

November 28, 2022



DOC Legal Division
Attn: Michele Dupis-Clark, Program Coordinator III
70 Franklin Street, Suite 600
Boston MA 02110-1327

RE: Information Request

Dear DOC Legal:

I am writing to request the proposed changes to :

103 CMR 505 , Use of Force

Please accept this as a public records request if required to provide this information.

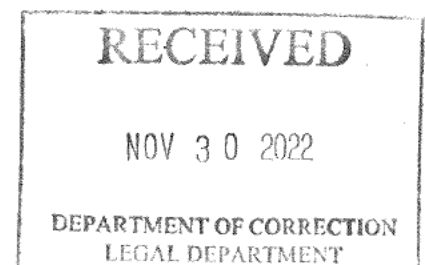
Also please place me on your mailing list for all proposed changes.

Thank you for your time and attention in this matter.

Sincerely,



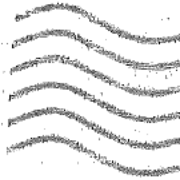
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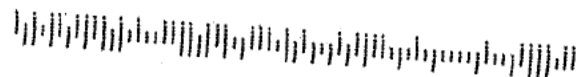
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DOC Legal Division
Attn: Michele Dupis-Clark, Program Coordinator III
70 Franklin Street, Suite 600
Boston MA 02110-1327

02110-132799



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contents may not have been evaluated and the
Department of Correction is not responsible
for the substance or content of the enclosed
material. If you have received unwanted
correspondence from this inmate call
1-866-684-2846 to stop future correspondence.



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Governor

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Lieutenant Governor

TERRENCE M. REIDY
Secretary

The Commonwealth of Massachusetts
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Legal Division
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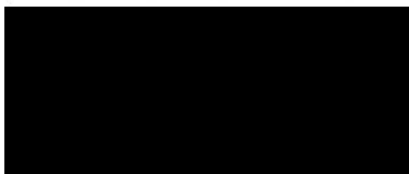
CAROL A. MICI
Commissioner

SHAWN P. JENKINS
Chief of Staff

KELLEY J. CORREIRA
ROBERT P. HIGGINS
MITZI S. PETERSON
THOMAS J. PRESTON
Deputy Commissioners

NANCY ANKERS WHITE
General Counsel

December 16, 2022



Re: 103 CMR 505 – Use of Force; December 19, 2022 Public Hearing

Dear [REDACTED]:

I am in receipt of your letter dated November 28, 2022. This letter is not a comment on the proposed version of 103 CMR 505, Use of Force, but is a request for a copy of the proposed version of the policy.

Please note that the proposed version of 103 CMR 505, Use of Force, was posted in the library at MCI-Norfolk. Notwithstanding this, your request is being treated as a public records request and I am enclosing a copy of the proposed regulation.

If you wish to challenge any aspect of this response, you may appeal to the Supervisor of Public Records following the procedures set forth in 950 CMR 32.08. You may also file a civil action in accordance with M.G.L. c. 66, sec. 10A.

Regards,

Michele Dupuis-Clarke, Program Coordinator III
Legal Division

Ms. Michele Dupuis-Clarke

December 1, 2022

Program Coordinator III

Department of Correction

70 Franklin Street

Suite 600

Boston, Massachusetts 02110

RECEIVED

DEC - 5 2022

DEPARTMENT OF CORRECTION
LEGAL DEPARTMENT

RE: 103 CMR 505: Use of Force Amendments

Dear Ms. Dupuis-Clarke,

In regard to the up-coming Amendment changes to 103 CMR 505 use of force, I offer the following: Humanization on how force by staff is used. I base this upon the following experience.

While confined in [REDACTED] use of force was wrongfully used against me. I was at time on a hunger-strike refusing both food + fluids. On the 4th day, I was informed that the medical doctor wanted me to be house in the Health Service Unit (HSU) for observation. I did refuse to move. My reason for the refusal was that I could undergo the same observation in my [REDACTED] cell.

After a brief period of refusing the move, I was then informed that Superintendent Steven Silva had ordered the extraction team to move me. It was either without or with force.

When those officers came to my cell in full protection gear, I was ordered to go to the door to be cuffed. I stood in the middle of the floor saying, or doing, nothing. The order to go to the door to be cuffed was given multiple times, with no response given.

When I saw the door slot open, I knew that a chemical agent was going to be used for wrongful reasons. For that reason, I grabbed my blanket from my bed and held it in front of me above my head. I was given three "shots" of the chemical agent without a reaction.

The cell door then opened and they rushed into the cell. During this time I received head injuries.

As I was escorted out of the cell in full restraints, I did notice that I was leaving a trail of blood on the floor.

Since I was in the HSU, my injuries were treated by medical staff. A suture doctor was called to close the head wounds.

Please let the record reflect that at that time, I was in my early 60's and that I had been on a full hunger strike for 9 consecutive days. I provided nothing to the

- OVER -

move team to justify their use of excessive force against me. Yet, they had been ordered to use force, if necessary, by Superintendent Silva. Force is one thing used within a prison. But, the use of excessive force must be banned.

This matter has convinced me that 203 and 303 does indeed need to be revised. Human understanding must be utilized when no real opposition is used against complying with staff orders.

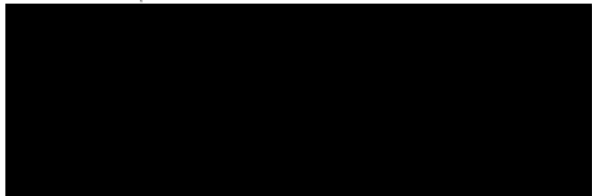
Relative to the proposed changes, human error in complying with them will exist due to no proper oversight being utilized to compell compliance.

Thank you for hearing my plea. Hopefully incidents such as the above will not take place again.

Sincerely,

[REDACTED]

It Is More Honorable To Correct A Wrong
Than It Is To Persist In It.



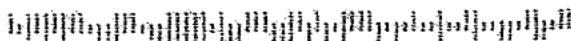
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Michele Dupuis-Clarke
Program Coordinator III
Department of Correction
70 Franklin Street, Suite 600
Boston, Massachusetts 02110

02110-132799





CHARLES D. BAKER
Governor

KARYN E. POLITO
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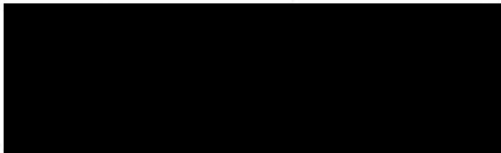
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MITZI S. PETERSON
THOMAS J. PRESTON
Deputy Commissioners

NANCY ANKERS WHITE
General Counsel

December 16, 2022



Re: 103 CMR 505 - Use of Force

Dear [REDACTED]:

Thank you for submitting comments regarding proposed changes to the Department of Correction 103 CMR 505 – Use of Force. This type of feedback provides valuable insight and perspective to the Department as it endeavors to promulgate effective regulations.

While I am unable to remark upon the specifics of what you describe in your comment, I assure you that your comments will be taken into consideration as the regulation continues to undergo review prior to promulgation.

Regards,

Michele Dupuis-Clarke, Program Coordinator III
Legal Division

BOSTON MA 020

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US POSTAGE

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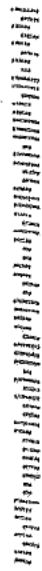
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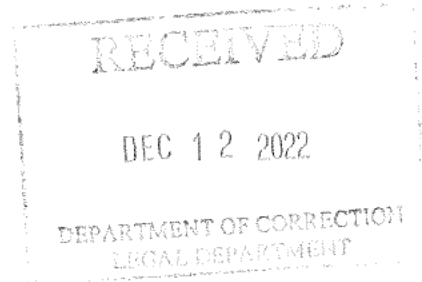
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MICHELE DUPUIS-CLARKE
PROGRAM COORDINATOR ILL
REGULATIONS COORDINATOR
DEPARTMENT OF CORRECTION
LEGAL DIVISION
75 FRANKLIN STREET SUITE 600
BOSTON MA 02110

02110-130175



Michele Dupuis-Clarke
Program Coordinator III
Regulations Coordinator
Department of Correction
Legal Division
75 Franklin Street Suite 600
Boston MA 02110



RE: Public Notice

Dear Michele Dupuis-Clarke
Program Coordinator III


Salutations.

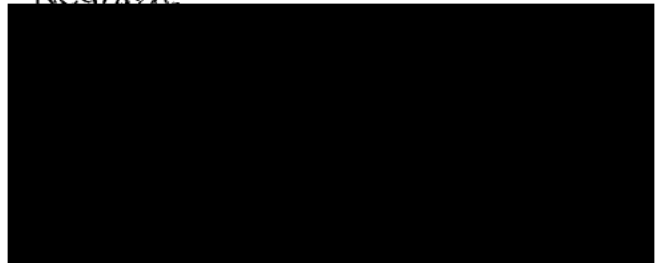
Thank you for the Public Notice regarding proposed changes to DOC Regulations.

Please maintain my name on your mailing list for Public Notice pursuant to MGLc 30A § 223.

Thank you.

Regards

Date: 12/06/2022
handcopy 



Michele Dupuis-Clarke
Program Coordinator IIZ
Regulations Coordinator
Department of Correction
Legal Division
75 Franklin Street Suite 600
Boston MA 02110

RE: Proposed Changes to 103CMR 505.00 USE OF FORCE

Dear Michele Dupuis-Clarke Program Coordinator IIZ
Salutations.

103CMR 505.00 Use of Force is scheduled for hearing. Thank you for Public Notice. The Librarian provided me with copy of the draft.

"...A hearing is intended to educate an agency to approaches different from its own, in shaping the final rule it may may and should draw on the comments tendered." South Terminal Corp. v. Environmental Protection Agency, 504 F.2d 646, 659 (1st Cir. 1974)... "Grocery MFRS. of Am. v. Dept. of Public Health, 393 NE 2d 881, 888, 379 Mass. 70 (Mass. 1979).

The copy of current 103CMR 505.00 (8/7/04) was provide to me by Harvard PLAP. It would seem that is the regulation is being considered for amendments, so shall be referred to by me. However the draft has renumberings and not much left of the current regulation so the draft may be noted in these comments.

1) 103CMR 505.04: Access to Regulations

"Copies of 103 CMR 505.00 shall be posted and maintained in prominent places accessible to all employees and inmates..."

The draft deletes "posted and" & "in prominent places" and inmates". Because the current regulation has force of law, I suggest before making the proposed changes, to first enforce the above current wording. Have an independent auditor inspect institutions to see if 103 CMR 505.00 is posted and maintained. If not pursuant 103CMR 505.16 employees should be subject to disciplinary action. Before the regulation is amended that should be done. Clean house sort of speak.

one

2) Amend 103 CMR 505:04 Access to Regulations by adding the following as last sentence.

An electronic copy of 103 CMR 505:00 Use of Force shall be accessible to all inmates as a free download onto a tablet possessed by the inmate.

Data, views & arguments

103 CMR 505:00 Use of Force is already in electronic format on the DOC website. DOC can have the electronic format copy made available to Keefe Commissary Network (KCN) (Access). A SCORE 5 and/or SCORE 7 tablet has "Agency" in the catalog for selecting Agency downloads, e.g. Understanding the COVID-19 Vaccine &c. Once purchased as a download, the item goes to "My Agency" for access. Hence, the means to have 103 CMR 505:00 Use of Force as free electronic download are available. In lue of make a new App, for Regulations. Being on a tablet increases the access.

In September 5, 2021 I wrote Kate Silvia, Director of Communications asking to have some basic DOC CMRs and/or policies made available for download on tablet. September 15, 2021 reply as follows.

This responds to your correspondence dated September 5, 2021 regarding adding a policy section to the catalog in the tablets.

Please be advised that I have forwarded your letter to Support Services as that is the Division who oversees the tablets, not this office.

That would be Gary Temple, Director Support Services. To date the CMRs and/or DOC policies are not available on the tablet.

The Contract has a means.

6.000 c. Free Content: All inmates who receive a new SCORE 7 tablet will have access to certain free content including, but not limited to, the following:

- 000 Agency Documents, 000

- 000 Gutenberg eBooks, 11 1/2

(Fourth Amendment to the Contract Between the Department of Correction and Keefe Commissary Network LLC For Inmate Commissary and Related Items RFR #17-DOC-COMMISSARY, at 4. Updates (c)).

Notice it has Agency Documents. In some part, that may refer to the DOC memos in the Canteen App informing of changes in canteen items.

Nonetheless, regulations could be made available for free download on a tablet. It may be like the Gutenberg Books app. I have 596 free books downloaded. I notice Storage Files 0.58 GB which may be the books &c.

Wherefore, to help inform inmates of the regulation I ask that the above sentence be promulgated.

