

Decision #1214
Rec'd 12/8/2022

**OPINION AND AWARD
IN THE MATTER OF THE ARBITRATION BETWEEN
OHIO CIVIL SERVICE EMPLOYEES' ASSOCIATION, LOCAL 11, AFSCME**

-AND-

**STATE OF OHIO DEPARTMENT OF REHABILITATION AND CORRECTION
SOUTHERN OHIO CORRECTIONAL FACILITY**

APPEARANCES

FOR OCSEA

Mal Corey, Advocate,
Gregory Crabtree, CO, Chapter President
Bryan Lawless, Grievant

FOR OHIO DRC

James Atkins, Advocate, Labor Relations Officer 3, DRC
Harold Bell, Major
Landon Conley, CO
Cody Fredrick, CO
Logan, Training Officer
Malone, Offender
Kelly Riehle, Associate Chief Inspector
Corey Sammins, RN
Seth Schuyler, CO
Tiffany Shope, CO
Gary Spradlin, RN
Karen Stanforth, RN
Stephen Virginia, Dr.

HEARING HELD

August 17, 2022

GRIEVANCE NUMBER

DRC-2021-04154-03

SUBJECT

Excessive Force Against Inmate

DECISION

Grievance Denied

Table of Contents

1

2 TABLE OF CONTENTS

3 **I. THE FACTS 3**

4 A. INTRODUCTION 3

5 B. HISTORY OF DISPUTE..... 3

6 **II. PROCEDURAL HISTORY 5**

7 **III. RELEVANT CONTRACTUAL PROVISIONS AND WORK RULES..... 6**

8 **IV. THE ISSUE 6**

9 **V. SUMMARY OF PARTIES’ RELEVANT ARGUMENTS..... 6**

10 A. SUMMARY OF MANAGEMENT’S ARGUMENTS 6

11 B. SUMMARY OF THE UNION’S ARGUMENTS 7

12 **VI. EVIDENTIARY PRELIMINARIES 8**

13 **VII. DISCUSSION AND ANALYSIS 8**

14 A. REASONABLE FORCE IN SELF-DEFENSE..... 8

15 B. NO OFFICERS REPORTED “EXCESSIVE” FORCE..... 9

16 C. SELF-INFLICTED INJURIES 9

17 D. GRIEVANT ACTED IN SELF-DEFENSE..... 9

18 E. SOURCE OF MR. MALONE’S INJURIES 10

19 F. SPEED OF EVENTS PRECLUDED DIFFERENT RESPONSE 11

20 G. THE GRIEVANT'S ALLEGED INJURIES 11

21 H. RANGE LIGHTS LIT DURING GRIEVANT-MALONE ENCOUNTER..... 11

22 I. REASON FOR MR. MALONE’S AIR TRANSPORT TO HOSPITAL..... 12

23 **VIII. PENALTY ASSESSMENT 12**

24 A. AGGRAVATIVE FACTORS 12

25 C. PROPER MEASURE OF DISCIPLINE 13

26 **IX. THE AWARD..... 13**

1 **I. THE FACTS**
2 **A. INTRODUCTION**

3
4 The parties to this disciplinary dispute are the State of Ohio Department of Rehabilitation and
5 Correction Southern Ohio Correctional Facility (“Management” or “DRC”) and the Ohio Civil Service
6 Employees’ Association, Local 11, AFSCME (“Union” or “OCSEA”), the exclusive bargaining
7 representative for Correctional Officer Bryan Lawless (“Grievant”).¹

8 At the time of his removal on December 21, 2021, the Grievant had accumulated approximately 4.5
9 years of seniority as a corrections officer with DRC, which removed him for having violated the following
10 rules:

- 11 Rule 8 Failure to carry out a work assignment or the exercise of **poor judgment** in carrying out an
12 assignment.
13 Rule 40 Use of **excessive force** toward any individual under the supervision of the Department or a
14 member of the general public.²
15

16 At the time of his removal, the Grievant had no active disciplinary record.³

17 **B. HISTORY OF DISPUTE**

18 Donald K. Malone III (“Mr. Malone”) was an inmate in the Southern Ohio Correctional Facility
19 (“SOC”) who was diagnosed as severely mentally ill (“SMI”). Mr. Malone believed that correctional officers
20 and, perhaps, fellow inmates thought he was a “Chomo,”⁴ which is prison parlance for “child molester,” a
21 profoundly toxic and provocative label in correctional facilities.

