
In the Matter of Arbitration Between:)

U.S. Department of Justice)

Federal Bureau of Prisons)

U.S. Medical Center for Federal)

Prisoners, Springfield MO.)

and)

American Federation of Government)

Employees, Local 1612.)

Cron Suspension
FMCS No. 12-03787
Arbitrator's Docket No. 130302

INTRODUCTION

The Undersigned Arbitrator was appointed according to the rules of the applicable collective bargaining agreement. The hearing was held on November 19-20, 2014 at the U.S. Medical Center for Federal Prisoners, Federal Bureau of Prisons, Springfield, MO.

Ms. Tiffany Lee, Attorney, represented the U.S. Medical Center for Federal Prisoners, Federal Bureau of Prisons, hereinafter referred to as the Agency, the Bureau, the Medical Center or the Employer. Ms. Michelle Davidson, Supervisory Clinical Nurse over the long-term care unit at the time of the discipline; Ms. Sherry Jacobson, Unit Supervisor; Mr. Juan D. Castillo, Regional Director for the Western Region for the Federal Bureau of Prisons, and Senior Executive Staff Warden at Springfield at the time of the incident; and Mr. Gregory Floyd, Facilities Manager for Springfield since April 2014, all testified on behalf of the Agency.

Mr. Evan Greenstein, Attorney, represented Local 1612 of the American Federation of Government Employees, hereinafter referred to as the Union or the Local. Ms. Tabra Steketee, Certified Nursing Assistant; Mr. Gregory Ramos, Special Investigation Specialist; and the Grievant, Mr. Zeb Cron, testified on behalf of the Union.

Each party had a full and fair opportunity to present and cross-examine witnesses and to present evidence at the hearing. The parties filed post-hearing briefs, the last of which was received by the Arbitrator on or about January 23, 2015, at which time the hearing was declared closed.

Issue:

Was the discipline of the Grievant for just and sufficient cause, and if not, what shall the remedy be?

Background:

The Grievant, Mr. Zeb Cron, had worked for the Bureau of Prisons for more than 11 years at the time of incident giving rise to the discipline at issue in this case. He had no record of any discipline with the Bureau before the discipline at issue here. He also had very good performance ratings, both before, during and after the incident at issue here.

Via letter dated February 9, 2012, the Grievant received notice of a proposal that he be suspended for 21 days “for Physical Abuse of an Inmate, a violation of Program Statement 3420.09, Standards of Employee Conduct.” There was also a second charge for unwarranted use of force. The first charge stated,

“Charge I: Physical Abuse of an Inmate

Specifically, on September 14, 2011, at approximately 8:00 am, while assisting the nursing assistants shower inmate James Crenshaw, Reg. # 19680-076, you threw two buckets of water on his face and body. In your affidavit, dated October 25, 2011, you admit, “I went to the mop closet, got a bucket rinsed it out and filled it with lukewarm water... I then used some of the water to clean his face, but used some of it to clean his chest area... I then returned to the mop closet and got another bucket of water, and came back and used it to rinse the rest of his body.” Furthermore, CNA #1 stated in her affidavit, dated January 24, 2012, that she observed you “throw water at inmate Crenshaw. Also, CNA #2 stated in her affidavit, dated January 24, 2012, that you “toss[ed] water on inmate Crenshaw from the blue buckets.” Both CNA’s stated that the situation you created “made them feel uncomfortable.” To justify your actions you stated in your affidavit that the “CNA’s were having problems with water pressure.” However, a Supervisory Clinical Nurse, stated in her affidavit, dated January 25, 2012, that not only has she never experienced water pressure problems in the showers, but that she also checked with Facilities and no work request relating to water pressure had been submitted.

Program Statement 3420.09, Standards of Employee Conduct, states in relevant part, “It is essential to the orderly running of any Bureau facility that employees conduct themselves professionally. An 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.

The Bureau’s sole mission is to ward inmates convicted of federal crimes. The public entrusts the Bureau to carry out this mission with the utmost humanity to those whom we house. The Bureau expects its employees to conduct themselves in such a manner that their activities both on and off duty will not discredit themselves or the agency... It is expected that employees shall obey, not only the letter of the law, but also the spirit of the law while engaged in personal or official activities.” As a Federal Law Enforcement officer you are held to a higher standard of conduct. Throwing water from a mop bucket on inmate Crenshaw reflects poor judgment on your part, violates public trust, and forms the basis for this charge.”

The Agency also proposed a second charge against the Grievant, for unwarranted use of force, based upon a report by Inmate Crenshaw to the Supervisory Clinical Nurse that the Grievant had hit him. In the decision letter dated May 31, 2012 the Deciding Official Warden Juan D. Castillo found that only Charge I was fully supported by the evidence. He reduced the proposed 21-day suspension to a 12-day suspension.

Ms. Tabra Steketee testified that she has worked for the Federal Bureau of Prisons Medical Center in Springfield as a Certified Nursing Assistant (CNA) for seven years. She said that during her training on bathing inmates she never was told that she could not use a bucket.

On the day in question, Steketee and CNA Dawn Burks were supposed to bathe Inmate Crenshaw. Steketee reported that Inmate Crenshaw could not walk or perform activities of daily living alone, such as showering. As they wheeled the Inmate into the shower on a gurney, Steketee testified, he started becoming “combative,” swinging at them with his arms and refusing to allow the CNA’s to undress him. The two CNA’s stepped out and asked the Grievant, Officer Cron to assist them because, according to Steketee, they did not feel they could control the

situation. Steketee testified that as Cron stepped in, the Inmate began spitting in his face. She said that the Grievant turned aside the Inmate's face and the CNA's continued to undress, wet down and lather up the Inmate.

According to Steketee, when they were ready to rinse off the Inmate they put him into the shower head first, because he was still spitting. She stated that the water pressure was "extremely low," and that this had been an ongoing problem for months. She believed that Charge Nurse Julie Lassiter put in a work order to fix the problem.

Steketee testified that because of the low water pressure the Grievant stepped out and returned with a bucket of water which he poured over the Inmate in order to rinse him off. She said that the Grievant "tossed" the water on the Inmate but did not do so with unusual force, maliciously or in retaliation, in her opinion. She testified further that when she stated in her affidavit during the investigation that she felt "uncomfortable with the situation," she did not mean that she was uncomfortable with the Grievant's action, but rather that she was uncomfortable with the Inmate's conduct, his spitting and yelling. She testified that when the Grievant stepped in, he restrained the Inmate's head and the Inmate stopped spitting. She said that the Inmate continued to yell but that he stopped trying to hit them when he was actually in the shower stall.