3) Amend 103 CMR 505.7(4) which in Draft becomes 103 CMR 505.10 Duty to Intervene by adding this sentence.

When the abused inmates asks for help another inmate shall have the right to intervene to stop the use of excessive force.

Data, views and arguments.

First as to the draft at 103 CMR 505.10 Duty to Intervene is consistent with some case law, so proper to promulgate.

"...[A]s a general rule, there is no duty to protect another from the criminal conduct of a third party. See *Luoni v Berube*, 431 Mass. 729, 731, 729 N.E.2d 1108 (2000); *Anthony A. v. John G.*, 415 Mass. 196, 200, 612 N.E.2d 663 (1993); *Mullins v. Pine Manor College*, 389 Mass. 47, 50, 449 N.E.2d 331 (1983). However, such a duty arises when there is a 'special relationship' between the defendant and the injured victim. See *Luoni v. Berube*, supra at 731-732, and cases cited. 'Special relationships exist in several situations, based either on responsibilities imposed by statute or common law (or both). A special relationship, when derived from common law, is predicated on a plaintiff's reasonable expectations and reliance that a defendant will anticipate harmful acts of third persons and take appropriate measures to protect the plaintiff from harm.' *Id.* at 732. See *Restatement (Second) of Torts* § 314A (1965) (one who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection has special relationship giving rise to duty to aid or protect)... *Kavanagh vs. Tes. of Boston Univ.*, 440 Mass 195, 201, 795 NE2d 1170, 1176 (2003), cf. *Roe v Northeastern Univ* 2019 Mass Super LEXIS 19.

A staff person has a duty to protect the abused inmate because of such special relationships exists. In support is the 8th Amendment of the US Const. "iii. Prison officials also have a duty to protect inmates from violent treatment by other guards. *Whitley v. Albers*, 475 U.S. 312, 319 (1986) / see e.g., *Smith v. Mensinger*, 293 F.3d 641, 650-51 (3d Cir. 2002) (8th Amendment claim stated because guard failed to intervene when other guards were attacking prisoner) ...". 41 Geo. L.J. Ann. Rev. Crim. Proc. (2012) page 1046, footnote 3037.

Second: The above proposed sentence is based on *Commonwealth v. Martin*, 369 Mass. 640, 341 N.E.2d 885, 1976 Mass. LEXIS 873.

Defendant Dantel R. Martin appealed his convictions, from his multiple convictions, arising from a clash between inmates and guards at Massachusetts Correctional Institution at Concord on October 15, 1972.

"... When his cell was opened, he walked to the end of the partition but, seeing blood on the floor and hearing sounds of a struggle on the stairs, he started back to his cell. He then heard Tremblay calling for help and surmised that Tremblay was in grave danger. The defendant raced down the stairs and saw Officer Quealey and two other officers striking Tremblay with clubs and a metal mop handle as he lay on the floor of an open cell. Tremblay had his arms over his head and was trying to fend off the blows. He was yelling for help. The defendant struck several officers, including Officers, including Officers Quealey and Taylor, with his fists in his effort to pull the officers off Tremblay..." Ibid. 369 Mass 640; 643, 341 NE2d 885, 888.

In *Com. v Martin* the SJC agreed with *United States v. Grimes*, 413 F.2d 1376 (7th Cir. 1969) a case resembling the *Martin* case, see Ibid. 369 Mass at 650-651, 341 NE2d at 892.

"We agree with the court in the *Grimes* case that the justification of defense of a third person does not necessarily stop short at the prison gates. But the fact that an episode occurs in prison may have considerable significance. So the question of the reasonableness of a belief that an inmate would be justified in using force against a prison guard, thus justifying intervening protective force, is conditioned by the fact that the guard, by the nature of his job, is himself privileged to apply force to inmates when necessary to preserve order in the institution. Therefore the guard's mere

taking an inmate into custody or holding him in custody would not be a proper occasion for intervening force. This may have an important bearing on the present case in the event of retrial.

Judgments reversed.

Verdicts set aside...

Ibid. 369 Mass. 640, 651, 652, 341 N.E.2d 885, 892.

The above requested sentence "When the abused inmate asks for help another inmate shall have the right to intervene to stop the use of excessive force..." should be promulgated. It would educate an inmate to when it is lawful to intervene.

The SBCC staff deprive me of my television. Regardless of their efforts to keep me informed on what is going on in the country I have heard about George Floyd. A police officer had his knee on George Floyd's neck. Officers would not let observers intervene. Unfortunately George Floyd died because he did not have a Grimes, and/or Martin to intervene. Just saying.

4) Amend 103 CMR 505.16: Sanctions for Violation of Regulation by adding this sentence. [Draft is 103 CMR 505.24].

For just cause pursuant to M.G.L. c. 127 § 12; c. 30 § 9B; and c. 31 § 4 the Commissioner shall forthwith remove any officer or employee who is unfaithful or incompetent by violating 103 CMR 505.00.

Data, views & arguments

Any officer or employee that violates 103 CMR 505.00 is unfaithful or incompetent, so subject to removal by the Commissioner. The above wording educates staff and inmates about that.

4) Keep 103 CMR 505.10: Requirements Governing the Use of Chemical Agents.

103 CMR 505.10 has the force of law. All that wording is important by establishing by Regulation the use of Chemical Agents.

I am latent Tuberculosis Patient, have C.O.P.D. (inactive) and Chronic care for heart condition. Pursuant 103 CMR 505.10(3)

"Inmates in adjacent cells shall also be checked for contraindications. If necessary, the inmate(s) shall be moved to a non-affected area before chemical agents are used unless an emergency exists requiring the immediate use of chemical agents."

When I was in [REDACTED] staff would ask me if I wanted to be removed from cell before a chemical agent was used on another inmate on the tier. That was proper procedure.

At [REDACTED] when I have been in [REDACTED] and [REDACTED] staff have used chemical agents on inmate a few cells down without making any effort to ask me if I want to leave the tier. My lungs hurt for at least a day after that.

The current wording should be kept.

Any thing about Chemical Agents is during so called Emergency with inmates fighting, an officer, believe Lieutenant gives order to stop or be sprayed. Chemical agent gets sprayed without regards to others with Chronic Care.

For an officer to be carrying a Chemical Agent it clearly is a PLANNED use of force. They may have had to sign it out, come to unit, spray it. That is all planned not a spontaneous use of force.

5) Specialty Impact Device as defined by 103CMR 505.5 should be banned from use. They are used without consideration as to if the inmate is Chronic Care, has heart condition, has Face Maker, etc. Staff may kill an inmate.

6) Amend 103CMR 505.07: Use of Force by adding this subsection (6).

(6) An employee shall not order an inmate to get down on the floor and/or ground.

Data, views & arguments.

I have seen officer come into [REDACTED] with bean bag weapon. He aims red laser on chest of inmate ordering inmate to get down. Seconds later boom shot the inmate.

An inmate may have a sincere religious belief such as "Thou shalt not bow down to man." An officer is not god deserving

such worship of bowing down to the officer. The above subsection shall protect the religious rights of inmates.

Thank you for considering some of my comments.

Respectfully Submitted

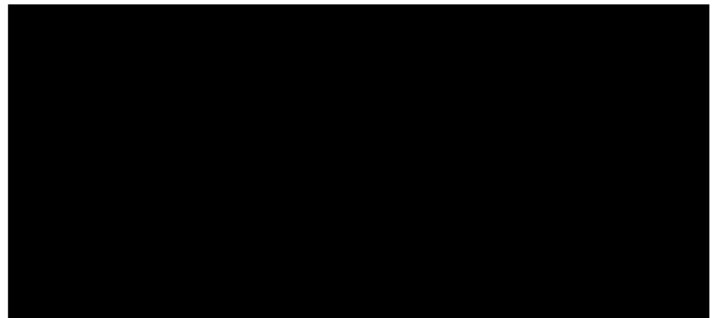
Date: 12/06/2022

p.c.



P.L.S.

enclosure



369 Mass. 640, *640; 341 N.E.2d 885, **885; 1976 Mass. LEXIS 873, ***1

Caution
As of: August 13, 2019 2:59 PM Z

Commonwealth v. Martin

Supreme Judicial Court of Massachusetts
November 4, 1975, Argued ; February 2, 1976, Decided
No Number in Original

Reporter

369 Mass. 640 *; 341 N.E.2d 885 **; 1976 Mass. LEXIS 873 ***

Commonwealth v. Daniel R. Martin

Prior History: [***1] Middlesex.

Indictments found and returned in the Superior Court on October 25, 1972.

The cases were tried before *Lappin*, J. The cases were reported by the Appeals Court.Disposition: *Judgments reversed. Verdicts set aside.*

Core Terms

inmates, instructions, assault, prison, guards, knife, use of force, cell, third person, convicted, cases, floor, correctional institution, self-defense, weapon, intervening, discipline, requests, battery, fight

Case Summary

Procedural Posture

Defendant appealed his convictions in Middlesex Massachusetts Superior Court on the basis that the trial judge refused to instruct jury with respect to defendant's claimed justification, that convictions were part of his attempt to come to aid of a fellow inmate who was being beaten by prison guards.

Overview

Prosecution and defendant agreed that defendant's convictions stemmed from a fight between correction officers and inmates. At trial, defendant testified that he saw corrections officers strike his friend, a fellow inmate, with clubs and a metal mop handle. The defendant admits that he struck several officers with his fists while trying to pull them off his friend. Evidence was controverted as to defendant's possession and use of a knife. Defendant's counsel requested jury instructions on justification, aid of another, which were refused. On

appeal, court reasoned that refusal was based on judge's belief that claimed justification was not recognized by Massachusetts. The court held that state law recognized justification of use of intervening protective force.

Outcome

Convictions reversed and set aside because Massachusetts recognized justification of use of force to protect another.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Jury
Instructions > Particular Instructions > Theory of
Defense

HN1 Theory of Defense

When evidence on the part of a defendant is sufficient to lay a basis for a charge to the jury on the justification claimed by him, it is of course immaterial that the triers might very well, in the end, lend no credence whatever to the defendant's version of the facts. However incredible the testimony of a defendant may be he is entitled to an instruction based upon the hypothesis that it is entirely true.

Criminal Law &
Procedure > Defenses > Justification

Criminal Law & Procedure > Trials > Jury
Instructions > Requests to Charge

HN2 Justification

See Ill. Ann. Stat. c. 38, § 7-1 (1972).

Governments > Legislation > Interpretation

Criminal Law &
Procedure > Defenses > Justification

Criminal Law & Procedure > Defenses > Self-
Defense

HN3 Interpretation

A justification corresponding roughly to Ill. Ann. Stat. c. 38, § 7-1 (1972) is recognized by the law of the Commonwealth of Massachusetts. Of course the justification may exist although it is not found in so many words in the Commonwealth's statute law: it may be read into the definition of a statutory offense or considered a common-law adjunct to, or qualification of, the offense. This is easily accepted and understood as to the more commonplace justification of self-defense.

Criminal Law &
Procedure > Defenses > Justification

HN4 Justification

It is hardly conceivable that the law of the Commonwealth of Massachusetts, or, indeed, of any jurisdiction, should mark as criminal those who intervene forcibly to protect others. To the fear of "involvement" and of injury to oneself if one answered a call for help would be added the fear of possible criminal prosecution.

Criminal Law &
Procedure > Defenses > Justification

HN5 Justification

The essence of conditions justifying the use of intervening protective force is this: An actor is justified in using force against another to protect a third person when (a) a reasonable person in the actor's position would believe his intervention to be necessary for the protection of the third person, and (b) in the circumstances as that reasonable person would believe them to be, the third person would be justified in using such force to protect himself. The reasonableness of the

belief may depend in part on the relationships among the persons. An actor's justification is lost if he uses excessive force, e.g., aggressive or deadly force unwarranted for the protective purpose.

Criminal Law &
Procedure > Defenses > Justification

HN6 Justification

The justification of defense of a third person does not necessarily stop short at the prison gates. But the fact that an episode occurs in prison may have considerable significance. So the question of the reasonableness of a belief that an inmate would be justified in using force against a prison guard, thus justifying intervening protective force, is conditioned by the fact that the guard, by the nature of his job, is himself privileged to apply force to inmates when necessary to preserve order in the institution. Therefore the guard's mere taking an inmate into custody or holding him in custody would not be a proper occasion for intervening force.

Headnotes/Summary

Headnotes

Assault, Defense of others. *Practice*, *Criminal*, Charge to jury; Exceptions: general exception.