22 Mr. Malone decided that he would be safer in SOC’s medical center than in his cell where he might
23 be smeared with feces or otherwise attacked. Mr. Malone sought to facilitate that transfer by deliberately
24 smashing the top of his head against a wall in his cell, hoping the injury would oblige the medical staff to
25 effect the transfer.

26 Instead, they left him in his cell, thereby prompting Mr. Malone to implement Plan “B.”
27 Specifically, in his dark cell,⁵ Mr. Malone tied a sheet around the cell door apparently to exclude intruders,
28 and tied a second sheet through the cell bars and around his neck. Then he assumed a semi-seated position
29 with his head near the eye level of a standing adult. Neither his legs (extended in front of him) nor his
30 backside (suspended in midair) supported his body weight.⁶

1 Hereinafter referenced as, “Parties.”

2 Joint Exhibits, Tab 1 (emphasis added).

3 Joint Exhibits, Tab 3, at 7. Nevertheless, Management correctly observes that, historically, the Grievant had some issues with use of force against inmates. Joint Exhibits, Tab 6, at 369.

4 Mr. Malone’s Testimony.

5 “The range light was off.” Joint Exhibits, Tab 4, at 64.

6 Joint Exhibits, Tab 4, at 18.

1 The Grievant later discovered Mr. Malone hanging in his cell, requested assistance with an attempted
2 suicide, returned to Mr. Malone’s cell, and—without entering the cell—began removing the sheet from Mr.
3 Malone’s neck. Shortly thereafter, Correctional Officer Tiffany Shope arrived and began untying the sheet
4 that prevented the cell door from opening.⁷ Correctional Officers Seth Schuyler and Landon Conley
5 arrived later.

6 Mr. Malone fell to the floor after the Grievant removed the sheet from his neck. The fall caused Mr.
7 Malone to strike the right side of his face against a wall and the back of his head against the cell door.⁸
8 After Mr. Malone fell, the Grievant, Correctional Officers Schuyler, and Conley entered the cell. The
9 Grievant had “tunnel vision” (lost situational awareness) when he entered the cell. Therefore, he could not
10 see Mr. Malone.⁹ Nevertheless, as they entered the cell, Correctional Officers Schuyler and Conley saw
11 Mr. Malone immediately stand up, move to the rear of the cell approximately 6 feet (3 steps) away, and
12 began swinging his fist.¹⁰

13 The Grievant *immediately* moved toward the back of the cell within range of Mr. Malone’s
14 swinging fist and was struck several times. In response, the Grievant hit Mr. Malone at least once in the
15 jaw and twice in the upper body.¹¹ Then the Grievant, Correctional Officers, Schuyler and Conley
16 “escorted” Mr. Malone to the floor and sought to handcuff him.¹² Mr. Malone stoutly resisted by pulling
17 his arms beneath his body.¹³ The correctional officers eventually cuffed him.

18 Nurse Spradlin arrived shortly before (or after) Mr. Malone was subdued. Mr. Malone was bleeding,
19 and Nurse Spradlin observed blood on the cell floor.¹⁴ Except for his self-inflicted head wound, nothing
20 in the arbitral record suggests that Mr. Malone was injured *before* the three correctional officers engaged
21 him in his cell.¹⁵ Nurse Spradlin placed a C-Collar and Pulse Oximeter on Mr. Malone.¹⁶ Thereafter, Mr.
22 Malone was placed on a back board, transported to the infirmary. Quickly, thereafter, he was flown by
23 helicopter to the OSU Medical Center, where he was admitted to ICU for treatment of his *extensive*

⁷ Where an inmate either has hanged himself or is attempting to do so, the correction facility forbids a correction officer to enter the cell without at least one other accompanying correction officer.

