

THE LABOR RELATIONS CONNECTION

Michael C. Ryan, Esq., Arbitrator

In the matter of the
arbitration between:

MIDDLESEX SHERIFF'S OFFICE

- and -

MIDDLESEX CORRECTIONAL
OFFICERS' ASSOCIATION, NEPBA,
LOCAL 500

LRC No. 538-18

Gr: [REDACTED]

Suspension

DECISION AND AWARD

For the Middlesex Sheriff's Office

[REDACTED]

For the Union

Gary G. Nolan, Esq.

I. Background.

The hearing in this matter took place on May 16 and June 12, 2019. The parties stipulated to the following statement of the issues:

Was the discipline of the Grievant for just cause? If not, what shall the remedy be?

Both parties filed post-hearing briefs on August 9, 2019.

The following article of the collective bargaining agreement is relevant:

ARTICLE VI - DISCIPLINE AND DISCIPLINE

Section One. The Sheriff, or his designee, shall have the right to discipline or discharge any employee for just cause. ...

Also relevant are the following policies of the Middlesex Sheriff's Office:

POLICY 220 - EMPLOYEE CONDUCT AND DISCIPLINE

220.03.03 Policy

The purpose of this policy is to establish rules of conduct to be observed by each employee of the Office. These rules do not attempt to cover every contingency which may arise during the performance of an employee's duties and this policy shall not be interpreted so as to relieve employees of their primary responsibility for the care and custody of inmates ... or their obligation to render good judgment and adherence to all provisions of the law.

220.07.01 Conduct Between Employees and Inmates

Each employee shall be cognizant of the rights of inmates as established by law, regulation or policies of the Office.

220.08.01 Conduct Related to Security

Officers shall maintain the internal order, security and discipline of the facility. Officers shall remain alert at all times and respond to problems in an efficient, responsible, and professional manner.

220.14 List of Offenses

When an employee is subject to disciplinary action, the employee may be charged with, but not limited to, any 1 or more of the offenses enumerated below. ...

- .02 Conduct unbecoming an officer
- .16 Use of Excessive Force

- .24 Negligence or dereliction of duty
- .33 Violating any provision of a written order, including post orders, policies and procedures, directives or rules and regulations

POLICY AND PROCEDURE 505 - USE OF FORCE

505.06.03 Policy

It is the policy of the Middlesex Sheriff's Office to permit the Use of Force by officers in the performance of their duties provided the force used is necessary, reasonable and suitable given the circumstances and situation being confronted. ... Under no circumstances shall an officer use or permit the use of force as a method of punishment, discipline or revenge.

505.06.05 Definitions

1. Excessive Force - Force, which exceeds reasonable force, or force, which was reasonable at the time its use began, but was used beyond the need for its application.

The Union represents officers, sergeants and lieutenants at the Middlesex Jail and House of Correction in Billerica, Massachusetts ("MHC"). The MHC houses approximately one thousand male inmates, who are either serving sentences after conviction or awaiting trial.¹

The grievant, [REDACTED] [REDACTED] has been employed as an officer in the MHC since 2003. He has spent much of that time

¹ Technically, those who are awaiting trial are designated as detainees, not inmates, but for simplicity's sake, I will use the term "inmates" to cover both categories.

in the segregation unit (referred to as "E-Pod"). It contains many of the most dangerous and disruptive inmates.²

Until the incident that gave rise to this grievance, the grievant had never been disciplined, nor had he ever been the subject of a use-of-force complaint. Indeed, the grievant is considered particularly competent in dealing with violent inmates, and hence is often assigned to "move teams" - groups of officers who are specially trained and chosen to move uncooperative inmates from one unit or cell to another. MHC has used videos of some of the grievant's moves as training material for other officers.

The segregation cells in E-Pod are along one side of a long corridor. The other side of the corridor is a thick, mullioned glass wall, which looks out on a dayroom and a control post staffed by an officer. The cells have steel doors with a window in the upper half. Each cell has a narrow bed in the center, and an integrated steel toilet and sink on one wall.

