FEDERAL MEDIATION AND CONCILIATION SERVICE

In the Matter of the Arbitration between

American Federation of Government Employees, Local 1304, Union,

-and-

United States Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Greenville, Illinois, Agency.

FMCS Case No. 08-52608

Arbitrator's Decision and Award

The grievant, Eric Newsome, was a Senior Officer Specialist, correctional officer, at the Federal Correctional Institution at Greenville, Illinois, operated by the Federal Bureau of Prisons, United States Department of Justice. Newsome was terminated on October 26, 2007, for allegedly physically abusing an inmate, failure to follow post orders, and lack of candor. On November 23, 2007, a grievance[1] was filed protesting the termination. On December 20, 2007, the U.S. Department of Justice, Federal Bureau of Prisons, denied the grievance.[2] The union[3] invoked arbitration on January 7, 2008.[4] The parties selected Donald G. Russell as the arbitrator and he was notified of his appointment by letter dated

1 Joint exhibit 2.

2 Joint exhibit 3.

3 American Federation of Government Employees, Local 1304.

4 Joint exhibit 4.

February 12, 2008, from the Federal Mediation and Conciliation Service. The arbitrator and parties agreed upon July 23, 2008, as the date for the arbitration hearing. It was necessary to vacate that date and the arbitration hearing was reset for two days, September 4 and 5, 2008. The hearing was held at the FCI Greenville[5] on those days. Docia M. Casillas, Supervisor, Labor-Management Relations, represented the employer, FCI Greenville. Adrienne Kincaid Murphy, attorney, represented the union and the grievant. Karen Waugh, CSR and RPR, took notes of the proceedings and prepared a transcript from her stenographic notes.[6] Following completion of the transcript, the parties submitted post-hearing briefs which were received by the arbitrator on December 12 and 15, 2008. Upon receipt of the final brief, the arbitrator closed the record and cross-served the briefs. The matter is now before the arbitrator for decision.

The Case

The American Federation of Government Employees, Local 1304, is the exclusive bargaining representative of certain employees of the Federal Correctional Institution at Greenville, Illinois, and the grievant, Eric Newsome, is one of the employees represented by the union. The parties have a Master Agreement which was in effect at all times relevant herein.[7]

Eric Newsome began working for the Federal Bureau of Prisons on October 16, 1994. Except for the September 29, 2004, incident in question in this case, the unchallenged and clear evidence is that he was more than a good correctional officer, he was excellent. There was no discipline. He was assigned to special teams including the Disturbance Control and Special Operations Response Team. He was promoted to Senior Officer Specialist, a position held by "top of the line staff" who are "highly experienced."[8] On September 29, 2004, he was Officer In Charge, directing other correctional officers. The Federal Bureau of Prisons trusted him enough to have trained, at least in part, 70% of the staff at FCI Greenville.

On September 29, 2004,[9] Newsome was working as Officer In Charge in the Special

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5 Federal Correctional Institution at Greenville, Illinois.

6 The transcript contains details of the time and other matters in the hearing.

7 Master Agreement, Federal Bureau of Prisons and Council of Prison Locals, joint exhibit 1.

8 Transcript, p. 249, testimony of Warden Sherrod.

9 This part of the arbitrator's decision is not meant to be an exhaustive finding of facts and setting out of the testimony. The transcript of the two-day hearing is 426 pages long and the documentary evidence is four inches high and weighs more than seven pounds. This section is just meant to set out a summary of what lead to this discipline and this case. An examination of the evidence and how it

Housing Unit (SHU) where for various reasons inmates must be separated from the rest of the inmate population. In some cases it is for the individual inmate's safety because he might be harmed by other inmates or may harm himself. In other cases it is because the individual inmate is a disciplinary problem and threatens other inmates. For whatever reasons the inmates are in SHU, it is difficult to deal with these inmates. They are locked up alone in individual cells.

Correctional Officers Jeffrey Lohr and Daniel Gordon were on duty that night. As OIC, Eric Newsome, was their superior. On that day, it became necessary for the officers to move certain inmates to other cells. One inmate in particular did not want to move from his cell to another cell.[10] Possible reasons for his not wanting to move will be discussed later in this decision.

Officers Lohr and Gordon went to the inmate's cell to talk him into moving. He was being recalcitrant. Officer Gordon, who was the property officer that day, talked to the inmate for a brief time, a minute or two, and it appeared to the officers that the inmate might cooperate. Officer Gordon unlocked the food flap in the cell door when he thought the inmate would agree to be cuffed;[11] but, suddenly the inmate changed his mind. At this point, Officer Newsome, the grievant, stepped in front of the door and started talking to the inmate trying to persuade him to cooperate and move from his cell. Next, Officer Newsome was more firm and told the inmate he must cooperate and allow himself to be cuffed up through the slot in the door which was standard operating procedure for cuffing inmates.

Officer Newsome testified in federal court,[12] "Inmate was saying things like I'm tired of moving, I just moved in my cell rotation a few days ago, I like this range,[13] I don't want to move. He was using foul language."