⁸ Joint Exhibits, Tab 4, at 18.

⁹ Joint Exhibits, Tab 4, at 18, 35. Observe, however, that the Grievant did not mention “tunnel vision” in another interview. See Joint Exhibits, Tab 4, at 54-56.

¹⁰ Joint Exhibits, Tab 4, at 20.

¹¹ Joint Exhibits, Tab 4, at 18.

¹² Joint Exhibits, Tab 4, 56-57. Once . . . [the Grievant] . . . had unjustifiably engaged with . . . [Mr. Malone], Officers Schuyler and Conley had no choice but to engage as well. The force used by Schuyler and Conley was minimal and justified. . . .” Joint Exhibits, Tab 4, at 22.

¹³ Joint Exhibits, Tab 4, at 19.

¹⁴ Joint Exhibits, Tab 3, pages 293 & 294, Pictures of cell.

¹⁵ Joint Exhibits, Tab 4, at 20. “The officers . . . should have taken time to properly assess the situation to determine a method of approaching that posed the least threat to themselves and . . . Mr. Malone.” *Id.*

¹⁶ Joint Exhibits, Tab 4, at 63.

1 *injuries.*

2 As delineated in Nurse Karen Stanforth’s testimony, Mr. Malone arrived at the hospital in *serious*
3 condition:

- 4 1. Multiple bruises on the right side of his face
- 5 2. Swelling of the right ear and eye areas.
- 6 3. A 1.8 cm laceration of the left rear side of . . .[his] . . . head
- 7 4. [A] notable deformity of . . . [his] . . . lower mandible
- 8 5. [S]ignificant head trauma
- 9 6. Bruising and swelling of his head and face
- 10 7. Neck pain, rib pain, and a broken jaw
- 11 8. Head trauma and a significant amount of head and facial swelling.
- 12 9. Multiple right-sided facial fractures including the zygoma and orbital wall, which were consistent with
13 a tripod fracture, . . . , [involving] . . . the three primary boney structures supporting the eye orbit, the
14 sinus cavities, and the jaw area . . . caused by a direct blow to the cheekbone.¹⁷
- 15 10. Multiple rib fractures from 3 through 11 on the patient’s right side and multiple rib fractures of 3-8
16 on the left. The right side started filling up with blood and fluids, and Mr. Malone’s lung collapsed
17 halfway, creating a dead space that filled with fluid and blood.
- 18 11. Mr. Malone’s lung partially collapsed. Such injuries result from “physical assaults or car crashes and
19 are life-threatening, requiring emergency medical attention. The severity of these injuries does not
20 fit the documented reports of the events surrounding the UOF.¹⁸
- 21 12. Mr. Malone’s injuries were caused by . . . blunt force trauma . . . ‘that required being flown [to the
22 Ohio State University’s hospital] by a helicopter, because these were life-threatening injuries that had
23 to be treated immediately.

24 II. PROCEDURAL HISTORY

25 Based on the charges stated earlier in this opinion,¹⁹ DRC removed the Grievant, on December 21,
26 2021.²⁰ The Parties reached impasse, regarding the just-cause basis of that disciplinary decision and
27 selected the Undersigned to resolve it via a virtual arbitral hearing. At the outset of the arbitral hearing,
28 the Parties raised no procedural issues that would undermine the Arbitrator’s jurisdiction to hear the
29 instant dispute. During the arbitral hearing, the Parties’ advocates made opening statements, as well as
30 introduced testimonial and documentary evidence to support their respective positions in this dispute.
31 All documentary evidence was available for proper and relevant challenges. All witnesses were duly
32 sworn and available for both direct and cross-examination. At the close of the hearing, the Parties agreed
33 to submit Post-hearing Briefs. The Undersigned closed the arbitral record upon receipt of the Parties’
34 Post-hearing Briefs.
35

¹⁷ The cheekbone fracture can cause problems for the rest of his life. (Nurse Spradlin’s testimony).