On the date in question, April 28, 2017, a recent arrival to E-Pod was Isaabdullah [REDACTED]. The previous day, [REDACTED] had threatened several officers, was charged with several disciplinary offenses (by the grievant, among other officers), and transferred to E-Pod. The following morning, at around 9:34

² E-Pod comprises more than the segregation unit, but the parties used the term as a synonym for segregation.

AM, [REDACTED] was released from his cell for a brief period of daily exercise, which in E-Pod consists of walking up and down the corridor. Three other E-Pod inmates were also in the corridor. All four inmates were dressed in loose jumpsuits, white socks, and plastic slippers, and all were wearing restraints that consisted of handcuffs and leg irons tethered together by a strap down the front of the body. The restraints hamper inmates' movements, but do not necessarily prevent them from inflicting injury: they can kick and punch and, by maneuvering their bodies, can even wrap the tether around an opponent's neck. The grievant testified that he has sustained many injuries from shackled inmates.

Like all areas of the MHC, E-Pod is under continuous surveillance by CCTV cameras, which are on the ceilings of the corridor and the cells. The cameras captured the ensuing incident from several angles, and the tapes (without audio) are in evidence.

The tapes show [REDACTED] entering the dayroom, where officers place him in restraints and then escort him into the corridor. The three other inmates are also seen walking along the corridor.³ [REDACTED] appears restless, agitated, and "hyper," and

³There are several videos in evidence, each from a camera with a slightly different angle. I have pieced together the action to form a continuous narrative.

talks continuously. Almost immediately, he begins sequentially addressing each of the other inmates or detainees in an aggressive fashion, bumping them with his body, "getting in their face," and yelling at them. His observable behavior is consistent with the grievant's testimony, as well as the officers' written reports, that he was "trying to start a fight."

Within a few seconds, at 9:37AM, the grievant and Officers Jonathan Berkeley, John Gray, and Sgt. Carney enter the corridor. The grievant and CO Berkeley each take one of [REDACTED] arms and begin walking him back to his cell, accompanied by Carney and Gray.⁴ [REDACTED] tries to shake the grievant and Berkeley off, whereupon they shove the front of his body up against one of the cell doors, grasp his arms more firmly, and continue walking him to his cell, with [REDACTED] strongly resisting.

At 9:38, the four officers and [REDACTED] enter the cell. The grievant has [REDACTED] right arm, Berkeley his left, Gray has a hand on his back, and Carney follows behind. Together the four officers place [REDACTED] face-down on the bed, with his head turned toward his right.⁵ At that point, the grievant is standing at

⁴ It is relevant that the grievant is 6'1" and weighs 295 pounds. [REDACTED] was 6'0" and around 200 pounds.

⁵ The officers' objective was to remove [REDACTED] restraints. It is not desirable to leave an inmate in his cell wearing restraints, because he will be unable to eat or use the toilet. He can also

██████████ right, near his head, with his right hand on ██████████ neck and his left gripping ██████████ right arm. Gray is next to the grievant, with one hand on ██████████ back and the other on his thigh. Berkeley is on the other side of the bed, with his left hand on ██████████ back. Carney is at the bottom of the bed, holding ██████████ legs.

██████████ immediately begins to struggle, turns his head to the left, and begins raising his left shoulder in an attempt to roll over onto his back. To prevent him from doing this, the grievant jumps into a kneeling position on the bed and presses down on ██████████ left shoulder. When the grievant jumps, his right knee lands forcefully on the mattress. The upper part of his right knee joint makes contact with the back of ██████████ head, pushing it very slightly forward. About a second after the grievant lands on the bed, Officer Berkeley turns his head toward the grievant and speaks to him, and the grievant immediately glances down, moves his knee away from ██████████ head, and then continues struggling with ██████████

At that point, all four officers are leaning over ██████████ and attempt to control him as he squirms. Because the camera is on the ceiling, their bodies block most of their movements.

attempt to use the cuffs to smash the windows in the cell. Ideally, the officers would have removed the restraints while ██████████ knelt on the bed or stood, but he had refused their orders to do so.

