

State of New Hampshire



PERSONNEL APPEALS BOARD
25 Capitol Street
Concord, New Hampshire 03301
Telephone (603) 271-3261

APPEAL OF STEVEN SOULE

Docket #95-T-20

Order on:
State's Motion for Rehearing and for Reconsideration
and
Appellant's Motion for Reconsideration and Objection

October 19, 1995

On September 22, 1995, the New Hampshire Personnel Appeals Board received the State's Motion for Rehearing and for Reconsideration of the Board's September 4, 1995, decision in the above-titled matter. The Board received the Appellant's Motion for Reconsideration and Objection on October 4, 1995.

In its motion, the State argued that there were errors of law and incorrect findings of fact that demonstrate that the Board erred in its decision to order the reinstatement of Mr. Soule. In his Motion, the appellant argued that there was ample evidence which exonerated Mr. Soule of the offense of excessive use of force in the control of an assaultive inmate, and that the evidence would not support a finding that Mr. Soule had committed any offense under the personnel rules.

The State's assertion that RSA 21-I:58 neither authorizes the Board to hold a *de novo* hearing in order to make an independent determination of the facts underlying the discipline, nor to substitute its judgement for that of the appointing authority in the face of conflicting evidence, is contrary to the simple language of RSA 541-A. In Peabody v. State Personnel Commission, 109 NH 152 (1968), the New Hampshire Supreme Court clarified the Board's authority to make independent findings in such instances:

"As a fact-finding tribunal, the [board] was at liberty to resolve any conflict in the evidence and to accept or reject such portions of the testimony as it saw fit."

The State failed to persuade the Board that the Board exceeded its authority by rejecting any of the evidence upon which the State had relied in deciding to terminate Mr. Soule's

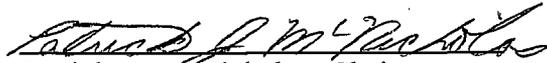
APPEAL OF STEVEN SOULE
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ORDER ON PARTIES' MOTIONS...

employment. The State also failed to persuade the Board that this tribunal "...should sustain the findings of the appointing authority if it finds that there was some evidence on which the appointing authority could have based its decision." (State's Motion, p. 2 ¶2) Although the Board concedes that its first factual finding was more properly a conclusion of law, as argued by the State, the Board affirms its other findings and rulings, which are well-supported by the evidence in this case.

Similarly, the Appellant failed to persuade the Board that the evidence "exonerated" Mr. Soule, or that his conduct did not warrant any discipline under the Rules of the Division of Personnel. The evidence reflects that staff in the Special Housing Unit collectively used excessive force during the altercation with Jose Lebron. The evidence does not prove that Mr. Soule was solely responsible for injuries to the inmate. However, Mr. Soule's participation, and the extent to which he participated in the incident, support the conclusion that Mr. Soule "threaten[ed] the safety of another employee or client," in violation of Per 1001.05 (b)(3)a., which warranted suspending him without pay or benefits.

The Board voted unanimously to deny both the State's and the Appellant's Motions for Rehearing and/or Reconsideration. To the extent that the Appellant's Objection is consistent with the decision above, it is sustained. The Board voted to affirm its decision, reinstating Mr. Soule following a 5 month disciplinary suspension without pay. He shall be reinstated consistent with the terms and conditions described in the Board's September 4, 1995, order.

THE PERSONNEL APPEALS BOARD


Patrick J. McNicholas, Chairman


Mark J. Bennett, Commissioner


Robert J. Johnson, Commissioner

cc: Virginia A. Lamberton, Director of Personnel
John Vinson, Esq., General Counsel, Department of Corrections
M. J. Mickey Busca, SEA Legal Intern, State Employees' Association

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case Nos. 95-782, Appeal of New Hampshire Department of Corrections and 95-790, Appeal of Steven Soule, the court upon January 23, 1997, made the following order:

Appeal withdrawn.

Distribution:

Jennifer B. Gavilondo, Esquire
Stephen J. Judge, Esquire
Michael C. Reynolds, Esquire
John Vinson, Esquire
NH Personnel Appeals Board 95-T-20
Donna K. Nadeau, Supreme Court
File

Howard J. Zibel,
Clerk

The State of New Hampshire

Supreme Court

No. 95-782
95-790

Appeal of NH Department of Corrections
Appeal of Steven Soule

TO THE CLERK OF N. H. PERSONNEL APPEALS BOARD #95-T-20

*I hereby certify that the Supreme Court has issued the following order
in the above-entitled action:*

January 23, 1997. Appeal withdrawn.