Syllabus

In a trial on charges arising from a clash between inmates and guards at a prison, evidence that the defendant heard another inmate calling for help and saw the inmate being beaten by prison officers with clubs and a metal mop handle as he lay on the floor and that he then struck the officers with his fists in an effort to pull them off the inmate was sufficient to lay a basis for a charge to the jury on the defendant's claimed justification that use of force to protect another is privileged. [642-644]

Where the transcript of a criminal trial suggested that the judge was looking at the defendant's written request for instructions when defense counsel took his exception to the omission of certain instructions by referring to the numbers in the written request and where, in light of the line of interrogation counsel had

pursued throughout [***2] the trial, a colloquy with counsel at the bench, and counsel's summation, the judge must have been aware that the omitted instructions constituted the keystone of the defense, the exception was sufficient to advise the judge of the asserted error. [644-646]

Use of force, not excessive in the circumstances, against another to protect a third person is justified when a reasonable person in the actor's position would believe that intervention was necessary for the protection of the third person and that the third person would be justified in the circumstances in using such force to protect himself. [646-652]

Counsel: Joseph F. Flynn for the defendant.

Alan L. Kovacs, Assistant District Attorney, for the Commonwealth.

Judges: Tauro, C.J., Quirico, Braucher, Hennessey, & Kaplan, JJ. Mr. Chief Justice Tauro participated in the deliberation on this case, but retired before the opinion was issued.

Opinion by: KAPLAN

Opinion

[*641] [**887] The defendant Daniel R. Martin appeals under G. L. c. 27B, §§ 33A-33G, from his multiple convictions, described in the margin, 1 [***4] arising from a clash between inmates and guards at Massachusetts Correctional Institution at Concord on October [***3] 15, 1972. The issue on appeal is whether the trial judge committed error in failing to instruct the jury with respect to the defendant's claimed

¹With regard to the alleged attack on Officer Quealey, the defendant was convicted of assault and battery on a guard of a correctional institution (G. L. c. 127, § 35B), assault and battery with a dangerous weapon (G. L. c. 265, § 15A), and armed assault with intent to kill (the indictment was for such assault with intent to murder, G. L. c. 265, § 15, see Commonwealth v. Demboski, 283 Mass. 315, 321-324 [1933]). As to the alleged attack on Officer Taylor, the defendant was convicted of assault and battery on a guard of a correctional institution, and assault with a dangerous weapon (G. L. c. 265, § 15B), the judge having directed a verdict on the charge of battery with a dangerous weapon.

justification or defense, namely, that the acts of which he was accused were part of an attempt on his part to come to the aid of a fellow inmate and friend, Gene Tremblay (tried and convicted together with the defendant ²), who was being unlawfully beaten by [*642] prison guards. The Commonwealth, without expressly conceding the matter, does not actually dispute that the evidence adduced by the defendant at the trial provided a basis in fact for such instructions. It contends, however, that no proper request was made for the instructions, ³ and doubts whether the law of Massachusetts recognizes the use of force for the protection of another person as a justification or defense for the actor.

1. We sketch very briefly the facts as they appeared at trial. The prosecution was of course intent to show that the defendant's acts were simply aggressive attacks on the correction officers in a prison brawl, while the defendant strove to prove that he acted honestly and reasonably upon observing the inmate Tremblay being beaten by the officers.

According to the prosecution's case, a struggle erupted between two correction officers and two inmates as the inmates were being escorted from a second-floor segregation unit down to a first-floor area for showers and exercise. One of the inmates, Tremblay, fought with an officer near the stairwell and the officer fell or was shoved down the stairs, with Tremblay following him down. The fallen officer yelled to officers on the first floor for help, and one of them, John Quealey, restrained Tremblay, while others went to summon aid. Officer Quealey held Tremblay [***5] by the hair while pushing him toward and into an open cell on the first floor. According to the prosecution's proof, Tremblay was held in the cell but not beaten; no clubs or other weapons were used by the officers in the affray although it appeared that clubs were kept in a nearby desk.

Meantime the second inmate involved in the fight on the second floor had taken the cell keys from the other officer and released other inmates of the segregation unit. Several of the inmates, including the [***888] defendant, ran down the stairs and met officers who had

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The defendant took the stand to give his version of the facts. He was corroborated in part by the codefendant Tremblay. Because the defendant's view was obstructed by a partition between the rows of cells on either side of the second floor, he had not been able to see the fight there and did not know who had started it. When his cell was opened, he walked to the end of the partition but, seeing blood on the floor and hearing sounds of a struggle on the stairs, he started back to his cell. He then heard Tremblay calling for help and surmised that Tremblay was in grave danger. The defendant raced down the stairs and saw Officer Quealey and two other officers striking Tremblay with clubs and a metal mop handle as he lay on the floor of an open cell. Tremblay had his arms over his head and was trying to fend off the blows. He was yelling for help. The defendant struck several officers, including Officers Quealey and Taylor, with his fists in his effort to pull the officers off Tremblay. The defendant denied that he had a knife at this time; he did not stab Officer Quealey or threaten Officer Taylor with a knife. [***7] He testified that he first saw the knife on the floor where another inmate had dropped it after the stabbing of Officer Quealey.

The violence ended when assistant deputy superintendent Nicholas Genakos ordered the officers to withdraw [*644] while he and Jon Cooke, a social worker, negotiated with the inmates. During the negotiation Cooke saw the defendant with a knife and, when Genakos asked for it, the defendant said, "We'll see how this goes." The defendant testified that he made the statement and that he did have a knife, but only for a short interval when Cooke saw it. A search by the State police after the inmates had returned peacefully to their cells failed to turn up a knife.

HN1 [***] The evidence on the part of the defendant, summarized above, was sufficient to lay a basis for a

charge to the jury on the justification claimed by him (see point 3 below). It is of course immaterial that the triers might very well, in the end, lend no credence whatever to the defendant's version of the facts. As was said in Commonwealth v. Campbell, 352 Mass. 387, 398 (1967), quoting from People v. Carmen, 36 Cal. 2d 768, 773 (1951), "However incredible the testimony of a defendant [***8] may be he is entitled to an instruction based upon the hypothesis that it is entirely true." See Commonwealth v. Vanderpool, 367 Mass. 743, 746 (1975); United States v. Grimes, 413 F.2d 1376, 1378 (7th Cir. 1969), and cases cited.

2. The judge instructed the jury with respect to self-defense and even related these instructions to the question whether the defendant was privileged to use a dangerous weapon to protect himself from attack by Officer Quealey. But he gave the jury no instructions on the subject of the privileged use of force to protect another. This failure seems to have been due to the judge's belief that the claimed justification was not recognized in the law of Massachusetts.

[**889] The defendant made due request in writing for jury instructions on the subject. His request was submitted the day before the judge charged the jury. The main requested instruction (No. 9) was a quotation from the relevant statute law of Illinois as reproduced in the case of People v. Johnson, 4 Ill. App. 3d 249, 251 (1972): "A [*645] HN2 [***] person is justified in the use of force against another when and to the extent that he reasonably believes that such conduct [***9] is necessary to defend himself or another against such other's imminent use of unlawful force. . . ." Smith-Hurd Ill. Ann. Stat. c. 38, § 7-1 (1972). Five further instructions were requested related to the subject. ⁴ After the judge had concluded his charge, the

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pursued throughout [***2] the trial, a colloquy with counsel at the bench, and counsel's summation, the judge must have been aware that the omitted instructions constituted the keystone of the defense, the exception was sufficient to advise the judge of the asserted error. [644-646]

Use of force, not excessive in the circumstances, against another to protect a third person is justified when a reasonable person in the actor's position would believe that intervention was necessary for the protection of the third person and that the third person would be justified in the circumstances in using such force to protect himself. [646-652]

Counsel: Joseph F. Flynn for the defendant.

Alan L. Kovacs, Assistant District Attorney, for the Commonwealth.

Judges: Tauro, C.J., Quirico, Braucher, Hennessey, & Kaplan, JJ. Mr. Chief Justice Tauro participated in the deliberation on this case, but retired before the opinion was issued.

Opinion by: KAPLAN

Opinion

[*641] [**887] The defendant Daniel R. Martin appeals under G. L. c. 27B, §§ 33A-33G, from his multiple convictions, described in the margin, 1 [***4] arising from a clash between inmates and guards at Massachusetts Correctional Institution at Concord on October [***3] 15, 1972. The issue on appeal is whether the trial judge committed error in failing to instruct the jury with respect to the defendant's claimed

¹With regard to the alleged attack on Officer Quealey, the defendant was convicted of assault and battery on a guard of a correctional institution (G. L. c. 127, § 35B), assault and battery with a dangerous weapon (G. L. c. 265, § 15A), and armed assault with intent to kill (the indictment was for such assault with intent to murder, G. L. c. 265, § 15, see Commonwealth v. Demboski, 283 Mass. 315, 321-324 [1933]). As to the alleged attack on Officer Taylor, the defendant was convicted of assault and battery on a guard of a correctional institution, and assault with a dangerous weapon (G. L. c. 265, § 15B), the judge having directed a verdict on the charge of battery with a dangerous weapon.

justification or defense, namely, that the acts of which he was accused were part of an attempt on his part to come to the aid of a fellow inmate and friend, Gene Tremblay (tried and convicted together with the defendant ²), who was being unlawfully beaten by [*642] prison guards. The Commonwealth, without expressly conceding the matter, does not actually dispute that the evidence adduced by the defendant at the trial provided a basis in fact for such instructions. It contends, however, that no proper request was made for the instructions, ³ and doubts whether the law of Massachusetts recognizes the use of force for the protection of another person as a justification or defense for the actor.

1. We sketch very briefly the facts as they appeared at trial. The prosecution was of course intent to show that the defendant's acts were simply aggressive attacks on the correction officers in a prison brawl, while the defendant strove to prove that he acted honestly and reasonably upon observing the inmate Tremblay being beaten by the officers.

According to the prosecution's case, a struggle erupted between two correction officers and two inmates as the inmates were being escorted from a second-floor segregation unit down to a first-floor area for showers and exercise. One of the inmates, Tremblay, fought with an officer near the stairwell and the officer fell or was shoved down the stairs, with Tremblay following him down. The fallen officer yelled to officers on the first floor for help, and one of them, John Quealey, restrained Tremblay, while others went to summon aid. Officer Quealey held Tremblay [***5] by the hair while pushing him toward and into an open cell on the first floor. According to the prosecution's proof, Tremblay was held in the cell but not beaten; no clubs or other weapons were used by the officers in the affray although it appeared that clubs were kept in a nearby desk.

Meantime the second inmate involved in the fight on the second floor had taken the cell keys from the other officer and released other inmates of the segregation unit. Several of the inmates, including the [***888] defendant, ran down the stairs and met officers who had

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The violence ended when assistant deputy superintendent Nicholas Genakos ordered the officers to withdraw [*644] while he and Jon Cooke, a social worker, negotiated with the inmates. During the negotiation Cooke saw the defendant with a knife and, when Genakos asked for it, the defendant said, "We'll see how this goes." The defendant testified that he made the statement and that he did have a knife, but only for a short interval when Cooke saw it. A search by the State police after the inmates had returned peacefully to their cells failed to turn up a knife.

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defendant's counsel, directing attention to the six instructions by their numbers in the written request previously handed up, excepted to the judge's failure to give any of them: "On behalf of the defendant Martin, I would like to take an exception to the failure of the Court to give my requests for instructions to the jury, No. 9, 10, 12, 13, 14 and 15"

[**10] We do not accept the Commonwealth's suggestion that the exception was insufficient to advise the judge of the asserted error. The present case is distinct from *Commonwealth v. Shea*, 323 Mass. 406 (1948), cited by the Commonwealth, where the defendants attempted to take a "shot-gun exception" to so much of the charge as was inconsistent with the requests for rulings, and did not point out the portions of the charge they considered inconsistent and erroneous, despite the judge's request that they do so. *Id.* at 416; and see the bill of exceptions in that case at 78. Although it is of course possible in the context of a particular trial that a reference by numbers [*646] to a sequence of requests may not be clear or emphatic enough to alert the judge to the substance (cf. *Delancey v. Motichek Towing Serv., Inc.*, 427 F.2d 897, 900-901 [5th Cir. 1970]; *Burns v. United States*, 286 F.2d 152, 157 [10th Cir. 1961]; 5 L. Orfield, Criminal Procedure Under the Federal Rules § 30:52, at 79 [1967]), we do not think there was any such difficulty here. The transcript suggests that the judge was actually looking at the written requests when counsel took his [***11] exception but, even if he was not, he could not have been unaware, in light of the line of interrogation counsel had pursued throughout the trial, a colloquy with counsel at the bench, and counsel's summation,⁵ that the privilege to defend another was the keystone of the defense. The judge's failure to charge on the matter therefore appears not to be a consequence of the defendant's failure to inform him of error in the charge, but rather to be traceable, as we have said, to the judge's view of the governing law.