After a few seconds, ██████ begins talking to them, having worked himself into a fetal position facing left. They pause and listen to him, with their hands still on his body.

After a few more seconds, at 9:38AM, Sgt. Ronald Accardi, who had been monitoring the incident from the control post in the dayroom, enters the cell. After a brief interchange, all five officers begin leaving the cell. ██████ still in restraints, jumps off the bed, follows them to the door, and stands talking with them for a few seconds. The door closes, ██████ paces the cell, rinses his face at the sink, and then stands looking out the window in the door.

Later that day, ██████ filed an inmate grievance concerning this incident.⁶ It stated:

While out at REC, a few inmates started to yell at me and I felt I needed to defend myself. So I began to yell back, "Get out my way, you're not a threat!" to them. ...

The slurs and threats had me on edge, so I walked by and was trying to speak to HOC Imam, when officers started to charge at me and threw me into the wall with extreme force! Then I was thrown into the metal windows in front of Imam! ... I was then dragged into cell and told by officer J. Gray and F. ██████ to kneel on the bed which I did. When they shouted "Don't resist" multiple times and kneed me in my head and ribs aggressively multi time and twisted my legs and thumb until Officer Berkeley told them to stop. ...

⁶ This was one of seven grievances that ██████ filed on April 28, May 1, and May 2, raising a variety of allegations. In one of his May 1 grievances, he alleged that the grievant "kneed and punched and elbowed my head ... extremely hard."

██████ was seen, after a fashion, by Nurse Lynn Anderson.⁷ He complained of pain in his right wrist and hand, but not of any head or neck injury, nor did Nurse Anderson observe any signs of one.

All of the officers involved in the incident submitted reports. None mentioned any contact between the grievant's knee and ██████ head. The grievant reported that he "positioned [himself] on the bed to control his shoulders so he couldn't stand up" Likewise, other officers reported that the grievant "placed his body on the bed and restrained the Detainee's shoulders to stop him from thrashing around" and "moved to D/T [detainee] ██████ shoulders."

At the request of Deputy Superintendent Richard Vivier, the grievant and Officer Gray submitted second reports on May 1, 2017.⁸ The grievant's report stated:

We brought Detainee ██████ into his cell and he was given a direct order to kneel on the bed so his restraints could be removed. He then laid down and started to thrash around and began kicking at Officer Berkeley and Officer Gray. He then tried getting up off the bed so I attempted to get onto the bed so that I could assist in controlling Detainee ██████ and prevent ██████ attempted assaults on staff. While

⁷ ██████ was dissatisfied with the level of medical care provided, and eventually refused all offers of medical help.

⁸ Both Gray and the grievant initially submitted Incident Reports, but not Use of Force Reports. Deputy Superintendent Vivier later stated that he asked for additional reports after viewing the video and seeing what he described as "[t]he knee strike to the back of the head, neck, or shoulder area." He described those parts of the body as "a red area we don't strike."

climbing on top of the bed my knee made incidental contact with ██████ around his head area. The contact was minimal and only occurred due to the unstable situation presented by ██████ thrashing his body violently. ...

██████ inmate grievances were referred for investigation to Deputy Michael Mahoney, the Deputy Director of the MSO's Internal Investigations Unit ("IIU"). Mahoney viewed the video, read the officers' reports, and interviewed nine witnesses, including all of the officers involved in the incident. (He did not interview ██████ During his interview, the grievant made the following statements:

... I jump[ed] up on the bed to grab [██████] upper body, because he was thrashing around. We restrained him, and then we were told to leave the cell, so I left the cell. When I jumped up on the bed ... I possibly made incidental contact. I didn't know if I did, I put it in my report because ... [i]f I thought I did it, I put it in my report. ...

I jumped up to the side to control his upper torso, to restrain him down and ... I wrote in my report I possibly, my knee might have slid across the side of his head. But I don't believe it did. ... [B]ut I put [it] in the report just to be safe. ... I don't lie in my reports. ...

When you jump up on the bed ... body parts go with you. If I grazed his head, I might have. ... I possibly made incidental contact when I jumped up on the bed. ...