February 25, 1997

Attest: *Carol A. Belmain*
Carol A. Belmain, Deputy Clerk

State of New Hampshire



PERSONNEL APPEALS BOARD
25 Capitol Street
Concord, New Hampshire 03301
Telephone (603) 271-3261

APPEAL OF STEVEN SOULE
Department of Corrections
Docket #95-T-20

September 4, 1995

The New Hampshire Personnel Appeals Board (McNicholas, Bennett and Johnson) met Wednesday, July 19, 1995, to hear the appeal of Steven Soule, a former employee of the Department of Corrections who was discharged from his position of Corrections Corporal, effective March 28, 1995, for allegedly abusing and attempting to injure an inmate in the Special Housing Unit of the New Hampshire State Prison. John Vinson, Esq., appeared on behalf of the Department of Corrections. SEA Legal Intern M. J. Mickey Busca appeared on behalf of the appellant.

The record in this matter consists of the notice of appeal and notice of scheduling, the audio tape recording of the hearing on the merits convened in Concord, New Hampshire, and exhibits admitted into the record at the hearing. The following persons, who were sequestered at the request of the State, gave sworn testimony at the hearing:

Peter McDonald, Administrator, Department of Corrections
Steven Soule, Appellant
Sgt. Robert Drew, Department of Corrections
Michael Sokolow, Unit Manager, Department of Corrections
Lt. Steven Westgate, Department of Corrections
Sgt. Robert Thyng, Department of Corrections
C.O. Scott Bungay, Department of Corrections
Investigator Christopher Davis, Department of Corrections

The following exhibits** were admitted into the record at the hearing:

The Board granted the parties' Motion to have DOC Exhibit #1 and Appellant's Exhibits B and Exhibit C marked "Confidential". Unless otherwise ordered by a court of competent jurisdiction, these documents shall not be made available to any person or party without the express, prior approval of both the Appellant and the State.

Appeal of Steven Soule
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- DOC Exhibit #1 - Investigative Report Documents - CS 1-94-129 (77 pages)
- Joint Exhibit A - March 28, 1995 letter of termination from Acting Warden Peter McDonald to Corrections Corporal Steven Soule (2 pages)
- Appellant's Exhibit B - Investigative Report Documents - CS I-94-129 (16 pages)
- Appellant's Exhibit C - Investigative Report Documents, 5/27/93 letter of warning, daily progress notes, work logs (92 pages)
- Appellant's Exhibit D - 12/29/94 Performance Evaluation of Steven Soule (4 pages)
- Appellant's Exhibit E - 1/5/94 Memo from Michael Sokolow to Warden Cunningham recommending removal of 5/27/93 letter of warning from Appellant's file
- Appellant's Exhibit F - 7/23/93 memo from Warden Cunningham to Steven Soule agreeing to remove 5/27/93 letter of warning after 12/7/93
- Appellant's Exhibit G - 6/6/94 letter of commendation from Warden Cunningham to Steven Soule and 5/31/94 letter of appreciation (2 pages)
- Appellant's Exhibit H - Rules and Guidance for Department of Corrections Employees, Reference No. ACA #90 C2-4036, Statement 2.16 and attached Code of Ethics (20 pages)
- Appellant's Exhibit I - 6/13/95 Police Standards and Training letter with attachment to State Employees' Association in re: "Force Continuum" (9 pages)

The State argued that the appointing authority acted appropriately in discharging Mr. Soule, a six year employee of the Department, when its investigation disclosed that he had used excessive force, resulting in injuries to an inmate, during a routine exchange of handcuffs on the morning of June 28, 1994. The State asserted that as a result of an altercation with officers during his transfer from the Close Custody Unit to the Special Housing Unit, Inmate Jose Lebron suffered three broken ribs, a bruised kidney, and facial lacerations requiring several stitches above his right eye. The State alleged that Mr. Soule "...repeatedly and violently **knee[d]**" the inmate in the back when he refused to obey officers' orders during the exchange of handcuffs. The State further alleged that **Mr. Soule's** use of force was excessive because the inmate "was not physically violent but merely failed to obey orders."