⁵ The judge stated to the jury that certain instructions had been requested, "all of which I believe I have encompassed in what I have already told you." The context indicates that this comment was directed only to the requests concerning the requirements of proof (as in the defendant's requests Nos. 19-21). We do not agree with the Commonwealth's suggestion on appeal that the jury could themselves somehow have converted the judge's instructions on self-defense into suitable instructions regarding defense of another. Especially is this suggestion unacceptable because the Commonwealth has doubted whether the latter justification was available in this jurisdiction.

[***12] [**890] 3. We hold that *HNS* [†] a justification corresponding roughly to that quoted from the Illinois statute⁶ [***13] is recognized by the law of the Commonwealth. Of course the justification may exist although it is not found in so many words. [*647] In our statute law:⁷ it may be read into the definition of a statutory offense or considered a common-law adjunct to, or qualification of, the offense. This is easily accepted and understood as to the more commonplace justification of self-defense. See *Commonwealth v. Shaffer*, 367 Mass. 508 (1975), and the many cases cited; *United States v. Grimes*, 413 F.2d 1376, 1378-1379 (7th Cir. 1969).

There is some but not much light in the decided cases in this jurisdiction about justified force used in aid of another. In *Commonwealth v. Cooley*, 6 Gray 350 (1856), H. and A. Cooley apparently interfered in the arrest of a relative, B. Cooley, by one Rice, an assistant marshal of Springfield, and they were indicted in a first count for assault on Rice as an official, and in a second count for a common assault on him. A majority of the court held the following charge proper (although possibly too favorable to the defendants): "[I]f Harrison and A. M. Cooley interfered, not knowing that Rice was an officer and acting in discharge of his duty, but interposed for the purpose of arresting or quelling a fight or breach of the peace, they would not be liable for so doing, unless they used more force or violence than would have been necessary for that purpose; [***14] and if they did interpose for the purpose of arresting a fight, and used more force than was necessary for that purpose, they would be liable on the second count." *Id.* at 354. Somewhat closer in point is *Commonwealth v. Malone*, 114 Mass. 295 (1873), where the defendant

⁶ The trial judge was bound to charge on the subject even if the instructions as requested were incorrect in particulars. See *Commonwealth v. Aqlasotellis*, 336 Mass. 12, 15-16 (1957); *United States v. Grimes*, 413 F.2d 1376, 1378 (7th Cir. 1969); 5 L. Orfield, Criminal Procedure Under the Federal Rules § 30:37, at 65-66 (1967); cf. *Celanese Corp. of America v. Vandellia Warehouse Corp.*, 424 F.2d 1176, 1181 (7th Cir. 1970) (same rule in civil cases); *Florists' Nationwide Tel. Delivery Network - America's Phone-Order Florists, Inc. v. Florists' Tel. Delivery Ass'n*, 371 F.2d 263, 270 (7th Cir.), cert. denied, 387 U.S. 909 (1967) (same); 9 C.A. Wright & A.R. Miller, Federal Practice and Procedure § 2552, at 630-631 (1971) (same).

⁷ "Justification," including justification for use of force for the protection of others, is, however, a proper and feasible subject for legislation, and in fact has been codified in the statutes of many States. See n.13 below.

assaulted a young girl in the [*648] presence of her mother, the mother struck the defendant, and the defendant retaliated, for which assault he was charged. The defendant's request for an instruction that the mother was not entitled to use force to defend her daughter was held properly refused and the following instruction properly given: "... The law gives the right, if the defendant was inflicting great violence on the daughter's person. The mother had a right to use as much force as was reasonably necessary to protect her person from great injury, and if she did not use more force than was reasonably necessary for that purpose, the use of such force was no justification of the defendant's blow upon Mrs. Rennehan." *Id.* at 296. These cases are suggestive but laconic.⁸ The paucity [**891] of direct authority is perhaps explained by the likelihood that one coming to the defense of another [***15] may himself be, or come to be, under attack, and may thus simply claim self-defense, a less esoteric justification.⁹

[***16] Whatever the precise precedents, *HNS* [†] it is hardly conceivable that the law of the Commonwealth, or, indeed, of any jurisdiction,¹⁰ should mark as criminal those who [*649] intervene forcibly to protect others; for the law to do so would aggravate the fears which lead to the alienation of people from one another, an alienation symbolized for our time by the notorious Genovese incident.¹¹ To the fear of "involvement" and

⁸ In *Commonwealth v. Riley*, Thacher's Crim. Cas. 471 (Boston Mun. Ct. 1837), the facts would entitle a jury to find that McNally was the aggressor in beating Riley, and that Stewart, a witness, handed Riley a knife which Riley used in self-defense, killing McNally. Judge Thacher said in his charge to the jury: "Where a known felony is attempted upon the person, be it to rob or murder, the party assaulted may repel force by force; and even his servant then attendant on him, or any other person present, may interfere to prevent mischief; and if death ensue, the party so interposing will be justified." He also said: "If Stewart believed at the time, that McNally intended to kill Riley, he had a right to interfere to prevent further mischief, and to give to Riley a weapon which was necessary for his defense." *Id.* at 475, 476.

⁹ It has been suggested also that cases in which the justification of third-person defense might be available have been tried on a footing of preventing crime. Cf. *Commonwealth v. Cooley*, cited above in the text, and *Commonwealth v. Riley*, note 8 *supra*.

¹⁰ See W.R. LaFave & A.W. Scott, Jr., Criminal Law § 54 (1972); note 15 *infra*.

of injury to oneself if one answered a call for help would be added the fear of possible criminal prosecution.¹²

[***17] It becomes necessary to sketch the conditions justifying the use of intervening protective force. *HNS* [†] The essence is this: An actor is justified in using force against another to protect a third person when (a) a reasonable person in the actor's position would believe his intervention to be necessary for the protection of the third person, and (b) in the circumstances as that reasonable person would believe them to be, the third person would be justified in using such force to protect himself. The reasonableness of the belief may depend in part on the relationships among the persons involved (a matter to which we return below). The actor's justification is lost if he uses excessive force, e.g., aggressive or deadly force unwarranted for the protective purpose.

Of course, the subject cannot be exhausted in a paragraph. Without subscribing in advance to all the relevant provisions of the Model Penal Code of the American [**650] Law Institute, we recommend it for study.¹³ Accelerated by that Code, the trend, which is exemplified by legislation adopted in many States,¹⁴ has been to interweave closely the justification of defense of a third person with self-defense; to

¹¹ This occurred on March 13, 1964. See N.Y. Times, March 14, 1964, at 26, col. 4.

¹² It is instructive that the laws of some countries in continental Europe denounce as a crime the failure to render help in given circumstances. See Dawson, *Negotiorum Gestio: The Altruistic Intermediary*, 74 Harv. L. Rev. 817, 1073, 1101-1114 (1961). Thus art. 330c of the West German Criminal Code, as amended in 1953, provides (translation by Professor Dawson): "Whoever does not render help in cases of accident, common danger or necessity although help is required and under the circumstances is exactable, and in particular is possible without danger of serious injury to himself and without violation of other important [wichtige] duties, will be punished by imprisonment up to one year or by fine." *Id.* at 1104-1105.

¹³ The principal sections of the Code (Proposed Official Draft 1962) to be consulted are §§ 3.05(1), 3.09(1)-(2), 3.04(1), (2)(a)(i), (b); and see Tentative Draft No. 8 (1958) for commentary on these sections.

¹⁴ It is reported that in the past twenty years some twenty-one States have adopted legislation in the field of "justification"; another fifteen States, and the Federal government as well, are considering such legislation. See Note, *Justification: The Impact of the Model Penal Code on Statutory Reform*, 75 Colum. L. Rev. 914, 914-915 (1975). The legislation on the use of force in defense of a person is analyzed at 932-939.

369 Mass. 640, *650; 341 N.E.2d 885, **891; 1976 Mass. LEXIS 873, ***17

eliminate [***18] some earlier authority restricting the justification of third-person defense to situations where the third person is seen retrospectively to have been entitled to use force in his own defense (regardless [***892] of the belief, which might be mistaken, of the "reasonable person" at the time); ¹⁵ [***19] and to remove earlier artificial or factitious restrictions of the justification, e.g., restrictions to protection of spouse, child, parent, master, or servant. ¹⁶

One such possible factitious restriction was rejected, we think correctly, in *United States v. Grimes*, 413 F.2d 1376 (7th Cir. 1969), a case resembling the present. The defendant Grimes, an inmate of the Federal penitentiary in Marion, Illinois, seeing (as he claimed) a fellow inmate, Reid, being beaten by prison guards with metal flashlights, ran to Reid's aid and struck one of the [***651] guards. Grimes was indicted and convicted of assault upon an employee of a United States correctional institution (18 U.S.C. §§ 111, 1114 [1970]). On appeal, it was held that the trial judge erred in refusing a jury instruction regarding justified use of force to protect a third person. The court spoke as follows to the point that, while the justification might be suitable generally, it should be rejected in the prison context because of its effect on institutional discipline: "We perceive no serious threat to prison discipline from a defense which merely protects inmates from unauthorized physical [***20] abuse by overzealous officials. Our decision in no way limits the power of prison officials to restrain or subdue unruly inmates, to carry out all reasonable orders necessary for the maintenance of prison discipline, or to cope with attempted assaults or escapes by prison inmates. See A.L.I. Model Penal Code §§ 3.07, 3.08 (Proposed Official Draft 1962). The Government's concern that recognition of this limited defense will emasculate *Section 111* is belied by the fact that since 1905, when this statute was originally enacted, this is apparently the first such case." *Id.* at 1379.

¹⁵ See W.R. LaFave & A.W. Scott, Jr., *supra* note 10; G. Williams, *Criminal Law: The General Part* § 73 especially at 207 (2d ed. 1961). In New York, for example, the restrictive decision of *People v. Young*, 11 N.Y.2d 274 (1962), may be taken to be overruled by *N.Y. Penal Law § 35.15* (McKinney 1975), enacted in 1965-1968. See also 12 DePaul L. Rev. 155 (1962); 8 Minn. L. Rev. 340 (1924); 20 Wash. & Lee L. Rev. 98 (1963).

¹⁶ See the comment on § 3.05 of the Model Penal Code in Tentative Draft No. 8 at 31 (1958).

We agree with the court in the *Grimes* case that *[HNS]* the justification of defense of a third person does not necessarily stop short at the prison gates. But the fact that an episode occurs in prison may have considerable significance. So the question of the reasonableness of a belief that an inmate would be justified in using force against a prison guard, thus justifying intervening protective force, is conditioned by the fact that the guard, by the nature of his job, is himself privileged to apply force to inmates when necessary to preserve order in the institution. ¹⁷ [***652] Therefore the guard's [***21] mere taking an inmate into custody or holding him in custody would not be a proper occasion for intervening force. This may have an important bearing on the present case in the event of retrial.

Judgments reversed.

Verdicts set aside.

Mr. Chief Justice Tauro participated in the deliberation on this case, but retired before the opinion was issued.

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Wright v. O'Brien

Appeals Court of Massachusetts

September 19, 2016, Entered

15-P-1399

Reporter

2016 Mass. App. Unpub. LEXIS 892 *; 90 Mass. App. Ct. 1105; 59 N.E.3d 455; 2016 WL 4987482

Opinion

EDWARD G. WRIGHT VS. STEVEN J. O'BRIEN.

Notice: SUMMARY DECISIONS ISSUED BY THE APPEALS COURT PURSUANT TO ITS RULE 1:28, AS AMENDED BY 73 MASS. APP. CT. 1001 (2009), ARE PRIMARILY DIRECTED TO THE PARTIES AND, THEREFORE, MAY NOT FULLY ADDRESS THE FACTS OF THE CASE OR THE PANEL'S DECISIONAL RATIONALE. MOREOVER, SUCH DECISIONS ARE NOT CIRCULATED TO THE ENTIRE COURT AND, THEREFORE, REPRESENT ONLY THE VIEWS OF THE PANEL THAT DECIDED THE CASE. A SUMMARY DECISION PURSUANT TO RULE 1:28 ISSUED AFTER FEBRUARY 25, 2008, MAY BE CITED FOR ITS PERSUASIVE VALUE BUT, BECAUSE OF THE LIMITATIONS NOTED ABOVE, NOT AS BINDING PRECEDENT. SEE *CHACE V. CURRAN*, 71 MASS. APP. CT. 258, 260 N.4, 881 N.E.2d 792 (2008).

PUBLISHED IN TABLE FORMAT IN THE MASSACHUSETTS APPEALS COURT REPORTS.

PUBLISHED IN TABLE FORMAT IN THE NORTH EASTERN REPORTER.