Stuff happens when you're rolling around with somebody and if incidental contact is made, it happened. ... I didn't mean to do it. It was an accidental, going up to push him down, and that was it. ... I haven't even seen the tape. ...

... I didn't knee strike the kid, I didn't hit the kid in the face, I did nothing. ... I haven't even seen the video so I don't even know what it looks like. ...

All of the officers who were present in [REDACTED] cell on April 28 stated in their interviews that they did not observe the grievant knee-strike [REDACTED]. One stated:

... when [REDACTED] tried to spin around Officer [REDACTED] got up on the bed to try to keep his shoulders from spinning, so the inmate would not turn around to continue to be able to kick at us. ...

Officer Berkeley stated:

When Officer [REDACTED] put his knee on the bed, I said, "Just look out for his head, make sure we don't hit his head."

Mahoney did not interview [REDACTED]

Mahoney issued a 58-page investigation report on September 25, 2017. He found that the grievant "delivered one knee strike to DT [REDACTED] head and that, under the circumstances, this use of force was excessive."

On June 8, 2018, over a year after the incident and some eight months after completion of the report, Superintendent Osvaldo Vidal charged the grievant with seven violations of the MSO's policies on Employee Conduct and Discipline and Use of Force, all relating to the alleged knee strike to [REDACTED] head.⁹ On August 13, 2018, after a disciplinary hearing, Superintendent

⁹ The policies cited were 220.03.03, 220.07.01, 220.08.01, 20.14.02, 220.14.16, 220.14.24, and 220.14.33, the latter incorporating by reference 505.06.3, all of which are set forth above.

Vidal sustained all seven charges. In his final decision and letter of suspension, the superintendent stated:

I find that there is credible evidence that on April 28, 2017 you used excessive force while trying to restrain ... [Detainee ██████████] in his cell. Specifically ... [o]nce D/T ██████████ was back inside his cell, he began to resist further after he was placed on the bed inside of his cell with his stomach down. Once on the bed, D/T ██████████ tried turning his body to the right side and pulling his legs into the core of his body. At this time, at approximately 9:38AM, Officer ██████████ right knee moves towards D/T ██████████ head and he administers a knee strike to D/T ██████████ head with his right knee. Although D/T ██████████ was actively resisting, he was not resisting in a manner that warranted a knee strike to the head given that D/T ██████████ had handcuffs and leg irons on.

... After reviewing all of the evidence submitted at the disciplinary hearing, in particular the MSO video of the incident, I find that the video of the incident clearly shows that you administered a knee strike to D/T ██████████ head with your right knee. Your action of administering a knee strike to the head of a detainee who was handcuffed and had leg irons and a tether was an excessive use of force in this instance. I take into consideration that the D/T ██████████ was actively resisting. However, there were three other officers in the cell assisting with restraining D/T ██████████ ... I find that administering a knee strike to D/T ██████████ head in this instance was unnecessary and an excessive use of force and that other means were available to you to restrain the detainee. ...

Superintendent Vidal ordered the grievant suspended for ten days, five to be served immediately and five held in abeyance for one year, to be imposed in the event of any other disciplinary incident during that period. He further ordered the grievant to attend use-of-force training. The grievant was

also prohibited from bidding assignments or applying for promotions for as long as eighteen months.

II. Contentions of the Parties.

The MSO

The events that led to the grievant's suspension were captured on video. While holding ██████ by the neck, the grievant deliberately struck ██████ sharply on the head with his knee. At the time, ██████ was on the bed, in restraints, and held immobile by three other COs. This was an unnecessary and excessive use of force.

Given this undisputable evidence, the Union had only one card to play: arguing that the video was inaccurate and unreliable, because at a speed of fifteen frames per second, the camera will inevitably fail to capture some of the action. The Union offered no expert testimony or other evidence to support that contention. While the Union claims to perceive a "jump" in the tape, if the video is played against an external timer, it will be seen that the timer synchronizes precisely with the running timestamp on the video. There are no "missing pieces."