The record reflects that on the morning of June 28, 1994, after being denied permission to go to the Prison's law library, Inmate Jose Lebron became verbally and physically abusive to Correctional Officers in the Close Custody Unit and was transferred to the Special Housing Unit, pending administrative review. The inmate was returned to his cell and handcuffed for the transfer. Upon arrival at the SHU, Sgt. Robert Drew and Cpl. Timothy Withington, who were escorting the inmate, turned the inmate over to Corporal Poole who, in turn, directed Correctional Officer Scott Bungay to remove the inmate's handcuffs so that they could be

returned to Sgt. Drew and Cpl. Withington.² Mr. Lebron was ordered to kneel with his legs crossed, facing the wall, for what the witnesses described as standard procedure when exchanging handcuffs.

When the first handcuff was removed from Inmate Lebron's right arm, he was ordered to place his hand on top of his head. Instead, he began waving his arm around, pretending not to understand the officers, shouting in Spanish that he did not understand English. Mr. Lebron also attempted to get to his feet. A very brief altercation ensued and ultimately, he was forced to the floor and handcuffs were reapplied. Mr. Lebron sustained injuries to his ribs, kidney and face and had to be admitted to the infirmary for observation for 48 hours, delaying his scheduled transfer into the custody of federal marshals. The only injury which was visible immediately after the incident was a laceration and extreme swelling in the area of the inmate's right eye. However, X-rays and urinalysis performed approximately four hours later, after the inmate complained of pain in his back, disclosed the other injuries.

The Department of Corrections undertook an investigation of the incident, conducting interviews with inmates and staff, reviewing medical records, and administering polygraph examinations to Mr. Soule and Inmate Ismael Cintron.³ At the conclusion of the investigation, Chief Investigator Christopher Davis prepared a "Report of Investigation to the Attorney General" and the "Investigator's Statement" dated March 16, 1995, some eight and one half months after the incident, which was submitted to the Warden's Office. The investigator concluded that Steven Soule had used excessive force in subduing Inmate Jose Lebron, although he indicated that there was insufficient evidence to prove that the inmate was kicked, as several witnesses had alleged. His report also noted that there was insufficient evidence to prove whether or not the other officers involved in the altercation acted improperly, or might not have been truthful during the investigation.

² Correctional officers are issued a set of handcuffs as part of the personal equipment for which they are responsible. Exchanging handcuffs allows officers to retrieve their own equipment when prisoners are transferred from one unit to another. The Board was advised at hearing that the policy and procedures for executing the exchange of handcuffs has since been modified. The Board welcomes that irrelevant information as the procedure extant at the time of this incident appears both unnecessary and unwise, facilitating incidents of the type at issue.

³ The appellant suggested that some of Mr. Lebron's injuries might have occurred after the handcuff exchange, when he was placed in a cell with Inmate Cintron. As part of the investigation, Cintron claimed that he had seen the altercation and that Lebron had been kicked in the ribs by Mr. Soule. That allegation was the subject of polygraph examinations administered to both Inmate Cintron and Mr. Soule. The Board agreed to exclude all polygraph evidence, or references to the polygraph results themselves.

Mr. Soule argued that he used only the amount of force necessary to regain control of the inmate as quickly as possible. He testified that he was in his office when Inmate Lebron was brought onto the unit, and that one of the prisoner trustees had reported to him that Inmate Lebron was being disruptive. He then heard a call for assistance over the radio. Mr. Soule testified that he responded immediately, and when he rounded the corner into the rotunda, he saw the inmate being physically violent with three officers: Poole, Bungay and Thyng. He testified that the inmate's right hand was free, clenched in a fist, and that he was swinging it at the officers. Mr. Soule testified that by the time he could intervene, the inmate had gotten his right foot flat on the floor and was moving into a standing position. Mr. Soule testified that he then applied a common peroneal strike to the inmate's right leg in an attempt to bring him back down to his knees. Mr. Soule testified that when the inmate did not go to his knees, he used the common peroneal strike as many as three more times to the inmate's right leg trying to bring the inmate down and keep him down until the officers could get him handcuffed again.

Mr. Soule testified that the inmate was combative and assaultive, and that his use of force was not excessive in relationship to the degree of resistance offered by the inmate. Mr. Soule described himself during the incident as "very focused, very concerned, very scared." Mr. Soule also argued that if he had failed to intercede while Officers Bungay, Poole and Thyng were trying to subdue Inmate Jose Lebron, he would have been in violation of Paragraph IV F of the Rules and Guidance for Department of Corrections Employees entitled, "Failure to Assist an Employee in a Hazardous Situation."

"Any employee who fails to immediately render all practical assistance to another employee who is in danger of physical harm or who is attempting to subdue an unruly resident has violated this rule."