When asked by the questioner what he was saying, Officer Newsome testified, "Fuck you, mother fuckers, I'm not moving. I'm tired of your shit. I'm tired of being fucked

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should be considered will be set out in the discussion section later in this decision.

[10] He was in Cell A-10 on the Alpha range. There are four ranges in the Special Housing Unit, Alpha (A), Bravo (B), Charlie (C), and Delta (D). A and B are disciplinary segregation units and C and D are administrative units.

[11] Handcuffed.

[12] The federal court case will be discussed later.

[13] "Range" means a corridor, or hallway.

with. I mean I don't know verbatim. That is basically what he was saying."[14]

Officer Gordon had a set of cuffs. He opened the food flap and put the cuffs inside the door. The proper procedure is the have the inmate put his hands through the flap and outside the door to be cuffed, but there is a great deal of testimony from officers who do the day-in day-out operations that the ideal is rarely accomplished because inmates, particularly agitated inmates, make it as difficult as possible to put the cuffs on. Their cooperation is as minimal as they can get away with. So, when Gordon attempted to cuff the inmate inside, instead of outside, the door, it was not an unusual occurrence.

At this point, Newsome is on the left as the three officers faced the door. Gordon is in front of the flap. To Gordon's right is Officer Lohr near the door's opening edge. As Gordon starts to put the cuffs on the inmate, Officer Newsome passes behind him and directs Officer Lohr to open the door. Lohr opens the door.

Officer Newsome, the grievant, is the first to enter the cell. Just as he enters, a pair of handcuffs are kicked on the floor nearly to the opposite end of the range. Fairly quickly Officer Lohr leaves the room, does a quick visual search, then having located the cuffs he retrieves them and returns to the cell. Meanwhile, Officer Newsome and Officer Gordon are in the cell with the inmate.

Officer Newsome testified that as he entered the cell the inmate took a swing at him. Newsome and Gordon wrestled the inmate to the floor and attempted to get him under control. All the while they were doing this, the inmate was resisting. Upon his return, Officer Lohr was able to help Officer Newsome get the cuffs on the inmate's right wrist. Gordon evidently got cuffs on his left wrist.

Officer Newsome entered the cell at 12:20:03 p.m. as shown on the video which was taping the range and the door of the cell. Finally, at 12:21:53 p.m., one minute and fifty seconds later (just short of two minutes), Officer Lohr exited the cell. It took three correctional officers almost two minutes to get the inmate under control.

The video shows that Officer Gordon had a set of cuffs when he arrived at the cell door and Officer Newsome, the grievant, also had a set of cuffs. Officer Lohr told the investigators that he did not have cuffs and that is why he rushed down the hall to retrieve the cuffs which had been kicked down the hall. He believed, according to his statement, that these were the only cuffs between the three officers. Actually, there appear to have been two sets of cuffs. Officer Gordon had no cuffs when he exited the cell and Officer Newsome still had his set of cuffs. The best guess is that Gordon's cuffs were the ones that the three placed on the inmate during the scuffle in the cell.

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[14] This testimony is consistent with the testimony of Officers Lohr, Gordon, and Newsome in the arbitration hearing. Unfortunately the video of the range, agency exhibit 18, did not have audio. Even so, the arbitrator believes this was a fair description of what the inmate was saying.

Officer Lohr testified he retrieved the cuffs from the other end of the range and when he returned, the inmate "was already on the floor, bent over on his knees with his hands tucked underneath his – you know, in his stomach with his head towards the bunk. Gordon was on his left side. Newsome was basically over his back to his right. I came in.[15] Gordon was, Mr. Gordon was getting his left arm behind his back. When I came in, he was getting his left arm behind his back. I put the handcuffs[16] on his left arm and then me and Newsome were in the process of trying to get his right arm, which he was resisting, to get it behind his back to secure him."

Officers Newsome, Gordon, and Lohr left the area after getting the inmate cuffed and the cell door closed. All of the officers prepared initial memorandums and later gave affidavits to the Department of Justice, Office of Inspector General, Special Agent Kimberly Thomas.

The inmate was taken to Health Services inside the Greenville Institution and was seen there by Physician's Assistant Timothy Adesanya at 1400 hours (2 p.m.) The report indicates that the inmate was injured at 1300 hours (1 p.m.)[17] The inmate had lacerations that required stitches on the left side of the scalp and in the area of the left eyebrow. Three sutures were placed in one laceration and seven in the other. The inmate had marks on his back. The evidence clearly shows that the inmate was banged up and got the worst of the scuffle.

The matter was turned over to the Office of the Inspector General for an investigation. Special Agent Thomas conducted the investigation. Following the investigation, Officer Newsome was placed on restricted duty and continued to work at Greenville until July 20, 2006, when he was placed on home duty status following his indictment on federal charges.[18] He was indefinitely suspended on August 10, 2006, while the federal criminal cases against him and Officer Gordon were pending.

