On cross-examination, Mr. Connelly acknowledged that, in other forced cell moves he has been involved in, the inmates have been combative. Mr. Connelly acknowledged as well that, despite the combative nature of the inmates in the other instances, he never hit an inmate. Mr. Connelly testified on cross-examination that, after the calculated use of force, and consistent with practice, there was a debriefing with a lieutenant, during which each team member was invited to comment. The lieutenant also inquires as to whether there were any team members injured. Mr. Connelly referred to this as an "after action" review on re-direct examination. H.T. 25, 35-36, 38.

Testimony of Lieutenant Kurt Metzler

Kurt Metzler is a lieutenant and works as a shift supervisor at FCC Coleman. Lieutenant Metzler testified that the incident in question occurred at the Penitentiary 2 Special Housing Unit. Inmates at this facility are there either because there is a general concern for their safety, so that they have requested protective custody, or because they are undergoing special management unit review to be transferred to a higher level of security from a regular penitentiary due to security concerns. H.T. 43-44, 85.

Lieutenant Metzler's testimony, corroborated by the testimony of Lieutenant Zora William McKinley Gregory, establishes that the Special Housing Unit does a 21 day rotation of inmates to other cells, to minimize anything which can be done by the inmates in the call in relation to issues such as escaping or (as described by Lieutenant

Metzler) "other mischief" which might include attempting to manufacture weapons. H.T. 44, 85-86.

On November 7, 2009, the inmates were instructed to pack up their belongings, submit to restraints, and move over to the cell next store. They refused. Lieutenant Metzler then notified a captain who authorized a ten man team to engage in a calculated use of force. Two camera operators and someone from the medical staff were also included in the operation. Steps were taken to give the inmates an opportunity to move peacefully, and when they failed the team went into the cell. Five members of the team were assigned to restrain and secure each inmate. The inmates were restrained as the camera operators filmed the incident. One inmate spat at Lieutenant Metzler after he was placed in restraints. H.T. 45-46

Lieutenant Metzler also provided testimony concerning the role of each team member under calculated use of force policy. The first officer for each inmate has the role of pinning the inmate and controlling the neck and the head. Two or three officers are responsible to control the arms, and two officers are responsible for controlling the legs. One team member for the upper extremities will have a set of hand restraints. One team member for the lower extremities will have leg irons to place on the respective inmate. H.T. 46-47.

Following the calculated use of force, the officer-in-charge, here Lieutenant Metzler, conducts a video debriefing with team members. Issues such as injuries, equipment failure, the inmates' actions, and issues with the video (e.g. battery died) are discussed. As stated previously, each member is invited to comment on anything relevant. A video of the debriefing of the November 7, 2009 incident was played during the course of the hearing. H.T. 48-49

Lieutenant Metzler testified that Officer Connelly did not, during the course of the debriefing, reveal that he found it necessary to strike an inmate three times.

Lieutenant Metzler testified that, as the debriefing presents the opportunity to "Monday Morning Quarterback" yourself, he would have expected Mr. Connelly to reveal such information. H.T. 49-50.

Lieutenant Metzler testified that, in his opinion, Officer Connelly had no reason to strike the inmate in question. Officer Connelly's assignment was to control the one leg, and to place the restraints on the legs. Lieutenant Metzler testified that, in his 18 years of service, at Coleman and other prisons, he has participated in approximately 18 to 20 cases of calculated use of force. Lieutenant Metzler testified that on one occasion, at Coleman, he witnessed an officer striking an inmate. Lieutenant Metzler then removed the officer from the cell and assisted in securing the inmate. Lieutenant Metzler testified that, aside from more extreme circumstances not present in this set of facts, during a calculated use of force there should be no reason to strike an inmate. Time is on the team's side, given the preparation for the event and the fact that the inmates are greatly outnumbered. H.T. 52-53.