The State argued that the degree of force utilized by Mr. Soule constituted a violation of Paragraph IV M of the Rules and Guidance for Department of Corrections Employees entitled "Abuse of a Person Under Departmental Control."

"Any employee who assaults or strikes a person under departmental control, subjects them to improper punishment or deprives them of benefits without justifiable cause may be charged with abuse of a person under departmental control. This rule does not preclude employees from defending themselves from attack or utilizing the force necessary to subdue unruly persons, or to prevent an escape."

Peter McDonald who was Acting Warden at the time of the termination, testified that after first reviewing and discussing the investigative reports and supporting documentation with John Kovaks, head of the Investigations Unit, and Major Guimond, the senior uniformed staff member at the prison, he requested some clarification and additional information. He testified that once that information had been collected and reviewed, he scheduled a pre-determination meeting with Mr. Soule to advise him of the results of the investigation⁴ and to obtain his "input". He testified that Mr. Soule declined to offer any information which would cause him to question the Investigator's findings, or demonstrate a need for further investigation. Mr. McDonald also testified that in light of the investigation results and Mr. Soule's failure to offer any additional information which might explain his conduct, he decided that immediate termination was the only appropriate action he could take.

Mr. McDonald testified that as an employee of the Department for more than 20 years, he has seen plenty of photographs of injured inmates, but few that left him as "dismayed" as the photographs of Mr. Lebron, since he believed the injuries were inflicted by a trained officer who had been warned previously about the use of force. He testified that there were enough staff on hand to control the situation without resorting to the level of force used by Mr. Soule, and that even if Mr. Lebron had managed to break free, he couldn't have gone very far. Mr. McDonald testified that by the end of the incident, as many as six to eight people were involved in restraining Mr. Lebron, and that someone had a hand on the inmate throughout the entire episode.

Sgt. Robert Drew testified that he was one of two officers who escorted Jose Lebron from CCU to SHU on the morning of June 28, 1994. He testified that he and Corporal Withington turned the inmate over to officers at the SHU, who then initiated the exchange of handcuffs. He said that when Mr. Lebron was ordered to put his free hand on top of his head, the inmate pretended not to understand English and began waving his right hand around. He said that he saw Correctional Counselor Kathy Jovin-Leach on the unit and immediately moved her to the Sergeant's Office to isolate her from the incident. He testified that he saw someone "...come at Lebron low and hard," driving Mr. Lebron into the wall where he was kneeling. He testified that he saw that person hold him by the shoulders and knee him several times in the back. He testified that he could not see the officer's face, and knew only that the person was of stocky build with short dark hair, and that he was wearing uniform pants and a white tee shirt. After

⁴ Mr. McDonald said he was unsure why it had taken nine months from the date of the incident to the conclusion of the investigation and ultimate decision to discharge Mr. Soule from his employment as a Corrections Corporal. Mr. McDonald also testified that during that nine-month period, Mr. Soule continued to report to work as scheduled.

talking with Investigator Davis about which officers were on the unit at the time, Sgt. Drew concluded that it must have been Mr. Soule who knocked the inmate into the wall.

Sgt. Drew indicated in both his oral testimony and in his second written statement that he did not believe Inmate Lebron was attempting to strike any of the officers during the incident, but that he was trying to "bait" the officers. Sgt. Drew also testified that when the incident began and he moved Ms. Jovin-Leach into the Sergeant's office, it was to protect her from possible injury as well as to shield her view of the incident as it was occurring. Although Ms. Jovin-Leach's statement was included in the investigative report, she was not called to testify at the hearing on the merits.

Correctional Officer Scott **Bungay**, who was directly involved in the handcuff exchange and ensuing altercation, testified that as he approached Lebron, the inmate began throwing his arm around and trying to stand up. He said it was obvious that the inmate had intentions of assaulting someone. He testified that in spite of the size of the officers involved in trying to subdue Inmate Lebron, the inmate still managed to get one foot flat on the floor and was moving rapidly into a standing position. He testified that when the inmate began to move into a standing position, the officers took him down. Officer **Bungay** testified that after Mr. Lebron was on the floor, he began pushing himself up with his free hand, at which time Officer **Bungay** used a radial arm strike to bring the inmate down. He testified that Mr. Lebron hit the floor without any opportunity to break his fall, and that he believed that was when Inmate Lebron suffered the facial injuries. He testified that he saw Mr. Soule use only one common peroneal strike to the inmate's right leg. He also testified that throughout the incident, he always had control of Inmate Lebron's left arm by holding and manipulating the cuff which was still attached to Inmate Lebron's left wrist.

