

WILLIAM E. RIKER
ARBITRATOR

IN ARBITRATION PROCEEDINGS PURSUANT TO THE
MASTER AGREEMENT BETWEEN THE PARTIES

In the Matter of a Controversy)	
)	
between)	William E. Riker
)	Arbitrator
COUNCIL OF PRISON LOCALS, AMERICAN)	
FEDERATION OF GOVERNMENT)	
EMPLOYEES,)	
)	
Union,)	
)	
and)	
)	
FEDERAL BUREAU OF PRISONS,)	San Francisco, CA.
)	July 26, 2015
Employer,)	
)	
RE: A. Holladay – Suspension Appeal)	
)	
)	
)	

FMCS Case No. 15-51877-3

This arbitration arises pursuant to the Master Agreement (MA) between the Council of Prison Locals, American Federation of Government Employees, Local 1112, Florence, Colorado, hereinafter the “Union” and The U.S. Department of Justice, Federal Bureau of Prisons Administrative Maximum Security, Florence, Colorado, hereinafter the “Agency” and/or “Employer.”

The arbitration was heard on Wednesday, May 20, 2015 and was held at the Administrative Maximum Security Institution of the Federal Correctional Complex in Florence, Colorado. It was heard before William E. Riker, who was jointly selected by the parties as the sole arbitrator from a list of arbitrators submitted to the parties from the Federal Mediation and Conciliation Service (FMCS).

The parties agreed the issue that was jointly agreed upon is timely, properly before the arbitrator, and that the arbitrator's decision is final and binding. The Employer and Union were afforded full opportunity to present their respective positions on the record. This included examination and cross-examination of witnesses, introduction, receipt of relevant exhibits, and argument.

At the conclusion of the hearing the parties elected to submit post-hearing briefs that would be due 30 days after the close of the hearing. The arbitrator received the briefs on or before June 30, 2015 and determined that they were timely filed. The parties also requested an opportunity to submit reply briefs, which was granted. The reply briefs were received by the arbitrator on July 5, 2015.

APPEARANCES

ON BEHALF OF THE UNION

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ISSUE

Was Officer Holladay’s suspension for just and sufficient cause? If not, what is the appropriate remedy?

MASTER LABOR AGREEMENT

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

...

ARTICLE 32 – ARBITRATION

...

Section h. The arbitrator’s award shall be binding on the parties. However, either party, through its headquarters, may file exceptions to an award as allowed by the statute.

...

PROGRAM STATEMENT

1. Purpose and Scope

The Bureau of Prisons authorizes staff to use force only as a last alternative after all other reasonable efforts to resolve a situation have failed. When authorized, staff must use only that amount of force necessary to gain control of the inmate, to protect and ensure the safety of inmates, staff and others, to prevent serious property damage, and to ensure institution and good order. Staff are authorized to apply physical restraints necessary to gain control of an inmate who appears to be dangerous because the inmate:

....

e. becomes violent or displays signs of imminent violence

...

BACKGROUND

Government employees and the Federal Correctional Complex in Florence, Colorado have had an ongoing labor/management relationship. Over the years the parties have met, negotiated, and memorialized the terms and conditions of employment for staff at the maximum correctional facility.

The Grievant in this matter, Senior Officer Specialist Adam Holladay, has been employed by the Bureau of Prisons for more than 24 years. On August 7, 2013 he and another officer were assigned to escort an inmate, taking him from his cell in the segregation unit to his scheduled medical examination. During the course of the inmate being escorted an incident occurred that culminated with the Grievant being charged with violating the standards of conduct by his using excessive force to control the inmate.

The Employer conducted an investigation and reached the following finding: "On about August 7, 2013, while assigned as the Escort Officer # 2, you used excessive force on inmate ..., when you pushed him against the wall The video of the incident reveals you were escorting inmate ... down the range in Z Unit, when you both stopped

and inmate ... appears to be speaking to you. You placed your left hand on inmate ... left shoulder and pulled inmate ... across to the left side range wall, pushing him to the wall, and then down on the floor.