On cross-examination, Lieutenant Metzler testified that changing events while in the cell cannot transform a calculated use of force into an immediate use of force. Lieutenant Metzler testified that, in an emergency situation, there are no identified tactics or techniques in officer training. The first goal would be to extract yourself from the area and to safety. Lieutenant Metzler testified that, in the instance of calculated use of force, there is a script, and that policy indicates that the officers will use the minimum amount of force to control the situation. Lieutenant Metzler acknowledged on cross-examination that he did not have a clear view of events as they unfolded in the

cell on November 7, 2009. The cell itself was 8 x 10, and 12 people were in the cell. There was also a two-man bunk, a stainless steel shower, a desk, and a toilet/sink combination. H.T. 54-58

Testimony of Unit Manager Matthew Kleckner

Matthew Kleckner is a Unit Manager. Mr. Kleckner supervises a housing unit, case managers, counselors, and secretaries in that unit. Mr. Kleckner began his career with the Bureau in 1993, and has also served in positions of corrections officer and lieutenant. Mr. Kleckner's particular experience is addressed in the record and I have reviewed it and taken it into account. H.T. 65-66

Mr. Kleckner conducted the investigation into Mr. Connelly's conduct on November 7, 2009. The incident was referred to Mr. Kleckner from a committee. As per practice, Mr. Kleckner forwarded the results of his investigation, and his conclusion, to Internal Affairs. At the Internal Affairs level, Internal Affairs can reject the proposed conclusion or agree with that it is substantiated in which case the matter is forwarded to Human Resources for administrative processing. Internal Affairs also has discretion to request or order further investigation if necessary. H.T. 68-69.

Mr. Kleckner sustained the allegation of physical abuse against an inmate in this case. Mr. Kleckner based this conclusion on video evidence and the admission of Mr. Connelly that he struck the prisoner. During his testimony, Mr. Kleckner was referred to Joint Exhibit 4, the Standards of Conduct, at Section 9 (2), which indicates that "[a]n employee may not use brutality, physical violence, or intimidation toward inmates, or use of force beyond that which is reasonably necessary to subdue an inmate." Mr. Kleckner determined that Mr. Connelly's action in striking the inmate three times went beyond that reasonably necessary to subdue the prisoner. Mr. Kleckner testified that he

reached this decision because "the inmate was pretty much under control," and there were nine other staff members there to control the inmates. Mr. Kleckner also cited the disciplinary grid, attached to the Standards of Conduct, which in reference to Physical Abuse of Prisoners, indicates that the fact that there were no injuries should not be controlling on the penalty level where the action was totally unwarranted. H.T. 75-78; Joint Exhibit 4.

On cross-examination, Mr. Kleckner acknowledged that the inmate in question was resisting before Mr. Connelly used force to restrain him. Mr. Kleckner acknowledged that policy does not identify with specificity which tactic or technique is appropriate or inappropriate in relation to handling an inmate who is resisting. The policy instructs the officer in such an instance to "use the minimum amount of force necessary to control the inmate. N.T. 80-83.

Testimony of Lieutenant Zora William McKinley Gregory

Lieutenant Zora William McKinley Gregory is a Special Investigative Agent. There is one other SIA in the complex, Randall Noble. SIA's oversee the investigation sections at the complex. SIA's are the liaisons with local federal law enforcement. The SIA's also conduct local internal investigations, assist the lieutenants and supervisors in the departments with inmate internal investigations, and assist the Officer of the Inspector General and the Office of Internal Affairs in allegations of staff misconduct. H.T. 82-83

On November 7, 2009, Lieutenant Gregory was the operations lieutenant. Lieutenant Metzler called him that day and asked to assemble a team in relation to the inmates who were resisting a 21 day move. Lieutenant Gregory testified that a captain

also asked him to assist Lieutenant Metzler because Gregory had more experience with use of force situations. H.T. 86, 96.