Subsequent History: Appeal denied by *Wright v. O'Brien*, 476 Mass. 1103, 2016 Mass. LEXIS 813, 63 N.E.3d 387 (2016)

US Supreme Court certiorari denied by *Wright v. O'Brien*, 2017 U.S. LEXIS 1028 (U.S., Feb. 21, 2017)

Core Terms

grievances, inmate, qualified immunity, pat search, amended judgment, investigated, sexual misconduct, internal affairs, detached, rights, staff

Judges: Trainor, Vuono & Blake, JJ. [*1]

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

This is an appeal by the defendant, Steven J. O'Brien, who was at all relevant times the superintendent at the Old Colony Correctional Center (OCCC), from an amended judgment against him in the amount of \$45,000 for violation of the Massachusetts Civil Rights Act (MCRA) and \$45,000 for violation of the plaintiff's Federal civil rights. At the time of trial, defendants Harold W. Clarke (Commissioner of Correction), James R. Bender (Deputy Commissioner of Correction), and John O. Martins, a correction officer, were also defendants in this action. The jury returned verdicts in favor of both Clarke and Bender, and the plaintiff has not filed a cross appeal from that determination. The jury returned a verdict against Martins in the total amount of \$47,500. Specifically, the jury awarded the plaintiff \$7,500 on his claim for assault and battery, \$20,000 for intentional infliction of emotional distress, \$10,000 for his Federal civil rights claim, and \$10,000 for his MCRA claim.

At trial, O'Brien (and the other defendants) moved for a directed verdict at the close of the evidence; the judge [*2] deferred ruling on the motion until the jury had returned their verdicts. After the verdicts, the defendants moved for judgment notwithstanding the verdicts, which motion was denied. The judge subsequently entered an order specifying that the verdicts against O'Brien were in his official capacity as superintendent of the OCCC, while the verdicts against Martins were in his individual capacity. The plaintiff then moved to correct the judgment to provide that the verdicts against O'Brien were in his individual capacity. The judge granted the motion, and an amended



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The Commonwealth of Massachusetts
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THOMAS J. PRESTON
Deputy Commissioners

NANCY ANKERS WHITE
General Counsel

December 16, 2022



Re: 103 CMR 505 – Use of Force

Dear [REDACTED]:

Thank you for submitting comments regarding proposed changes to the Department of Correction 103 CMR 505 – Use of Force. This type of feedback provides valuable insight and perspective to the Department as it endeavors to promulgate effective regulations.

Your comments will be taken into consideration as the regulation continues to undergo review prior to promulgation.

Regards,

Michele Dupuis-Clarke, Program Coordinator III
Legal Division

December 9, 2022

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DEC 14 2022

DEPARTMENT OF CORRECTION
LEGAL DEPARTMENT

DOC Legal Division
Attn: Michele Dubois-Clarke, Program Coordinator III
70 Franklin Street, Suite 600
Boston MA 02110-1327

RE: 103 CMR 505: Use of Force, Opposition to Regulation Change
(DOC) Culture of Punishment

The Massachusetts Department of Correction (DOC) continue a failed practice implemented 32 years ago by then Governor William Weld with a culture of "teaching prisoners the joys of busting rocks" and "Root Strap Tactics". These same tactics detailed in these proposed regulation changes.

For 100 years MCI-Norfolk has existed on a culture of community, collaboration and programs. Under the current administration at the DOC central and MCI-Norfolk that is all being systematically destroyed due to operational failures and attempting to turn back the clock to the Weld era as this proposed change. The struggle of the current DOC administration push against the Criminal Justice reform passed by legislators can be seen in these proposed changes.

MCI-Norfolk remains a productive prison community in spite of the current administrations harmful tactics. There is a "Quad" which is historically known as the "Oval" as it was first referred to as a symbol of the Community Gathering area. A place for older prisoners to walk in safety on a level surface and provide a greater feeling of safety than a normal prison yard. This in area serves as the physical and spiritual center of the prison being surrounded by the school building, and Community Service Building (CSD). However now under the current repressive administration in charge the quad has been all but closed for "destination only". Recently the 2022 Community Day event was expanded to include the Quad. However the Community aspect appears to be taking it's last breaths.

Never before in the History of MCI-Norfolk has the administration been compelled to close the Quad (heart of the prison). However failures by administrators to properly operate this prison has resulted in repressive and harsh tactics. Administrators blame DOC Central office for sending "undesirable inmates" to the prison. MCI-Norfolk has a history of collaboration and building men not oppressing them.

In the past there has been peaceful walks "group demonstrations" to protest prison conditions around the Quad without incident in the 1970s. Some 30-70 prisoners were transferred to other prisons. The Quad was not closed for this.

There was a group altercation (gang disturbance) in the alley off the Quad many years ago. The reaction of that administration at the time was not to repress and punish the population but to engage and collaborate as architect and first Superintendent [REDACTED] would have done. This resulted in the first Restorative Justice Program in Massachusetts prisons.

Under the current DOC administration and changes such as this programing has been reduced and suspended without penological interest. Suspending programs or cutting back programing. The focus for the DOC is that of punishment and not addressing behavioral health factors, mental health, substance disease and reentry. This regulation change is just another example of a punishment culture.

Programing access has been reduced and in the words of prisoners "programing has become toxic". Prisoners who are doing the "right things" are being sanctioned and punished without cause, being denied programing and treatment.

Currently Administrators have commented when these concerns are brought to them in the following manner. "I never believed I would have been able to shut this place down and COVID opened that door for me.", "We are going take the weights from you melt them down and build a statue to the officer in Shirley.", "Remember [REDACTED] was fired, he's not a good example.", "Why should this be different from any other prison?", "Milford DOC Central office does not understand this place and all the defenders are retired". This antagonistic nature is now common place at MCI-Norfolk and across the DOC from administrators to correctional officers without accountability. When letters of concern are sent to DOC Headquarters in Milford these letters are sent back to the prison without correction.

November 25, 2022 a Notice of Public Hearing in regrd to Use of Force (103 CMR 505) is being amended December 19, 2022 which includes: K-9 Units, use of firearms, Chemical Agents/Speciality Impact Munitions, Batons just to name a few. These items all sound as if the DOC is going to war. An Officer has not been killed for over 50 years in the MA-DOC. However many Inmates have died in DOC custody without accountability. Staff on Inmates assaults go unchecked.

November 3, 2022 Officer [REDACTED] 21 year veteran of the DOC did slap Inmate [REDACTED] across the face in front of other witnesses and staff. Immediately after being assaulted [REDACTED] did respond out of self defense. Inmate [REDACTED] did put himself between the staff member and inmate stopping the altercation and preventing an escalation. [REDACTED] since filed an informal complaint placing his eyewitness testimony on record. Officer [REDACTED] continues to work and receive pay. It should be noted that even though cameras are placed in all areas of the prison the [REDACTED] remain without cameras. In spite of a report detailing misuse of DOC Inmate Food Budget. It should also be noted this matter is not being addressed as a "Use of Force" which requires a higher level of review. However Officer [REDACTED] admits in his initial report physically making contact with [REDACTED] which falls under use of force.

On or about January 14, 2022 , [REDACTED] was assaulted at (MCI-Norfolk) by [REDACTED]. This all took place on DOC cameras. [REDACTED] is legally blind and the administration and the officer in question are fully aware of his disability and the assault that took place. However there has been a systematic effort by Superintendent Nelson Alves, Investigators and IAU to cover this up. In brief on [REDACTED] in [REDACTED] [REDACTED] was assaulted by a MA-DOC employee. [REDACTED] was then placed into segregation and released shortly after. [REDACTED] was walking down the stairs looking at his feet due to his disability going up and down stairs requires

alot of attention to his steps and movement. Officer [REDACTED], did barrel up the stairs physically elbowing through him resulting [REDACTED] being shoved to the floor.

[REDACTED] at approximately [REDACTED] Officer [REDACTED] did engage in a blind side attack from behind on [REDACTED]. This assault occurred when [REDACTED] was walking away from Officer [REDACTED] a 19 year veteran of the DOC. It should be noted officer [REDACTED] has been disciplined multiple time for misconduct. Furthermore it should be noted that Officer [REDACTED] is currently on no inmate contact still being paid. The Internal Affairs Investigation [REDACTED]. [REDACTED] has also filed a formal grievance to document this assault [REDACTED].

[REDACTED] was assaulted in [REDACTED] by Correctional Officer [REDACTED] during an argument between the two directly in front of [REDACTED]. While engaged with [REDACTED] in a verbal argument over property issues, Officer [REDACTED] quickly motioned his hand thus assaulting [REDACTED] with a slap across his face. Out of shock of being assaulted by this officer [REDACTED] asked Officer [REDACTED] "Did you just slap me in the face? Did you just slap me in the face?". Officer [REDACTED] realizing quickly what he had done, tackled [REDACTED] to the ground. [REDACTED] has physical impairments which require use of a walker and has used this for a number of years before this incident, due to a major back operation. It should also be noted that (2) cameras are located in this area however the DOC claims no camera footage was available in this incident.

The DOC continues to show disregard for rules of conduct and continues to cover up events in favor of officers and now a regulation change is proposed to free up further conduct. However no changes to improve programing and health services.

The current DOC is obviously setting a battle plan in place for the new elected officials. Health & Human Services (HHS) would provide better leadership with the \$700 million dollar yearly budget and not allow for such abuses as these prosed changes. Creating a climate suitable for healing and reconciliation for everyone effected by crime and make a safer society, for survivors of crime, prisoners, families and the greater community. HHS is better suited to address fiscal priorities such as, use of lower security, proper use of force regulations more effective programing and treatment and working in conjunction with parole to prepare prisoners for successful release to society. HHS will not weaponize behavioral issues but seek to create more effective solutions to crime and prison management, and Substance Use Disease (SUD).

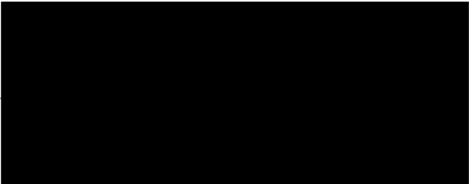
The DOC has released some 50% of the population to society without major incidents. However DOC staffing costs continue to rise and Central DOC office in Milford has not reduced their staffing levels but increased an emphasis on punishment such as this proposed change. Not seeking to correct causative factors. Spending only 2% of the budget on programing.

The culture of the DOC needs to be changed to place Treatment over Punishment (TOP). Stopping this regulation change and waiting for new leadership to make such decisions when seated in January 2023 only makes sense.

On behalf of the Norfolk Inmate Council (NIC) I respectfully offers these thoughts.

Respectfully ,

cc: file



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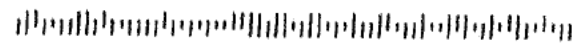
DOC Legal Division
Attn: Michele Dubois-Clarke, Program Coordinator III
70 Franklin Street, Suite 600
Boston MA 02110-1327

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Deputy Commissioners

NANCY ANKERS WHITE
General Counsel

December 16, 2022



Re: 103 CMR 505 - Use of Force

Dear [REDACTED]

Thank you for submitting comments regarding proposed changes to the Department of Correction 103 CMR 505 - Use of Force. This type of feedback provides valuable insight and perspective to the Department as it endeavors to promulgate effective regulations.

Your comments will be taken into consideration as the regulation continues to undergo review prior to promulgation.

Regards,

Michele Dupuis-Clarke, Program Coordinator III
Legal Division

Dupuis-Clarke, Michele A. (DOC)

From: Huey, Kristyn <khuey@plsma.org>
Sent: Wednesday, December 14, 2022 3:40 PM
To: Dupuis-Clarke, Michele A. (DOC)
Subject: Prisoners' Legal Services Testimony for 103 CMR 505: Use of Force Public Hearing

CAUTION: This email originated from a sender outside of the Commonwealth of Massachusetts mail system. Do not click on links or open attachments unless you recognize the sender and know the content is safe.

Good afternoon Michele,

I hope this email finds you well. I am the Brutality Project director at Prisoners' Legal Services of MA and would like to testify on behalf of PLS at the Use of Force public hearing on Monday morning at 10am. I'd also like some clarification about the approximate length of time for the hearing, as well as the length of time for each individual to provide testimony. Also, is there a specific order in which testimony will be given? I would like to testify sometime between 10am-12pm, if possible. Lastly, I'd like to confirm that I have the correct Zoom information for the hearing: Webinar ID: 840 9333 4834; Passcode: 058915; Dial-in Telephone number: 1-646-931-3860.

Thank you so much for your assistance.

Sincerely,

Kristyn J.E. Huey, Esq.
Director, Brutality Project
Senior Staff Attorney
Chair, Women's Incarceration Conditions & Reentry Project
Co-Chair, DEI Committee
Law Student Supervisor
Prisoners' Legal Services
50 Federal Street, 4th Floor
Boston, MA 02110
Tel: 617-482-2773 Ext: 6814
Fax: 617-451-6383
khuey@plsma.org

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"In the end, we will remember not the words of our enemies, but the silence of our friends."-
Rev. Dr. Martin Luther King, Jr.