Officer Gordon accepted a plea agreement and pleaded guilty to filing a false report in return for the prosecution dropping the charge of aiding and abetting in the violation of the inmate's civil rights, a charge that could have resulting in nine years in federal prison had he been convicted of it. The grievant, Eric Newsome, was tried in the United States

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15 The video shows that Lohr reentered the cell at 12:20:19, sixteen seconds after Officer Newsome first entered the cell.

16 Handcuffs from the hall.

17 This is about 40 minutes off.

18 He was charged with deprivation of rights under color of law, falsification of records in a federal investigation, and making a false statement.

District Court, Southern District of Illinois, in late July of 2007.[19] Eric Newsome was acquitted of all charges by the jury in the federal district court criminal case against him.

Following his acquittal on July 26, 2007, the grievant was notified by Captain Kirk Jones (FCI Greenville) that the agency was proposing that he be removed from his position. The union filed a written response,[20] the grievant made an oral response,[21] and grievant's criminal defense attorney wrote a response.[22] The matter was considered by Captain Kirk Jones who recommended removal of the grievant from his position. Warden Audie Sherrod made the decision to terminate the grievant's employment and issued the termination letter on October 26, 2007. The grievant was terminated for failure to follow post orders, physical abuse of an inmate, and lack of candor.[23]

The grievance was filed and processed through the grievance procedure culminating in the union invoking arbitration on January 7, 2008. The matter was heard on September 4 and 5, 2008. Post-hearing briefs were filed on or before December 9, 2008, and received by the arbitrator on December 12 and 15, 2008. Under the rules of the Federal Mediation and Conciliation Service, the arbitrator has sixty days from the close of the hearing (receipt of the final brief) to issue his decision and award in the case.

The Issues

The issues are:

Did the Agency have just cause to remove the grievant from his employment with the Federal Bureau of Prisons?

If not, what should the remedy be?

Discussion

The Federal Bureau of Prisons must prove that there is just cause for the removal of the grievant from his employment. In a termination case such as this, the Agency has the burden of proving the just cause by a preponderance of the evidence. There is a difference between the burden of proof in a criminal prosecution, beyond a reasonable doubt, and the burden here, a preponderance of the evidence. Sometimes employee

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19 The arbitrator is unsure of how many days the trial lasted, but did read transcripts from it date July 23 and July 25, 2007.

20 Joint exhibit 8.

21 Joint exhibit 10.

22 Joint exhibit 9.

23 Joint exhibit 11.

advocates argue that a termination should be by proof beyond a reasonable doubt, but that standard is not being applied here. The burden of proving just cause means that the Agency must persuade the arbitrator that the evidence shows that it is more likely that its version of events and facts is more likely than the grievants version with respect to all of the elements of just cause.

In any case involving just cause it is helpful to examine the seven tests for just cause set out by Arbitrator Carroll R. Daugherty in *Enterprise Wire Co. and Enterprise Independent Union,* 46 LA 359 (March 28, 1966). Although these tests are not always rigidly applied like a blueprint, they nevertheless provide a framework or guide to whether just cause standards have been met. The tests are not important because Daugherty wrote about them, but because they represent the thought of a series of arbitrators who have decided just cause cases.[24]

The tests require (1) notice to the employee of a (2) reasonable rule or order (3) with an investigation that is (4) a fair investigation with (5) proof that the employee committed the acts charged and the employee (6) was treated equally with other employees and (7) the penalty assessed fits the severity of the offense. The rules are thoroughly discussed in *Just Cause, The Seven Tests, Second Edition* by Adolf Koven and Susan L. Smith, Revised by Donald F. Farwell, The Bureau of National Affairs, Inc., 1992, ISBN 0-87179-708-9.[25]

The parties in this case referred to the Douglas factors, *Douglas v. Veterans Administration,* 5 MSPR 280 (1981). These factors are the application of the 7th test in a federal context in order to insure that mitigating factors are considered. Mitigation, and its opposite, aggravation, are considered by arbitrators in considering the 7th test, the penalty. The Douglas factors offer no surprises. They are a compilation of mitigating factors. The arbitrator must consider them, especially if the decision-makers for the employer, the Agency, did not.

The just cause standards and the Douglas factors were applied to the three charges against the grievant. Taken in order of seriousness, these were (1) physical abuse of an inmate, (2) failure to follow post orders, and (3) lack of candor. The arbitrator, having heard the testimony and having considered the evidence, including testimony in other forums submitted by the parties as evidence herein, the credibility of the witnesses and the arguments and briefs of the representatives, and being otherwise duly advised, the arbitrator finds that there is not a preponderance of evidence to support a finding of just cause for the termination of the grievant, Eric Newsome, based on physical abuse of an inmate and lack of candor; but does find that a preponderance of the evidence is that the

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[24] Some arbitrators claim they pay little heed to the seven tests, but on close inspection it is unlikely these arbitrators would uphold a termination for violation of a rule the grievant and workforce never heard of.

[25] There is a recently issued third edition.

grievant violated a post order, but under the circumstances, progressive discipline would have met the just cause standard of appropriateness of remedy and a termination was too severe considering the circumstances of the offense and other mitigating factors. Following are the reasons for this ruling.