Lieutenant Gregory testified that, when confrontation avoidance proved to be ineffective, and the inmates refused Lieutenant Metzler's orders to comply to hand restraints, the cell door was opened for the teams to go in and secure the inmates, apply restraints, and remove them from the cell. As the cell door opened one of the inmates "popped" the sprinkler system. Lieutenant Gregory then stepped to the side to let the teams perform their duties. He did not see Mr. Connelly's actions. Lieutenant Gregory testified that, had he seen Mr. Connelly punch the inmate, he would have immediately called out because that would have been outside of the force policy. H.T. 87-88, 96.

Lieutenant Gregory testified that it was a violation of policy for Mr. Connelly to hit the inmate three times with the leg irons in his hand. Lieutenant Gregory testified that the calculated use of force used involved a team concept, where each inmate was significantly outnumbered. Lieutenant Gregory testified that, under such circumstances, and given the plan for each officer's role, it is going to be extremely difficult for the inmate to be combative or to resist in an excessive fashion. Lieutenant Gregory testified that the decision to do something like Mr. Connelly did, using the leg irons to strike the inmate, would only be justified in more extreme circumstances, e.g. where the inmate is in possession of a weapon. Lieutenant Gregory testified that, although it is true that in this instance the inmate was kicking at the officers, this development was not at all surprising, and in fact could easily have been anticipated. Lieutenant Gregory testified that, with the number of officers involved, the chances that the inmate could kick forcefully enough to hurt anyone was not very high. H.T. 90-91

On cross-examination, Lieutenant Gregory acknowledged that inmates at a penitentiary are more prone to violence than inmates at the low. H.T. 95.

In relation to whether calculated force can turn into immediate use of force, Lieutenant Gregory testified that, in the end, "force is force" and thus to that extent there is no distinction. Lieutenant Gregory testified that the difference is that with calculated use of force there is a plan, and numbers, thus theoretically limiting the amount of force which will be required to restrain and control the inmates. Lieutenant Gregory testified that, despite the fact that calculated use of force should result in limiting the propensity for the inmates to resist, each situation is different and "something out of the ordinary" is typically going to happen in each of those situations. The lieutenant, here Lieutenant Metzler, is responsible for monitoring and directing the team should that become necessary. This in itself is different than an immediate use of force, as a supervisor is present and able to observe and direct, and take action if necessary. H.T. 95-99

On cross-examination, Lieutenant Gregory testified that physical abuse of an inmate is a serious charge, and that under policy there are not levels in relation to a finding of such abuse. Lieutenant Gregory testified that, in his opinion, Mr. Connelly violated the policy by moving outside his role, which was to take control of a leg, and utilizing the leg irons to punch the inmate three times. H.T. 99-100.

In relation to the appropriateness of Mr. Connelly's conduct, Lieutenant Gregory testified that it is important to recognize that, in calculated use of force, the officers are wearing safety equipment, including a helmet, face shield, a vest, a groin protector, elbow pads, gloves, and shin guards. This is in addition to the fact that the officers outnumber the inmates. Lieutenant Gregory testified that this is a markedly different

situation then an incident out in the general population and an inmate attacks an officer. H.T. 99-100.

Lieutenant Gregory acknowledge that there have been instances where staff have been injured during a calculated use of force, and that, despite all the safety equipment, injuries are still possible. N.T. 100-101.

On re-direct examination, Lieutenant Gregory testified that time is on the side of the team, because there is time to brief the team members on their roles, to put on the safety gear, to get mentally prepared, and the inmates, who are in a confined space, are not going anywhere. On re-cross examination, Lieutenant Gregory testified that, despite all the planning, there is no surefire way of anticipating what will actually happen once the team goes into the cell. H.T. 102-105

Testimony of Kevin Rison

Kevin Rison is the Human Resources Manager at the Federal Corrections Complex in Coleman. In his testimony, Mr. Rison described the administrative process for discipline, and I have reviewed that. Referring to Joint Exhibit 4, attachment A, page 9, Mr. Rison noted that the range of penalties for physical abuse of an inmate is official reprimand to removal. In Mr. Connelly's case, the proposed discipline was 7 days and it was reduced to two. Warden Pastrana was the deciding official in relation to this discipline. Warden Pastrana retired prior to the date of hearing in this matter and did not testify. Mr. Rison testified that typically the deciding official, which is typically the warden of the facility where the employee is working, will consider the Douglas factors. Mr. Rison testified that, in this case, Warden Pastrana's decision letter references several of the Douglas factors. H.T. 106-114; Joint Exhibit 3, Joint Exhibit 4.

