STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2009B043**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

DAVID A. SMITH,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS,

Respondent.

Administrative Law Judge Mary S. McClatchey held the hearing in this matter on June 9, 10, and 11, 2009. The record was closed on June 15, 2009, upon receipt of redacted exhibits from Respondent. Assistant Attorneys General Willow Arnold and Eric Freund represented Respondent. Respondent's advisory witness was Warden Larry Reid, Warden of the San Carlos Correctional Facility and Complainant's appointing authority. Complainant appeared and was represented by James Carleo, Esquire.

MATTER APPEALED

Complainant, David Smith (Complainant or Smith), appeals the disciplinary imposition of a $200.00 fine by Respondent, Department of Corrections (DOC or Respondent). Complainant seeks rescission of the disciplinary action.

For the reasons set forth below, Respondent's action is **affirmed**.

ISSUES

1. Whether Complainant committed the acts for which he was disciplined;

2. Whether Respondent's action was arbitrary, capricious or contrary to rule or law;

3. Whether the discipline imposed was within the reasonable range of alternatives available to the appointing authority.

FINDINGS OF FACT

General Background

1. Complainant is a Sergeant at San Carlos Correctional Facility (San Carlos). He has served at San Carlos for seven years and previously worked in another DOC facility for three years.

2. Complainant's performance evaluations have been consistently positive. For the period 2007 - 2008 he received an overall Level 2 rating, with Level 3's in Job Knowledge and Communication. Level 3 represents consistently exceptional performance.

3. San Carlos is a unique correctional facility which predominantly houses inmates with mental health diagnoses.

Use of Force Policy and Pressure Point Control Tactic Training at DOC

4. All DOC correctional officers are trained in the Use of Force Options policy, Administrative Regulation (AR) 300-16RD. They receive training in the policy as cadets and annually thereafter.

5. Under AR 300-16RD, justification for the use of force by DOC officers "is usually measured by two broad criteria: 1. The use of control methods was initiated by an individual's level of resistance and/or non-compliance. 2. The physical force used is necessary and reasonable, not excessive, and is appropriate when considering the type of resistance/non-compliance encountered." AR 300-16RD, Section I(A).

6. The policy requires DOC officers to "make every reasonable effort to resolve a conflict by talking directly to a disruptive offender." AR 300-16RD, Section IV(A)(6)(b).

7. The Use of Force policy prohibits the use of physical force as punishment. It requires officers to conduct themselves professionally when managing an offender and to avoid any personal reprisal when controlling an offender by use of force. AR 300-16RD, Sections IV(A)(1) and (6)(a).

8. The policy requires all planned responses to disruptive or violent behavior of offenders to be audio/video recorded. The policy states the benefits of recording as: documentary evidence of offender conduct for use in future litigation and misconduct reports; DOC employee debriefing and future training; and protection of DOC employees from false offender reports. AR 300-16RD, Section IV(A)(6)(c).

9. The Force Options section of the policy requires that officers "be reasonable in the selection of force options based upon the totality of the circumstances and the DOC employee's perception of the incident. Use of control methods must be initiated by the offender's level of resistance/noncompliance and the force used must be necessary, reasonable, and not excessive considering the resistance." AR 300-16RD, Section IV(A)(8)(B).

10. Physical Force options permitted under the policy include but are not limited to: "pain compliance, joint and leverage locks, shoulder pin, strikes, chemical agents, electronic control, and impact weapons. These techniques and/or devices are not designed to, nor do they typically cause, serious bodily injury or death." AR 300-16RD, Section IV(A)(8)(B)(2).

11. Pressure point control tactics (PPCT's) are the heart of the physical force options permitted and trained by DOC. PPCT's temporarily stun an inmate when used appropriately. Appropriate use of PPCT's can gain the attention of and re-direct an inmate into compliance.

12. PPCT tactics that are approved by DOC and taught to all officers annually include:

    a. a kick to the tubular area pressure point, located on the back of the upper leg;

    b. a kick to the common peroneal area, located on the upper thigh where one's hand naturally falls; and

    c. touch pressure on the mandibular angle, located on the side of the head behind the ear.

13. Use of profanity with inmates is prohibited. San Carlos has a zero tolerance policy regarding use of profanity with inmates.

14. It is the duty of the correctional officer to de-escalate all situations in which an inmate is aggressive, hostile, or combative.

15. The general rule governing physical use of force by DOC officers on inmates is as follows: officers are limited to the use of pre-approved and trained tactics. The only exception to this general rule is as follows: if an officer's life is in danger, or if the officer reasonably believes that he or she is in imminent danger of serious bodily injury, then the officer is permitted to use any force necessary to protect himself, up to and including deadly force. Strikes to parts of an inmate's body that are not pre-approved pressure point control areas are prohibited unless the officer is in danger of loss of life or imminent serious bodily injury.

16. Definitions in the Use of Force policy include the following:

a. "Serious Bodily Injury: Bodily injury, which involves a substantial risk of death, serious permanent disfigurement, or protracted loss or impairment or the function of any part or organ of the body."

b. "Force Options: A planned and trained use of reasonable physical force, to include deadly force, to gain control of an incident or offender."

c. "Offender Resistance: The physical or nonphysical force used by an offender against another offender or against a DOC employee, contract worker, or volunteer who is attempting to gain compliance."

d. "Reasonable: An adjective that characterizes a process by which a fact, conclusion, or act is supportable or justifiable by the use of information and logical thought or explanation."

e. "Transport/Restraint Chair: A specifically manufactured chair used to safely and securely transport an offender from one area to another. The chair has two separate functions. The title and use are based upon an offender's actions and resistance.

Transport Chair: When an offender has to be safely moved from one physical location to another, the transport chair will be utilized. All of the restraint belts will be placed upon the offender and secured.