Here is the situation that existed on that day. Officer Gordon was the property officer. As he explained it, "When an inmate comes to Special Housing, his property is confiscated from his housing unit where he was currently housed and that property is sent to Special Housing, the property officer, myself, goes through the property and reissues the inmate his allowed items, hygiene items and so forth." This is noted by the arbitrator because it supports later testimony of Gordon as to his motive when he entered the cell later.

Officer Lohr had the least time in service and was troubled at the time by the fact that his wife, who also works for the Bureau of Prisons, was assigned from Greenville to a location in West Virginia. The evidence is credible that he wanted to move from Greenville to the location where his wife was assigned.

The grievant, Officer Newsome, worked at Greenville from October 16, 1994. His record was exceptionally good. He was never disciplined. He was on the Special Operations Response Team and Disturbance Control Team, as well as other special teams. He trained 70% of the correctional officers at Greenville. He was, by all accounts and by all evidence, a good correctional officer.

The task that had to be undertaken was to move the inmate from his cell, A-10, to another cell because the cells would be needed the next day to hold prisoners involved in hearings. The inmate is bi-polar and is off his meds. He does not want to move. He just moved into this cell yesterday. His friend is across the hall. When Officers Newsome and Gordon arrive, and shortly later Officer Lohr, the inmate is yelling and cursing and telling them he does not want to move. His friend across the hall in another cell is yelling encouragement to him in his recalcitrance. So, are other inmates.

Even so, the correctional officers try to persuade him to cooperate, put his hands through the slot in the door, and be cuffed to be moved. Mostly the banter back and forth is between the inmate and Officer Gordon. Everyone agrees the inmate would blow hot and cold, he would curse and swear and say he was not going to move and then he would calm down a little and the officers believed he might comply with their requests.

There is a gesture by Gordon on the video of the actions in the hall where the Agency insists he is pointing at the video camera. All sorts of assumptions were made by the Agency investigators and decision makers that Gordon was saying that Officers Newsome and Lohr should move in closer to block the camera and it is inferred that they somehow conspired or understood that Gordon would pretend to cuff the inmate and they would all go in and beat him up. Nothing in the evidence supports this conclusion in any way.

Here is what happened. Officer Gordon, the property officer, is tired of debating with this inmate. He and Newsome and Lohr could have fetched the Lieutenant and put together a special team to go into the cell and approach him with overwhelming force and cuff him. That would be what the book says should happen. Officer Gordon testified that he wanted to go into the cell and remove the inmate's property and hold it until he later wanted something. Then he would agree to move in order to get his property. Officer Gordon testified that he often did this. It is not in the book, but it is effective and gets the job done. Problem is that Gordon decided to pretend to cuff the inmate so that they could open the door and he knew the door should not be opened unless the prisoner was cuffed, except for exceptional circumstances that did not exist here.

Gordon did not have to tell Newsome and Lohr that there was a camera on the wall taking shots of what they did. They worked there every day and knew it was there. Gordon was aware that the inmate should be cuffed before they went into the cell, so he asked them to move in closer to hide the fact that he did not cuff the inmate before they opened the door. Gordon credibly testified that Officer Newsome did not know that he clicked the cuffs closed and then dropped them to the floor. There was testimony that the range is quiet and Newsome should have heard the cuffs hit the floor. The arbitrator credits the testimony of the witnesses who work in the SHU range that the range is noisy with inmates shouting and talking to each other from cell to cell all the time. The specific testimony in this case was that it was not only noisy, but that the inmate across the hall was shouting encouragement to the inmate to continue his lack of cooperation and even talking trash to the correctional officers so that they had to tell him to be quiet. It isn't clear that Newsome could have heard the click, but Gordon said he closed the cuffs before he dropped them. Close observation of the video shows that about the time they were dropped, Newsome was moving behind Gordon toward the door. It is reasonable that he neither saw nor heard the cuffs dropped, but assumed that Gordon put them on. Should he have assumed that? No, but that is a different omission than intentionally beating up an inmate. This will be discussed further later.

The trouble with what Gordon did, which he testified he did often, was that this time the inmate did not passively let him or another guard take the property and exit the cell without incident. This time, as every witness who was there testified, when Newsome entered the cell the inmate hit him in the face with his fist. The medical records show that the next day Newsome has some puffiness on his face. There were not serious lacerations, but there was enough to support his testimony, Gordon's testimony, and Lohr's testimony, that the inmate slugged him.

There was a suggestion in the hearing that the inmate, who had been shouting and swearing and had his medications in his shorts instead of having taken them, suddenly became compliant when Newsome entered the cell and raised his hands and backed up as if to say, "I give up, don't hit me."[26] The arbitrator does not credit this version. The physical and visual evidence belies this. It is not plausible that a person can back up to a

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[26] See Officer Lohr's testimony in the transcript on page 110, line 9.

back wall of a cell and simultanously kick cuffs down the hallway, especially if he first moves forward to hit the person entering the cell. It is certain that none of the correctional officers kicked the cuffs and all evidence points to the inmate having kicked the cuffs out the door and to the end of the range, quite a distance. The cuffs were kicked way further down the range than anyone moving backwards could have kicked them. Even though it cannot be seen on the video, all testimony points to the inmate moving toward the opening and attacking the first person through the door, Newsome.