On cross-examination, Mr. Rison acknowledged that deciding officials may evaluate disciplinary action differently, though in most instances the evaluation would be similar. Mr. Rison acknowledged that, in the decision letter, Warden Pastrana did not make specific mention of the Douglas factors. H.T. 113-114.

Testimony of Associate Warden Hector Joyner

Hector Joyner is an Associate Warden. In his testimony, Warden Joyner provided a synopsis of his history of employment with the Bureau, and his functions in certain of those positions. Warden Joyner also testified as to numerous times in his tenure of employment where he was involved in use of force situations. Warden Joyner testified that, on one occasion, he did see an officer hit an inmate in the course of a calculated use of force. Warden Joyner testified that he has never seen a situation in a calculated use of force situation where an officer hit an inmate and the after action committee determined that the action was reasonably necessary. H.T. 117-119, 134-135.

Warden Joyner testified that the key policy in relation to use of force is 5566, entered as Joint Exhibit 6. During his testimony, Agency counsel questioned Warden Joyner about the contents of the use of force policy, and I have considered this testimony. Warden Joyner provided testimony further illustrating the differences between immediate use of force, and the actions an officer might take in response there, versus a calculated use of force. Warden Joyner also provided corroborating testimony that, in accordance with policy, team members in a calculated use of force situation wear a significant amount of safety gear. H.T. 121-123.

During his testimony, Warden Joyner was referred to page 5, D of the Use of Force and Application of Restraints Policy, entered as Joint Exhibit 6, which prohibits exceptions to the use of force policy unless the staff member, based on the facts and

circumstances, would be justified in concluding that "sound correctional judgment" required, as a last resort, action to be taken to "prevent serious physical injury or serious property damage which would immediately endanger the safety of staff, inmates, or others." H.T. 123-125; Joint Exhibit 6.

In relation to page 7, Section H of the policy, Warden Joyner read that section into the record. Warden Joyner testified that, in his opinion, Mr. Connelly's action in striking the inmate with the leg restraints in his hand violated the rule, because he was seeking to punish the inmate. Warden Joyner testified that Mr. Connelly's duty was to obtain control of the leg he was responsible for, and to apply the restraints to both legs once the other leg was secured by another officer. After being shown the video of the events, Warden Joyner testified that he could see nothing which would warrant punching the inmate with the leg restraints in his punching hand. Warden Joyner testified that he could not see the inmate kicking at officers in the video. Warden Joyner testified that, even if there was such kicking, Mr. Connelly's duty was to gain control of the leg he was responsible for, and that striking the inmate would not have been justified. Warden Joyner testified that, by seeking to gain the inmate's compliance, this was the equivalent of punishment as inflicting pain equals punishment under the rules. Warden Joyner further testified that the fact that the teams outnumbered the inmates provides more reason to conclude that Mr. Connelly had no need to strike the inmate. In Warden Joyner's opinion, a reasonable officer would not have perceived a serious threat existed under the circumstances. Warden Joyner testified that, in a calculated use of force situation like this, it would never be appropriate to hit the inmate with leg irons. H.T. 125-134; Joint Exhibit 6.

Warden Joyner testified that Mr. Connelly's use of force was a physical abuse of an inmate, because he went beyond his assigned responsibility when he struck the inmate with a metal object. The minimal amount of force needed was to gain control of the leg, and apply the restraint. H.T. 136.