Program Statement 556606, Use of Force and Application of Restraints, states in relevant part 'when authorized staff must use only that amount of force necessary to gain control of the inmate, to protect and ensure the safety of inmates, staff and others, to prevent serious property damage, and to ensure institution security and good order'.

Your action of pushing inmate... into the range wall constitutes an unwarranted use of force, and forms the basis of the charge." (Joint Exhibit 8)

According to the testimony, a Notice of Discipline was issued notifying Adam Holladay that the finding was he would be suspended for thirty (30) calendar days for unwarranted use of force. (Joint Exhibit 1)

Subsequently, on September 17, 2014 Complex Warden David Berkebile, after a review of the record, issued his written decision noting, in part, the following: "Of great importance to me when determining the appropriate penalty, if I believe an employee committed misconduct, is their acknowledgement of wrong doing, and their ability to implement personal controls to ensure the behavior is not repeated. It concerns me you accepted no responsibility for your actions, nor did you provide me any indication this type of incident would not happen again in the future. After careful consideration, I find the charge fully supported by the evidence in the disciplinary action file. Your suspension is warranted and in the interest of the efficiency of the service. In

determining the appropriate penalty, I considered, among other factors, you have been employed by this agency for 23 years, you have no prior discipline, and your performance is at an acceptable level in your position. However, I also considered you did not accept any responsibility for your actions. Therefore, it is my decision a suspension of ten (10) calendar days should have the desired effect (Joint Exhibit 8)

On October 20, 2014 a formal grievance was filed protesting the Agency's action noting in part that: "The Agency, through the actions of deciding official, Warden D. Berkebile, suspended Officer Holladay ten (10) days without just and sufficient cause. Officer Holladay acted within the scope of his employment and training when he was forced to use immediate force to maintain control of a disruptive and combative inmate with a known history of violence against staff and other inmates (Joint Exhibit 6)

The parties processed the dispute but were not able to resolve their differences and the Union notified the Agency that they were moving the grievance to final and binding arbitration.

POSITIONS OF THE PARTIES

The arbitrator summarizes the positions of the parties as follows:

EMPLOYER

The Grievant is a law enforcement officer and thus held to a higher standard of conduct. He is a well trained experienced officer who was fully aware of the Agency's use of force policy. The evidence presented at the hearing, including the video relating to the incident at issue, clearly identifies that Officer Holladay used excessive force when he

picked up the inmate and slammed him into the far wall and then onto the ground. He did this without any objective as seen from either the deportment or body language of the other officer who was accompanying the inmate or even the inmate himself. This fact indicates that such a degree of force was unnecessary for suppressing the inmate's language and actions.

A full and fair investigation was initiated, and it resulted in the warden being advised of the fact that the Grievant's use of force was considered to be excessive and unwarranted. Subsequently, Complex Warden Berkebile reviewed the Grievant's work history and lack of any prior discipline, which he took into consideration when he elected to reduce the proposed discipline of a thirty (30) day suspension to that of a ten (10) day suspension. As testified to by the warden during the hearing, a significant factor in imposing the level of discipline was because Officer Holladay stubbornly asserted that he had done nothing wrong. Yet, the video clearly shows that he used excessive force, behavior that is contrary to the Agency's standard of conduct.

The opinion of the warden is that due to his obstinacy in this situation the Grievant in electing to use excessive force, when he threw the inmate against the wall and then onto the floor, could easily endanger the other staff and may well invite inmate reprisals.

In summary, the evidence has conclusively established that the Grievant knew the standard of conduct relating to the use of excessive force, and with full intent and knowledge of his actions he had knowingly violated them. He stubbornly refused to acknowledge that his actions were inconsistent with what he had been taught, and as to what he had taught others over the years, when he was assigned to instruct fellow officers during educational seminars.