Newsome defended himself. He legitimately had a set of cuffs in his right hand. He no doubt hit the inmate with them during the fight. There is a temptation to call it a scuffle, but it was in fact a violent fight. The inmate was smaller than each of the correctional officers, but it still took almost two minutes to get him under control and cuffed. He was still on his knees with Gordon and Newsome kneeling next to him as Lohr left the cell.

The very best case that the Agency can make is that after all of this that, while defending himself from a crazed bi-polar inmate off his meds[27] after a two minute scuffle, Newsome may have whacked the inmate one or two times in the head. To find fault with this, one must assume that it was all over and the inmate was not still resisting or fighting. The arbitrator believes he was still fighting and resisting and, if there were a couple of blows, they still were in the category of self-defense and getting the inmate under control. Proof that the inmate was still violent exists in that during the violent fight the radio that Newsome wore on his belt came lose from its holster and fell to the floor. Newsome being unaware that it was not there as he left the cell, the inmate picked it up and set off the body alarm and shouted and cursed threats into it. It is not credible that this inmate ever was compliant and not a threat.

Taking into account what happened, it is time to examine the charges against Officer Newsome.

First, let's look at the charge that he is guilty of physical abuse of an inmate. This is the most serious charge. The table of penalties allows for official reprimand to removal based upon the circumstances of the incident.

As stated above, the arbitrator believes that the grievant was not guilty of physical abuse of an inmate, but merely defended himself from the belligerent inmate after he was hit in the face by the inmate. All of the things that happened during the next nearly two

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[27] When other officers came to get the inmate and take him to the clinic, the officers found the inmate's medication in his shorts. Why did he not take it? No one knows for sure. Maybe he wanted to give or sell it to another inmate. It is possible, with a bi-polar, that he didn't take it because while a bi-polar person does not want the depression experience, if he goes off his meds he may experience a manic episode and get a high. No one testified to help us examine this on the record. It is certain, however, that an inmate who is bi-polar is more volatile when he is not taking his medications.

minutes were in the category of the use of force reasonably necessary to subdue an inmate. In this case, the inmate was totally out of control and violent. Gordon credibly testified that if the inmate were compliant it would not have taken two minutes to get him under control. None of this will support a finding of physical abuse of an inmate.

Only the slightest part of it suggests some improper actions by the grievant. Officer Lohr testified that after he left the cell and at the door he looked back and Officer Newsome struck the inmate in the face when he was under control. Gordon testified that he saw Newsome hit the inmate twice with cuffs, but it was during a time when the inmate was "refusing to be cuffed." This accounts for the lacerations. Officer Lohr testified that he saw Officer Newsome strike the inmate after he was restrained, but this is the same Officer Lohr who admits he saw and heard the cuffs hit the floor and yet opened the cell door against policy and testified in federal court under oath that when he went back into the cell, after retrieving the cuffs down the range, he saw that the inmate was bleeding. This bleeding is consistent with Gordon's version that Officer Newsome struck the inmate while he was resisting and that Lohr did not see it since he was down the range to get the cuffs.

Lohr testified in federal court that he went to recover the cuffs, an important point, because Gordon and Newsome "had a pair of cuffs between the two of them." In the arbitration hearing, Lohr testified that after the cuffs flew by him, "I went down the hallway because I thought it was a pair of cuffs, which I knew we only had one set of cuffs. I knew I didn't have any. I think Newsome had given Gordon his pair of cuffs, and I went down the range real quick to retrieve the pair of cuffs." Four years after the event, Officer Lohr continued to swear there was only one pair of cuffs. The arbitrator would not call this perjury, but given all the investigation and reports and probably coaching by counsel and the opportunity to see the video, this is proof as to how easily someone involved in a skirmish can be mistaken about what happened. The arbitrator finds Officer Lohr's credibility to be questionable, not because he is necessarily misleading the finders of fact, but he does not have a grasp on what actually happened.[28]

While the inmate was bleeding, according to Lohr, when he returned from the range, he says he saw Officer Newsome hit the inmate on the right side of his face and head as he stood in the door leaving a second time and while the inmate was cuffed and on the floor. Remember, by Gordon's testimony the inmate was struck by Newsome while Lohr was absent and by Lohr's testimony the inmate was bleeding when he returned from down the range. If there were blows, were they the ones that caused the lacerations on the inmate

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[28] Lohr testified that when he returned from the range, Gordon was on the inmate's left side with Newsome over his back and on his right side and "the inmate ... was bent over on his knees with his hands tucked underneath his – you know, his stomach with his head towards the bunk." Officer Gordon testified that he was on the inmate's left, his head facing the door." Was his head facing the door or the bunk. Did the inmate turn 180 degrees during the fight, or is one of the witnesses confused?

who began to bleed while resisting? If these blows occurred, they were probably not the ones that caused the bleeding. The testimony is to the contrary.