Steketee also said that she overheard a conversation between Inmate Crenshaw and Lt. Felts several days after the incident in which the Inmate told Felts that the Grievant had hit him. She said that Lt. Felts told the Inmate that they would have to do an investigation and that the Inmate would have to remain locked in his room during the investigation. According to the

CNA, she overheard the Inmate then say that that he had lied and that the Grievant had not struck him.

Steketee testified that she was aware that Inmate Crenshaw did not like water in his face. When asked whether they could have continued and finished his shower with the low water pressure, she stated that it would have taken a lot longer and they were concerned about finishing quickly because of his behavior. According to the CNA the other shower stall in that bathroom had low water pressure too at that time because she had previously used it with other inmates.

Steketee testified that she did not believe that the Grievant hit the Inmate in the face with water or intended to do so. She said that the Inmate's face was not lathered up. She acknowledged that when dealing with a difficult inmate, they are taught to de-escalate the situation.

The Grievant testified that his position is Senior Officer Specialist and that he had worked for the BOP for 11 years at the time of this incident. He also has served 6 years in the Army and worked at another state correctional institution before coming to BOP.

The Grievant said that he had worked on Inmate Crenshaw's floor for nearly all of his time at the Medical Center and was familiar with him. According to the Grievant, he had a great rapport with the Inmate and could usually talk him into doing whatever the staff needed him to do.

The Grievant testified that on the day in question, one of the CNA's asked for his help and when he walked into the shower, there were the Inmate, CNA's Steketee and Burk and two inmate attendants present. He said that he dismissed the inmate attendants because any time

there is a problem with one inmate, it is better to isolate that inmate from other inmates, so that the correctional officer does not have to deal with several inmates at one time.

The Grievant testified that the Inmate was screaming and flailing his arms and trying to spit on the Grievant and the CNA's. According to the Grievant, he restrained the Grievant by crossing the Inmate's arms on his chest and turning his head to the side so that he could not spit on them. He said that this kind of restraining was common for this Inmate who would protest about taking medication, giving blood, taking a shower, being moved and other activities the Inmate was required to do. The Grievant said that the Inmate was like a "special needs child;" he would give him cookies or a cracker to get him to take his medications, for example.

The Grievant testified that the shower pressure was a trickle on the day in question. He said that they could not move the Grievant to the other shower stall because to do so with an Inmate on a gurney would block access to the entire bathroom. He also testified that they could not move the Inmate down to the other shower room on the floor because it was several hundred feet away, the Inmate was naked, and they did not have a sheet with which to cover him. He concluded that it was safe to leave the CNA's with the Inmate by that point in time because the Inmate had calmed down, and so the Grievant went across the hall to a mop room and filled up a bucket with warm water that he tested with his forearm. He said that the bucket was used to hold spray bottles and so was clean, but he rinsed it out and filled it up in a deep sink there. The bathroom sinks are too shallow to fill containers of any significant size, he said.

The Grievant said that when he returned there was feces on the floor because they were doing a diaper change. He used some of the bucket water to rinse away the feces and the soap on the floor so that he and the CNA's would not slip. Then he used the rest of the bucket to rinse

off the Inmate's torso, which he said that he did "in a gentle manner, like you would your grandkid." He returned to fill another bucket and continued the process. According to the Grievant, he did not pour any water on the Inmate's head, although he had no idea that the Inmate did not like water on his face.

The Grievant said that he did not report the incident because it involved nothing out of the ordinary, in terms of dealing with this Inmate. The Grievant asserted that he continued to have the same rapport with Inmate Crenshaw after the incident as he did before the incident.

The Grievant also testified that he saw a correctional officer pour a bucket of water on an inmate during his rookie year. He said that the inmate, who had been involved in a drug cartel, was faking a coma. In order to shower him they would put him in a wheelchair and take him to a very small shower area where they would use buckets to rinse him off. The senior officers told him not to participate directly in this method of bathing the inmate, so as to avoid any possible problems in his probationary period.

The Grievant testified that he had an earlier incident with Inmate Henderson, who reported seeing the Grievant throw water in Inmate Crenshaw's face. According to the Grievant, there was a large gambling scheme on the floor in which the Grievant confiscated a large number of gambling stacks, in which Henderson may have been involved. After this incident, according to the Grievant, Inmate Henderson avoided him unless it was absolutely necessary for them to interact.

The Grievant stated that the second affidavit he gave in this case was not included in the disciplinary folder when discipline was proposed. With regard to his written statement saying that he knew that it was wrong to use a bucket, the Grievant testified that he was advised to write

this in order to get a more lenient penalty, but that he did not believe on the day in question or later that he was doing something wrong. However, he said that he knows now not to use a bucket in that situation again; he said that he also has learned that he must slow down and ask for assistance in similar situations.

Ms. Sherry Jacobson, Unit Manager for the past five years in the Springfield facility, testified that she has been with the Bureau of Prisons since 1990. She testified that there are currently 330-340 inmates in the medical facility, out of about 1000 inmates in the prison. She supervises a staff of seven, composed of case managers, unit counselors, and unit secretaries. She said that Inmate Crenshaw was on a floor which is more like a nursing home, where the inmates receive the highest level of round-the-clock care.

According to Jacobson, on September 16, 2011, Inmate Crenshaw was wheeled in a wheelchair to her office by another inmate. Inmate Crenshaw stated that he had been hit in the face by an "Officer Crom." Jacobson gave the Inmate a grievance form and also notified the command of the correctional officers and the SIS office, the facility's investigative unit. She reported that the Inmate claimed he had been punched in the face. She heard back from them that they did not have an "Officer Crom."

Two or three days later, Inmate Crenshaw returned to her and told her that no one was listening to him, and that Officer Crom had hit him in the face and poured water on his face. She said that the Inmate was crying when he told her this, not angry, but frustrated. She said that she was not too familiar with this Inmate and that it was difficult to understand him. She went to the staff list and found the name of the Grievant. Inmate Crenshaw told her that Inmate "Reggie" on Unit 3-2 knew about the incident. She found Inmate Reginald Smith who, according to Jacobson,

told her that he did not witness the incident, but saw Inmate Crenshaw being wheeled into the shower, although he was yelling and being vocal at the time. She testified that she also spoke to Inmate Henderson. In her affidavit dated October 25, 2011 she stated that Henderson told her that that he saw the Grievant intentionally throw a blue bucket filled with water and hit Inmate Crenshaw in the face with water.