On cross-examination, Warden Joyner acknowledged that, from the video itself, there is no way to see if the leg irons actually made contact with the inmate's body. H.T. 139

Warden Joyner acknowledged on cross-examination that he cannot make the assessment whether, in striking the inmate, Mr. Connelly intended to strike the inmate. H.T. 141.

Warden Joyner testified that it is not unusual to encounter resistance in a forced cell move, such as occurred here. H.T. 143.

Warden Joyner acknowledged on cross-examination that, even with all the protective gear on, officers have been injured during such forced cell moves. Warden Joyner acknowledged that an officer can be injured by an inmate kicking at him, even with all the protective gear on. Warden Joyner acknowledged that the team cannot anticipate everything that is going to happen as they enter the cell in a calculated use of force situation. H.T. 144-145.

Warden Joyner testified that, in the instance where an inmate has "tossed" the team and is striking officers, hitting the inmate to gain control could well be permissible under the use of force policy. Warden Joyner testified that, in this instance, the inmate had not "tossed" the team, and the other team members were not striking the inmate as Mr. Connelly did. Warden Joyner testified that, if Mr. Connelly were correct that the

inmate posed a threat to the point where hitting him was acceptable, the other officers too would have been striking him. H.T. 149-150.

Warden Joyner testified that the key in assessing this situation is "sound correctional judgment." No policy outlines, or can outline, exactly what an officer is to do in a given situation. H.T. 151.

Warden Joyner acknowledged that Joint 6, page 7 sets forth certain things an officer cannot do in using restraints, including using them around the neck or face in a manner to restrict blood circulation or to obstruct the inmate's airway. H.T. 151-152

Warden Joyner testified on re-cross examination that he believed in this case the restraints were used in a manner similar to brass knuckles, and as such represented punishment. H.T. 153.

Marc Farris was part of the use of force team on November 7, 2009. Officer Farris remembers it was wet, due to the sprinkler head being broken. Officer Farris remembered nothing else. Officer Farris testified that, where an inmate is kicking or flailing in such a situation, the goal is to take control of the inmate's body and all extremities. H.T. 155-157.

POSITIONS OF THE PARTIES (IN BRIEF)

The Agency's position may be summarized as follows:

- The Agency's discipline for abuse of an inmate is reasonably related to the orderly, safe, and efficient running of the Agency. Employees are on notice of the Agency's policies, including that fact that "[a]n employee may not use brutality, physical violence, or intimidation toward inmates, or use any force beyond that which is reasonably necessary to subdue an inmate." In relation to the suggested Table of Penalties, specifically in relation to physical abuse of an inmate, the table provides that, "[i]n determining the severity of the penalty, the circumstances of the incident (were the employee's actions totally unwarranted) should be given more consideration than the presence of absence of physical injury." Joint Exhibit 4, Attachment A, page 9.

- There is a basic public policy served in prohibiting the physical abuse of inmates. The Agency and its employees are entrusted with the care and custody of federal inmates, which includes providing for their well being. Employees are prohibited from any brutality and physical violence because they have no place within a correctional environment and run counter to the mission of the Agency.
- Grievant, like all employees within the Agency, received training on use of force when first entering the Agency, in institutional familiarization and more advanced training. When first employed by the Agency, the Grievant was also trained on and signed a receipt for the Standards of Conduct program statement. See Joint Exhibit 3, page 84. The Grievant, like all Agency employees, also received additional use of force training every year at Refresher Training. This training includes use of force training, in both immediate force and calculated use of force scenarios.
- It is not relevant that there were no injuries resulting from the Grievant's actions. The actions themselves are relevant. The reality is that there were four other individuals on the inmate that the Grievant struck with leg irons, each with protective gear. Even if we assume that the inmate was kicking, the Agency put on compelling testimony that the proper response would be to hold onto the leg, control it, and stop the kicking so the restraints could be applied. The actual threat to staff was minimal. The Grievant never explained in his testimony why he could not have simply held on to the leg, as opposed to punching the inmate. The Grievant also neglected to mention the punches in the debriefing, immediately following the calculated use of force.
- Outside of the Grievant's own subjective assertions that he believed striking the inmate with leg irons was a reasonable and warranted reaction based on perceived threat to staff, no other testimony exists to support the Grievant's conduct. Thus, the Grievant's conduct was fairly investigated and his misconduct was appropriately sustained.
- Warden Pastrana plainly considered the Douglas factors in writing the decision letter in this matter. In doing so, the Warden mitigated heavily in the Grievant's favor, reducing the suspension from seven days to two days. Warden Pastrana still came to the conclusion that the serious nature of the offense justified a suspension. The Grievant's actions were serious because they could have harmed the inmate, they did compromise his professionalism as an officer, and because they violated training and policy. The Grievant failed to appreciate the serious nature of the offense in his testimony, and urged that he would do the same thing