Restraint Chair: A security chair designed to immobilize the legs, arms, and torso by utilizing restraints to secure the hands, feet, and body to the chair frame. The restraint chair must be authorized by the appointing authority, or designee, as a necessary, immediate response to dangerous, disruptive, or self injurious behavior when less restrictive intervention has been determined to be unsafe or ineffective. All of the restraint belts will be placed upon the offender and secured." AR 300-16RD, Section III.

17. Complainant has received all required initial and annual PPCT training while at DOC.

18. The Shift Commander must supervise all planned use of force incidents.

DOC Staff Code of Conduct

19. AR 1450-1 is the DOC Staff Code of Conduct. The regulation states, "It is the policy of the Department of Corrections (DOC) that DOC employees, contract workers, and volunteers are to have honesty, integrity, and respect for the worth and individuality of human beings, as well as a strong commitment to professional and ethical correctional service." AR 1450-1, Section I.

20. The Code of Conduct provides, "Excessive physical force or verbal abuse of offenders by DOC employees, contract workers, and volunteers will not be permitted, nor will physical/verbal force be used beyond that necessary to control an offender or to enforce legitimate and legal commands." AR 1450-1, Section IV(A).

Warden Reid and Video Taping of Use of Force Incidents

21. Larry E. Reid became the Warden of San Carlos in October 2007. He is also the Warden of two other DOC prisons. Warden Reid began his career with DOC as a correctional officer and was promoted up the chain of command to become Warden.

22. When Warden Reid arrived at San Carlos, he observed that most of the correctional staff were high quality workers. However, he was concerned that the standards of conduct that had been condoned in the past were lower than the standards to which he was accustomed, and which he sought to enforce. He knew that it would require training over a period of time to bring the standards up to his level of expectation.

23. For example, use of force incidents at San Carlos were not video taped as a standard practice when Warden Reid assumed his position. One of the first acts he took as Warden was to purchase video cameras and require all correctional staff to video tape every use of force incident.

24. When Mr. Reid previously served as the Warden of the Colorado State Penitentiary, he reviewed hundreds of video taped use of force incidents.

June 28, 2008 Incident

25. K.D. is an inmate at San Carlos with a mental health diagnosis.

26. At approximately 5:00 p.m. on June 28, 2008, K.D. broke a light, a food tray, and another item in his cell and cut himself on his forearm and neck with the sharp objects. He sustained lacerations to his neck and forearms.

27. Prison staff placed K.D. in ambulatory restraints: chains around his ankles and connecting his legs, which enabled him to walk; chains around his wrists, connecting his arms, enabling him to use his hands; and a chain around his waist, with a strap running from the front of his waist under his groin area to the middle of his back.

28. At approximately 5:45 p.m., K.D. began to kick his cell door and yell, causing more damage to his previously inflicted injuries.

29. The mental health counselor caring for K.D. determined he was an imminent danger to himself and others. The counselor contacted the shift commander, Captain Sean Pruitt, and stated he was placing an order for K.D. to be placed in four-point restraints in the Administrative Segregation (Ad Seg) Unit.

30. A four-point restraint is the maximum constitutionally permissible restraint of a person in custody, in which the individual is placed on his back with locked chains holding his wrists, ankles, and torso to the bed.

4-Point Transfer of K.D.

31. The transfer of an inmate to the "4-point room" in the Ad Seg Unit is referred to as a "4-point transfer" and is considered to be a "use of force" incident for purposes of prison regulations.

32. Captain Pruitt assembled a team of four officers to conduct the transfer of K.D. from his cell to the 4-point room, plus one officer to video tape the transfer.

33. Complainant was on a nearby unit at the time he heard the radio announcement of the use of force transfer. He left his unit in order to assist with the transfer.

34. When Complainant arrived at K.D.'s cell, K.D.'s transfer was in progress. K.D. was on the floor of his cell under his bed, holding onto the leg of his bed.

35. The four officers were attempting to remove K.D. from under his bed. They were talking to him, ordering and cajoling him to let go of the bed, as they pulled on K.D.'s legs. One officer said, "No one is going to hurt you. You need to cooperate. Work with us."

36. Complainant stood at the door of K.D.'s cell and watched.

37. K.D. was not kicking. He was lying on his stomach, holding onto a metal leg of his bed.

38. Complainant walked forward and stood on the back of K.D.'s left leg in the lower area, either on the ankle or the shin. Complainant placed his weight on K.D.'s back lower leg.

39. K.D. immediately cried out in pain.

40. K.D. let go of the bed and the officers lifted up K.D. as a group and walked him out of his cell. When they reached the hall, K.D. was noncompliant and refused to walk. He lowered his shoulder and used it to push staff away from him. He also attempted to strike staff with his head. He was so heavy that the five officers had to place him on the hall floor.

41. During the transfer of K.D., the shift commander, Captain Pruitt, left the area completely for a few minutes to attend to another crisis situation and to retrieve the transport hood. Pruitt returned to the transfer when K.D. was entering the hall.

42. K.D. was so resistant and difficult to handle that he almost hit his head on a wall on the way down to the floor. By this time in the transfer, the officers were exhausted.

43. The officers slowly lowered K.D. to the floor. He lay on his stomach, in the ambulatory restraints and with hand muffs on his hands.

44. In the course of lowering K.D. to the floor, K.D. was swung in a circle and ended up with his feet spread directly on either side of Complainant's left foot.

45. K.D. closed his feet around the back of Complainant's left foot. This movement resulted in the fifteen-inch chain wrapping around the front of Complainant's left ankle, closing behind Complainant's left ankle, with K.D.'s feet crossed in back of Complainant's left ankle.

46. Complainant ordered K.D. to let go of his foot. Other officers ordered K.D. to let go of Complainant's foot. K.D. did not comply with these orders.

47. One officer came behind Complainant and attempted to separate K.D.'s feet, so that Complainant could remove his foot from the chain that looped around it. This attempt was unsuccessful.

48. The officers were all exhausted from the intensity of the physical struggle with K.D. and the difficulty of carrying him.