Jacobson testified that normally when an inmate has a grievance with the staff member, the staff attempts to resolve it informally without filing a formal grievance. She felt the situation here was different because of the Inmate's affect, especially his crying, and she believed that "something had happened." She said that when Inmates are acting disorderly, and the staff member feels that he or she cannot handle the situation, the protocol is to get more staff to help or to call a supervisor. She said that typically inmates in the Medical Unit cannot be sent anywhere else, and so problems with them must be resolved.

Jacobson did not talk to the Grievant before making her report about the Inmate's allegations. She testified that she did not believe her role was to perform a full investigation, but rather just to gather sufficient information to report the incident. She did not know about any complaints of low water pressure. She said that she made no judgment as to whether Inmate Crenshaw was credible and that she hadn't thought about whether the Grievant was credible.

Ms. Michelle Davidson testified that she has worked at the Springfield Federal Bureau of Prisons Medical Facility for her entire career of more than 17 years. At the time of this incident, she was the Supervisory Clinical Nurse over the long-term care unit, where she handled staff and inmate complaints. She testified that Inmate Crenshaw has a brain injury and is functioning at about the level of a three-year-old child. She stated that he cannot care for himself at all, is very

heavy, and a lift must be used to get him in and out of bed. She said that he can be very argumentative and the staff just learns to work with any difficult inmate. According to Davidson, if an inmate is not cooperating with a procedure, normally the procedure can simply be put off until later. She said that sometimes her staff needs the assistance of an officer to complete their work.

According to Davidson, Inmate Henderson came to her on September 20, 2011 and told her that she should talk to Inmate Crenshaw. Henderson told Davidson that he had seen Inmate Crenshaw being wheeled into the shower room, yelling. He also told her that he saw the Grievant go into the mop room and get a pail of water and that he watched through a window and saw the Grievant throw a pail of water in Inmate Crenshaw's face, according to Davidson. She said that she believed Inmate Henderson because he was a fairly upstanding inmate and because of the sincerity he displayed when reporting to her; he even teared up a little bit. She then went to talk to Inmate Crenshaw, and said that he told her that "the bald officer" had thrown water in his face. She said that he was crying when he told her, and that he frequently cries.

According to Davidson, this Inmate hates to have water sprayed in his face. She said that she had found her staff of CNA's spraying water on his face when they showered him on more than one occasion, and she had instructed them to simply wipe off the lather on his face with a washcloth.

She testified that she did not believe that the Grievant's conduct showed good nursing judgment or "good judgment period." She testified that there were other options for rinsing off the Inmate, including wiping off the lather and feces, covering him with a sheet and moving him to another shower stall. As for filing an injury assessment report on Inmate Crenshaw, she

testified that she did do a visual assessment of him and found no injury and concluded that there was no need to file a report.

Davidson said that no one had reported to her that there was a problem with low water pressure. She also testified that she had assisted in the showering of an inmate several days earlier and there had been no problem with water pressure. Davidson testified that she believed, as she stated in her report, that if there were a problem with water pressure it would have been reported to her by her staff. She also testified that she concluded that the Grievant and the two CNA's who were present during the incident were lying when they reported that there was low water pressure.

Under questioning from the Union, Davidson testified that she did not question the nursing supervisor who was on duty when the incident occurred. She also never questioned the Grievant and did not question the two CNA's before she turned in her report. Under further questioning from the Union, Davidson stated that she could not envision a situation in which it would be necessary to use a bucket, although she had said in her affidavit during the investigation that if a bucket were used, the water should be poured and not thrown. She also acknowledged that Inmate Crenshaw was often belligerent, swinging his arms and screaming a lot.

Mr. Gregory Floyd testified that he started with the Bureau as a corrections officer and became a Facilities Manager in 2012, serving first at FCI Terminal Island, and then in Springfield beginning in April 2014. He testified that he believed that if the water pressure in the showers was low, it would also be low in the mop closet nearby. Floyd testified that he had

checked the work orders for September 2011 and found no work order requests for low water pressure in the shower at issue.

Under questioning from the Union, Floyd acknowledged that sometimes staff members report a problem which they say has been going on for some time. He also testified that work orders are generally closed out for the year around September 12, in preparation for the end of the fiscal year.

The Parties presented additional information on this point after the hearing date. They submitted a work order dated October 4, 2011, showing that the showerhead, hand-held sprayer and water faucet handle were all replaced for this shower unit.

Mr. Juan D. Castillo testified that he currently serves as Regional Director for the Western Region for the Federal Bureau of Prisons, but at the time this incident occurred he was the Senior Executive Staff Warden at Springfield. He has been with the Bureau for more than 23 years. He was the Deciding Official in the Grievant's disciplinary case at issue here.

Castillo testified that when an employee responds to proposed discipline against him, he looks mostly for honesty in the employee's response. Castillo testified that one of the important factors in this case is that the information provided by the Grievant in his oral reply was significantly different than he had given during the investigation. Castillo also said that the Grievant failed to take responsibility for his actions, and instead claimed that they were a common way to deal with this situation.

Castillo also testified that after he concluded that the Grievant had committed the conduct in question, he considered the *Douglas* factors in deciding the appropriate penalty in this case. He determined that the offense was very serious because it violated the Agency's core values and

mission to provide safe and humane treatment for inmates. He considered the Grievant's conduct as inhumane. He considered the Grievant as an experienced 12-year staff member who had mistreated an inmate who was a "quadriplegic" with mental problems. He said the conduct violated standards of correctional excellence and integrity. According to Castillo he had never heard of using a bucket of water on an inmate in his 23 years with the Agency. He noted that employees are required to take annual training on employee conduct standards, which Castillo himself attended while he was Warden. An employee who has questions about conduct may review the standards on the intranet, ask a supervisor, or query the ethics office in Washington DC.

Castillo also testified that the Grievant's conduct put other staff members at risk, because several inmates were concerned about the treatment and might want to retaliate against staff. Castillo said that he also considered that the Grievant is not simply a correctional officer, but a senior officer specialist, someone to whom other correctional officers look for guidance.

In considering the Grievant's possibility for rehabilitation, Castillo noted that the original proposed discipline was for 21 days but he concluded that 12 days would have the necessary effect. He also considered that the Grievant had 12 years of service and no record of discipline. He viewed these as mitigating factors.