Sergeant Robert Thyng testified that in addition to refusing orders, Inmate Lebron was disruptive and violent. He testified that when he became involved in the incident, Officers Poole and **Bungay** were trying to get control of the inmate's right arm, which the inmate was swinging around. He testified that the inmate might have been trying to hit someone, or might simply have been trying to free himself. Sgt. Thyng testified that although he weighs almost 200 pounds and was much larger than Mr. Lebron, when he grabbed the inmate's arm, Mr. Lebron started "swinging [him] around". He said the inmate was halfway to a standing position when Mr. Soule kned the inmate in the leg. Sgt. Thyng testified that the incident lasted no more than twenty or twenty-five seconds from start to finish, and that he only saw Mr. Soule apply one common peroneal strike. Sgt. Thyng testified that he did not see the inmate hit the wall, and that while he remembered seeing the inmate hit the floor, he did not see which officers were on him when he fell.

Lt. Steven Westgate testified that he was in his office when the incident occurred. He said that he heard a commotion, with officers yelling orders at the inmate and the inmate responding, "You'll have to kill me first!" He testified that when he stepped out of his office, he saw the inmate down on the floor with one arm beneath him, and that the officers were ordering him to place his hand behind his back so that the handcuffs could be reapplied. He said that he got down face-to-face with the inmate and told him to do what the officers were telling him to do, and that no one wanted to hurt him. He said that he saw the cut and swelling of the inmate's eye.

Correctional Unit Manager Michael Sokolow, who was not present in the unit at the time of the incident, testified that he saw Inmate Lebron in the yard on his way to the infirmary at approximately 9:15 a.m. shortly after the incident. He testified that he saw him again several hours later.¹⁵ Mr. Sokolow testified that when he first saw Mr. Lebron being escorted across the yard that morning, the inmate's eye was cut and badly swollen, but Mr. Lebron was walking without any apparent discomfort. He noted that Mr. Lebron was handcuffed with his hands behind his back at that time. He testified that when he saw Mr. Lebron later in the day, his hands were cuffed in front of him, and he appeared to be walking with obvious discomfort.

Mr. Sokolow testified that as the appellant's supervisor, he found that Mr. Soule could be arrogant and abrasive. He also said that Mr. Soule tended to be too direct in his communications with co-workers and that he needed to be more tactful. However, he testified that throughout the period of time in which he had supervised Mr. Soule, he had never seen Mr. Soule use more than the appropriate or necessary degree of force to gain control of a situation with an inmate.

On July 27, 1995, eight days after the close of evidence in this case, Attorney John Vinson requested that the Board grant his Motion to Consider Newly Discovered Rebuttal Evidence.... He asked the Board to admit into the record a photocopy of a memorandum dated March 28, 1995 from Michael Sokolow, Unit Manager, to Major, Guimond, Bureau of Security.

The Board voted to deny the motion. The proffered memorandum is dated March 28, 1995, the date that the appellant was discharged. Therefore, it could not have been considered as part of the investigation which the record indicates was completed on March 16, 1995. Furthermore, insofar as Mr. Sokolow testified that he was not present in the unit when Mr. Lebron was transferred, his assessment of the inmate's conduct and that of the officers is of relatively little value in deciding the appeal.

FINDINGS OF FACT

1. On May 27, 1993, Mr. Soule received a written warning for failing to meet the work standard. On July 23, 1993, following Mr. Soule's request for informal settlement of that warning, Warden Cunningham offered to remove the letter from Mr. Soule's file after December 7, 1993, provided that certain conditions were met. Those conditions were met, and the warning should have been removed from Mr. Soule's personnel file(s) as agreed. The letter of warning should not have been available for review by either the investigations staff or the acting warden in deciding the truth of the allegations in this instance, or in determining the appropriate disciplinary action to impose.
2. At the time of his dismissal, Mr. Soule had been employed by the Department of Corrections for slightly more than six years. He had attained the rank of Corporal and was assigned to the maximum security unit, otherwise known as the Special Housing Unit.
3. On June 28, 1994, Inmate Jose Lebron was transferred to the Special Housing Unit pending administrative review, after threatening and attempting to strike an officer in the Close Custody Unit.
4. Mr. Lebron was subsequently injured in an altercation with Correctional Officers after his arrival at SHU while struggling to free himself from Correctional Officers who were attempting to effect a handcuff exchange.
5. Immediately following the incident, preliminary medical reports indicated that Inmate Lebron had suffered lacerations to his face, requiring several stitches above his right eye. The same reports also indicated that when the inmate was seen by Dr. Fairley at 9:15 a.m. to have his eye sutured, he also complained of pain in his left wrist, which appeared to have been bruised during the altercation when Correctional Officer Bungay manipulated the handcuff on the inmate's wrist. Approximately 90 minutes after being seen in Health Services for suturing of his right eye, Inmate Lebron began complaining of pain in his back.
6. In spite of allegations, by the inmate and by Corrections Counselor Kathy Jovin-Leave that someone kicked Mr. Lebron during the incident, the investigation did not produce evidence which would prove that Jose Lebron was kicked. Steven Soule admitted that he kned Inmate Lebron "several times" during the altercation, but denied ever kicking, him.