¹⁸ Medical staff subjected Mr. Malone to multiple serious medical procedures, including: (1) correction of a Hemothorax by removing blood with a large needle aspiration; (2) Insertion of a chest tube to allow the air to drain from the chest cavity and the lung tissue to reinflate which took several days; and (3) Performed an ORIF, [by an ENT surgeon], which is an open reduction and internal fixation of his fractured mandible, zygomatic arch and sinuses. Thereafter, Mr. Malone was transferred to the Franklin Medical Center until he relocated to the Toledo Correctional Institution on May 12, 2021. (Nurse Spradlin’s testimony).

¹⁹ See *supra*, p.2 and accompanying text.

²⁰ Joint Stipulation, No. 5, Joint Exhibits, Tab 1, at 1.

1 **III. RELEVANT CONTRACTUAL PROVISIONS AND WORK RULES²¹**

2 **Article 24.02 - Progressive Discipline**

3 The Employer will follow the principles of progressive discipline.

4 Disciplinary action shall be commensurate with the offense. Disciplinary action shall include:

5 a. One (1) or more written reprimand(s);

6 b. One (1) or more working suspension(s). A minor working suspension is a one (1) day
7 suspension, a medium working suspension is a two (2) to four (4) day suspension, and a major
8 working suspension is a five (5) day suspension. No working suspension greater than five (5) days
9 shall be issued by the Employer.²²

10 * * *

11 **Article 24.06-Imposition of Discipline**

12 * * * *

13 Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall
14 not be used solely for punishment.²³

15 **Ohio Department of Rehabilitation & Correction**

16 **Rule/Code Reference**

17 **AR 5120-9-01, 5120-9-02**

18 * * * *

19 **II. PURPOSE**

20
21 The purpose of this policy is to provide guidance to institutional staff who must utilize force when
22 responding to incarcerated individual resistance in those staff that investigate incidents of force.

23 * * * *

24
25 **IV. DEFINITIONS**

26 * * * *

27
28 Excessive Force - An application of force which, either by the type of force employed, or the extent
29 to which such force is employed, exceeds that force which ***reasonably appears to be necessary***
30 under all the circumstances surrounding the incident.

31
32 Force - The exertion or application of a physical compulsion or constraint.

33 * * * *

34
35 Planned Use of Force - Any use of force in which staff can prepare for the use of force; or where force
36 is being contemplated to achieve compliance with rules, regulations, lawful orders, and directives.²⁴

37 **IV. THE ISSUE**

38 Was the Grievant removed for just cause? if not, what shall the remedy be?

39 **V. SUMMARY OF PARTIES' RELEVANT ARGUMENTS**

40 **A. SUMMARY OF MANAGEMENT'S ARGUMENTS**

41 1. The Grievant violated Rule 8 by exercising poor judgment in carrying out an assignment.

²¹ Although the Parties neither cited nor *argued* the nuances of a *specific* contractual provision(s), No. 7 of the Joint Stipulations cites Article 24 of the Collective-bargaining Agreement. Therefore, the Arbitrator included relevant sections of the Collective-bargaining Agreement (2021-2024).

²² Collective-bargaining Agreement (2021-2024), at 92.

²³ *Id.*, at 94, 95.

²⁴ Joint Exhibits, Tab 5, at 315-316.

1 Specifically, the Grievant used excessive force to subdue Mr. Malone, an individual under the
2 supervision of the Department.

- 3 2. The Grievant was trained to **reactively** use force as well as to reactively **avoid** the use of force
4 under proper situations.
- 5 3. The Grievant has a [**non-disciplinary**] history of issues with the application of force that dates
6 to his probationary period in June 2018.
- 7 4. After Mr. Malone stood up, moved to the back of the cell, and began throwing punches, the
8 Grievant had no reason either to enter the cell or to approach Mr. Malone. The Grievant should
9 have closed the cell door, called for a supervisor, and conducted a planned use of force. Instead,
10 “the Grievant brutally beat a severely ill offender within an inch of his life.”
- 11 5. Whenever possible, an employee should call for assistance before applying the use of force.
- 12 6. If the officers would have **slowed down** and **assessed** the situation, this incident could have
13 and should have been handled through a planned UOF instead of a reactive UOF. De-escalation
14 techniques could have been applied and any force needed to restrain Mr. Malone could have
15 been planned and recorded. The reactive force used by the Grievant was not justified.²⁵