Under questioning from the Union, Castillo pointed out certain differences in details that the Grievant provided in his affidavits versus his oral reply. The Union asked whether the Grievant simply provided additional details at one time that were not provided at another, rather than conflicting reports about what happened. The Director emphatically maintained that the differences were significant and that they demonstrated that the Grievant was changing his story

over time about what happened. Castillo did not recall seeing the second affidavit provided by the Grievant during the investigation when he made the decision to issue the discipline. He also did not know whether an inmate injury assessment was performed.

The Union also questioned the Deciding Official about the fact that the Inmate who was allegedly harmed never was interviewed in an investigation. Castillo testified that he concluded that he had enough information without the investigation including a statement from the Inmate, especially because the Grievant himself admitted in his affidavit during the investigation that what he had done was wrong.

Mr. Gregory Ramos, currently a Special Investigation Specialist, testified that he was given five days' discipline about 15 years ago for use of excessive force in handling an inmate who was being taken to the shower. He reported that as he was removing handcuffs from the inmate, the inmate broke the handcuffs and pushed Ramos into the shower. The inmate spat in Ramos' face and on his shirt and Ramos sprayed the inmate in the face to get him to stop spitting at him and "cuff up." When Ramos went to apply the handcuffs, the inmate elbowed him and Ramos took him down to the ground. When Ramos ordered the inmate to get up he did not do so and so Ramos dragged him to his cell and locked him in, according to his testimony.

The Union's Position:

- When an agency brings a disciplinary action against an employee, the agency bears the burden of proving the charges against the employee. The agency must prove every element of each charge by a preponderance of the evidence.
- The agency also must prove that the penalty is reasonable, taking into account the *Douglas* factors. If the agency cannot prove the reasonableness of its penalty, then it is

appropriate for the arbitrator to mitigate the penalty or rescind it, and arbitrators have great leeway in assessing and modifying the penalty.

- The agency also must prove a genuine nexus between the discipline and the efficiency of the federal service.
- The Agency here has failed to establish just cause under the collective bargaining agreement.
- The Agency has not presented any explicit rule or policy that the Grievant violated, and did not communicate any such policy to the Grievant or to other employees.
- The Agency did not provide training to the Grievant on how to bathe inmates. Even the nursing assistants were not told that they could not use a bucket when bathing an inmate.
- The Grievant's actions were reasonable, especially considering his lack of training and limited knowledge of how to handle this type of situation. He reasonably ordered the inmate attendants to leave. He used a minimal amount of force to subdue Inmate Crenshaw, with whom he was quite familiar.
- The Agency failed to show why using a bucket during a shower amounts to physical abuse of an inmate or violates BOP policy. Even if it does violate the policy, an employee cannot be expected to know this without training.
- The Agency failed to complete a full and proper investigation, thereby calling into question the validity of the charge against the Grievant.
- The Agency's investigators made no effort to interview the Inmate allegedly abused by the Grievant. That Inmate's credibility with regard to his hearsay reports of abuse is questionable, especially because of his alleged statement to Lt. Felts that he had lied about the Grievant striking him.
- The Agency also failed to question and take statements from any of the other inmates who may have witnessed the incident, or knew about other facts related to the incident. Henderson's testimony is especially important since Davidson relied upon his statement that he saw the Grievant throw water in Inmate Crenshaw's face.
- The Agency failed to interview Lt. Felts who allegedly spoke to Inmate Crenshaw about the incident.

- Henderson's credibility is very important. Live testimony from him and others, including CNA Burke, who were present during the incident is crucial to a proper investigation. Henderson had a motive for reporting falsely against the Grievant, because of the Grievant's involvement in another incident with Henderson.
- The Arbitrator should not accept the affidavit of CNA Burke because she was not called to provide live testimony; her affidavit goes to the heart of the matter here and cannot be cross-examined. The Agency could have called her as a witness.
- Warden Castillo, CEO of the facility, could have asked the investigators to conduct the questioning of additional witnesses when he received the proposed suspension, rather than rely on a faulty investigation. In addition, when an inmate is injured, there are very specific procedures which must be followed and here there was no injury assessment report filled out.
- The Agency failed to provide substantial evidence that the Grievant is guilty of physical abuse of an inmate. Nearly all of the Agency's decision is built on hearsay evidence, and the Agency's investigators failed to interview witnesses and substantiate the hearsay statements.
- The Agency's witnesses stated that they believed the credibility of the inmates, but also stated that they are not investigators.
- The only two eyewitness accounts provided at arbitration were provided by the Union, through Steketee and the Grievant.
- They consistently stated that there were water pressure problems, as did CNA Burke. Their testimony is supported by the work order of October 4, 2011. Even if low water pressure was not a long-term problem, there is no reason not to believe the Grievant that it was a problem on the day of the incident.
- The Grievant was a very credible witness who described the Inmate not as a problem but rather as a "special needs" child. His testimony that he checked the water temperature and poured it gently over the Inmate should be believed.
- Warden Castillo presented as a credible witness, but his conclusions were based on a faulty investigation. The alleged inconsistencies in the Grievant's various statements about the incident do not provide mutually exclusive explanations and therefore are not contradictory.

- The statements of the two CNA's do not contradict the statements of the Grievant. There are no direct inconsistencies between the statements, and the CNA's admit that they did not have a full view of the inside of the shower stall.
- It is impossible for the Agency to establish its case by a preponderance of the evidence because there are too many questions unanswered by the evidence. The facts as reported create questions which might have been answered by a more thorough investigation.
- This is a clear case of "Monday morning quarterbacking" and there is not enough clear evidence that the Grievant committed physical abuse of an inmate.
- In addition, the Agency failed to apply its policies in a nondiscriminatory manner. The testimony of Officer Greg Ramos shows that his actions, including spraying a non-compliant inmate with a water hose, were far more serious than that of the Grievant, and yet he received less discipline.
- The Union also provided a spreadsheet listing 7 other employees with offenses similar to the Grievant's who were provided with less discipline than the Grievant.
- The Grievant's suspension was not progressive or corrective, which violates the collective bargaining agreement. At most the Grievant was guilty of an inadvertent offense, given the fact that he has not been trained, even now, on the proper way to bathe an inmate. In a similar case the Arbitrator reduced a suspension to a letter of counseling and the same should be done here.
- The Agency has not proven that the Grievant is guilty of physical abuse of an inmate and so no discipline is appropriate. If the Arbitrator concludes that discipline is appropriate, however, an analysis of the Douglas factors shows that the Grievant should not have been suspended. The 12-day suspension was "clearly excessive, disproportionate to the sustained charges, arbitrary, capricious and unreasonable."
- While the seriousness of the offense is slightly aggravating, it is not nearly as serious as the Agency found, considering that the Grievant did not know that his conduct was inappropriate at the time of the incident and as soon as he became aware, he took responsibility immediately for his conduct.
- The Deciding Official's conclusion that the incident had a negative effect on his supervisor's ability to have confidence in the Grievant is belied by the fact that he consistently receives very high performance ratings, including during the period when this incident occurred.