if he had it to do over again. Grievant should simply have grabbed the inmate's leg in order to gain compliance.

- The Agency has also provided evidence supporting consistency of penalty, as another bargaining unit in the past, charged with physical abuse of an inmate, received a seven day proposal and a three day suspension. Thus, the penalty imposed on the Grievant is consistent with guidelines and past practice of the institution.
- While the Agency strenuously urges that the grievance should be denied, it should be noted that the Union has requested remedies are either inappropriate or not adequately stated.
- There was just and sufficient cause for the suspension at issue. The grievance should be denied.

The Union's position may be summarized as follows:

- It is important to note at the outset that neither of the inmates involved in the force cell movement at issue was injured. Nor were there any staff injuries.
- The deciding official in this matter. Warden Jorge Pastrana, did not testify in this matter. But according to his letter, he made the decision to issue the two day suspension based on the disciplinary file. The file, of course, does not contain any evidence that any other officer or lieutenant witnessed the grievant strike the inmate in question. Likewise, he could not know that from the video. The only way he could know that is the admission of the Grievant himself.
- Though the Bureau attempts to cloud the issue here by arguing that evaluation of force is different when it is calculated versus immediate, in fact "force is force." The Bureau's own policy supports this fact. As such, just as with immediate use of force, the Grievant here was entitled to use the amount of force necessary to control the inmate. Lieutenant Gregory, who was the Operations Lieutenant on the day in question, provided testimony consistent with the Union's position on this point. Lieutenant Metzler, also a Bureau witness, likewise testified that in a calculated use of force situation an officer is entitled, under policy, to use the force necessary to control the situation. Lieutenant Kleckner, who investigated the Grievant's conduct, agreed with Lieutenant Gregory and Lieutenant Kleckner.

- Physical abuse of an inmate is a very serious charge. The Union's position is that, in order for the Bureau's position on this to be sustained, the Grievant would have to have intended to abuse the inmate, or punish him. The grievant credibly testified that he had no such intention, and the objective evidence does not support such a finding.
- The Bureau's position is grounded in the fact that the Grievant struck the inmate, but there is nothing in Bureau policy indicating that what this Grievant did violated policy or rules. Rather, the inquiry relates to whether the Grievant went beyond the force necessary to control the inmate. This did not happen.
- The Bureau also makes much of the fact that the Grievant had leg irons in his hand at the time he struck the inmate three times in the upper thigh. Though management witnesses, in derogative fashion compared the Grievant's actions to "using brass knuckles," in fact the Grievant only struck the grievant in a measured fashion, and there is nothing within regulations or policy which prohibit the grievant from doing what he did. The restraints were not used to lift or carry the inmate; they were not used around the inmate's neck; and they were not used to punish the inmate.
- In a similar arbitration at Coleman, Case No. 12-52885, the arbitrator sustained the Union's grievance over a two-day suspension issued to an officer for use of excessive force. In that case, the officer forcibly shoved an inmate into an outdoor recreation cage in the Special Housing Unit at one of the United States penitentiaries while the inmate was handcuffed. The officer did so because the inmate was combative, and attempted to spit on the officer. The arbitrator concluded that the officer did not use brutality, and was not physically violent. Rather, he was concerned about the safety of himself and his fellow officers. The same result should obtain here.
- The Bureau also called an expert witness, Assistant Warden Hector Joyner. His testimony, however, was based upon conjecture, speculation, and unpersuasive opinions. Though Warden Joyner was not present at the facility on the day in question, and was not present for the after action review, remarkably he came to the conclusion that the Grievant had violated policy by using the restraints in a fashion comparable to using "brass knuckles." There is nothing in the video or any statements from those present that day which supports Warden Joyner's position that the Grievant hit the inmate with the leg irons. Certainly the fact that the inmate was not injured would militate toward the opposite conclusion. Assistant Warden Joyner's testimony on cross-examination was evasive, disjointed at times, and unresponsive at other times. His testimony should not