16 **B. SUMMARY OF THE UNION’S ARGUMENTS**

- 17 1. The correctional officers, in Mr. Malone’s cell, used **reasonable** force to gain control of the
18 situation.
- 19 2. The arbitral record demonstrates that the Grievant struck Mr. Malone **three times** in **self-**
20 **defense** after Mr. Malone attacked him.
- 21 3. The investigatory record **does not state** that the Grievant struck Mr. Malone in the **rib cage**.
- 22 4. To insist that the Grievant struck Mr. Malone **more than three times** effectively accuses a
23 supervisor and all others of lying.
- 24 5. Mr. Malone is not a credible witness.
 - 25 (a) Before having read the conduct reports, Mr. Malone did not know who struck him.
 - 26 (b) Mr. Malone also conceded that he was faking by appearing to hang himself.
 - 27 (c) Mr. Malone claims that he never stood or threw punches at correctional officers. However,
28 six witnesses testified that Mr. Malone stood up and threw punches at correctional officers.
- 29 6. Mr. Malone struck the Grievant several times in the shoulder and chest area. The Grievant
30 subsequently claimed an injury that occurred on the day of the incident, and which was
31 subsequently approved and paid.
- 32 7. Officer Wade, the transport officer, said the helicopter was only used to fly the Grievant to the
33 medical center because the ambulance would have taken 7-8 hours to respond.
- 34 8. A more plausible explanation for the injuries to Mr. Malone’s ribs is that the weight of several
35 officers falling on Mr. Malone fractured his ribs. Mr. Malone has a history of self-inflicted
36 injuries.
- 37 9. The arbitral record merely indicates the existence of Mr. Malone’s injuries. They do not establish
38 **how** the injuries occurred.
- 39 10. Management’s effort to get Correctional Officer Conley to change his testimony evidences that
40 management lacked confidence in that case.

25 Joint Exhibits Tab 4, at 21.

1 11. At the end of the day, the correctional officers saved Mr. Malone’s life.

2 12. Even if the correctional officers used excessive force, the penalty table calls for either a two-day
3 suspension or removal. The circumstances of this case suggest that the Grievant is a salvageable
4 employee warranting progressive discipline and a two-day suspension.

5 **VI. EVIDENTIARY PRELIMINARIES**

6 Because this is a disciplinary dispute, Management has the burden of proof/persuasion and,
7 thus, must demonstrate by preponderant evidence in the arbitral record as a whole that the Grievant
8 was terminated for just cause. Doubts about the existence of just cause shall be resolved against
9 Management. Similarly, the Union must shoulder the burden of persuasion for its allegations and
10 defenses, doubts about which shall be resolved against the Union.

11 **VII. DISCUSSION AND ANALYSIS**

12 The central issue in this dispute is whether the Company has demonstrated by preponderant
13 evidence in the arbitral record as a whole that the Grievant was removed for just cause: (1)
14 Exercising poor judgment, and (2) Using excessive force against Mr. Malone. For the reasons
15 discussed in the ensuing discussion, the Undersigned holds that the Grievant ***was terminated for***
16 ***just cause.***

17 **A. REASONABLE FORCE IN SELF-DEFENSE**

18 Preponderant evidence in the arbitral record establishes that when the Grievant and
19 Correctional Officers Schuyler and Conley entered Mr. Malone’s cell, he ***immediately*** stood up,
20 moved to the back of his very ***dark*** cell approximately 6 feet away from the correctional officers and
21 began swinging his fists.²⁶ The Grievant then ***immediately*** moved within range of Mr. Malone’s
22 swinging fists and was struck approximately two or three times. The Grievant then struck Mr.
23 Malone in the face and the upper chest area. The Grievant, Correctional Officers Schuyler, and
24 Conley “***escorted***” Mr. Malone to the ground.²⁷ Somewhere during that interaction, Mr. Malone
25 sustained the life-threatening injuries discussed earlier in this opinion.²⁸ Mr. Malone freely
26 admitted that he deliberately struck the top of his head against a wall, hoping to be transferred to