- As for the Grievant's potential for rehabilitation, it is clear that he will not engage in this type of conduct again.
- The Agency is required to consider whether a lesser penalty would accomplish the same result, and it is clear that a letter of counseling would do the job in this case.
- It would be premature for the Arbitrator to rule on the appropriateness of attorney fees at this juncture.
- In summary, the Union requests that the grievance be sustained, the suspension be reversed entirely, the Grievant made whole for all lost wages and other benefits resulting from his suspension. Alternatively, if the Arbitrator concludes that the Grievant is guilty of any misconduct, the penalty should be reduced from a 12-day suspension to a letter of counseling.

The Agency's Position:

- The Grievant's suspension was for just and sufficient cause and served the efficiency of the service.
- Where all of the Agency's charges have been sustained, the Arbitrator may review an Agency-imposed penalty only to determine whether all of the relevant factors have been considered and whether the penalty falls within tolerable limits.
- The Grievant's penalty should be upheld as it was made in consideration of all relevant factors and was within tolerable limits of reasonableness.
- In determining whether the selected penalty is reasonable, the Arbitrator should give deference to the Agency's discretion in exercising its managerial function of maintaining employee discipline and efficiency.
- The penalty should be upheld because Regional Director Castillo considered all of the relevant factors, including the applicable *Douglas* factors and exercised his discretion within appropriate limits.
- The Warden considered the seriousness of the Grievant's conduct in light of his position as a law enforcement officer, who are to be held to a higher standard.

- The Deciding Official looked at the Grievant's conduct, specifically throwing a bucket of water on an inmate who was helpless and who the Grievant knew did not like water in his face.
- The Deciding Official concluded that this treatment of an inmate who was a quadriplegic and essentially mentally retarded was "totally inhumane," and would be considered "not acceptable by anyone," especially when committed by a 12-year employee.
- The impact on this Inmate cannot be overstated. He was upset enough to return to Ms. Davidson a second time and she believed that this situation was "different" and "unusual." This was especially true because the Inmate hates water in his face.
- The Grievant provided the best evidence against his conduct. He reported that the Inmate was calm when he left the room to go to the broom closet, and therefore there was no correctional reason for him to go to the mop closet or pour the mop closet water on the Inmate.
- The Deciding Official also considered that the Grievant had been trained on the Standards of Employee Conduct and especially the Agency's expectations regarding how employees are to conduct themselves when interacting with the inmates.
- The Deciding Official also considered that Grievant is a GL-8, Senior Correctional Officer, a position for which he applied and was selected and in which he could provide guidance to other correctional staff.
- The Deciding Official also legitimately considered that the Grievant's actions might put other staff members in danger, because of inmates retaliating for inhumane treatment by the staff. While there was no notoriety outside of the institution, he did consider the fact that inmates knew about the situation.
- RD Castillo did consider the Grievant's performance evaluations as a mitigating factor.
- The Deciding Official considered that the Grievant did not take responsibility for his actions, which reflected a failure to comprehend and acknowledge why his actions were inappropriate, and impacted his potential for rehabilitation.
- RD Castillo also considered that the Grievant's oral and written responses were not credible because they presented a totally different perspective from his original statements.

- As Warden, Castillo determined that a 12-day suspension would change the Grievant's behavior and the Arbitrator should not upset this determination, which is within the Agency's authority.
- The arguments made by the Union are insufficient to warrant mitigation. The Agency provided testimony and evidence which supports the charge and the discipline.
- The Union's assertion that the investigation was insufficient is faulty because it is undisputed that the Grievant obtained two buckets of water from the mop closet and brought them back to the shower stall. The Grievant did what he is charged with, throwing buckets of water on the Inmate.
- Assuming for argument's sake that the Grievant "poured" the buckets of water, the undisputed fact is that he went to the mop closet, without a request or a sound correctional purpose, and used two buckets of water on an Inmate who was not combative or able to leave the area under his own power.
- The Grievant did not have to go to the mop closet, the cleanliness and use of which was unknown, and use it to toss water on an Inmate. He could have used the other shower stall in the bathroom, or one in another bathroom on the floor, or used the sinks in the bathroom.
- The Union's argument that there was low water pressure is not convincing, because Davidson testified that she had not been informed of any such problems and she had recently showered an inmate without experiencing such problems. In addition, inmates were still being showered on the floor, six days a week at that time.
- The work order provided by the Agency dated October 4, 2011 does not specifically indicate a water pressure problem, and if the problem were water pressure, the repairs would most likely be for pipes and drywall, and not for fixtures.
- The Grievant did not need to go to the mop closet and chose to do so in opposition to his training, sound correctional judgment and the Standards of Employee Conduct.
- The Agency respectfully requests that the grievance be denied and the 12-day suspension upheld, as the Grievant committed the misconduct, and the penalty was made in consideration of all relevant factors, and the penalty was imposed for just and sufficient cause. In addition, the penalty is reasonable in light of the seriousness of the offense.

Findings and Decision:

The Agency proposed a 21-day suspension of the Grievant for two charges: 1) physical abuse of an inmate; and 2) use of excessive force. The latter charge was not sustained by the Deciding Official, who reduced the suspension to a 12-day suspension. The Union grieved that action, the Parties could not resolve the grievance, it proceeded to arbitration and two days of hearing were held.

The Agency must establish that the suspension here was imposed for just and sufficient cause and that it promotes the efficiency of the service, according to Article 30 of the collective bargaining agreement. In assessing whether there is just cause for the suspension of the Grievant, the evidence must establish that the Grievant is guilty of the remaining charge against him; that the penalty issued is appropriate; and that there is a significant nexus between the suspension and the efficiency of the service. In examining the penalty, the Agency has significant discretion to determine an appropriate penalty for proven misconduct in order to meet its goals regarding the efficient management of its operation and the Arbitrator does not see her role as simply substituting her judgment for that of Management with regard to the appropriate penalty. The Employer here argues that in assessing a penalty argues that it has taken into account the relevant *Douglas* factors, and that the penalty falls within reasonable limits.¹

¹ The action against the Grievant was proposed as an adverse action because it was a suspension of more than 14 days and was later reduced by the Deciding Official to a discipline. Generally the arbitrator is not required to consider the *Douglas* factors (*Douglas v. Veterans Administration*, 5 MSPR 280 (1981) and other MSPB precedent in cases involving discipline of 14 days or less. *AFGE Local 3887, Nat'l Council of Dept. of Educ. Locals Council 252 v. Dept. of Educ., Institutional Review Branch*, 48 FLRA 717 (1993). Nevertheless, the Deciding Official considered the *Douglas* factors and they present a good scheme for analyzing whether the penalty is appropriate, as part of the just cause analysis.