Moreover, even if true, the Union's contention is immaterial, because the video leaves no doubt that the grievant struck ██████ on the head with his knee. He admitted deliberately placing his knee on the bed in the vicinity of ██████ head. The video belies the Union's contention that

that it does not show actual contact between the grievant's knee and [REDACTED] head.

The Union's insistence that that the grievant could properly use a knee strike because [REDACTED] was assaultive evades the issue of whether the grievant exerted excessive force *in this particular instance*. It does not account for such factors as where the incident occurred, whether the subject was restrained, the presence of other officers, and the available alternatives to the use of force. Each of those factors was significant in this case. Nor does the Union address Superintendent Vidal's testimony that a knee strike to the head is never appropriate, except in life-threatening circumstances.

The Union

All officers present at the April 28 incident unanimously stated that the grievant did not execute a knee strike or use excessive force. During a fast-moving situation, the grievant jumped onto the bed to gain leverage over an assaultive inmate. His knee did not "strike through" [REDACTED] head. The video shows [REDACTED] continuing to lash out, without interruption. He sustained no head injury.

The video does not establish that the grievant's knee contacted [REDACTED] head, or if so, with what force. No witness authenticated it as a fair and accurate representation of the April 28 incident. Its slow speed of fifteen frames per second

necessarily omitted some movements and chopped up the action. There was no audio.

Even if a knee strike occurred, it was a balanced response to an assaultive subject. Policy 505 does not prohibit knee strikes, nor does it contain a blanket prohibition against striking a subject's head. The MPTC model allows unarmed officers to strike any area of the body, even in non-life-threatening situations.

The MSO ignored its progressive discipline policy and failed to consider the grievant's stellar seventeen-year career. MSO policy requires disciplinary decisions "within a reasonable time period," but the investigation and decision-making process took well over a year.

As a remedy, the Union requests that the grievant be made whole in all respects, including lost wages, paid details, and overtime, with interest, as well as any other loss attributable to the discipline. The Union also asks the arbitrator to retain jurisdiction in the event of a dispute over the remedy.

III. Opinion

It is undisputed that the grievant and his fellow officers were warranted in using some degree of force on inmate [REDACTED]. All of the evidence confirms that [REDACTED] was aggressive, assaultive, and noncompliant. Once in his cell, it was important to remove [REDACTED] restraints, for his own safety as

well as institutional security. Since ██████ refused to comply with directives that would have allowed the officers to do so, the officers had to exert some force. In doing so, they themselves were at risk of injury. Witnesses for both parties testified that an assaultive inmate, even in restraints, can bite, kick, head-butt, and even attempt to strangle with the tether. The grievant himself has been punched and kicked by inmates in restraints.

Given these circumstances, the grievant was suspended not for the *per se* use of force, but for "excessive force" of a very specific kind: an alleged "knee strike" to ██████ head. The threshold inquiry here (as in all disciplinary cases) is whether the grievant in fact engaged in this misconduct. In this case, that initial question - whether the grievant executed a knee strike upon inmate ██████ - is dispositive of the grievance, because I find that he did not. Therefore, there was no just cause for his discipline.

A "knee strike" is not just any kind of blow using the knee. It is a term of art that covers several techniques for hitting an opponent on the front or side of the body with the knee. Knee strikes are rather complex, learned skills, the objective being to generate power from the torque of the body, the strength of large muscles, and sometimes from momentum, and to direct that power into the knee. Thus, a knee strike is

manifestly an intentional act. It cannot occur by accident.

The Union's expert, Security Specialist Robert Dyer, testified that knee strikes are among several strikes that are permitted under the nationally recognized Use of Force Model of the Municipal Police Training Committee, which the MSO uses to train its officers. According to Dyer, the MSO's officers are trained in strikes with the knee, elbow, palm, and fist, and are instructed to execute each strike at full force, so that multiple strikes will not be necessary.¹⁰

The grievant denied that he executed a knee strike to ██████ head on April 28, 2017. He testified that while he was standing next to the bed and attempting to control ██████ he was unable to gain enough leverage to push ██████ back and left shoulder downward toward the bed. The grievant estimated that there was only about eighteen inches between the side of the bed and the wall. Standing in this narrow space, he had very little room to maneuver. He therefore jumped onto the bed so that he could exert more downward pressure on ██████ back and prevent him from kicking the other officers. He admitted that his knee accidentally contacted ██████ head, but not with any force.