7. Nine months elapsed between the incident involving Inmate Lebron and the termination of Steven Soule. During that period of time, Mr. Soule continued to work without interruption as a Corrections Corporal.
8. The Investigator's conclusions that "Inmate Jose LEBRON was not a physical threat to Correctional Officers he was simply not complying with their verbal orders" is inconsistent with the original statements given by Officers Poole, **Bungay**, Thyng, Soule and Drew.
9. The Investigator reported that he had been unable to "determine if the other officers involved in restraining of the inmate acted improperly or were being untruthful when questioned about this incident. While there appear to have been concerns about the other officers' involvement in the incident and their participation in the investigation, there was no evidence of a further investigation to resolve these issues.
10. The Investigator's conclusion that "Steven SOULE'S use of excessive force probably lead to LEBRON'S ribs being broken" is unsupported by the testimony of Officers Thyng, Poole and **Bungay**.

In his closing argument, Mr. Vinson asked the Board to find that Sgt. Drew's account of the incident was the most credible, as he was the only truly impartial of the observers in this instance. He asked the Board to find that Mr. Soule over-reacted, used poor judgement, and applied excessive force in response to an inmate who had refused to obey orders, but was being neither violent nor dangerous.

While the Board would agree that the amount of force used by the officers as a group was excessive, and that one or more of the officers may have acted in violation of DOC Policies and Procedures governing the use of force, the Board is not persuaded that Mr. Soule's conduct alone warranted his immediate termination. Sgt. Drew's first written statement describing the incident was prepared and submitted by him nine days after the incident. That statement, in his own words and in his own handwriting, says:

"On June 28, 1994 myself and Cpl. Withington took Jose Lebron to SHU for threatening Officer Justin Byrne with harm. When we got to SHU, the officers took control of Jose Lebron. When they took one handcuff off Jose Lebron he physically fought with the officers. CC/CM Kathy Jovin-Leach was in the area, so I took her into the Sgt. Office

so she would not be injured. When I looked back Jose Lebron was on the floor and Lt. Westgate was telling him what to do, what the officers asked of him." (Emphasis added.)

When Drew was later interviewed by Cpl. Davis almost eight months later, Cpl. Davis wrote the statement for Sgt. Drew and described a very different situation:

"Jose Lebron was not being assaultive while on his knees against the wall. He was simply waving his hands saying he didn't understand English (like talking with his hands type thing)."

The State failed to offer a satisfactory explanation for the discrepancy between Sgt. Drew's original assessment, that the inmate was "physically fighting" with the officers as opposed to "simply waving his hands ... like talking with his hands type thing." There are similar discrepancies between the Investigator's findings and the statements of those officers most directly involved in the altercation with Mr. Lebron.

For instance, Investigator Davis concluded that Mr. Lebron was not being combative or assaultive toward the officers, but was "simply not complying with their verbal orders". However, Sgt. Thyng described him as becoming "more combative" throughout the handcuff exchange until he was finally "taken to the floor" and held down. Cpl. Poole wrote that the inmate "...became disruptive while being uncuffed" and that "...he swung his arm at this officer and CO **Bungay** and attempted to stand up." Corrections Officer **Bungay**, who was one of the first officers to take charge of Lebron upon his arrival at the SHU, stated that as soon as the cuff was released from the inmate's right hand, "...he immediately became aggressive trying to stand up and swing his right hand." C.O. **Bungay** said that he had a "goose neck hold" on the inmate's left hand, but that the inmate was still trying to get up, and was "...resisting and trying to assault staff" before he was taken down.