Is There Sufficient Evidence to Sustain the Charge?

The Deciding Official did not sustain the second proposed charge of use of excessive force related to an allegation of hitting the Inmate. The remaining charge is related to the use of the bucket of water as part of an incident involving bathing an Inmate; the Agency has cited this action as a violation of Program Statement 3420.09, Standards of Employee Conduct, which states in relevant part,

It is essential to the orderly running of any Bureau facility that employees conduct themselves professionally. An 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.

The evidence clearly demonstrates that the Inmate in question cannot walk or stand and must be showered by the CNA's on a gurney. He has significant cognitive and speech difficulties, apparently related to a brain injury or disability. The Inmate has a history of problems cooperating with those trying to assist him with daily living tasks and other tasks necessary for his care, such as showering, and taking medication and blood tests. He can become "combative" and "belligerent" during these tasks, according to both Union and Management Witnesses. The eyewitnesses reported that on the day in question, the Inmate was yelling, cursing, swinging his arms at them from the gurney and spitting at the staff to express his objection to being showered. The seriousness of this conduct is best demonstrated by the judgment of the CNA's, who were accustomed to dealing with this Inmate's problems, and who concluded that they needed the help of a correctional officer on that day to shower the Inmate.

The staff bathing the Inmate that day indicated that this was a difficult task for another reason, in addition to the Inmate's conduct. The Grievant testified that the water pressure in the

shower was very low, no more than “a trickle” and while it was sufficient to wet down the Inmate, he felt that it was not sufficient to rinse off the soap, feces and vomit on the Inmate within a reasonable period of time. In addition, the Grievant testified that there was feces and soap on the floor in the shower room, which he could not easily rinse off with the low water pressure.

After the hearing the Parties submitted a work order dated October 4, 2011 for the replacement of the plumbing fixtures in this shower. Without more information about why the work order was issued, several weeks after the events at issue here, it is not clear whether the old fixtures created a water pressure problem and/or whether they were the source of a low water pressure on the date in question. However, the eyewitnesses all provided information about this issue, both during the investigation and at the hearing. They stated early on and consistently maintained that the water pressure was very low in the shower.² The affidavits of the CNA’s indicated that this had been a problem they had been discussing with each other for days. Most importantly, however, their evidence relates to the day in question and is therefore stronger than the evidence of Management’s Witness regarding her observation of the status of the shower several days or weeks earlier. The evidence of the eyewitnesses is also stronger than the contention that the absence of a work order before October 4th demonstrates that the water pressure must have been in proper working condition on the day in question. Many reasons may explain the absence of such a report, including complications in filing new work orders at the

² All three eyewitnesses to the incident, the Grievant and the two CNA’s, raised the low water pressure issue in their original affidavits during the investigation and the Grievant and Steketee maintained in their testimony at arbitration that the water pressure was low. Although Burk’s affidavit was signed under oath and produced as part of a formal investigation by the Agency, she did not testify at arbitration and has not been subjected to cross-examination. Therefore the Arbitrator has afforded her affidavit less weight than the other evidence on this point and other details in this dispute that Burk discussed in her affidavit. Very little weight has been given to her statements with regard to information relied upon by the Agency but disputed by the Union.

end of the fiscal year and/or individual employees simply forgetting to report the problem or concluding that someone else had already reported it. In sum, the evidence presented here is not sufficient to establish that there was no problem with water pressure on the day in question. Rather, the consistent testimony of the eyewitnesses indicates that the water pressure was low on the day in question when the staff was showering the Inmate.

Management argues that the shower could simply have been postponed. However, the evidence demonstrates that showers cannot always be postponed, and the evidence here suggests that this shower could not be postponed.³ Furthermore, the decision to postpone a shower would most likely be a decision to be made by the CNA's and/or the Supervising Nurse, based upon health reasons. There is no evidence that this is a decision to be made by a correctional officer, unless the Inmate were posing a real threat to the safety of himself or others, or other significant correctional problem. None of the staff involved in the incident here reported that the Inmate's conduct rose to that level -- at least after the Grievant was called in to assist and subdue him.

The Grievant admits that he consecutively retrieved two buckets of water from a nearby mop closet and poured most of the water on the Inmate. He asserts that he rinsed out the bucket before using it, checked the temperature carefully each time and gently poured it over the Inmate, as he would do with a grandchild. Agency Witnesses Davidson and Jacobson received reports from Inmates of very different actions on his part, and this information triggered the investigation leading to the Grievant's suspension. According to the testimony and affidavits of Davidson and Jacobson, Inmate Henderson told them that the Grievant threw two buckets of

³ There was evidence in the investigation records that the Inmate's shower already had been postponed. There is also evidence, both from the investigation and the testimony at arbitration, that he had vomit and feces on him.

water in the face of Inmate Crenshaw. They also reported that Inmate Crenshaw also told them that the Grievant threw water twice in his face.

No testimony, affidavits or statements from either inmate were presented at arbitration, however. The Agency's investigators did not testify, but according to the notes of the investigation, they tried to interview Henderson about the incident and he refused. There is no record of any attempt to interview Inmate Crenshaw, the alleged victim of the physical abuse charge.

The Arbitrator understands that it may be difficult for the Bureau to obtain statements from inmates complaining about the actions of correctional officers, for a variety of reasons. Nevertheless, it is not clear why the Bureau did not even attempt to interview or obtain a statement from the Inmate who allegedly was abused by the Grievant in this case, and who did complain about it. Nor was there an attempt to interview Lt. Felts, who was mentioned in the investigation as having talked to the alleged victim about the incident. The hearsay statements of the inmates cannot be tested, through cross-examination, to determine their credibility with regard to what they saw or experienced. Furthermore, the inmates cannot be examined about any potential bias or ill motive they may have for making such accusations. The Grievant has suggested that Inmate Henderson may have had an ill motive, based upon prior dealings between the Grievant and Henderson, described in the Background section of this opinion.