Having watched the video, Dyer concurred with the grievant.

¹⁰ For obvious reasons, officers in correctional institutions do not carry weapons, so their tactics are limited to the use of the body.

In his opinion, the grievant did not execute a knee strike.¹¹ The grievant did not position his body, and specifically his hips, in a manner that would generate force into the knee. Second, he did not "move through the target area" with his knee (i.e., continue the strike through its full range of motion, rather than arresting the force at the point the knee contacts the target). Instead, the force of the grievant's knee was a function of his jump, and was directed downward onto the mattress, rather than horizontally toward ██████ head.

Having closely reviewed the video myself many times, I agree with the Union's expert that the grievant did not execute a knee strike. Once in ██████ cell, the overall objective of the four officers was to immobilize ██████ face-down on the bed so that they could remove his restraints before leaving him in the cell. Because ██████ was resisting fiercely, this was not an easy task. The cell is quite small. The grievant estimated that there was only about eighteen inches between the side of the bed and the wall. Standing in this narrow space, the grievant was unable to gain enough leverage to push ██████ back and left shoulder downward toward the bed. He therefore

¹¹ The Union criticizes the reliability of the video, in part because its relatively low number of frames per second, 15. In theory, it could theoretically omit tiny movement details. Nonetheless, the video clearly displays a sufficient amount of detail to decide the factual matter in this case: the grievant's jump onto the bed, and the position of his right knee when he landed.

jumped onto the bed so that he could exert more downward pressure with his hands. At no point did he intend to strike [REDACTED] or even to touch him with any part of his body other than his hands and arms.

The video plainly shows that as the grievant landed on the bed with both knees, his right knee contacted the back of [REDACTED] head. I am convinced that this was accidental, and also that the grievant was not even aware of it. The grievant's attention was wholly directed toward [REDACTED] thrashing body.¹² It was only when Officer Berkeley told him to "look out for [REDACTED] head" (as Berkeley told the investigators) that the grievant realized his knee was in contact with [REDACTED] head. He then moved it away.

This accidental contact between the grievant's knee and the back of [REDACTED] head could not and did not constitute a knee strike. It occurred entirely inadvertently, in the midst of a maneuver that the grievant performed under stressful circumstances in very tight quarters.

There is also no evidence that [REDACTED] sustained any injury at all to his head or neck, as would almost certainly have occurred with an intentional, full, and athletically implemented

¹²It is probably for the same reason that the other officers did not observe the contact between the grievant's knee and [REDACTED] head. All of them were fully occupied in attempting to control lower portions of [REDACTED] body, as the video shows.

knee strike. He exhibits no sign of such an injury on the video and did not complain of one to Nurse Anderson or anyone else. In his inmate grievance, he complained only of a swollen right thumb and a sprained left calf.

The grievant's suspension rested entirely on the MOC's conclusion that the grievant purposefully used his training and skill to strike [REDACTED] on the head. However, I find that the grievant's statement to the investigators -- that such contact as occurred was inadvertent and "incidental" -- was not only credible, but entirely consistent with the video and other evidence.

For all of the foregoing reasons, I find that there was no just cause to discipline the grievant. The grievant did not execute a knee strike on [REDACTED] nor use excessive force during the incident of April 28, 2017. The suspension must be rescinded, and the grievant made whole. In the absence of any contractual provision for interest, I decline to order the payment of interest, interest not being customary in arbitral remedies.

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AWARD

The discipline of the grievant was not for just cause.

The Middlesex Sheriff's Office shall rescind the suspension, both already served and held in abeyance, and shall make the grievant whole for all lost wages and other losses caused as a result of the suspension. It shall expunge all reference to the suspension from the grievant's personnel file and other personnel records.

I retain jurisdiction for 60 days from the date of this award, in the event of any dispute over the remedy. Either party may invoke this jurisdiction.



Michael C. Ryan
Arbitrator
October 21, 2019