The Board certainly understands that in developing his findings, the investigator needed to consider the possibility that any or all of the officers directly involved in the altercation might have described the incident in such a manner that their actions would be seen as a reasonable response to the degree of resistance offered by the inmate, not excessive force for which they might later be charged. Their description of Inmate Lebron as combative and assaultive is bolstered by Correctional Officer **Byrne's** statement. Byrne, who was not in the SHU and had no active role in the exchange of handcuffs, wrote that Mr. Lebron threatened him and remained "verbally hostile" until he was handcuffed for transfer to SHU, at which point he "attempted to knee" the officer. C.O. Byrne described Mr. **Lebron's** frame of mind at the time of the transfer as "very abusive and assaultive."

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While the appointing authority has given great weight to Sgt. Drew's and Cpl. Withington's reports that the inmate was cooperative while being escorted to SHU, it appears to have ignored statements by Officers Bungay, Thyng, Poole and Soule about change in the inmate's behavior once the handcuff exchange was initiated. The appointing authority has also neglected to offer a reasonable explanation why it believes that Mr. Soule should bear full responsibility for injuries sustained by the inmate, when there were at least **three** other officers actively involved in restraining the inmate, and as many as six to eight after they had wrestled him to the floor.

The Board is troubled by the appointing authority's rather disingenuous reference to an earlier written warning Mr. Soule received for use of excessive force. Mr. Soule's decision to accept the appointing authority's conditions for removal of that warning from his file does not constitute an admission by him that any of the allegations contained therein are true. Mr. Soule testified, without dispute, that in light of Mr. Soule's good work performance, Warden Cunningham had offered to remove the warning from his "DOC file" after a period of six months, provided that he could obtain a recommendation to that effect from his supervisor, and provided that there were no other allegations of misconduct. Mr. Soule agreed to the terms which the Warden offered.

The appointing authority did not advise Mr. Soule that while it would remove the letter from his file on the unit, it intended to retain the letter in another file, or that it reserved the right to rely on the letter at a future date to support some other personnel action. Had Mr. Soule been aware of the department's intentions, he might not have agreed to the proposed informal settlement and would have retained the option of disputing the facts of the warning before this board. Therefore, in light of the appellant's good faith understanding of his agreement with the Warden, the Board found that the State may not rely on the warning as either evidence of prior discipline or proof of a course of conduct.

The letter of termination states, in part:

"... Repeatedly and violently kneeling an inmate who was not physically violent but merely failed to obey orders clearly violates these policies [addressing abuse of a person under departmental control]. The inmate involved sustained three 'broken ribs, a bruised kidney, and several stitches in his forehead as a result of the excessive force applied to him."

All three officers referred to the inmate hitting the floor after a radial arm strike was used to take him down. They all indicated that he was unable to break his own fall and hit the floor with his face. Accordingly, the Board found that Mr. Soule was not personally responsible for

the inmate's facial lacerations. In fact Officer Thyng who administered the radial arm strike may be more responsible than the appellant for that injury.

Sgt. Drew testified that he had seen someone "come in low and hard" driving the inmate into the wall, but that he had been unable to make a positive identification of that person. He later concluded that it must have been Mr. Soule, although he formed that opinion only after discussion with Investigator Davis. Dr. Johnson's written statement asserted that he had seen officers stepping on the inmate's back to hold him in a prone position once he was down. Use of feet to hold the inmate down could explain how the inmate's ribs were broken and his kidney bruised. Dr. Johnson's observations are more consistent with Ms. Jovin-Leach's claim that an unidentified officer kicked the inmate, and with Mr. Lebron's claims that he was kicked after he hit the floor.¹⁶ Having considered those factors in light of the statements given by C.O. Bungay, Cpl. Poole and Sgt. Thyng, the Board found that there was insufficient evidence to prove that Mr. Soule broke the inmate's ribs or bruised his kidney by "kneeing" him in the back.

While the Board believes that the overall level of force used in this instance was excessive, and that Mr. Soule should be disciplined severely for his participation in this incident, neither the cumulative effect of that force nor the extent of the injuries sustained by the inmate should be blamed entirely upon Mr. Soule. The investigative report itself attributes Lebron's facial injuries to his hitting the floor after Sgt. Thyng struck him in the radial nerve of his right arm, causing him to collapse to the floor without any opportunity to break his fall. The investigative report claims that the inmate said he was taken to the floor by officers who had jumped on his back and that he couldn't breathe. He allegedly said that after his left arm was thrust up behind his back, the officers began banging his head on the floor, and that Mr. Soule had run up and kicked him. With the exception of the alleged kick, of which there was no proof, the remainder of the allegations refer to "the officers".