The affidavits of the CNA's and the testimony of CNA Steketee suggest that the Grievant may not have been as gentle in his conduct as his testimony indicates. As discussed above, CNA Burk did not testify at arbitration, or submit to cross-examination on what she saw; therefore the Union raises a reasonable objection that the Agency may not rely upon her affidavits to be taken

at face value for the truth of their contents. In addition, it is not clear from her affidavits that she actually saw any water from the buckets touch the Inmate.

However, the affidavits of CNA Steketee state that the Grievant “threw [water] into the stall as opposed to pouring it on Crenshaw” (October 24, 2011 affidavit) and “threw the water on his body to wash off the soap” (January 24, 2012 affidavit). At arbitration she said that the Grievant “poured the water on him to rinse the soap off,” and later said that he “tossed the water on him in an effort to rinse the soap off.” In her testimony she also stated that she did not recall any water hitting the Inmate’s face, and that she did not believe the Grievant was aiming for his face, since his face wasn’t lathered up. She provided similar statements in her affidavits. From her first affidavit, Steketee also stated that she did not believe that what the Grievant did was abuse. She stated consistently that she believed that the Grievant was acting to rinse off the Inmate, and not in a retaliatory or malicious manner.

The disturbing accusations of the inmates that the Grievant threw buckets of water in the face of a prone Inmate who is both physically and mentally disabled reasonably prompted serious concern on the part of the Bureau. This is a serious allegation of conduct that could be considered physical abuse. However, there must be convincing evidence to prove important elements of a charge of physical abuse of an inmate that results in the discipline of an employee, especially one with a very good record over a substantial period of time, such as the Grievant. Second or third-level hearsay evidence is simply not strong enough to support a conclusion that the Grievant intentionally threw buckets of water in Inmate Crenshaw’s face. There is sufficient evidence, however, to conclude that the Grievant likely “tossed” the water on Crenshaw’s body, in an effort to rinse him off.

The Agency argued that there were reasonable alternatives that the Grievant and the CNA's could have used to rinse off the Inmate. The Grievant and CNA Steketee provided explanations for why they did not move the Inmate to another shower stall. Their explanations are reasonable, especially for why they did not move him hundreds of feet to another stall at the other end of the hall, when he was already wet and covered with soap lather and also had feces and vomit on him. Furthermore, their reluctance to move him anywhere is understandable, given the Inmate's combative conduct when being moved into the shower originally. Once they got him in the shower stall his movements could be contained and he calmed down, according to the evidence. The CNA's judgment and testimony is especially convincing on this point, since it is her duty to provide showers.

The Deciding Official's testimony indicates that he concluded that the Grievant's use of water in buckets from the mop closet to rinse the Inmate constituted inhumane abuse on its face, regardless of the circumstances, and that this conduct merited a significant suspension. Along with the other Management Witnesses, he testified that he could not imagine a scenario in which such conduct would be acceptable. The Grievant's conduct, however, must be viewed in light of all the conditions at the time, including the problems posed by the Inmate's conduct and the low water pressure. Under the circumstances, there is not sufficient evidence to support the conclusion that the action of using a bucket to rinse off the prone Inmate constituted cruel or inhumane treatment, or clear physical abuse. There is not sufficient evidence that the Grievant intended to engage in punitive, inhumane treatment or physical abuse of the Inmate by his conduct and without evidence of intent it is difficult to sustain such a charge. Furthermore, there

is not sufficient evidence to establish that the Inmate was physically abused, or that he suffered injury or trauma from the incident.⁴

The Deciding Official concluded that the Grievant's conduct constituted physical abuse, and this was the primary basis for Charge I. However, the Deciding Official also considered the Grievant's overall conduct that day broadly, as a violation of Program Statement 3420.09, Standards of Employee Conduct. For that reason and because of the broad language of that Standard, the Arbitrator concludes that there may be grounds to sustain Charge I for the Grievant's conduct of tossing water from a bucket on an Inmate, even if the evidence does not support a conclusion that the Grievant's conduct rose to the level of physical abuse.

The Program Standard requires officers to act professionally, and not to engage in actions that intimidate inmates. The Union argues that the Grievant has not been properly trained in bathing inmates, and so had no reason to know that his conduct was not proper. However, there is no evidence that bathing inmates is one of his customary duties, or that it was his duty in this situation. The Grievant's role in this situation was to keep the Inmate calm or at least subdued, so that the CNA's could do their job of bathing him. Nevertheless, the Grievant took matters into his own hands and determined that using a bucket from the mop closet was the best way to handle the situation of rinsing off the Inmate. It is clear from the evidence that the Grievant acted without consulting the CNA's, and that Steketee was at least surprised⁵ by his unorthodox

⁴No injury assessment report was filed by the Agency because Nursing Supervisor Davidson said she checked him out and there was no physical injury. The Arbitrator has provided some weight to her testimony and that of Jacobson that something about this situation seemed different to them. They reported that the Inmate was crying when he told them about the situation. However, Davidson also reported that the Inmate frequently cried and other evidence in the record indicates that he was perhaps emotionally volatile, like a three-year old child. Furthermore, the evidence demonstrates that he was upset and frustrated not just with the initial situation, but with a perceived lack of concern about it from other staff members, such as Lt. Felts. Without any physical or psychological assessment, and no testimony or statement from the Inmate, there is not reliable evidence of harm to the Inmate.

⁵ She also stated in her first affidavit that she wasn't comfortable with the Grievant throwing water on the Inmate and that she had never seen this technique used before to bathe an Inmate. In her second affidavit and at arbitration

method. Furthermore, because he did not consult the CNA's before acting, it is likely that the Grievant inadvertently violated a preferred method of bathing this mentally-disabled Inmate by accidentally splashing water in the Inmate's face when he tossed the buckets of water on his body. There is no evidence that the Grievant knew or should have known about the Inmate's aversion to water in his face; however, his failure to consult the CNA's means that they had no opportunity to communicate this fact to him before he acted.

On the basis of this evidence the Arbitrator concludes that the Grievant stepped outside of his normal role and duties, and in doing so violated the standards of professional conduct at issue here. His conduct may well have had the effect of intimidating both Inmate Crenshaw and other inmates as well. Because the duty and role of the Grievant was to restore and to preserve order in this situation, when he decided to go out in the hall and transport a bucket of water into the shower room, and use it on the Inmate, he ran the risk that his conduct could reasonably be perceived by inmates as a correctional measure, used to intimidate or to subdue Inmate Crenshaw -- even if that was not the Grievant's intent. This is especially true because the Inmate had been vocally and physically resisting going into the shower, and his combative resistance was serious enough to require the intervention of the correctional officer just a short time earlier.⁶ Furthermore, by risking splashing water in this Inmate's face, the Grievant's conduct was likely to make the situation worse rather than calmer, due to this Inmate's aversion to such action.

she indicated that her discomfort was with the overall situation and particularly with the behavior of the Inmate, rather than the conduct of the Grievant. The Arbitrator concludes, however, on the basis of all the evidence that she felt some discomfort with this unusual method of bathing this Inmate.