"A man who stands for nothing will fall for anything!"-Malcolm X

Dupuis-Clarke, Michele A. (DOC)

From: Dupuis-Clarke, Michele A. (DOC)
Sent: Friday, December 16, 2022 11:31 AM
To: Huey, Kristyn
Subject: RE: Prisoners' Legal Services Testimony for 103 CMR 505: Use of Force Public Hearing

Good morning Atty. Huey,

Thank you for your email regarding the December 19, 2022 public hearing re: 103 CMR 505 – Use of Force.

While there isn't an established time-limit per se, we generally ask that participants try to keep their comments under five-minutes so that everyone wishing to speak can do so. If you feel your comments may exceed the suggested timeframe, you may always submit a longer, written comment. That being said, yours is only request received to-date so you have been scheduled to speak first; therefore, please log into the webinar promptly at 10 am. and be assured there will be ample time available to you.

Those who wish to speak prior to the meeting will be called in the order their request was received; similarly, those who request to speak during the meeting, will be called in the order they make their request known. The hearing will continue so long as there as long as there are participants requesting to submit comment.

For your convenience, attached please find a link to the Notice of Public Hearing, complete with webinar information, that has been posted to the Department's website on Mass.gov.

<https://www.mass.gov/service-details/notice-of-hearings-and-proposed-regulations>

Best,

Michele Dupuis-Clarke, Paralegal / Program Coordinator III

Massachusetts Department of Correction
Legal Division
70 Franklin Street, Suite 600
Boston, MA 02110

From: Huey, Kristyn <khuey@plsma.org>
Sent: Wednesday, December 14, 2022 3:40 PM
To: Dupuis-Clarke, Michele A. (DOC) <Michele.Dupuis-Clarke@doc.state.ma.us>
Subject: Prisoners' Legal Services Testimony for 103 CMR 505: Use of Force Public Hearing

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Sincerely,

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Rev. Dr. Martin Luther King, Jr.

"A man who stands for nothing will fall for anything!"-*Malcolm X*

TO: Michele Dupious-Clarke,
Program Coordinator III,
Department of Correction
70 Franklin Street, suite 600
Boston, MA. 02110

FROM: 



December 1, 2022


RE: 103 CMR 505: Use of Force

This letter is to submitted comments in opposition to, "Bring the regulation into compliance with current standards and the Department of Corretion practice for uses of force related, but not limited to, use of instruments of restraint, use of K-9 units, Use of firearms, and use of OC, Chemical Agents/Specialty Impact munitions/distraction Devices, Batons, and Electronic Control Devices."

Though the proposed amendments also include requirements for training..., we object to this military approached to be used at the Massachusetts Treatment Center on residents who are civilly committed, and not serving any prison sentence, in fact, residents have completed the Court sentenced for their crimes and are at by statute, a Treatment Facility, only run by DOC. Any punitive treatment by law would shut the Center down in purpose.


Further more, there is a current complaint in Suffolk Superior Court, against the MTC, and DOC, which includes the use of force improperly, suggesting the user was not trained properly, and the DOC is not always capable of making sound judgements in emergency. (Docket # 2284CV1619F) Casey & Milliken vs Commonwealth DOC .

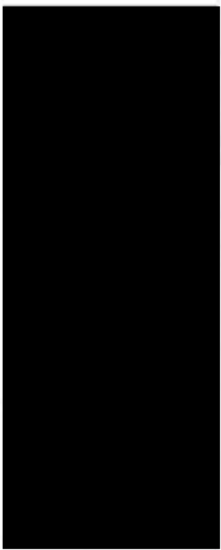
As such the following oppose strongly any millitary style training to be used by Correction Officers/ Guards for Civil Citizens, given the Department of Corrections History and judgements, as apparent in several on going lawsuits.



AND OTHERS....ADDED SHEET

Opposition Signatures to changes proposed: RE: 103 CMR 505





Michele Dupious - Clarke
Program Coordinator III
Department of Correction
70 Franklin Street, Suite 600
Boston, MA. 02110

02110-132799

BROCKTON MA 023



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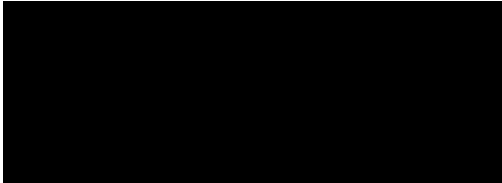
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THOMAS J. PRESTON
Deputy Commissioners

NANCY ANKERS WHITE
General Counsel

December 19, 2022



Re: 103 CMR 505 – Use of Force

Dear [REDACTED]:

Thank you for submitting comments regarding proposed changes to the Department of Correction 103 CMR 505 – Use of Force. This type of feedback provides valuable insight and perspective to the Department as it endeavors to promulgate effective regulations.

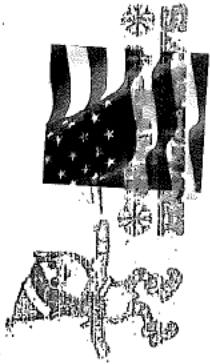
Your comments will be taken into consideration as the regulation continues to undergo review prior to promulgation.

Regards,

Michele Dupuis-Clarke, Program Coordinator III
Legal Division



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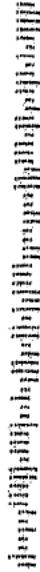



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16 DEC 2022 PM 2 L

Michele Dubois-Clarke
D.O.C. Legal Division
70 Franklin Street, Suite 600
Boston, MA. 02110

02110-131350




December 15, 2020

Michele Dubois-Clarke
poC Legal Division
70 Franklin Street, Suite 600
Boston, MA. 02110

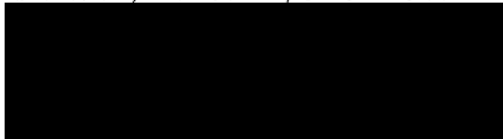
RE; 103 CMR 505; Use of Force, Regulation Changes

Dear Michele Dubois-Clarke

The culture of punishment being disseminated by the DOC upon the inmate population needs no arms race. Use of force regulation change is reactive and Malicious. The DOC's self prophesized escalation of internal strife with inmates is a direct result of the punishment of the inmate population over the acts of single individuals. Yet the example being set by the DOC staff is exactly what they claim to want to prevent in inmates.

The DOC staff is not activating inmates tablet cameras to catch staff misconduct or staff induction of drugs yet body cameras are being pilot programed for staff. Administration who allow high risk inmates to remain in medium security are not fired for violating policy they are instead moved to other institutions often with the same or greater positions, no matter who those inmates injure. When inmates at MCI Norfolk used gym equipment and rocks to harm/murder other inmates the gym was not emptied and the yard not paved over. But when a corrections officer is hospitalized over administrations neglect to follow policy its the inmate population without physical fitness equipment, aggressively provoked by staff and faced with the threat of greater use of force to reward the DOC's misguided retaliations.

The proposal for greater use of force well the DOC punishes the inmate population trying to incite fear, environmental issues and create a need for such tools is blatantly with malicious intent. The DOC should focuss on proactive measures to deter the need for use of force. This can include outside work release, furloughs, presumptive parole, Second Look Act, Letters of support for parole from staff and of course improved community contact options. I implore you not to pass Use of force regulation changes and put care back into the DOC's care and custody credo.

Thank you for your time




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THOMAS J. PRESTON
Deputy Commissioners

NANCY ANKERS WHITE
General Counsel

December 20, 2022



Re: 103 CMR 505 – Use of Force

Dear [REDACTED]:

Thank you for submitting comments regarding proposed changes to the Department of Correction 103 CMR 505 – Use of Force. This type of feedback provides valuable insight and perspective to the Department as it endeavors to promulgate effective regulations.

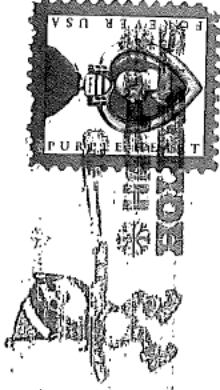
Your comments will be taken into consideration as the regulation continues to undergo review prior to promulgation.

Regards,

Michele Dupuis-Clarke, Program Coordinator III
Legal Division

BROCKTON MA 023

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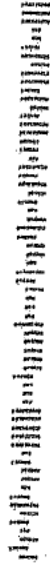
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*Ms. Michele Dubois-Clarke
Program Coordinator III
Free Legal Division
70 Franklin Street, Suite 600
Boston, Ma 02110-1327*

02110-131350




Michelle Dubois-Clarke
Program Coordinator III
D.D.C. Legal Division

I write this in opposition for the proposed changes to the use of force.

Under the current administration, the prison staff has been allowed to pretty much do as they please with no accountability to speak of. Case in point  a retired Deputy superintendent was charged on three separate occasions with D.U.I. (driving under the influence), on of those times, she was also charged with assault of police. M.G.L. 268B & 25, Suspension of Persons Under Indictment for Misconduct in Office, calls for termination of individuals under indictment for a crime. This did not happen in  case she was allowed to continue to work and even collect a pension, all in violation of state law all supported by the commissioner of correction.

For what reason would the D.D.C. need to possess such dangerous weapons unless it's to further their rein of torture of the incarcerated.

The commissioner of correction is obligated to rehabilitate those in their custody, instead we come to realize

that the D.O.C. allow to operate a criminal drug ring unchecked, run by C.O.s who brought into the prison weed, heroin, soboroin, Percynol etc. [redacted] who was a top union steward for the correction officers union at one time, stood in opposition for the (Medical Assisted Treatment) M.A.T. that was designed to help inmates with drug addictions. Why? Because it would eat into his profits

For what reason does the D.O.C. need with more dangerous weapons when the prison system does not reflect the level of violence required to substantiate such a request? The correctional officers likes to use to term, "They walk a tough beat."

This is a great lie. The truth is the D.O.C. under the control of the department of public safety has done nothing more than to become ever more corrupted, repressive, dysfunctional, oppressive, chaotic and utterly directionless.

The department of correction under the department of Public Safety has shown time and time again that it's unable to properly run the prison system in a fashion that would garner positive results, they have allowed racism to flourish, gender bias, C.O. drug dealers continue to run the prison drug market, unchecked inmates are forced to take the blame for criminal minded C.O.s, when will the Commissioner hold her people accountable for the failure of the prison system? When will the Commissioner hold C.O. [redacted] (drug king pin of Norfolk [redacted] C.O. (abuse of force, assault and battery of an inmate) Please note that this assault was of a disabled inmate, C.O. [redacted] (abuse of force, assault and battery of an inmate), [redacted] multiple counts of a abuse of force, multiple counts of

assault and battery of inmates), [REDACTED] P.O.
(abuse of force, assault and battery of an inmate), Deputy Superintendent
of reentry [REDACTED] engaged in a physical altercation at
M.C.I. Walpole with the director of treatment and now she's allowed
to come to M.C.I. Norfolk and oppress dehumanize and hurt programs
inmates created to become better individuals.

And they (D.O.C.) want to have permission to have more
dangerous weapons accessible by disgusting and unprofessional
individuals like those mentioned? [REDACTED] in this prison (M.C.I.
Norfolk) without the need for such dehumanizing tools at the recidivism [REDACTED]
[REDACTED] tested who worked here and who was not, why is that [REDACTED]
produced results that included a lower recidivism rate, where as we are
overseen by individuals who beat their wives, how can criminals
rehabilitate so-called criminals? They can't.

So why would criminals want to weaken the
current use of force policy and as for more dangerous tools, it's
not for to instill fear, hatred, oppression, repression and dehumanization
similar to the slave days. When is enough, enough?

Deny the D.O.C. the proposed changes to the use
of force Policy, it garners no positive adjustments only anger
hatred and revenge.

[REDACTED]



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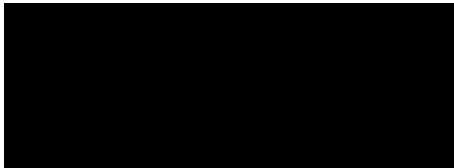
CAROL A. MICI
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MITZI S. PETERSON
THOMAS J. PRESTON
Deputy Commissioners

NANCY ANKERS WHITE
General Counsel

December 20, 2022



Re: 103 CMR 505 – Use of Force

Dear :

Thank you for submitting comments regarding proposed changes to the Department of Correction 103 CMR 505 – Use of Force. This type of feedback provides valuable insight and perspective to the Department as it endeavors to promulgate effective regulations.

Your comments will be taken into consideration as the regulation continues to undergo review prior to promulgation.