RULINGS OF LAW

1. Per 1001.08(a)(4) of the Rules of the Division of Personnel provides for the immediate dismissal of an employee, without prior warning, if the employee is found to be "...the aggressor in a fight or an attempt to injure another person in the workplace."

The Board notes that while it received no direct testimony from Mr. Lebron, statements attributed to Mr. Lebron through Investigator Paggliccia make no reference to his being slammed into the wall or kneed in the back, but concentrate on injuries he sustained after he had already been taken down to the floor.

While there is undisputed evidence that Inmate Jose Lebron sustained injuries as a result of an altercation with Correctional Officers on the morning of June 28, 1994, and that the cumulative response by as few as four or as many as eight Correctional Officers was excessive, the appointing authority did not prove, through a preponderance of the evidence, that Mr. Soule was the **demonstrated** "aggressor in a fight or an attempt to injure another person in the workplace." Therefore, Mr. Soule should not have been terminated under the provisions of Per 1001.08 (a)(4).

2. Per 1001.08(b)(3) of the Rules of the Division of Personnel provides for the dismissal of an employee, with or without prior warning, for violation of a posted or published policy, the text of which clearly states that violation of same may result in immediate dismissal.

DOC Policy 2.16, Section I, Subsection 2 states, "Violation of these rules may subject the violator to disciplinary action and/or discharge under the provisions of the Rules of the department of Personnel..." DOC Policy 2.16, Section IV, Subsection M - Abuse of a Person Under Departmental Control, states, "Any employee who assaults or strikes a person under departmental control, subjects them to improper punishment or deprives them of benefits without justifiable cause may be charged with abuse of a person under departmental control...."

The department's policy allows the appointing authority absolute discretion in determining whether or not to charge an employee with abuse of a person under departmental control. Through the adoption of its policy, the department has also allowed itself absolute discretion in deciding whether or not to discipline employees who are proven to have abused persons under departmental control. The Board found that the breadth of discretion which the appointing authority has reserved for itself in this instance is inconsistent with the intent of Per 1001.08(b)(3).

3. Per 1001.05(b)(3)a., authorizes an appointing authority to immediately suspend an employee, without pay, without prior warning, for "threatening the safety of another employee or client."

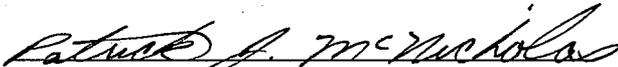
Mr. Soule's conduct on the morning of June 28, 1994, and the level of force used by him in response to the degree of resistance offered by the inmate constituted a violation of Per 1001.05(b)(3)a., whereby Mr. Soule threatened the safety of a "client", for which the appointing authority would be authorized to suspend Mr. Soule without pay. The seriousness of his conduct warrants a suspension in excess of 20 days.

DECISION AND ORDER

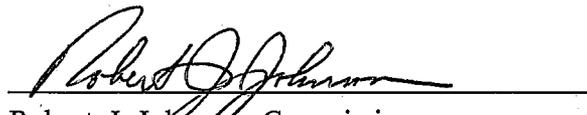
After careful, thoughtful deliberation, the Board voted unanimously to reinstate Mr. Soule to his former position classification at the Department of Corrections, reducing his termination to a five month disciplinary suspension without pay for the period of March 28, 1995 through August 27, 1995. Mr. Soule's reinstatement shall be made without benefit of back pay, seniority credit, leave accrual, retirement credit or reimbursement of **medical/dental** expenses for himself or any legal dependent(s) of his, which otherwise would have been considered eligible for payment under a State-paid medical or dental insurance plan which may have been incurred by him or any legal dependent(s) during the period of suspension.

Mr. Soule shall be returned to active status effective August 27, 1995, and shall be returned to duty and to pay status immediately thereafter, provided, however, that Mr. Soule shall be permitted to give a reasonable period of notice of resignation to his current employer (if any), and to work out that period of notice up to a maximum of 30 days from the date of reinstatement to active status. Any notice period which the appellant elects to take shall be treated as an approved, unpaid leave of absence without pay.

THE PERSONNEL APPEALS BOARD


Patrick J. McNicholas, Chairman


Mark J. Bennett, Vice-Chairman


Robert J. Johnson, Commissioner

cc: Virginia A. Lamberton, Director of Personnel
John E. Vinson, General Counsel, Department of Corrections
M. J. Mickey Busca, SEA Legal Intern