As to the Union's argument relating to the untimely processing of the Grievant's imposed discipline, based on the record there should be no dispute that the matter was processed consistent with the terms of the negotiated Master Agreement and Agency standards, and that their plea should be rejected by the arbitrator. In addition, the Employer was cognizant of and adhered to the "Douglas factors" when the decision was made to impose the level of discipline that was determined by the warden to be appropriate for the offense.

In conclusion, the Agency seeks a ruling from the arbitrator where the Grievant is to be held responsible for his conduct on August 7, 2013. This is based on the fact that he deliberately and with intent used excessive force against an inmate, which is a violation of the Agency's standard of conduct. The arbitrator is asked to deny the grievance in its entirety and affirm the ten (10) day suspension that was imposed on the Grievant.

UNION

The Agency's suspension of Officer Holladay was not issued for just and sufficient cause, as the Employer is required to prove a genuine nexus between the discipline administered and the efficiency of the federal service. In this matter, the Agency fails to carry its burden of proof as they have failed to satisfy their contractual obligations to take disciplinary action for just cause only. Article 30 of the Master Agreement between the Union and Correctional Complex at Florence requires the Employer to prove that there was a violation of validly promulgated work rules, which they have given proper notice of.

In the matter that is before the arbitrator for his final and binding decision it should be clear from the record, as well as through direct and cross-examination of the witnesses, that the ten (10) day suspension was not appropriate or even warranted for the charged offense. The Employer has charged the Grievant with unwarranted use of force, in that the act of pushing the inmate against the wall and then onto the floor was the basis for the charge of the unwarranted use of force. However, the testimony of Officer Holladay is credible when he testified that based on the inmate's actions and posturing he appeared aggressive. As such, the Grievant believed he had to protect himself against a perceived threat from an inmate who had a history of assaulting staff. It was at that point during the incident when the Grievant determined he would apply the techniques that the Agency had trained him to use in situations such as the one he was encountering on August 7, 2013.

Secondly, it is also clear that the Employer, in reviewing the evidence and level of discipline imposed, had failed to give adequate consideration when the warden assessed the reasonableness of the penalty. If he had, he would have recognized that rescission or at least mitigation should have been applied based on the facts of the case.

Thirdly, the arbitrator is also asked to take into consideration that the Agency's processing of this incident and subsequent penalty that was imposed was untimely, as the Agency did not begin investigating the matter until January 2014 despite their having received the authorization to conduct an investigation at an earlier time. In addition, the Agency waited more than ten months to issue the proposed discipline, and over a year after the event had taken place before their reaching a decision.

In conclusion, the Union asks the arbitrator to issue a ruling that the discipline imposed by the Employer be overturned or otherwise mitigated. As such, Officer Holladay is to be made whole through back pay, including interest, and any other benefit that the Grievant is entitled to through a reversal of the suspension. Also, that the discipline be expunged from Officer Holladay's personnel file.

DISCUSSION AND OPINION

There should be no question as to the concern on the part of the Bureau of Prisons in that the entire staff fully recognizes that inmates are confined in an environment that provides them with safe and humane conditions, which are found to be consistent with American values (TR: pp, 93-95). The Agency's Standard of Conduct makes it specifically clear through written form and periodic training, that an employee may not use brutality, physical violence or intimidation toward inmates, as well as applying any force beyond what is considered to be reasonably necessary in order to subdue an inmate. However, it is established that officers are given the right to protect themselves and others when necessary. The question, which is up for review, is that in light of the brief but intense sequence of events that occurred, did the Grievant feel so threatened by the inmate's demeanor that, based on his years of experience, he believed it was essential to use the force that was applied.

After reviewing the record, which included the direct and cross-examination of witnesses, the relevant exhibits, as well as a video of the event that occurred on August 2013, including the arguments submitted by the Employer and Union, the arbitrator has

reached a finding that the charge of the Grievant using excessive force against the inmate is not sustained. Therefore, the ruling is that the Agency's decision to suspend Officer Holladay was not issued for just and sufficient cause.