49. Neither Captain Pruitt, Complainant nor any other officer issued a directive or a request for the other officers to take a break from the transfer, so that Complainant could be removed from the chain around his left ankle. No officer called for additional assistance from other officers by radio.

50. During this period of time when K.D.'s feet were wrapped around Complainant's left foot, Complainant did not make any noises or statements indicating he was in pain.

51. If Complainant had remained standing in place, there would not have been much, if any, pressure from the chain on the front of his left ankle. Complainant did not remain standing.

52. Complainant kneeled down on top of K.D.'s back, placing his left knee on K.D.'s back with his weight on K.D. When Complainant knelt down in this manner, he caused the chain around the front of his left ankle to pull harder into his skin,

because the chain was being pulled back and down by K.D.'s feet behind him. This caused pain on Complainant's left front ankle area.

53. While kneeling on K.D.'s back with his left knee, Complainant used his right knee to strike K.D. in the lower to middle back area, five times, hard. The lower back area where the strikes were delivered is close to the kidneys and ribs. K.D. did not move during these knee strikes.

54. K.D. released his feet from around Complainant's ankle and Complainant got up.

55. K.D. called out in pain. K.D. became more agitated and resistive and said, "Someone kicked my back."

56. Captain Pruitt noticed at least one of Complainant's knee strikes to K.D.'s back and was immediately troubled by it. He approached Complainant and re-directed him away from K.D., and ordered him to put the transport mask on K.D.'s face. The transport mask covers an inmate's face, to avoid spitting and potential adverse health risks to officers.

57. Complainant walked to K.D.'s head area and watched as the officers attempted to gain control of K.D.

58. Complainant and other officers placed the transport mask on K.D.

59. The officers then lifted up K.D. and brought him down the hall, through one door, and then through a second door into the 4-point room. During this portion of the transport, K.D. was extremely combative, waiving his head and shoulders in an attempt to head butt the officers.

60. When the officers placed K.D. on the 4-point bed, face up, K.D. was still extremely combative, and his legs were kicking wildly. The officers had a very difficult time gaining control of his body.

61. Two officers held down K.D.'s legs while they locked his feet to the bed, using chains. Two other officers held down K.D.'s arms and torso, while his wrists were locked to the bed with the chains. A strap was tightened across K.D.'s torso.

62. Complainant was at K.D.'s head. During the time he was standing in this area, he engaged in two very fast actions in which his right arm was brought into K.D.'s head area in a very fast motion. It is impossible to see K.D.'s head area on the video tape during these actions.

63. After Complainant's first contact with K.D.'s facial area, the transport mask came off K.D.'s face and K.D. spit in an officer's face. The second contact occurred immediately after K.D. spit.

64. After these two actions occurred, K.D. cried out that someone hit him in the face.

65. Complainant testified at trial that his fingers somehow went inside K.D.'s mouth and therefore he removed his hand quickly from K.D., thus causing him to draw his arm back. This testimony is rejected as untrue on the basis that his hand was never brought back quickly from K.D.'s head area. The fast motions by Complainant were towards K.D.'s face area.

66. Complainant testified that he used a pressure point strike to K.D.'s mandibular area, which is directly behind the ear. This strike is a permissible pressure point control tactic. Assuming this testimony is true, it accounts for only one of his strikes at K.D.

67. It is found that Complainant struck K.D. in the facial area twice with his hand; however, it is unknown whether the actions were both permissible uses of force, impermissible strikes, or some other action to gain control of K.D.'s head.

68. During the struggle, K.D. also kicked another officer in the face, knocking his glasses off and breaking them.

69. During the time the officers were gaining control of K.D. on the bed, K.D. said, "I can't breathe." Complainant responded in a loud voice, "If you're talking you're breathing, now shut up."

70. K.D. stated several times that he had been struck in the face and said, "I bet it's on camera whoever hit me."

71. After the incident, all officers, including Complainant, were asked if they sought medical treatment. Complainant and the other officers rejected medical attention.

72. Captain Pruitt noted that Complainant's left shin had minor abrasions, no swelling, and that no blood had broken through Complainant's skin.

73. Complainant did not provide evidence of injury to his left ankle on June 28, 2008, at hearing.

74. K.D. did not sustain any notable injuries as a result of the June 28, 2008 incident.

Policies Governing Use of Force Incidents

75. DOC AR 300-16RD requires the shift commander to complete a Use of Force Report form after the incident and prior to the end of his or her shift. In addition, all line officers involved in the incident must complete an Incident Report Form prior to the end of shift.

76. The policy also requires the completion of an "Incident After Action Report" by an administrative head, who reviews and investigates the incident. The report consists of findings regarding the use of force incident, type of force used, whether the type of force used was justified and appropriate, and whether the amount of force was applied appropriately. The After Action Report must be completed within three working days of the incident. DOC AR 300-16RD, page 8.

77. A fact finding board or committee review must be completed within ten working days of the use of force incident. Any exceptions to this process must be approved by the administrative head.

Incident Reports

78. Captain Pruitt timely wrote a Use of Force Incident Report on the K.D. incident. The Captain noted that K.D. had used several levels of resistance during the transfer: Psychological Intimidation, Verbal Non-Compliance, Passive Resistance, Defensive Resistance, and Active Aggression.

79. Under the section, "Control Effected by DOC Employees," Captain Pruitt noted the use of Verbal Direction, Strength Techniques, and Pressure Points at the mandibular angle.

80. Captain Pruitt's report omitted any reference to Complainant standing on the back of K.D.'s lower leg in his cell. Pruitt may have been absent during that action. The report referred to Complainant's knee strikes to K.D.'s back as "knee strikes to the right common peroneal (upper thigh)" of K.D.

81. Complainant's Incident Report described the beginning of the incident as follows, "Staff were attempting to pull [K.D.] from under the bunk in his cell. The inmate resisted all attempts to be removed the inmate (sic) from under the bunk. When they were finally able to get his legs from under the bunk he began to kick at the officers Josh Lessar and Tony Evanoff, in an extremely aggressive manner. I stepped into the cell and placed my right foot on the inmates left leg to prevent him from kicking either of them."