Regards,

Michele Dupuis-Clarke, Program Coordinator III
Legal Division

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In Memoriam
Vida K. Berkowitz
(1994-2005)

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**Also Licensed in New York

December 19, 2022

VIA EMAIL

Michele Dupuis-Clarke, Program Coordinator III
Department of Correction
70, Franklin Street, Suite 600
Boston, MA02110

Re: Comments on behalf of the Massachusetts Correction Officers Federated
Union in the matter of the Department of Correction Public Hearing
Amendments to 103 CMR 505 Use of Force

Dear Ms. Dupuis Clarke:

This office is counsel to the Massachusetts Correction Officers Federated Union (MCOFU). In that capacity, this letter provides comments responding and in opposition to one of the amendments proposed by the Department of Correction (DOC) in 103 CMR 505 and are being submitted pursuant to M.G.L. Section 30A. Our comments relate directly to the proposed amendment at 505.18 (2). That proposed amendment reads:

(2) Once all use/assisted/witness use of force reports have been reviewed and signed-off on (sic) by the Shift Commander, which shall be within five (5) business days of the incident, staff shall have the opportunity review available recording(s) associated with the use of force. The reports authored before video recording review shall never be re-opened under any circumstances. Staff who wish to clarify or provide additional information shall do so via an addendum to their original incident report.

Michele Dupuis-Clarke, Program Coordinator III
Department of Correction
Page 2 of 3
December 19, 2022

Although the proposed amendment does not expressly state that staff cannot review available video before providing reports, that may be an intent implied by the text. To the extent that is so, MCOFU respectfully asserts that the text should be withdrawn for two important reasons. First, the text, as implied, conflicts with a recently negotiated agreement between the Commonwealth of Massachusetts and MCOFU on point. That Agreement is contained in a document entitled Body Worn Camera Pilot Program Policy at Section 3.7, Viewing of BWC Recordings, Subsection A. There, the Agreement states:

A Correctional staff members shall only review/manage BWC recordings in accordance with their user license and/or profile, or with appropriate authorization (e.g., use of force, preparation of incident and other reports, before providing testimony, and/or when providing any oral or written statement required by DOC). In the foregoing circumstances, authorization will not be denied. Notwithstanding the foregoing, a correction officer may be required to provide an oral statement to a supervisor, provided that when any such statement is provided the officer will be allowed to amend his/her oral statement following a review of BWC recordings. An officer will not be subject to disciplinary action for any such oral statement made in good faith.

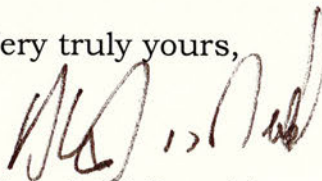
MCOFU and DOC have reached a cooperative and mutually beneficial arrangement for the review of body worn camera recordings prior to writing reports. That provision was an integral part of the overall BWC Program Policy Agreement and should be honored by DOC by withdrawing the proposed Section 505.18 (2) described above. A failure to do would be harmful to the relationship of the parties in general. Worse, it would threaten to unravel the innovative Pilot Program and delay, if not thwart, a determination over whether the desired goals of DOC would be achieved by the introduction of the BWCs into its facilities.

Michele Dupuis-Clarke, Program Coordinator III
Department of Correction
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December 19, 2022

A second reason for the withdrawal of the proposed regulation is that it would be counterproductive to the very use of BWCs. The central rationale for the deployment of the BWCs is that they would provide accurate accounts of what transpired in a use of force, leading to fewer uses of force, fewer uses of excessive force, fewer complaints from inmates, and fewer injuries to both inmates and officers. Those outcomes would best be served by allowing officers to refresh their recollection of what transpired in a use of force through review of the recordings. That is particularly so since under the stress of the moment their focus may not have captured, or their mind not recalled, full details of the encounter. The ability to refresh that recollection will aid in the filing of accurate reports. While one might worry that unscrupulous officers could be tempted to distort a report to avoid allegations of impropriety, such worry is misplaced. Any such officers would be dissuaded from doing so since they would know that their reports would be contradicted by the recordings and leave them open to charges of untruthfulness on top of any other charge they might have preferred to avoid. Simply stated, prior review by officers of their recordings **would promote accuracy and honesty in report writing and fulfill the rationale for the very deployment of the cameras.**

For the foregoing reasons, MCOFU supports the withdrawal by DOC of its proposed amendment of Section 505 at subsection 505.18 (2).

Very truly yours,



Alan J. McDonald

AJM/pn

cc: MCOFU Executive Board (By Email)



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Governor

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Lieutenant Governor

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NANCY ANKERS WHITE
General Counsel

December 21, 2022

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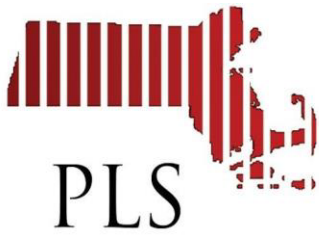
Re: 103 CMR 505 – Use of Force

Thank you for submitting comments regarding proposed changes to the Department of Correction 103 CMR 505 – Use of Force. This type of feedback provides valuable insight and perspective to the Department as it endeavors to promulgate effective regulations.

Your comments will be taken into consideration as the regulation continues to undergo review prior to promulgation.

Regards,

Michele Dupuis-Clarke, Program Coordinator III
Legal Division



PRISONERS' LEGAL SERVICES OF MASSACHUSETTS

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State prisoner speed dial: 9004 • County prisoner collect calls: 617-482-4124

Date: December 19, 2022

To: Michele Dupuis-Clarke
Program Coordinator III
Department of Correction, Legal Division

From: Kristyn J.E. Huey, Esq.
Brutality Project Director
Senior Staff Attorney
Prisoners' Legal Services of MA

Re: **Comments on 103 CMR 505: Use of Force**

Prisoners' Legal Services (PLS) appreciates the opportunity to comment on proposed changes to the Use of Force regulations. We are concerned about the proposed changes, many of which weaken the MA Department of Correction's (DOC) prohibition against excessive force and make the use of excessive force more likely and less able to be punished. We make these comments based on our knowledge of our clients' experiences through processing hundreds of requests for assistance and investigation after the use of force by DOC staff against them.

As a preliminary matter, PLS strongly recommends that the DOC take into account the unique needs and vulnerabilities of prisoners of color, prisoners with disabilities, and prisoners with mental health concerns, making changes and amendments where necessary and appropriate, in promulgating use of force regulations, standards, and training.

Additionally, we encourage the DOC to begin using "people first" language. We have heard from numerous currently and formerly incarcerated people that the language of "inmate" is dehumanizing and degrading, and that they prefer the use of terms like "prisoner" or "incarcerated person". There is no penological purpose served by utilizing language that dehumanizes the people in the care, custody, and control of our state prisons, and we suggest that it is time to move forward to using language that will lift the humanity of those who are incarcerated.

Proposed 103 CMR 505.07: Definitions; "Reasonable Force"

This definition replaces the definition of "reasonable force" in the current regulations: "the use of physical power, a weapon, a chemical agent, specialty impact device, or instrument of restraint applying the least amount of force necessary in a manner to carry out the actions listed in 505.07(2) (a) through (j)." The new definition removes the "least amount of force necessary" standard and replaces it with "force that is proportionate" to accomplish various purposes. PLS strongly opposes this change, which by its terms permits officers to use more force than may be

necessary to accomplish legitimate ends as long as the force is “proportionate.” DOC should maintain the current regulation deeming all unnecessary force per se unreasonable.

For the same reason, DOC should also keep the following language in the current “Philosophy” section: “It is the Department’s philosophy to train staff to use *only the amount of force necessary* to: gain control of an inmate; to protect and ensure the safety of all inmates, staff and others; to prevent significant property damage; and, to ensure institution safety, security and good order.” 103 CMR 505.06 (emphasis added). The proposed regulations delete this critical limitation on the use of force.

Proposed 103 CMR 505.08 (1): Philosophy; De-Escalation Requirement

PLS encourages DOC to add into the regulations a requirement that de-escalation prior to the use of force shall include intervention by any qualified staff person who shall (1) actively seek to resolve the issue without use of force, (2) consider whether a cooling off period may assist in avoiding use of force, and (3) make recommendations to supervisory staff regarding how force could be avoided. Before any correctional officer enters the cell, supervisory staff shall implement any and all recommendations made to avoid use of force, unless implementation of such recommendations would place any person at risk of harm.

PLS recognizes that the proposed regulations include some additional language regarding the use of de-escalation that may be intended to strengthen its use. We believe that in order for de-escalation to provide a meaningful potential for avoiding force, the regulations should include as a method of de-escalation a staff member's proactive attempt to resolve the situation necessitating de-escalation, within the bounds of the prison’s rules and regulations.

Proposed 103 CMR 505.09: Use of Force

PLS encourages DOC to add into the regulations a requirement for adequate policies governing the use of force and monitoring of the use of force, including the use of body-worn cameras by all corrections officers on a permanent basis instead of as part of a pilot program.

PLS encourages DOC to add into the regulations a requirement for appropriate selection and supervision of staff involved in tactical and special operations teams, including barring from such teams all officers found to have engaged in excessive force.

Proposed 103 CMR 505.11: Planned Use of Force

PLS encourages DOC to maintain the previous definition of planned use of force in the definitions section as the proposed definition is less clear and makes it easier to justify a use of force under the regulations. We applaud the addition of an evaluation by a Qualified Mental Health Professional in proposed 103 CMR 505.12 for all planned uses of force against a person on Therapeutic Seclusion or in a specialized mental health unit. However, we believe it is critical that the Qualified Mental Health Professional’s evaluation specifically be required to address whether the person is able to understand and follow orders at that time and that if the Qualified Mental Health Professional finds they are not, that force not be used absent risk of imminent death.

Proposed 103 CMR 505.13: Prohibitions on the Use of Excessive Force

PLS encourages the DOC to add into proposed 103 CMR 505.13(3) a statement that a staff member's failure to report an excessive use of force will subject them to discipline. As the Department knows, it is difficult for an officer, or any staff person, to report a coworker's misconduct and doing so has historically subjected staff persons to negative repercussions. Given that reality, the failure to accurately report must carry countervailing consequences if it is truly expected that staff will do it.

PLS is pleased to see the addition in proposed 103 CMR 505.13(4) of language prohibiting staff from kneeling on or placing sustained body weight on sensitive areas of a person's body like their neck or head during uses of force. This prohibition is important, and we encourage the Department to ensure that training gives sufficient attention to it given that it is a change from both policy and practice.

In 103 CMR 505.13(5), PLS encourages DOC to remove from the regulations the ability for correctional staff to use lethal force on an incarcerated person to prevent serious bodily injury to any person. Instead, PLS encourages DOC to allow for the use of lethal force only to prevent imminent death of another person. Permitting lethal force for "serious bodily injury" introduces ambiguity into the determination of when such force is permitted, as "serious bodily injury" is open to varying interpretations. To avoid potential tragic outcomes, only in the rare, clearly definite situation of imminent death should lethal force be allowed.

Proposed 103 CMR 505.14: Requirements Governing the Use of OC, Chemical Agents, Specialty Impact Munitions/Distractive Devices, Batons, and Electronic Control Devices

PLS encourages DOC to add into the regulations a requirement for the prohibition of chemical agents being used against any person on therapeutic seclusion, or any person who a qualified medical/mental health professional determines is unable to understand and comply with the orders being given. PLS notes that the use of chemical agents often produces common reactions that are counterproductive to de-escalating situations involving a person in distress such as: heightened panic, anxiety, difficulty breathing, etc.

In proposed 103 CMR 505.14(2), PLS encourages DOC to remove the word "successful." The application of those weapons should be considered a use of force, without qualification.

Proposed 103 CMR 505.15: Requirements Governing the Use of Instruments of Restraint

In section (5), PLS encourages the DOC to reference or include the prohibitions on using restraints on a pregnant or post-partum person consistent with G.L. c. 127, s. 118. The proposed language leaves the decision about the use of restraints on such persons up to the judgment of an individual officer, which may not be consistent with the mandates of the statute.

Proposed 103 CMR 505.17: Requirements Governing the Use of K-9 Units

PLS encourages the DOC to add into the regulations an elimination of the use of K-9 units for tactical purposes, with their use being limited to contraband detection only. K-9 units are a terrorizing, barbaric, and unnecessary means of subduing people.

Proposed 103 CMR 505.18: Reporting Requirements for the Use of Force

PLS encourages the DOC to strengthen the language in section (1)(e) of this regulation by adding a requirement that photographs of a prisoner's injuries be taken when force has been used to cause those injuries.

Proposed 103 CMR 505.21: Staff Misconduct and Inmate Allegations or Complaints

PLS encourages DOC to add into the regulations a requirement for adequate, unbiased investigation of all use of force incidents, which includes the following requirements: investigations are performed by personnel unconnected to the incident under investigation; officers are forbidden from conferring with one another; all witnesses identified by the prisoner subject to the force are interviewed and/or permitted to testify; and officers found to have engaged in criminal activity are referred to the District Attorney for prosecution.