Over the past 40 years this arbitrator has been assigned numerous cases dealing with the question of excessive force. These cases involved situations between law enforcement officers that work the streets, public agencies such as BART, city and county jails, and state and federal prisons. There is always a concern over whether the individual who wears the badge might exceed using the necessary force in which to control an incident. As noted by the Union, it is the Employer's responsibility to prove the nexus between the discipline administered and the efficiency of the law enforcement organization. In the matter at hand, the Agency must prove by a preponderance of the evidence that the discipline imposed against Officer Holladay improved the functioning of the federal service rather than having impeded it. In essence, the neutral's role is to determine if the evidence supports the charges against the Grievant. This is not a matter of an inmate who is secured in his cell yelling and throwing things. Rather, it is an inmate who was shown in the video as being clearly uncooperative and belligerent, his body was placed in a flat-footed stance while attempting to turn toward the officer. All of which, as testified by the Grievant, was reasonably believed to appear to be threatening.

In such an instance split second action and sound judgment was called for on Officer Holladay's part, since the outward behavior of the inmate required him to make a quick judgement call. During the Grievant's direct examination of the situation he quickly

made an assessment and determined how best to handle the circumstances he was faced with. It is apparent to the arbitrator that the Grievant was concerned for his safety:

Q. And you were standing where in relation to the inmate?

A. I was behind him. And prior to his turn I would be to his left. But once the turn started he was almost perpendicular to me.

Q. And what did you think when that happened?

A. This is when I got really scared. Because there's that core miniscule second in time where everything in my training, 24 years of experience, and everything in my body and my mind is screaming at me, the alarm bells are going off in my head, and I know for a fact that if I don't get this cat on the ground he's going to assault me... .

Q. Why do you say that you just knew that he was going to assault you?

A. When I had hold of his hand restraints I could feel his arm muscles and his lower back muscles and his shoulder muscles start to tighten up as he's starting to turn into me. And as his head came around you could see the look on his face and the look in his eyes, and it was almost... it was like pure hatred. It was unbelievable... (TR: page 138)

As testified by the Grievant, the situation he was faced with when attempting to control the motion of the inmate so as to prevent any bodily harm to himself or Officer Maness, he had applied a maneuver known as a "take-down," in which a level of force is used to gain control. He did this by using an action whereby he took control of the inmate's hand and arm, thus forcing him to the ground.

Based on the evidence presented, the arbitrator has been persuaded that the Grievant's action was a viable means for placing the inmate in a position where he could not harm himself or the officers who were accompanying him to the medical appointment. There should be no dispute those officers at a correctional facility who are

given the responsibility to maintain control over the incarcerated are often required to make quick judgment decisions. This calls for evaluating the force deemed necessary when responding to a probable threat, as well as being fully aware of the intensity of a given situation. Frankly, in the considered opinion of the arbitrator, their decisions should not have to be second-guessed. Thus, questioning an officer's judgment and concluding that the officer exceeded the boundaries of reasonable force without having reviewed the totality of the situation in which the officer had been confronted with, appears to this arbitrator to be shortsighted. As argued by the Union, it is why a timely post-assessment analysis is essential. It may very well have provided insight into the officer's judgment ability or at least one's capability to make the right decision when the margin between excessive and appropriate is extremely narrow. A timely full and fair investigation would have made the Employer cognizant of the impact of their assessment and subsequent imposed discipline.

The warden, while under direct examination, discussed why he had arrived at his decision to impose a suspension of ten days. It was his opinion that a more lenient level of discipline might possibly have a negative impact on the inmate-correctional officer relationship. In addition, the warden considered the fact that Officer Holladay refused to admit any wrongdoing over the judgment call he had made when bringing the inmate under control by putting him down.