82. Complainant's description of the circumstances preceding his decision to stand on K.D.'s lower leg is incorrect. K.D. was not kicking at the time Complainant stepped on his leg.

83. Complainant's Incident Report described the knee strikes to K.D.'s back area as follows: "I stepped in to assist the other officers when the inmate wrapped the leg restraints around my left leg and crossed his legs, effectively trapping my left leg. I was in extreme pain from the leg restraint chain grinding on my shin. I ordered the inmate to release my leg three times as the other officers ordered him also.

The inmate refused to let go and I felt that we were not going to be able to get him to release my leg before I gave out with exhaustion, so I attempted to strike the inmate in the common peroneal of his right leg, my first strike was on the common peroneal my second and third strike were in the upper thigh and my last two strikes were on the inmates' right side or upper back because the inmate was struggling against us so much that the strike did not connect with the common peroneal as they were intended."

84. Complainant's Incident Report was inaccurate and misleading.

85. Complainant's Incident Report described the events in the 4-point room with K.D. partly as follows: "We laid him on the four point bed and began to adjust the inmate in order to put the restraints on him, the inmate began to resist even more aggressively twisting and kicking it was during this time that the inmate kicked officer Rudy Valdez in the face knocking his glasses off and making the lens pop out. I was attempting to control the inmates head, while he was struggling he attempted to bite me several times and at one point even had the small finger of my right hand in his mouth. I was able to pull the finger and hand away before the inmate clamped down. The Tranzport Hood had come off the inmates head during this and the inmate spit on officer Josh Lessars right side of the face."

86. Complainant noted that after K.D. had been stabilized, Captain Pruitt took a picture of officer Valdez's glasses and face and a picture of Complainant's left shin, which was "scraped, bruised and swollen."

<u>After Action Report</u>

87. Captain George Goure was assigned to handle the After Action Report. Goure has been with DOC for twenty years, has been a PPCT instructor since 1992, and has served on over twenty Fact Finding Committees to review use of force incidents.

88. Captain Goure reviewed the video and the Use of Force Incident Reports. He was concerned about several of Complainant's actions during the incident:

- When Complainant stepped on K.D.'s leg, K.D. was not kicking. Goure thought Complainant's use of force was malicious and unnecessary and not a permissible technique.

- Complainant's knee strikes to K.D.'s back were not justified based on the totality of circumstances because Complainant could not objectively believe that he was in imminent danger of serous bodily harm at the time; when Complainant kicked K.D. in the back, Complainant had several permissible strike options available to him consistent with his training, such as a common peroneal strike, a tibial strike, and a mandibular strike.

89. Captain Goure listed eighteen separate training issues and concerns in his After Action Report In the introduction he stated that none of these concerns "negated the justification for the use of force, yet may have affected the overall resolution of the incident." The issues included the following:

A. An officer other than Complainant used profanity with K.D.

B. Complainant stepped on K.D.'s left leg and "applied his weight on it. The offender did not appear to be kicking at the time this occurred."

C. Staff carried K.D. by using his belly chain, safety strap and restraints.

D. Staff should have used a restraint chair to calm K.D. and catch their breath once they got him into the hall.

E. Regarding Complainant's knee strikes to K.D.'s back, the Report quoted Complainant's Incident Report and then rebutted it as untrue. Captain Goure stated, "Sgt. Smith states in his report that his first knee strike was to the peroneal of the offender's right leg and his second and third strike were to the upper thigh and his last two strikes to the upper back, due to the offender struggling. None of Sgt. Smith's knee strikes were to the peroneal or the leg, all strikes were to the back. During the time Sgt. Smith gave the knee strikes the offender did not move. One of the other staff members should have given pressure points and commands to release Sgt. Smith's leg."

F. Staff failed to make a plan to transfer the offender in the safest and most secure manner. The offender resisted staff all the way to the 4-point room and there was little control of the offender. Staff lost control of his feet going through the door, resulting in K.D. kicking officer Valdez in the face.

G. During the transfer, Officer Lessar attempted to give the offender a knee strike to the left peroneal and struck the offender near the left buttock. This was not malicious, he missed the target.

H. As K.D. lifted his head up and grunted on the 4-point bed, Officer Valdez placed his right hand on the offender's forehead and his left hand on his throat and pushed the offender's head down. Captain Goure recommended not placing any pressure on the throat area.

I. Captain Goure recommended using a chemical agent, Oleoresin Capsicum (OC), or pepper spray, in future incidents involving a non-compliant disruptive offender's removal from his cell. He cited Administrative Regulation (AR) "300-37 RD (restricted): Cell Extraction: Removal of a non-compliant disruptive offender from a cell, or other secured area, utilizing the chemical agent Oleoresin Capsicum (OC), in a pre-planned, organized forced compliance process."

90. Captain Goure believed that Complainant's statement to K.D., "If you're talking, you're breathing, shut up" was unprofessional and contrary to the goal of calming down the inmate.

91. The last page of the After Action Report contains a section entitled, "Use of Force Justification" with four boxes: Force was justified and appropriate; Force was justified but excessive; Force was not justified but minimal; and Force was not justified and excessive. In addition, it contains a section entitled, "Disposition" with three boxes: Refer to internal fact finding; Refer to Inspector General; and Close – no further action. Captain Goure did not check any of these boxes before sending the Report to Warden Reid. He expected the Warden to make the decisions required to fill them out. The Warden did make the decisions but did not fill out the boxes on the form.

92. The Captain completed the After Action Report within the required three-day period and forwarded the Report to Warden Reid.

Fact Finding Committee

93. Warden Reid reviewed the video, the After Action Report, and the Incident Reports of the officers. He was concerned by several discrepancies between the officers' written reports and the video taped recording of the incident. He was also concerned about what he believed to be several unauthorized physical force techniques that had been utilized by Complainant.