Is this excessive force? James Sellers testified in the federal case and his testimony under cross-examination by the prosecutor is revealing. "If an inmate is on the ground being held down by officers, can you strike him on the head with a pair of handcuffs?" Sellers' exchange with the prosecutor is interesting. He basically says that the mere fact there are handcuffs on the inmate does not preclude that he may still be resisting and it is not simple to answer such a question. No doubt every correctional officer would have difficulty with that question because those who work with the inmates, not those who sit in an office and make judgments after an incident, would say the cuffs are not relevant in that an inmate might still be resisting. Even if Officer Lohr saw what he says he saw, there is enough evidence that this inmate was still resisting that Officer Newsome cannot be said to have used unreasonable force to subdue him. Whatever caused the bleeding, according to Lohr, it was inflicted while the inmate was resisting Gordon and Newsome, not at the end.

It might still be possible to find that Officer Newsome was guilty of physical abuse if he and Gordon conspired to enter the cell and beat up the inmate. However, this is not what happened. It was Gordon who decided to fake the cuffing and toss the cuffs on the floor. Gordon's motives were not malicious even though his tactic was not expressly set out in the book. Newsome was not in a position, especially after he started walking around Gordon toward the door, to know that the inmate was not actually cuffed. If he heard the click and didn't hear the clang on the floor, he had good reason to assume that the cuffs were on just as they are time after time in the unit. He should not have assumed this, he should have personally observed it, but it is different from malice and forethought to assume your co-worker did his job correctly than conspiring to beat up an inmate. Gordon credibly testified in the federal case that it was his idea to drop the cuffs, go into the cell and take the property. Newsome was unaware of Gordon's intent.

The preponderance of the evidence is that Officer Newsome is not guilty of physical abuse of an inmate because he was defending himself from the inmate and only used such force as was necessary to subdue the inmate.

The second charge is that the grievant is guilty of lack of candor. The arbitrator finds that he is not guilty of violating this rule, if it is a rule, because the charge is too vague.

Lack of candor is not listed as a specific offense on the list of offenses.[29] The Agency must give employees notice of rules before it can discipline for violation of these rules, except for very egregious behavior that anyone should know he/she is not to engage in. The rule, if there were one, should be clear and unambiguous as to what is expected and how to comply with it as well as what is unacceptable and what the punishment for failure to comply would be. None of this exists as to the "lack of candor" charge.

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[29] Joint exhibit 6.

Officer Newsome clearly put some erroneous facts in his report. This is especially true when he said he cuffed the inmate. He was clearly mistaken, but the arbitrator believes he became confused when he talked to Gordon to try to remember what happened. This is not unusual for them to confer because in such a situation things happen so rapid fire that it is difficult to remember who did what and when and where it all happened. He did not intentionally attempt to mislead anyone, he just was mistaken. There is not advantage to him to say he cuffed the inmate instead of Gordon. Close examination of the reports shows many inconsistencies and factual errors, not only by Gordon, but by others. Investigators and trial advocates and those who hear the cases know that it is not unusual for witnesses to differ in their accounts. Officers Newsome, Gordon, and Lohr all realized, or should have, that the video would straighten out that kind of factual question. There would be no point to intentionally lie about it. Even if one assumed that Newsome is sneaky and given to prevaricating, which the arbitrator does not, he is clearly not stupid enough to say something happened when the video will clearly show it did not.

Roger Payne testified that he represented the union in negotiations with the Agency and "lack of candor" was discussed there. No one seemed to know what it is, Payne said, and the Agency did not include it in the table of penalties again.

Captain Kirk Jones says "lack of candor" is "... almost compared with integrity. As I looked at the evidence that was presented before me, I saw some flaws. There was some inconsistencies in some of the stuff that I read, and it made me believe that the truth was not being told."[30]

Warden Audie Sherrod testified, "lack of candor" is a "misstatement of facts" whether the person is lying (intentionally giving facts in spite of knowing that they are not true) or simply mistaken about the facts.[31] He did not testify as to whether Officer Lohr's testimony under oath that there was only one set of cuffs was "lack of candor," but presumably it would be because it would not matter that Officer Lohr was mistaken or intentionally lying.

Dennis Pickens, who is current Unit Manager at FCI Greenville and has been employed by the Bureau of Prisons for 22 years, was asked on cross-examination if he would have a problem with taking back an employee found guilty of "lack of candor." Pickens replied, "Lack of candor?"

Pickens' response is the same as the arbitrator's— lack of candor? What is it?

Clearly no one knows what it is.[32] If it is a misstatement of facts, then Officer Lohr is guilty of "lack of candor" by continuing to say there was one set of cuffs, saying that the

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30 Transcript at page 27.

31 Transcript at pages 256 and 265.

32 While no one knew what is was, or defined it the same way as others, each witness was willing to give a definition, albeit inconsistent with others.

inmate's head was towards the bunk, or was Gordon guilty by saying it was the other way, and, of course, the physician's assistant was guilty of "lack of candor" by saying the injuries to the inmate occurred at 1 p.m.