²⁶ The Union claims that Mr. Malone directed his swings/punches at the officers. Assuming, arguendo, the truth of that allegation, the officers would have been in no danger of being struck by Mr. Malone if they had remained at the front of the cell and waited to establish a planned force attack. Therefore, the Arbitrator accords no persuasive force to that allegation.

²⁷ Joint Exhibits Tab 4, at 56 (emphasis added).

²⁸ See *supra* p. 5 and accompanying text.

1 the infirmary. One can reasonably conclude that the other injuries were sustained before, during, or
2 after the three correctional officers “escorted” him to the ground.

3 Preponderant evidence in the arbitral record only establishes that the Grievant struck Mr.
4 Malone. Therefore, one can reasonably conclude that **more likely than not** the Grievant inflicted
5 the injuries that Mr. Malone suffered.

6 **B. NO OFFICERS REPORTED “EXCESSIVE” FORCE**

7 The Union stresses that none of the correctional officers either in or near Mr. Malone’s cell, on
8 April 27, 2021, reported the use of excessive force. That none of the officers explicitly reported the
9 use of “excessive” force, hardly establishes that the Grievant never used such force against Mr.
10 Malone in his cell. Circumstantial evidence and commonsense strongly undermine the conclusion
11 that the **lack** of an **explicit** admission somehow establishes innocence. Mr. Malone was
12 **uninjured** the day before the incident. Yet, he had sustained life-threatening injuries when he was
13 removed from his cell immediately following his encounter with the three correctional officers.
14 Absent an explanatory event between Mr. Malone’s injury-free condition on April 26, 2021, and his
15 encounter with the officers in his cell on April 27, 2021, one can reasonably infer—if not flatly
16 declare—that Mr. Malone sustained his injuries during his interaction with those correctional
17 officers in his cell that day.

18 **C. SELF-INFLICTED INJURIES**

19 The Union also argues that Mr. Malone’s injuries were somehow self-inflicted. The severity and
20 extent of Mr. Malone’s injuries resolutely stress the credibility of that contention. For example, it
21 strains credulity to claim that Mr. Malone somehow seriously **fractured ribs on both sides of**
22 **his body**. Nothing in the arbitral record addresses, not to mention establishes, that claim. Finally,
23 Mr. Malone freely admitted that he injured the top of his head by smashing it on the wall. That
24 admission affords him some credibility regarding injuring himself.

25 **D. GRIEVANT ACTED IN SELF-DEFENSE**

26 The Union argues that the Grievant responded to Mr. Malone’s attack in self-defense and never
27 struck Mr. Malone in the ribs. Management offers at least three responses to that contention. First,
28 the Grievant was uninjured the day before the incident when medical staff examined him. Therefore,
29 the life-threatening injuries that Mr. Malone sustained between the time of that medical
30 examination and the day of his clash likely occurred during his clash with the Grievant. Second,
31 Management avers that the Grievant and Mr. Malone never would have clashed, but for the

1 Grievant's approaching Mr. Malone who was standing approximately 6 feet away from the Grievant
2 swinging his fists. Third, Management contends that Lieutenant Rogers, who was either at or inside
3 the cell, could have conducted a **planned use of force**.²⁹ Given the distance between the Grievant
4 and Mr. Malone's swing fists, there was sufficient time to develop and implement a less-violent
5 **planned use of force** against Mr. Malone rather than the Grievant's **reactive use of force**. The
6 Grievant was trained how and when to use either approach.