94. Warden Reid decided to convene a Fact Finding Committee (FFC) to conduct an independent investigation of the incident and to determine whether the officers had complied with appropriate standards. The Warden was on vacation prior to convening the FFC; therefore, the process commenced late.

95. The Warden did not refer the incident to the Inspector General's office within DOC for investigation of potential criminal misconduct by Complainant or others, because he did not believe that Complainant or any other officer had engaged in criminal misconduct.

96. Warden Reid used highly experienced use of force leaders from facilities other than those in which he served as Warden. He sought to assure a review of the incident with "fresh eyes."

97. The FCC consisted of Chuck Hildebrand, a DOC Security Specialist and PPCT trainer who had served on fifteen and chaired seven prior FFC's; Angel Medina, a twenty-year DOC employee from the Clinical Services section at Headquarters; Captain Patsy Hartley, a use of force, chemical agent, and firearms instructor from Colorado State Penitentiary; and Lieutenant Richard Persons from Freemont Correctional Facility.

98. The FFC reviewed the incident reports, the Use of Force Report submitted by Shift Commander Pruitt, the Use of Force incident video, and staff training records. The FFC also interviewed all officers involved in the incident, including Complainant, during which time the video was played and discussed.

FFC Findings

99. On August 4, 2008, the FFC completed its report. Mr. Hildebrand wrote the final draft of the report, circulated it to the other three members for review and editing, and then the final report was approved and signed by all members.

100. The findings of the FFC were of two types: systemic problems and individual staff performance issues involving Captain Pruitt and Sgt. Smith.

101. The systemic problems included the following:

A. Neither the Shift Commander nor any member of the team considered using chemical agents because of their widespread misconception that it was not permitted with restrained inmates. Staff at all levels needed to be trained on the appropriate use of OC.

B. Neither the Shift Commander nor any staff considered taking a break during the middle of the exhausting transfer in order to reassess the situation and to consider using a wheel chair, gurney or transport chair. The FFC recommended the establishment of a transport process in San Carlos policy, under which non-compliant offenders may be moved via any of these three methods.

C. Staff blurred the line between treatment (removal of the self-harming inmate from his cell to a 4-point hold) and the safety and security imperative of transporting K.D. from one room to another in order to achieve this treatment goal. Staff appeared to the FFC to be "fixated" on getting the offender to the 4-point hold. However, they lost sight of the safety and security imperative of maintaining control over the inmate and avoiding injury to the inmate or to staff as they executed the transfer. The FFC recommended that staff receive "clear directives and training, to ensure safety and security is considered while accomplishing treatment."

D. No briefing was given to staff prior to the planned use of force. The FFC recommended that prior to all use of force incidents, a briefing should be conducted that includes: offender behavior, weapons present, medication, prior history, and escort process to include route and destination.

E. Several staff members were not certified in critical training areas per policy. One had expired PPCT credentials.

F. There was no specific "restraint and video policy" providing staff with clear direction as to the level of staff presence required for the application of ambulatory restraints and four point restraints. The FFC recommended formulation of such a policy.

G. Staff had no prior knowledge of the offender's P-code [a mental health indicator] or medication compliance. The FFC recommended that staff have a full understanding of the offender prior to a use of force incident in order to better manage the population.

H. Staff profanity and "synching" of the restraints on K.D. was not professional nor legally defensible. The committee recommended that staff be reminded of the importance of being professional in a highly volatile situation.

I. The "First Responder" policy is not clear at the facility and it is therefore unclear who is supposed to respond to radio calls for assistance. The First Responder policy needed to be reviewed and modified to assure that no unit is left understaffed and vulnerable during a staff-intensive event.

102. The FFC made several findings involving Captain Pruitt's lack of leadership as the Shift Commander on duty. Specifically, it found the following:

A. Captain Pruitt was not a presence during the incident. He gave no orders to staff and generally failed to coordinate and oversee the entire transfer. He left the team carrying a transport hood while staff were fully engaged.

B. Pruitt stated to the FFC that use of pepper spray would have disrupted the daily operations of the facility and would have made the work environment uncomfortable for staff due to the HVAC system's inability to eliminate it after use. The FFC stated that the focus needs to be on safety and security, not on staff comfort, in a situation such as this one. The committee felt that had OC been utilized, no staff injuries would have occurred.

C. Captain Pruitt failed to remove Sgt. Smith, "who was excessive and/or inappropriate, from the remaining use of force action."

103. The FFC made several specific findings of inappropriate use of force by Complainant. It found:

A. "Sgt. D. Smith utilized force several times during the incident which was inappropriate and excessive in relation to the resistance being offered by [K.D.] Smith can be seen on video stepping on [K.D.]'s ankle or leg restraints while staff members are attempting to get him removed from under the bunk. **The team agrees this was inappropriate form of force that is not**

authorized by policy or instructed as an appropriate method of force." (Emphasis in original)

B. "Sgt. D. Smith delivered several knee strikes to offender [K.D.]'s [right] side to include the rib area. This was in response to having his leg caught in the leg restraint chain. **Sgt. D. Smith admitted to the team that he put himself into this position by attempting to step over the offender**. Knee strikes to the rib area and kidney area are not an approved area for striking by PPCT. Strikes delivered in this area of the body can cause serious injury. **The team agrees these strikes were inappropriate and excessive based on the totality of circumstances at that moment during the incident. Sgt. D. Smith could have removed his leg with other appropriate force options.**" (Emphasis in original)

C. "While offender [K.D.] is on the table, Sgt. D. Smith struck him twice in the facial area. Sgt. D. Smith stated that he was attempting to turn his head away from staff, but video shows that the offenders head was always facing up. After one of the strikes, the transport hood comes away from the offender's mouth. Offender [K.D.] was then able to spit on staff member Lessar. **The team agrees these strikes were excessive and the result was an escalation in offender [K.D.]'s violent behavior. C/O Lessar was placed into an unsafe position because of Sgt. D.Smith's decision.**" (Emphasis in original)

D. "**Overall the team feels that Sgt. D. Smith's presence escalated offender [K.D.]'s disruptive (sic) and placed all staff members in an unsafe environment. His choices of force options are not legally defensible.**" (Emphasis in original)

104. The FFC did not make any other findings specific to staff present at the incident.

105. The FFC concluded that the incident could have been avoided if proper planning, leadership, and procedures had been utilized to manage the offender.