PLS encourages DOC to add into the regulations a requirement for adequate discipline of staff members found to be involved in improper use of force, threats of violence, use of racist slurs or other language indicating racial bias, racial profiling and bias in identifying those potentially involved in an incident, particularly where the incident is gang related, failure to report use of force, making false reports concerning the use of force, or retaliation against prisoners who report staff misconduct.

Proposed 103 CMR 505.23: Medical Treatment

PLS encourages DOC to add into the regulations policies requiring that prisoners subject to uses of force be examined by medical staff outside the presence of correctional staff or, at a minimum, outside the presence of staff involved in the use of force; that prisoners can call for emergency medical and mental health assistance through tablets; and that prisoners' injuries be photographed upon consent of the prisoner.

Proposed 103 CMR 505.24: Sanctions for Violation of 103 CMR 505.00

PLS encourages DOC to add into the regulations a requirement for officers found to have engaged in criminal activity to be referred to the District Attorney for prosecution.

Proposed 103 CMR 505.25: Training in the Use of Force

PLS encourages DOC to add into the regulations a requirement that officer training materials must include prison-specific standards. PLS recognizes the Department's effort to utilize training materials consistent with those used by the MA Municipal Police Training Committee but encourages standards specific to prison due to the fact that use of force situations in prisons often times do not translate to use of force situations outside the walls of confinement.

PLS encourages DOC to add into the regulations a requirement for adequate policies and training governing racial bias and misconduct as they pertain to the use of force, including use of racist slurs or other language indicating racial bias; prohibiting racial profiling and bias in identifying those potentially involved in an incident, particularly where the incident is gang related; investigation and, as warranted, discipline, of all officers alleged to have engaged in racist or discriminatory actions, including verbal abuse of prisoners.

PLS encourages DOC to add into the regulations a requirement for appropriate training in the use of force, including genuine de-escalation techniques and extensive situational training on applying the pyramid of force.

PLS encourages DOC to add into the regulations a requirement for clarification in written training materials and training given to DOC staff in Use of Force that the level of force used must be dictated by the actual risk presented by the prisoner on whom force is being used.

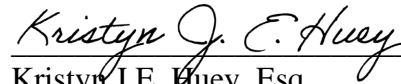
PLS encourages DOC to add into the regulations a requirement regarding the frequency of training.

Proposed 103 CMR 505.26: Data Collection and Tracking

PLS encourages the DOC to retain the existing requirement for quarterly reports about the use of force throughout the Department to be generated by the responsible division. In order for the Department to consistently track how force is being used and whether policy changes are needed, and for the public to have confidence that the DOC is using force appropriately, regular reporting is required.

Thank you for your time and attention to PLS concerns.

Best,



Kristyn J.E. Huey, Esq.
Brutality Project Director
Senior Staff Attorney
Prisoners' Legal Services of MA



CHARLES D. BAKER
Governor

KARYN E. POLITO
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General Counsel

December 21, 2022

Prisoners' Legal Services of Massachusetts
50 Federal Street, 4th Floor
Boston, MA 02110

Re: 103 CMR 505 – Use of Force

Thank you for submitting comments regarding proposed changes to the Department of Correction 103 CMR 505 – Use of Force. This type of feedback provides valuable insight and perspective to the Department as it endeavors to promulgate effective regulations.

Your comments will be taken into consideration as the regulation continues to undergo review prior to promulgation.

Regards,

Michele Dupuis-Clarke, Program Coordinator III
Legal Division



P.O. Box 1718
Boston, MA 02130
blackandpinkma.org
info@blackandpinkma.org

Michele Dupuis-Clarke
Program Coordinator III
Department of Correction, Legal Division

December 19, 2022

RE: Comments on 103 CMR 505: Use of Force

To whom it may concern:

Black and Pink Massachusetts is an independent organization and open family supporting LGBTQ+ people and people living with HIV impacted by the criminal legal system. We do this through mutual aid, organizing, and advocacy, including advocating on behalf of individuals who have had force used against them in the Department of Corrections.

We are writing in support of each of the comments provided to the Department during this hearing on behalf of Prisoners Legal Services. Each of their comments represents a necessary improvement to the proposed policy. In particular, we:

- Are in support of using “people first” language
- Are against removing the “least amount of force necessary” standard
- Are in support of the de-escalation requirement suggested by PLS to “Proposed 103 CMR 505.08 (1): Philosophy; De-Escalation Requirement”
- Are in support of the evaluation particulars recommended by PLS to “Proposed 103 CMR 505.11: Planned Use of Force”
- Are in support of a prohibition of chemical agents being used against any person on therapeutic seclusion, or any person who a qualified medical/mental health professional determines is unable to understand and comply with the orders being given
- Are in support of the changes proposed by PLS to “Proposed 103 CMR 505.23: Medical Treatment”

We note many of these due to their relation to incarcerated people with mental health issues. Incarcerated LGBTQ+ people disproportionately struggle with their mental health. Two died under DOC care related to their time in mental health watch as documented by the 2020 Department of Justice investigation.



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blackandpinkma.org
info@blackandpinkma.org

We are particularly concerned about the trauma that our community carries into prison and picks up there. In addition to groups mentioned in PLS' similar recommendation, we encourage the DOC take into account the unique needs and vulnerabilities of LGBTQ+ people, making changes and amendments where necessary and appropriate, in promulgating use of force regulations, standards, and training.

Please feel free to reach out to our office at morgan@blackandpinkma.org with any additional questions or clarifications!

Thank you,

Morgan Benson
Policy Coordinator
Black and Pink MA



CHARLES D. BAKER
Governor

KARYN E. POLITO
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December 21, 2022

Black & Pink Massachusetts
P.O. Box 1718
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Regards,

Michele Dupuis-Clarke, Program Coordinator III
Legal Division

HARVARD PRISON LEGAL ASSISTANCE PROJECT

HARVARD LAW SCHOOL

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6 EVERETT STREET, SUITE 5107
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December 19, 2022

Via Email

Michele Dupuis-Clarke
Program Coordinator III
Department of Correction
70 Franklin Street, Suite 600
Boston, MA 02110

RE: HARVARD PRISON LEGAL ASSISTANCE PROJECT'S COMMENTS ON PROPOSED REVISIONS TO 103 CMR 505 – USE OF FORCE

Dear Ms. Dupuis-Clarke:

Harvard Prison Legal Assistance Project (PLAP) appreciates the opportunity to comment on proposed changes to the regulations governing the use of force in Massachusetts prisons, 103 CMR 505.00. Law students at PLAP represent incarcerated people in prison disciplinary and parole cases, among other matters. In the course of our work, particularly within the disciplinary process, we regularly represent prisoners on whom force has been used, we have reviewed the reports and video recordings related to uses of force, and we have questioned officers who participated in uses of force. As such, we are familiar with the various circumstances and events that can lead to a use of force, and with the concerns about safety – the safety of all persons in the facility – that are implicated.

These regulations are important, both in setting reasonable and predictable parameters for when force is used, and in ensuring that there are processes in place to guard against the overuse of force or the use of excessive force. The process is as important as the substance, and that process must be fair and clearly communicated to all.

We commend the Department's efforts, with these regulatory amendments, to bring greater detail and clarity to questions of substance and process surrounding the use of force. While we and our clients have had, and will likely continue to have, disagreements about the necessity for and scope of force used in individual instances, the additional detail offered in these amendments provides a clearer road map that stands to benefit all parties and, it is hoped, will reduce the use of force systemwide.

With respect to specific sections of the regulation, PLAP offers the following comments:

505.07: *Definitions*, “Employee.”

The regulation defines “employee” broadly, for purposes of 103 CMR 505, to include DOC contractors or agents. It does not appear that the term “employee” is widely used in the rest of the regulation, however. For example, Section 505.13’s prohibitions on the use of excessive force discuss a “staff person” or “staff members” rather than employees. The Department should review the regulation and wherever possible, substitute the broader term “employee” for the other terms used therein.

505.08: *Philosophy*

Subsection (2) sets forth a sound approach where it states that the use of chemical agents, firearms, electronic control devices, instruments of restraint equipment, and canines shall not only be subject to 103 CMR 505 but shall be the subject of their own policies, with accompanying guidelines, and that these policies will be available to the public. *See also* 103 CMR 505.14 – 505.17. With all of these items, the temptation is real to use them because they are available, even when such use is unnecessary. Policies specific to each of these items could reduce any such temptation and any ambiguity around their use.

That being said, we continue to believe that the K-9 Patrol Unit should not be used on people in DOC prisons, and that its use for this purpose should be retired.

505.09: *Use of Force*

Subsection (1) refers to the Use of Force Pyramid, which is also defined in Section 505.07. That pyramid is not attached to the regulation, however. It should be appended to the end of the regulation, or otherwise made publicly available to those in and out of prison.

505.10: *Duty to Intervene*

This section is laudable in its instruction that staff members are obligated to intervene when another person is using excessive force. Such situations are inherently difficult, however, as staff members may have limited options in terms of how to intervene, the pressure on all staff members not to cross any of their colleagues is undeniable, and any intervention may come only after excessive force has already been used. This section should therefore add a requirement that staff members intervene when they observe another staff member escalating, or failing to deescalate, a situation with a prisoner. Intervention by an employee might be more feasible or realistic on the earlier side, before any force is used, and such intervention may result in no force being used at all. It may be easier for an employee to overcome any pressure (real or perceived) not to intervene at this early stage, especially if a Department regulation requires it.

505.11: *Planned Use of Force*

The required video recording of planned uses of force is not new, but its reiteration is appreciated, as is the clarification that cell or area extractions are planned uses of force. *See also* 103 CMR 505.07, “Planned Use of Force.” Our students and their clients have too often seen events unfold involving no immediate threat, which nevertheless were labeled a “spontaneous” use of force. This practice, which defies common sense and undermines the Department’s credibility, was particularly true at Souza-Baranowski Correctional Center and particularly so in early 2020. It bears noting that this was not always the practice; at one time, cell or area extractions were routinely considered to be planned, and the team of officers routinely included someone tasked with video recording. It is a worthwhile endeavor to return to that prior practice.

505.13: *Prohibitions on the Use of Excessive Force*

Subsection (3) is an important signal to all DOC employees and all incarcerated people that excessive force should be reported and not tolerated. The challenge to the Department here is sizable, however. Employees who report may justifiably fear reprisal from their co-workers and supervisors. They may wonder how, if at all, they will be protected from reprisal by the Department. This section should state in plain terms that those who submit incident reports reporting excessive force will be protected for doing so, and accompanying details set out in this regulation or another Department policy.

505.18: *Reporting Requirements for the Use of Force.*

Six years ago, we opposed a proposed amendment that guaranteed employees the ability to review available video recordings while writing their reports. The obstacle such a rule presents to a fair, accurate review of the use of force is obvious. Proposed subsection (2), which prohibits video review until after all reports have been written and prohibits the revision of those reports (while allowing addenda), is a welcome provision that will help preserve the integrity of the use of force review.

505.19: *Use of Force Package*

The specificity in Section 505.19 is appreciated and will help maintain the integrity of the Department’s reviews of use of force. Required elements of each person’s submission will help clarify everyone’s obligations while ensuring that all relevant information is acquired, and the 90-day deadline for completion of the review will ensure that any issues are addressed in timely fashion. The 90-day deadline will also allow disciplinary proceedings against the prisoner, if there are any, to move more quickly. In several cases we have had in recent years, the disciplinary report has remained pending for several months while we await production of discovery, which is only made after this review is complete.

505.21: *Staff Misconduct and Inmate Allegations or Complaints*

This section should include language to the effect that any investigation of alleged misconduct should include interviews not only of the participants, but of any bystanders, whether they are staff members, volunteers, visitors, or prisoners. Some incidents take place in areas where there may be one or more bystanders who witnessed some or all of the events, and who may be able to shed light on what happened for the investigators.

505.22: *Debriefing*

Subsection (2), which ensures that participating staff shall have the opportunity to review the video recordings (if any) with supervising officers, should include a caveat that such review is subject to, and does not supercede, the requirement of Section 505.18(2) that all reports shall be written before video is made available for review.

Thank you for your consideration of these comments. Harvard PLAP would be happy to discuss any of the comments, or the regulations in general. Our office can be reached at (617) 495-3969 or I can be reached by email at jthompson@law.harvard.edu.

Sincerely,

/s/ Joel H. Thompson

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Managing Attorney
Harvard Prison Legal Assistance Project



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Re: 103 CMR 505 – Use of Force

Thank you for submitting comments regarding proposed changes to the Department of Correction 103 CMR 505 – Use of Force. This type of feedback provides valuable insight and perspective to the Department as it endeavors to promulgate effective regulations.

Your comments will be taken into consideration as the regulation continues to undergo review prior to promulgation.

Regards,

Michele Dupuis-Clarke, Program Coordinator III
Legal Division