be given weight here. While in his testimony Warden Joyner suggested that the Grievant's actions amounted to punishment, which is a violation of policy, in other parts of his testimony he retreated from this position when he conceded that we cannot know what was in the Grievant's head. Importantly Warden Joyner did acknowledge on cross-examination that there could be times (such as where an inmate is bucking and throws team members off) where additional use of force could be consistent with policy. In this case, the inmate was combative and, despite the presence of protective equipment, serious injuries could have resulted if the grievant did not take the action he did.

- In sum, the deciding official here made his decision not on proof, but on a video which does not establish any physical abuse of an inmate. Witnesses involved in the incident did not see any abuse of an inmate.
- The grievance should be sustained. The disciplinary action was not taken for just and sufficient cause. The two-day suspension should be ordered vacated, with appropriate back pay and interest; and any reference to this suspension should be expunged, in the Grievant's personnel file and any other file maintained. The arbitrator is requested to maintain jurisdiction to address any potential issues in relation to implementation.

DISCUSSION

The Deciding Official, Warden Jorge Pastrana, issued a two day suspension to Michael Connelly for physical abuse of an inmate. Warden Pastrana made this determination based on Mr. Connelly's admission that, during a calculated use of force, he punched an inmate three times in the upper thigh while he had restraints in that hand.

The policies, regulations, and testimony of witnesses establish that, in determining whether Mr. Connelly did physically abuse an inmate, the inquiry is directed at whether his conduct went beyond that necessary to control the inmate. In making this inquiry, I accept that, in a calculated use of force situation, there generally should be less need to engage in force beyond the assigned tasks, because the team has had time to plan the mission, and greatly outnumbers the inmates (in this case ten to

two). I have accepted that the officers cannot use the restraints they have to punish an inmate, or use them in a fashion which would restrict their airways in any fashion. I have accepted that, despite all the planning, and the presence of protective gear, injuries can and do occur in the process of a calculated use of force.

In this particular case, prior to the calculated use of force, efforts were made, as required, to attempt to persuade the inmates one last time to participate in the cell rotation peacefully. When these efforts failed, and consistent with the Use of Force and Application of Restraints Policy (Joint Exhibit 6), the team went into the cell. This represented a decision to use force. Before or as the team moved in, one of the inmates broke a sprinkler head in the cell, and from that point forward water was spraying in the cell. One or both inmates also used a mattress to block the access of the teams or at least Mr. Connelly's team. As Mr. Connelly moved in, the officer in front of him was either kicked back into him, or shoved back into him. Mr. Connelly struggled to get control of the leg he was assigned to get control of, which was a prerequisite to putting on the leg restraints. Mr. Connelly then hit the inmate three times in the upper thigh, with the leg irons in his hand. Mr. Connelly gained the inmate's compliance by doing so, and was able to fulfill his role in restraining the leg or legs. There were no injuries as a result of this use of force.