Sgt. Sandoval and Co-worker Perspectives on the Incident

106. Sergeant Frank Sandoval was certified as an expert on use of force at DOC. The Sergeant has served at DOC for twenty-two years, and has taught PPCT, four-point restraint use, and firearms use as a DOC instructor.

107. Sgt. Sandoval reviewed the video tape of the June 28, 2008 incident after it occurred.

108. Sgt. Sandoval testified that the standard of conduct governing use of force at DOC is: an officer who is in fear of imminent serious bodily injury can use whatever force is necessary to remove that threat.

109. Sgt. Sandoval testified that DOC use of force policy does not condone, and he does not teach, that an officer can step on an inmate's ankle, unless an officer is in fear of imminent serious bodily injury.

110. Sgt. Sandoval testified that he did not know if other use of force options were available to the Complainant at the time he kicked K.D. in the back on June 28, 2008.

111. The other officers who participated in the June 28, 2008 incident testified at hearing. Most of the officers opined that Complainant had not used inappropriate or excessive force with K.D.

Pre-disciplinary Meeting

112. Warden Reid watched the video of the June 28, 2008 use of force incident over fifty times prior to the pre-disciplinary meeting.

113. On October 20, 2008, Complainant attended the pre-disciplinary meeting with his attorney. Warden Reid attended with his representative, Major Lori McGowan, Administrative Services Manager for LaVista and San Carlos.

114. Warden Reid led the meeting. He opened by providing the background of the incident, the investigations, and by discussing the information he had reviewed prior to the meeting.

115. Warden Reid explained that after he reviewed the video of the incident and the incident reports of the officers, he found possible discrepancies between the two. His initial review of the video revealed use of force which bordered on excessive and techniques used by Complainant which were unauthorized. He therefore convened an official Fact Finding Committee, chaired by the DOC Security Specialist.

116. Warden Reid asked Complainant to explain his recollection of the use of force incident. Complainant stated that the inmate had begun to kick at the other officers in his cell, when Complainant stepped on the back of his leg. Complainant stated that he "stepped in and placed my foot on his tibular in order to stop him from kicking." He stated that the tibular nerve is located at the back of the leg at the top, just below the knee. Complainant stated that he used the knee strikes on K.D.'s back because he was in pain, he couldn't move, and because if the inmate had "taken him out," there would have been only one officer left.

117. The Warden then played the video tape, stopping it at the parts he was concerned about so that Complainant could comment, clarify, and answer questions posed by the Warden.

118. When they viewed the scene in K.D.'s cell, when Complainant stepped on the inmate's leg, the Warden stated that he did not see the inmate kicking. Complainant did not respond to that statement directly.

119. Complainant indicated that they had fought K.D. all the way to the 4-point room, and that officers were getting hurt and falling out from exhaustion during the transport.

120. They next viewed the scene when Complainant kicked K.D. in the back. Warden Reid asked Complainant if he believed that the force he had used was excessive. Complainant responded, "No, sir, not one bit." He stated, "In my heart of hearts, I did what was necessary, and it was not excessive. " He explained that if K.D. had not trapped his leg, or if Complainant had continued to strike after K.D. let go of his leg, he would agree that the force used was excessive.

121. Smith also stated that he had no intention of hurting the inmate.

122. Complainant's attorney made a few statements at the close of the meeting. He stated that it was noteworthy that during the entire incident, K.D. sustained no physical or documented injury and that two officers did receive injuries. He also stated that it would have been preferable if the officers could have used an electrical or other instrument to gain control of K.D.

123. Complainant's attorney also stated that under the criminal excessive force statute, an injury to the inmate was a requirement of proof of the offense. There was no such injury in this case.

124. Smith reiterated it was never his intent to use any type of excessive force. He also stated, "I've had instructors tell me this specifically, if they've got you trapped and they're hurting you, you do what you need to do to go home that night. And, as I said, I've still got marks on my legs from this incident four months later." He stated that it was against his religious beliefs to hurt anyone.

125. Smith also stated that as they left the incident, Captain Pruitt had thanked Smith for being there. Officer Lester had also told Smith that Lester felt better and safer because Smith was there.

126. Warden Reid promised to speak with Captain Pruitt, Officer Lester, and Sergeant Sandoval, as requested by Complainant.

Decision to Impose Disciplinary Action

127. Warden Reid concluded that under the totality of circumstances on June 28, 2008, Complainant never had a reasonable fear of imminent serious bodily injury. Therefore, Complainant's use of physical force on K.D. that was neither approved nor trained was unjustified under AR 300-16RD.

128. Warden Reid specifically concluded that there were two incidents of force applied by Complainant that were unnecessary and excessive: standing on K.D.'s ankle and placing knee strikes to the kidney area of K.D.

129. After watching the video tape over fifty times, the Warden was unable to conclude definitively that Complainant struck K.D. in the facial area while lying face-up on the four-point bed.

130. Warden Reid considered many factors as mitigation in reaching his decision. First, he acknowledged that prior to his arrival at San Carlos, the level of professionalism governing use of force incidents was lower than the level he expected of his officers.

131. Second, Warden Reid gave a lot of weight to Complainant's years of exemplary service and behavior as a DOC officer. In November 2001 Complainant had received a disciplinary action for failing to disclose an incident of excessive force by another officer; the Warden did not consider this.

132. The Warden also spoke with Complainant's supervisors, who were very complimentary. He took their comments into account.