7 The Arbitrator finds Management's contentions considerably more persuasive than the Union's
8 on this point. Nothing in the arbitral record either demonstrates or suggests that the Grievant was
9 somehow obliged to **approach** Mr. Malone **immediately** upon entering the cell. But for the
10 Grievant's precipitous decision, Mr. Malone's injuries likely would have entailed only a gash on his
11 head and, perhaps, sheet burns around his neck, rather than the life-threatening injuries he
12 sustained.

13 E. SOURCE OF MR. MALONE'S INJURIES

14 The Union correctly argues that the arbitral record lacks **dispositive** evidence that identifies
15 the precise source of Mr. Malone's injuries. Nevertheless, the arbitral record establishes that, on
16 April 26, 2021, the day before the interaction between Mr. Malone and the Grievant, Mr. Malone
17 was uninjured. On April 27, 2021, Mr. Malone suffered life-threatening injuries. The only major
18 documented incident that possibly could have caused those injuries is Mr. Malone's interaction with
19 the Grievant. This **circumstantial evidence** manifestly supports a **reasonable inference** that
20 the Grievant—with or without contribution from Correctional Officers Schuyler and Conley—
21 inflicted those injuries.

22 The Union also argues that Mr. Malone **could have** sustained fractured ribs when the officers
23 "Escorted him to the ground." But for the Grievant's violation of Management's specific training
24 and policy about engaging inmates, Mr. Malone would have retained healthy ribs. As pointed out
25 elsewhere in this opinion, the correctional officers were specifically trained to avoid using reactive
26 use of force when a planned use of force would suffice. Specifically, but for the correctional officers'
27 having traversed **approximately 6 feet** within the cell to **affirmatively** engage Mr. Malone, he

²⁹ Management Post-hearing Brief, at 8.

1 very likely would not have suffered fractured ribs in the first instance.

2 **F. SPEED OF EVENTS PRECLUDED DIFFERENT RESPONSE**

3 The Union argues that the speed at which the events unfolded on April 27, 2021 obliged the
4 Grievant's response. This argument seemly addresses Management's contention that the Grievant
5 could have remained at the cell door rather than move within range of Mr. Malone's swinging fists.

6 This contention is puzzling. First, nothing in the arbitral record suggests an *immediate* need
7 to subdue Mr. Malone. Preponderant evidence in the arbitral record shows that the Grievant was
8 trained to use either a planned or reactive use of force, depending on extent circumstances. Second,
9 Mr. Malone was at least 6 feet away from the Grievant and never moved toward him. This solitary
10 fact, without more, demonstrates that the clash between the Grievant and Mr. Malone was avoidable.

11 **G. THE GRIEVANT'S ALLEGED INJURIES**

12 The Union argues that the Grievant was injured during his encounter with Mr. Malone. First,
13 evidence in the arbitral record *at least* contradicts this allegation. *Credible* evidence establishes
14 that, on April 27, 2021, shortly after his clash with Mr. Malone, the Grievant received a "clean bill
15 of health," Indeed, when asked if he was injured, the Grievant said, "I'm okay."³⁰ Second, the Union
16 argues that the Parties *stipulated* that the Grievant had been injured on April 27, 2021.
17 Nevertheless, the Undersigned failed to locate that stipulation in the arbitral record. Under these
18 circumstances, the Union's allegation that Mr. Malone injured the Grievant remains an allegation
19 rather than a proven fact. More important, even if Mr. Malone injured the Grievant during their
20 encounter, the Grievant's use of *excessive* force is hardly justified.

21 **H. RANGE LIGHTS LIT DURING GRIEVANT-MALONE ENCOUNTER**

22 The Union suggests that the range lights were on before "any officer . . . [entered] the cell." In
23 support of this claim, the Union cites page 85 of the joint exhibits.³¹ However, the more relevant
24 statement on that page states, "lights come on on the range, Nurse Sammons arrives can now see
25 that there are either five or six officers present at cell."³² "[L]ights come on on the range" suggests
26 that range lights previously were *off*. Similarly, "[C]an *now* see" suggests that one could not

³⁰ Joint Exhibits, Tab 4, at 69.

³¹ Union Post-hearing Brief, at 5.

³² Joint Exhibits, Tab 4, at 85.