People are sometimes mistaken about what happened, especially when a violent clash occurs between an inmate and correctional officers. Are they lying? Are they guilty of "lack of candor?" It is all to vague and ambiguous to discipline anyone on it without the Agency first defining it and issuing the definition throughout the system. Accordingly, the arbitrator finds that Officer Newsome was not guilty of lack of candor.

The rule violation that the grievant did commit is that he failed to follow post orders when he directed the opening of the cell door and entered the cell when the inmate was not cuffed. Newsome was well aware of the post order. It is a reasonable order. Newsome violated it.

The arbitrator does not believe that Officer Newsome knew that the inmate was not cuffed. Circumstances which mitigate his violation are that it is probable that he did not hear the cuffs hit the floor, he trusted his co-worker to properly do his job and cuff the prisoner, and Gordon credibly testified that Newsome did not know he was faking the cuffing so that he could go into the cell and take the inmate's property to leverage compliance. As he moved behind Gordon while Gordon faked the cuffing he was not really in a position to see if the cuffs were on or not. Finally, while he told Lohr to open the door, he could reasonably have assumed that if he did not see the cuffing Lohr did see it because he was aware of the post order too. Lohr opened the door.

This is not to say that failure to follow the post order was not a violation. The consequences in this case were serious because it resulted in injury to the inmate, albeit that he was out of control, and possible injury to three correctional officers. Even so, there are mitigating factors that should be taken into account because just cause standards require it and the Douglas factors, part of the union-Agency working agreement, also require it.

Newsome did not intentionally violate the post order, it was negligence, but not for gain and not frequently committed. The first Douglas order should have been applied here.

In considering the second Douglas factor, the arbitrator notes that Officer Newsome was an exceptionally good correctional officer with many achievements. This one sort of works both ways, his record should have been given more consideration but his experience should have kept him from negligently making the assumptions he did.

The third Douglas factor weighs totally in Newsome's favor in that his disciplinary record was totally clean until this incident. He is a good candidate for progressive discipline and the removal was too much penalty for the violation of the post order.

The fourth Douglas factor is that the decision-makers should have considered his past work record. His length of service (13 years), job performance (excellent), ability to get along with co-workers (very good), and dependability (again excellent), all weigh in favor of

mitigation of his violation of the post order.

The parties may differ on the weight of the fifth factor, the effect of the offense on his ability to perform at a satisfactory level and its effect on his supervisors' confidence in his ability to perform assigned duties. The Agency could have removed him from all duties after the incident, but the Agency demonstrated its faith in his performance by placing him on restricted duty for 22 months following the incident. He worked the perimeter, rear gate, and control room, and the satellite camp. He has access to weapons in some of these duties. If we were not to be trusted, imagine what he might do to an escapee along the perimeter fence. Truth is, he is no threat to prisoners except that if they attack him, this incident shows he will defend himself. That's to be expected. It is not bad. Most notably, a few months before his removal, his supervisor evaluated him as a "valuable member of this department." "Good job," the evaluator wrote. This should have been taken into account in mitigation of his failure to follow post orders.

The sixth Douglas factor is one called "equal treatment" or "disparate treatment" in the context of a look at just cause standards. It is "consistency of the penalty with those imposed upon other employees for the same or similar offenses." The union argues that the equal treatment should apply at all locations of the Bureau of Prisons and not just at one location. The union also argues that the annual report of the Bureau of Prisons on penalties for various offenses repeatedly shows that penalties are not consistent throughout the system. The union shows cases where officers received discipline for violence, including abuse of an inmate, but were not removed from their positions. The offense here is failure to see that the inmate is cuffed before entering the cell (or opening the door) and it is not necessary to decide all these difficult legal questions here. It suffices to say that Officer Lohr, who had the keys and actually opened the door and knew of the rule, was not removed for his part in this violation. Keep in mind that the bad result would not have happened if Officer Lohr had not opened the door, but had told Officer Newsome he did not believe the prisoner was cuffed. Accepting the Agency's position that Lohr received an oral reprimand, Newsome's penalty far exceeds the penalty imposed on Lohr and it not equal treatment. Lohr's disregard of the post rule while he knew the cuffs were not on is the sine quo non of the incident, without Lohr's opening the door none of the things that followed would have happened.

The arbitrator is not surprised with the verdict of the federal court jury. The acquittal of Officer Newsome on all counts should have prompted a new review of the evidence including the federal court testimony. While Captain Kirk Jones and Warden Audie Sherrod claimed they took all the Douglas factors into account as well as the federal court testimony and evidence, the result would suggest they did not. The arbitrator agrees with the union's argument that Captain Jones is not aware, or barely aware, of the Douglas factors. Warden Sherrod was aware of them, but it is difficult to believe he applied them. In any case, the acquittal of Newsome is not decisive, but it should have carried some weight.

The seventh Douglas factor is not much help. It requires that the penalty be consistent with the applicable agency table of penalties. Since the table provides for anything from official reprimand to removal, it is not possible it was not consistent with the

table. The union points out that lack of candor is not on the table of penalties. The range of penalties suggests that progressive discipline would ordinarily be in order.