In the considered opinion of the arbitrator, the administration could also have given equal weight as to what the severity of the discipline imposed might be and the effect it would have upon all of the officers who live with the inmates on a daily basis. In

essence, the correctional officers must maintain having the confidence and ability for making the right choices under high stress situations. Without such self-assurance it could result in stifling the initiative of personnel operating effectively in the chaotic and dangerous profession of law enforcement.

The arbitrator has also taken into consideration the fact that the warden was concerned the Grievant refused to acknowledge any wrongdoing relating to the judgment call he made in bringing the inmate under control when he had taken him down. Frankly, it would be a lack of conviction if the Grievant acquiesced to the administration's expectations that he should admit he used excessive force when taking the action he did.

The arbitrator, in his deliberation, considered not only the incident itself as seen through the video, but also included all of the evidence that had been presented during the course of the hearing as well. As such, it was clear that the inmate was perceived by the Grievant, as well as Officer Maness, to be an immediate threat and needed to be defused. Maness noted this fact on the day of the incident when he submitted his Memorandum and expressed that: "...The inmate then made a very aggressive hard turn to the left while telling Officer Holladay do not fucking touch me." (Exhibit 18)

Also, there was a report submitted by Doctor Allred, the staff physician, who immediately reached the scene after responding to a call from the escort officers. After his examination of the inmate the doctor stated in his written report: "Upon arrival, I found Officer Holladay on top of inmate... lying on the floor. I conducted two injury assessments of the inmate and escorting staff. During both evaluations, the inmate reported no injuries and I found no evidence of any to his person.... he remained

belligerent, verbally abusive and demanding throughout the process.” (Union Exhibit 2)

A third part of the record that has been considered by the arbitrator are the evaluations of the Grievant’s service record, as noted in several Annual Performance Reviews, in which he was consistently rated by his supervisors as being an officer who knew the rules and regulations and had the professional expertise to perform his job duties in a competent manner. Fourth, is the inmate’s Discipline Data Chronological Record which, in part, identified that the inmate, during his incarceration, exhibited being uncooperative, threatening bodily harm to staff and others, etc.

Over the years while serving as a neutral, this arbitrator has been assigned by the bargaining parties to decide more than a hundred grievances where the issue presented is the matter of excessive force by a law enforcement officer. While recognizing that there have been a number of those cases where the charge of an officer using excessive force has been sustained there are others where the evidence does not establish just cause. Those who are under law enforcement control are not immune from attempting to bring discredit upon those responsible for enforcing the law. The apparent goal has been for inmates to challenge the manner in which officers provide control over them. This fact is simply being noted for the sole purpose as to why a timely and full and fair investigation of all of the facts is deemed essential.

In summary, the issue in this matter pertains to a judgment call on the part of the officer who is faced with a hostile situation. The officer’s intensive and on-going training requires using one’s best judgment while performing their regular duties as a correctional officer in this maximum security institution. They are given the

responsibility of having to deal with an inmate population who constantly challenges them, whether inmates are under lock and key or as in this case, where the correctional officers were escorting an inmate to a medical appointment.

The neutral's role is to determine if the evidence supports the infractions the Grievant is charged with. The finding is that it does not and therefore the grievance of Officer Holladay is sustained. The Agency committed an unjustified personnel action by suspending Officer Holladay. The Union's request for relief is granted.

DECISION

The grievance is sustained

AWARD

Officer Holladay's suspension and elimination of all reference to his suspension is granted. Pursuant to the requirements of the Back Pay Act, 5, U.S.C. 5596, the Grievant is to receive all back pay with interest (including annual leave, sick leave and retirement benefits) that he would have received but for the Agency's unjustified personnel action.

The arbitrator shall retain jurisdiction for purposes of resolving any questions of attorney fees to which the Union may be entitled based on the arbitrator's ruling.

It is so ordered.

Date:

July 26, 2015


William E. Riker, Arbitrator