1 previously see. Finally, testimonies of several witnesses explicitly verify that darkness obscured
2 visibility in the cell, during the interaction between the Grievant and Mr. Malone.³³

3 **I. REASON FOR MR. MALONE’S AIR TRANSPORT TO HOSPITAL**

4 The Union argues that “a 7 to 8 hour wait for an ambulance transport”—rather than the
5 seriousness of Mr. Malone’s injuries—explains his lifeline air transport to the hospital. Still, Nurse
6 Karen Stanforth offered the following un rebutted testimony at the arbitral hearing: “Mr. Malone’s
7 injuries were caused by . . . blunt force trauma . . . ‘that required being flown [to the Ohio State
8 University’s hospital] by a helicopter, because these were life-threatening injuries that had to be
9 treated immediately.” The Undersigned finds Nurse Stanforth’s professional observations/opinion
10 to be credible and persuasive on this point.

11 **VIII. PENALTY ASSESSMENT**

12 Preponderant evidence in the arbitral record demonstrates that the Grievant specifically violated the
13 DRC policy and training regarding excessive use of force against inmates. Therefore, some measure of
14 discipline is indicated. Assessment of the proper measure of discipline involves an evaluation of the
15 mitigative and aggravative factors surrounding Management’s decision to terminate the Grievant. The
16 arbitrator shall not modify a disciplinary measure, unless it is unreasonable, arbitrary, capricious,
17 discriminatory, in bad faith, or abusive of discretion. Assessing the propriety of the Grievant’s
18 termination in the instant case requires evaluating and balancing the aggravative and mitigative
19 circumstances surrounding that decision.

20 **A. AGGRAVATIVE FACTORS**

21 The pivotal aggravative factor, in this case, is the Grievant’s intentional, inappropriate/unwarranted
22 use of excessive force against Mr. Malone. The second aggravative factor is the Grievant’s duty and
23 responsibilities as a correctional officer, to serve as a role model for inmates and to protect them if at all
24 possible. They are the Grievant’s wards. The Grievant’s role, in this respect, substantially compounds
25 the aggravative dimension of his violent conduct. Correctional officers are (or should be) highly visible
26 paradigms of substantial trust for the inmates and Management. Blatant breaches of that trust are

³³ “I could not see exactly what each officer was doing due to my view being restricted from the *lack of light*. . . .” (Statement of officer James E. Steinbock) (emphasis added). Joint Exhibits, Tab 4, at 63. “When I arrived, it was *dark* on the range and in the cell and the block lights were *off*.” (Statement by Nurse Spradlin) (emphasis added). Joint Exhibits, Tab 4, at 64. “The range lights were *off*, and it was *dark* on the range and inside the *cell*.” (Statement by Bobbie Mullins) (emphasis added).

1 intolerable because they very likely will irrevocably erode the foundation of the employer-employee
2 relationship.

3 **B. Mitigative Factors**

4 The major mitigative factor is the Grievant's unblemished disciplinary record.
5

6 **C. PROPER MEASURE OF DISCIPLINE**

7 This balance of aggravative and mitigative factors hardly bodes well for the Grievant. Trust is the
8 indispensable "glue" that binds the employer-employee relationship. The level of trust increases
9 proportionately with the level of an employee's position, the nature of an employee's duties, and/or the
10 magnitude of an employee's authoritative mantle in the workplace. As a Correctional Officer, the
11 Grievant literally held the very lives and well-being of inmates within in his hands. Trust and sound
12 JUDGMENT are indispensable for the Grievant. His conduct, in the instant case, constitutes a behavioral
13 "red flag" for any reasonable employer. Retention of the Grievant, in the shadow of this "red flag" poses
14 an unacceptable risk to any employer's future operational interest. That is especially true in the instant
15 case.

16 **IX. THE AWARD**

17 For all of the foregoing reasons, the Grievance is hereby **DENIED IN ITS ENTIRETY.**

18 

Robert Brookins, Professor of Law, Labor Arbitrator, J.D. Ph.D.