The eighth Douglas factor is "the notoriety of the offense or its impact upon the reputation of the agency." The Warden is correct that the staff, inmates, and community are aware of this incident. The union is correct in its statement that there was no evidence that this affected the reputation of FCI Greenville. If anything, at least with respect to Newsome's part in it, the federal court jury's acquittal of him shows there has been a fair and impartial judgment that he was not guilty of a crime.

The ninth factor is "the clarity with which the employee was on notice of any rules that were violated." Officer Newsome was on notice of the post order that a cell not be opened until the inmate is cuffed. That is the only violation he committed here.

The tenth Douglas factor is the "potential for the employee's rehabilitation." Officer Newsome is an excellent candidate for rehabilitation. He needs to be sensitive to personally checking that post orders, specifically cuffing of inmates, are complied with before opening, or ordering another correctional officer to open, a cell door. That should not be difficult to achieve given the difficulty that has resulted to him for not doing it in this case. There is nothing to suggest that he cannot be an excellent correctional officer again, and, in fact, his record strongly shows that he will be.

The eleventh Douglas factor is to consider "mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad fath, malice, or provocation on the part of other involved in the matter." The incident is filled with these elements. Warden Sherrod said he found none of these. He must have somehow missed the following. Officer Lohr used bad judgment in unlocking and opening the door when he, unlike Newsome, knew the cuffs were not on the inmate. Officer Gordon acted in bad faith when he failed to cuff the inmate and let Officer Newsome assume he had. It is difficult to fail to notice that the inmate had a mental impairment and was exhibiting crazed behavior having put his medications in his underwear instead of taking them. All of this goes to mitigate Officer Newsome's role in the violation of post orders.

The twelfth Douglas factor is the "adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others." The Warden did not say that he considered an unpaid suspension and Captain Jones did not consider alternative punishments. Actually, a hefty unpaid suspension and a verbal chewing out would very much have been in order in this case considering the result of not getting the inmate cuffed. Still, the Agency did not consider it.

Having considered the Douglas factors, the arbitrator finds that there are sufficient mitigating factors in this case that the removal was much too extreme as a penalty for the violation of the post order. A thirty-day suspension might have been in order. It would very probably have corrected the behavior.

Having found that there was not just cause for the removal of the grievant, the remedy

must be considered.

Clearly the grievant is entitled to be made whole for the unwarranted removal (personnel action) that occurred. Still, some discipline was in order. It is not possible to get the remedy exactly right, but hopefully the grievant can be put in approximately the economic position he would have been in had the unwarranted removal not supported by just cause not occurred. He should be made whole[33] for all economic losses suffered as a result of the removal including, but not limited to, back pay from October 26, 2007, to the date of his reinstatement at FCI Greenville, less 30 days for a suspension for violating the post order on cuffing inmates, have his seniority restored, and pension rights, and all other economic losses. Of course he should be reinstated to his position as Senior Officer Specialist at FCI Greenville.

The union asked for attorney fees to be awarded in this case. Attorney fees cannot be awarded in any case unless they are specifically authorized by statute or contract, or other specific authority. The arbitrator is unable to find that the Back Pay Act authorizes them. Even if it did, the grievant did violate a rule, post order, and by doing so helped to set all of these subsequent events in action. Under the circumstances, there should not be an award of attorney fees.

Award

The arbitrator, having heard the testimony and having considered the evidence, the credibility of the witnesses and the arguments and briefs of the representatives, and being otherwise duly advised, now

FINDS that there was not just cause for the removal, termination, of the grievant, Eric Newsome, for violation of a post order, lack of candor, or physical abuse of an inmate; and, further

FINDS there was just cause to discipline the grievant, Eric Newsome, for violation of a post order, to wit, opening and entering a cell without the inmate having first been handcuffed, but that there was not just cause to justify the severity of the penalty, removal, which was excessive for the offense proven, and that a lesser penalty of suspension (30 days) would have been more appropriate considering that the result of the violation of the post order was serious; and, further

ORDERS the Agency, Federal Bureau of Prisons, FCI Greenville, to reinstate the grievant to the position he held on September 29, 2004, at FCI Greenville; and,

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[33] Make-whole orders typically include some things and do not include others. The parties are encourage to agree upon what it takes to make the grievant whole in this case, but should there be disagreements about what he should receive or what should be considered to reduce the order, the arbitrator will retain jurisdiction to decide these issues.

ORDERS the Agency, Federal Bureau of Prisons, FCI Greenville, to make the grievant, Eric Newsome, whole for all economic losses suffered as a result of the termination without just cause, including, but not limited to, back pay (less 30 work days), seniority, fringes benefits and leaves, and pension rights; and, further

RETAINS JURISDICTION of this case to decide any issues that may arise between the parties concerning the determination of and implementation of this make-whole order.

Respectfully submitted this 17th day of January, 2009.

By: Donald G. Russell

Donald G. Russell, Arbitrator