133. Warden Reid also considered as mitigation Captain Pruitt's poor supervision of the incident and the fact that the inmate was so aggressive and combative and had assaulted two officers during the struggle.

134. Warden Reid considered the imposition of a corrective action, but rejected the idea because he wanted Smith to know that he found his performance to be inappropriate. The Warden chose perhaps the lightest disciplinary action available because he wanted Smith to know that the Warden had reviewed and considered all mitigation information Complainant had provided and that was available.

135. On November 17, 2009, Warden Reid issued the disciplinary action letter imposing a $200.00 fine on Complainant. The letter is over four pages long, single-spaced.

136. The letter reviews the entire process of reviewing the incident, and outlines several FFC conclusions, the contents of the video tape, and the statements of Smith and his attorney at the pre-disciplinary meeting. The Warden notes that "The video clearly captured the correctional officers' actions to gain control of a

disruptive, non-compliant, combative offender who was restrained with ambulatory and leg restraints."

137. The letter contains the Warden's finding that Complainant violated AR 1450-1, Staff Code of Conduct, IV B, which states, "Excessive physical force or verbal abuse of offenders by DOC employees will not be permitted, nor will physical/verbal force be used beyond what necessary to control an officer or to enforce legitimate and legal commands." In addition, the letter finds that Complainant's force techniques "were not authorized nor supported by approved DOC Training."

138. The Warden also concluded that Complainant's actions towards K.D. were blatant and willful, "causing K.D. to escalate thereby placing staff and offender at greater risk."

139. Warden Reid further found that Complainant's actions did not support the mission of the facility of providing intervention and treatment in a secure, clean, safe and humane environment for both staff and offenders. As a Correctional Officer II Lead Worker, Complainant had failed to model to the staff professional standards by violating policy by the choice of force he had used on a restrained mentally ill offender.

IG Report

140. The Inspector General's office conducted an investigation into criminal acts on June 28, 2008. Warden Reid was unaware of the investigation until the second day of the hearing in this case. As a result of the IG report, which was forwarded to the District Attorney, K.D. plead guilty to assault on a correctional officer involved in the June 28, 2008 incident. Warden Reid was also unaware of this criminal disposition until the second day of hearing.

141. Complainant timely appealed the disciplinary action.

DISCUSSION

I. GENERAL

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. Art. 12, §§ 13-15; §§ 24-50-101, *et seq.*, C.R.S.; *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rule 6-12, 4 CCR 801, and generally includes:

(1) failure to perform competently;
(2) willful misconduct or violation of these or department rules or law that affect the ability to perform the job;
(3) false statements of fact during the application process for a state position;

(4) willful failure to perform, including failure to plan or evaluate performance in a timely manner, or inability to perform; and
(5) final conviction of a felony or any other offense involving moral turpitude that adversely affects the employee's ability to perform or may have an adverse effect on the department if the employment is continued.

In this *de novo* disciplinary proceeding, the agency has the burden to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). The Board may reverse or modify Respondent's decision if the action is found to be arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S.

II. HEARING ISSUES

A. Complainant committed the acts for which he was disciplined.

Respondent has proven by preponderant evidence that Complainant committed the acts for which he was disciplined. Complainant stood on K.D.'s back lower leg area at a time when K.D. was not kicking any other officer. Pressure to this area is not an approved PPCT and is not taught in use of force training. Therefore, its use by Complainant at a time when K.D. posed no danger to anyone present was unjustified and excessive. Complainant blatantly and willfully violated AR 300-16RD and the DOC Staff Code of Conduct by standing on the lower back area of K.D.'s leg.

Complainant kneeled on K.D.'s back with his left knee and then delivered five hard knee strikes to K.D.'s lower back. These strikes were not given to any approved PPCT area and they were not a use of force option on which DOC officers are trained. The area on K.D. was in the vicinity of his kidneys and ribs; therefore, it was a dangerous location at which to sustain hard strikes.

No objective person in Complainant's situation would reasonably believe that he was in imminent danger of serious bodily injury. DOC AR 300-16RD, Section III(f) defines serious bodily injury as "Bodily injury, which involves a substantial risk of death, serious permanent disfigurement, or protracted loss or impairment of the function of any part or organ of the body." Complainant felt pressure on the front of his ankle from the chain. This pressure does not meet the standard for serious bodily injury in the regulation. Further, Complainant escalated the situation by kneeling on K.D.'s back with the leg trapped in the chain; this decision caused Complainant to feel more, not less, pressure on the front of his ankle.

In the absence of a reasonable belief he was subject to imminent serious bodily injury, Complainant was restricted to using only PPCT tactics that are approved and trained by DOC. The preponderance of evidence demonstrates that Complainant and the other officers had several authorized PPCT's available to them at the time Complainant struck K.D. in the back. Complainant blatantly and willfully violated AR

300-16RD and the DOC Code of Conduct by delivering five hard knee strikes into K.D.'s back.

Complainant presented several eye witness participants in the June 28, 2008 event at hearing, all of whom testified that Complainant did not engage in unnecessary or excessive use of force during the incident. However, these officers' testimony has far less weight and credibility than that of Captain Goure and the four use of force experts on the FFC. The San Carlos officers are motivated in part by the desire to protect their Sergeant. By contrast, Captain Goure and the FFC members had no stake in the outcome of their investigations and reports. Further, they had no motive to make negative findings about any particular officer, including Complainant. The FFC's critique of Captain Pruitt evinces its objectivity. Additionally, the witness participants were involved in the altercation, which was extremely disruptive. None of them could have been focused on Complainant's actions. Captain Pruitt only witnessed one of Complainant's knee strikes; yet, he was concerned enough about that one strike to remove Complainant from the situation and redirect him away from K.D.

B. The Appointing Authority's action was not arbitrary, capricious, or contrary to rule or law.

In determining whether an agency's decision is arbitrary or capricious, a court must determine whether the agency has 1) neglected or refused to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; or 3) exercised its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Lawley v. Department of Higher Education,* 36 P.3d 1239, 1252 (Colo. 2001).