⁶ No one has suggested here that throwing a bucket of water on the Inmate would have been an acceptable method for subduing him in this situation.

The evidence indicates that the Grievant's intent was probably to help the CNA's bring the shower to an end as quickly as possible. Correctional officers are trained generally to resolve disruptions quickly. However, the nursing staff has other concerns and may have methods of operation in the care of individual inmates that are not known to the correctional staff. The Grievant testified that the Inmate was calm when he left the room to get the water in a bucket, without the Grievant physically restraining him, so there was no immediate correctional need to end the shower right away. When the Grievant took over the bathing, and employed an unusual method, without even consulting the nursing staff present, he crossed a line he should not have crossed. Considering all the circumstances, the Arbitrator concludes that the Grievant acted unprofessionally, that his conduct could reasonably intimidate inmates, and that on this basis there is sufficient evidence to sustain Charge I.

The Appropriate Penalty

The Deciding Official concluded that Charge I was sustained in its entirety, i.e. that the Grievant engaged in physical abuse of the Inmate through his conduct. On this basis the Warden determined that a 12-day suspension was appropriate. In selecting the penalty, the Deciding Official concluded that the Grievant's conduct was very serious, and therefore a significant suspension was warranted, even considering important mitigating *Douglas* factors including the Grievant's 12 years of service, his good performance evaluations, and that he has never been disciplined before this instance.

In assessing the penalty here, the primary concern of the Deciding Official was what he considered the serious nature of the Grievant's "totally inhumane" conduct. For all of the reasons

discussed above, the evidence does not support a conclusion that the Grievant's conduct rose to the level of physical abuse or inhumane treatment of an inmate, however. In addition, there is not sufficient evidence to support the important conclusion of the Warden that the Grievant intended to act in a punitive fashion when he tossed the water on the Inmate, rather than simply trying to hurry and rinse him off.

Therefore the evidence does not support the primary basis for the Deciding Official's determination regarding the seriousness of the Grievant's misconduct. Nevertheless, the Arbitrator has concluded that there is evidence that the Grievant acted unprofessionally and in a way that was likely to result in intimidating inmates, even if that was not his intent. This is a significant offense and discipline is appropriate.

In assessing the appropriate penalty, the Agency points out that the Grievant is a law enforcement officer, held to a higher standard of conduct than other employees. The Grievant has significant authority over inmates and a correlating responsibility to exercise that authority carefully. The Deciding Official also considered that the Grievant is in a leadership position with regard to correctional officers. Other officers may look to him for leadership or answers concerning how to address difficult situations like the situation in which he found himself on the day in question. The Agency legitimately considered these factors with regard to assessing a penalty for his failure to act with a high standard of professionalism on the day in question.

The Deciding Official also testified that the Grievant did not take responsibility for his conduct or act remorsefully, and this affected his consideration of the Grievant's potential for rehabilitation when he selected the appropriate penalty. The Union argues that the Grievant was not placed on clear notice that it was improper under any circumstances to use a bucket of water

to rinse off an inmate. As this was not a usual method of bathing inmates,⁷ it is not clear why Management would have had such a rule; the Employer cannot be expected to foresee every action Employees might take and either approve or bar the conduct. Furthermore, it is not clear that bathing inmates is within the Grievant's normal duties. The Grievant was on notice that he was to act professionally as a correctional officer and not in a way that would unnecessarily intimidate inmates, and the Arbitrator has concluded that he did not meet this standard in this case, with this use of a bucket of water.

The Grievant has wavered back and forth on accepting responsibility here, at times arguing that he believes that he did act appropriately, under the circumstances, and at other times indicating that he knows that what he did was wrong. The Arbitrator has taken this factor into account in reviewing the Agency's penalty. The Grievant did acknowledge at arbitration that in similar situations he needs to slow down and ask for help.

However, absent the conclusion that the Grievant acted in an inhumane, punitive or physically abusive manner when he rinsed off the Inmate with a bucket of water, it is unlikely that the Deciding Official would have imposed such a severe penalty, based upon his testimony at arbitration. Therefore the Arbitrator concludes that his selection of a 12-day suspension, based upon unproven facts and conclusions regarding the seriousness of the offense, falls outside of tolerable limits. The Union argues that if any discipline is appropriate, a letter of counseling should be sufficient to correct the behavior of this 12-year employee who has earned such a good discipline and performance record until now. The Arbitrator concludes, however, that the

⁷ The Arbitrator has considered and given some weight to the Grievant's testimony that he saw a similar method used in bathing an inmate during his rookie year. However, the fact that that incident was highly unusual is borne out by the very unique nature of the inmate and his situation; the fact that other officers cautioned the rookie Grievant not to participate directly in this unorthodox procedure; and the fact that that this was the only instance of using a bucket to rinse an inmate that he had seen in 12 years. These facts should have given the Grievant pause in using the method here.

Agency has produced sufficient aggravating circumstances, as described above, that a one-day suspension is a more appropriate penalty. The penalty should be sufficient to impress upon the Grievant the need to slow down, and at least consult with the nursing staff responsible for Inmate care before engaging in unusual methods of care, even in trying circumstances. On the other hand, the penalty takes into account that this was a one-time incident in a career with the Bureau that has been marked by high performance standards. Therefore, for all of the reasons discussed above, the 12-day suspension shall be reduced to a one-day suspension.

As a final note, the Union has requested that the Arbitrator at this time not rule on or prematurely deny a possible request for attorney fees that may follow. The Arbitrator will not rule on the issue of the appropriateness of an award of attorney fees at this time.

AWARD

The grievance is sustained in part. There was not just and sufficient cause for a 12-day suspension but there was just and sufficient cause for a lesser suspension, for the reasons set forth above. The 12-day suspension is reduced to a one-day suspension. The Grievant has been affected by an unwarranted personnel action and is entitled to be compensated with backpay for the period of his original suspension, less backpay for the one day suspension. The Grievant also shall be made whole for any other losses resulting from his suspension. The Arbitrator will retain jurisdiction over the remedy portion of the Award.

Jeanne M. Vonhof
Labor Arbitrator

Decided this 3rd day of April 2015.