I am not in agreement with Assistant Warden Joyner's testimony that the punches to the inmate constituted punishment. Mr. Connelly credibly testified that he did not intend to punish the prisoner, but simply to gain compliance and to maintain the safety of his fellow officers. Mr. Connelly participated in about 20 other calculated use of force situations, and never had an incident. His actions in punching the prisoner had only to do with control, and concern for safety, not punishment.

The more difficult issue relates to whether, in the context of calculated use of force, Mr. Connelly acted too soon in resorting to these punches, or whether they should have been thrown at all. There is credible Agency testimony that time is on the side of the team, as they greatly outnumber the inmates, and thus patience is typically rewarded. Thus, it is conceivable that, despite the kicks of the inmate, and the fact that at least one other officer had been forcibly moved backward by the force of these kicks or shoves, Mr. Connelly could have continued to pursue getting control of the leg rather than punching the inmate.

The truth is that we don't know what would have happened had Mr. Connelly shown more patience and continued to pursue getting control without the punches. It is possible that another officer in Mr. Connelly's place might have employed that strategy. Obviously management believes that such a strategy should have been employed. I respect management's position as I know that the welfare of the inmates and staff members are at stake in these situations, and the Agency bears the burden of ensuring their welfare.

But I am not convinced, in fact, that in acting in the manner in which he did, Mr. Connelly engaged in physical abuse of an inmate. He made a choice, and used measured force to carry this choice out. As stated, he did not intend to hurt the inmate or punish him. The officers are not automatons, and must make split second judgments under difficult circumstances. Even though the disciplinary range for Physical Abuse of an Inmate goes from a written reprimand to removal, the stigma of having that offense on your record, even on the lower end of that spectrum, extends well beyond the discipline administered. This is in large part because the very title of the offense carries with it implications that the officer *intended* to abuse the inmate. This did not occur here.

The disciplinary grid for Physical Abuse of an Inmate indicates that, in determining the penalty, “the circumstances of the incident (were the actions totally unwarranted) should be given more consideration than the presence of absence of physical injury.” As I understand this guidance, if an officer had gone in the cell in question, and witnessed one of the inmates kneel down with his hands placed behind his head, and the officer then walked up and slapped him in the face, this would be the type of “totally unwarranted” abuse where the absence of an actual injury would be given less weight than the action itself on the issue of *level of discipline*. One of my central inquiries, however, is to determine if the offense of physical abuse *even occurred*. On this inquiry, and especially since one Agency witness likened what Mr. Connelly did to using “brass knuckles,” the fact that there were no injuries is completely relevant and worthy of significant weight.¹ The fact that there were no injuries supports the notion that there was no intent to physically abuse the inmate, and that there was no physical abuse.

¹ Associate Warden Joyner testified that the absence of injury was likely due to the inmate using body armor, e.g., bagging up clothes for protection. However, there is no evidence that the inmate actually did this.

AWARD

The grievance is sustained. The two-day suspension was not issued for just and sufficient cause. The Agency is ordered to rescind the suspension. The Agency is ordered to pay the Grievant the salary and benefits he would have earned had he not been suspended, together with any interest required or authorized by law. I will retain jurisdiction for a period of ninety days for the purpose of resolving any issues regarding remedy. Should either or both parties raise such an issue or issues within the ninety day period, I will retain open ended jurisdiction on that issue or issues until the issue or issues are resolved or until a supplemental award is issued.²

Dated: January 27, 2015



Thomas G. McConnell Jr.

² The Union urges that any reference to the suspension and charge involved should be expunged from all files, including his personnel file. The Agency urges that expunging such records violates federal law. I will remand this issue back to the parties for further review, as I would expect that there is an established practice in the federal setting, and perhaps in the federal prison setting, as to whether expunging records is permissible under these circumstances. In my arbitration practice outside the federal setting, expunging records is a routine remedy granted where discipline is found not to have been supported by just cause.