Complainant asserts that Warden Reid acted in an arbitrary and capricious manner by giving inadequate consideration to the opinions of his coworkers involved in the use of force incident. However, the correctional officers at DOC do not establish codes of conduct at San Carlos or any DOC facility. The written policies and the training based on those policies establish the standards of conduct that govern Complainant and all DOC employees. The evidence demonstrates that Warden Reid fairly applied those standards to Complainant in this case, while also considering several significant mitigating factors, including the opinions of Complainant's coworkers.

Warden Reid used diligence and care to procure all evidence available to him regarding the June 28, 2008 incident. By viewing the video tape of the incident over fifty times, the Warden assured that his factual conclusions were correct. By convening the FFC comprised of seasoned experts in the use of force at DOC, the Warden assured that he left no stone unturned and obtained an unbiased and professional perspective on the incident. The layers of investigation that occurred in this case assured that the

ultimate outcome would be based on not one individual's opinion, but on several subject matter experts' collective assessment.

The evidence also demonstrated that Warden Reid gave candid consideration to the unique situation at San Carlos. Specifically, the Warden was aware that under previous leadership the prison culture had been more lax in the enforcement of use of force standards. This mitigating factor was one of the primary reasons the Warden imposed a light disciplinary action.

Complainant argues that Respondent denied his right to due process by failing to assure the completion of the FFC's report in a timely manner and by neglecting to provide him with a copy of the IG investigative report. Complainant does not specify how his due process rights have been abridged by the delay in completion of the FFC report. Warden Reid was on vacation prior to the initiation of the FFC; therefore, it got off to a late start. The fact that the FFC took all the time necessary to undertake a thorough investigation underscores the integrity of the process; it does not indicate a deprivation of due process to Complainant.

Complainant was provided with a full opportunity in every step of the investigative process to provide his side of the story and any mitigating information he deemed appropriate: in his interview with Captain Goure for the After Action Report, in his interview with the FFC for the Fact Finding Report, and at the pre-disciplinary meeting with Warden Reid, with his attorney present to provide guidance and advocacy.

With regard to the IG investigative report, the investigation by the IG section of DOC is irrelevant to this case because Warden Reid did not believe that Complainant had engaged in criminal conduct. Any investigation into criminal wrongdoing by officers involved in the use of force incident was separate from the investigations that occurred under the jurisdiction and direction of Warden Reid. In addition, the fact that K.D. pleaded guilty to assault on an officer is immaterial, because the Warden considered K.D.'s combativeness and his assaults on staff in making his decision. Warden Reid's decision is the only one subject to review herein. Warden Reid was unaware that such a report existed until the second day of this hearing. Therefore, it had no impact on his decision making process.

Complainant also asserted that it is inappropriate for the Warden to conclude that Complainant engaged in excessive force. Complainant asserts that excessive force is a term used only in the criminal law context, and that the Warden's conclusion in this case could expose Complainant to criminal prosecution. This argument is rejected. As the state agency charged with ensuring the safety and security of inmates confined in its facilities, DOC appropriately exercised its discretion to define excessive force in its administrative regulations. As the appointing authority, the Warden is responsible for enforcing those regulations. Warden Reid expressly limited his investigation to a review of whether Complainant's conduct violated those administrative regulations.

C. The Appointing Authority's action was within the range of reasonable alternatives available.

The credible evidence demonstrates that the appointing authority pursued his decision thoughtfully and with due regard for the circumstances of the situation as well as Complainant's individual circumstances. Board Rule 6-9, 4 CCR 801. Complainant's misconduct was flagrant and serious. Therefore, it was appropriate for Warden Reid to bypass corrective action and to impose disciplinary action in this case. State Personnel Board Rule 6-2, 4 CCR 801. The fine of $200.00 was well within the range of reasonable alternatives available to Respondent, and was on the mild end of the spectrum available to Warden Reid.

CONCLUSIONS OF LAW

1. Complainant committed the acts for which he was disciplined.

2. Respondent's decision was not arbitrary, capricious, or contrary to rule or law.

3. The discipline imposed was within the range of reasonable alternatives.

ORDER

Respondent's action is affirmed. Complainant's appeal is dismissed with prejudice.

Dated this 30th day of July, 2009

[redacted]

Mary S. McClatchey
Administrative Law Judge
633 – 17th Street, Suite 1320
Denver, CO 80202
303-866-3300

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.); Board Rule 8-68, 4 CCR 801.
3. The parties are hereby advised that this constitutes the Board's motion, pursuant to Section 24-4-105(14)(a)(II), C.R.S., to review this Initial Decision regardless of whether the parties file exceptions.

RECORD ON APPEAL

The cost to prepare the record on appeal in this case is $50.00. This amount does not include the cost of a transcript, which must be paid by the party that files the appeal. That party may pay the preparation fee either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS. A party that is financially unable to pay the preparation fee may file a motion for waiver of the fee. That motion must include information showing that the party is indigent or explaining why the party is financially unable to pay the fee.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. Board Rule 8-69, 4 CCR 801. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 59 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 866-3300.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An appellant may file a reply brief within five days. Board Rule 8-72, 4 CCR 801. An original and 9 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on 8 1/2 inch by 11 inch paper only. Board Rule 8-73, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Board Rule 8-75, 4 CCR 801. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty-calendar day deadline, described above, for filing a notice of appeal of the ALJ's decision. Board Rule 8-65, 4 CCR 801.

CERTIFICATE OF SERVICE

This is to certify that on the 30th day of July, 2009, I served electronically true copies of the foregoing **INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE and NOTICE OF APPEAL RIGHTS** ~~in the United States mail, postage prepaid~~, addressed as follows:

James A. Carleo, Esquire
[redacted]

and in the interagency mail, to:

Willow Arnold
Eric Freund
[redacted]

[redacted]
Andrea C. Woods