



LGIT'S COMMANDER'S LOG

September 2008

The Use of Pepper Spray or Other Chemical Agents in Amounts Greater Than Necessary May Violate an Inmate's Constitutional Rights

QUESTION: Can the use of chemical agents, including pepper spray, in quantities greater than necessary to gain compliance or to incapacitate an inmate constitute the use of excessive force?

ANSWER: Yes. The use of an excessive quantity of a chemical agent against an inmate may violate the inmate's federal and state constitutional rights.

CASE: *Benny Iko, Personal representative of the Estate of Ifeanyi A. Iko, et al. v. James Shreve, Lieutenant, et al.* United States Court of Appeals for the Fourth Circuit, Decided August 6, 2008

In *Iko v. Shreve*, the United States Court of Appeals for the Fourth Circuit considered a number of liability issues arising from the death of an inmate who died after being forcibly removed from his cell and transferred to another cell. The facts in the case established that Ifeanyi Iko ("Iko") was an inmate at the Western Correctional Institution. On April 28, 2004, Iko was involved in a violent altercation with his cellmate. Correctional officers broke up the fight by administering pepper spray. Iko was taken for medical attention and moved to an isolation cell. Lieutenant James Shreve ("Lt. Shreve"), the manager of Iko's housing unit, attempted to speak with Iko several times after the fight, but had difficulty communicating with him. Lt. Shreve became concerned and requested that someone from the prison's psychology department visit Iko. Over the next two days, different members of the prison mental-health staff visited Iko. On April 20, 2004, one of them recommended that Iko be transferred to a cell in the "Special Observation Housing" ("SOH") unit, where he would receive more frequent observation and medical attention. The transfer was scheduled for later that day. Just prior to the transfer, the prison psychologist encouraged Iko to "cuff up" by inserting his wrists through a slot in the cell door, so that he would not have to be transferred by force. When Iko did not respond, the chief of security and the prison warden authorized his transfer by force. To effectuate the transfer, prison authorities utilized a procedure called a "cell extraction." A team of seven correctional officers (the "extraction team") was assembled, led by Lt. Shreve. Standing prison procedures authorized the extraction team to use force if and to the extent necessary to secure compliance. The cell extraction was videotaped pursuant to state policy.

Immediately prior to the cell extraction, Iko lay passively on the floor of his cell. Lt. Shreve told Iko that he could avoid the use of force if he came to the door to be handcuffed. When Iko did not move, Lt. Shreve deployed a pepper spray "fogger" for several seconds through the door slot. Lt. Shreve then shut the slot door. When Iko did not come to the door, Lt. Shreve deployed another short burst of pepper spray. As he was doing so, Iko came to the door with his wrists and hands in front of him and his palms face down, and inserted them through the slot where the pepper spray was being deployed. Several officers then began shouting that Iko should instead turn around and place his hands behind his back through the slot. When Iko did not do so, Lt. Shreve administered yet another burst of pepper spray, and Iko again lay down on the floor of his cell. Lt. Shreve and another officer then each released a final burst of pepper spray and prepared to enter the cell. The pepper spray was dispersed in Iko's cell for approximately nine to fourteen seconds.

Iko was lying still on the floor of his cell when the extraction team entered. They secured Iko's arms in metal handcuffs behind his back and his legs in shackles, and placed a spit mask over his head. The team lifted Iko from the floor and, pursuant to standard cell-extraction procedure, walked him to a nearby medical

room to be examined by a nurse. Iko did not respond when the nurse spoke to him. Instead, he hung his head and the officers propped him up. After about a minute, Iko collapsed forward. The officers caught him and placed him in a nearby wheelchair for transportation to the SOH cell. At no point did the nurse provide any medical treatment or even come into physical contact with him. Nor did the officers remove Iko's spit mask or decontaminate him or his clothing, which was saturated with pepper spray. The officers then wheeled Iko to the SOH cell via an outdoor path, carrying his legs in front of the wheelchair to keep them from dragging on the ground. Iko was placed face down on the floor of the cell. The officers dispatched someone to retrieve nylon "flex cuffs" to replace Iko's metal handcuffs. While the officers waited, they continued to restrain Iko by kneeling and otherwise exerting downward pressure on various parts of his body. After several minutes, the flex cuffs arrived. The officers exchanged Iko's cuffs and left him face down, arms restrained behind his back, and spit mask still on. After he left the cell, Lt. Shreve offered that Iko could come to the slot to have his cuffs removed, but Iko did not respond. The officers left. Iko was found dead in his cell a short time later by SOH staff. A state medical examiner concluded that Iko died of Asphyxia, caused by chemical irritation of the airways by pepper spray, facial mask placement, compressional and positional mechanisms. Iko's estate and family members sued the officers in federal court.

One of the excessive force claims made by the plaintiffs concerned Lt. Shreve's use of a large quantity of pepper spray against Iko. The federal district court ruled that this claim was ripe for trial, and the federal appeals court agreed. In doing so, the appeals court said that "[i]t is generally recognized that it is a violation of the Eighth Amendment for prison officials to use mace, tear gas or *other chemical agents in quantities greater than necessary or for the sole purpose of infliction of pain.*" In this regard, the Maryland Division of Correction Directive governing the use of force, while permitting the use of pepper spray, states that "[o]nly the minimal amount of chemical agents necessary shall be used in a given situation." Therefore, Lt. Shreve had fair warning from existing law that multiple applications of pepper spray against a passive inmate who made at least some attempt at compliance, received no decontamination, and was forced to wear a spit mask was unlawful. Thus, the issue of whether Lt. Shreve's use of pepper spray was disproportionate to the need for force would be placed in the hands of a jury.

NOTE: Whether the amount of the chemical agent used against an inmate was "excessive" is determined on a case-by case basis. The following factors are examined: (1) the need for the application of force; (2) the relationship between the need and the amount of force that was used; (3) the extent of any reasonably perceived threat that the application of force was intended to quell; and (4) any efforts made to temper the severity of a forceful response. In the *Iko* case, the court was concerned not only with the quantity of pepper spray used, but also with the officers' failure to diminish its effects. For example, they never changed Iko's clothing, never removed the spit mask covering his nose and mouth, and never secured him any medical treatment for the exposure. In light of this case, it is critical that staff adhere to *all* procedures when chemical agents are used, including ensuring that the circumstances allow for the use of such agents, using only the amount necessary to gain compliance, and procuring medical treatment immediately after their use.

Prepared by John F. Breads, Jr., Director of Legal Services

This publication is designed to provide general information on the topic presented. It is distributed with the understanding that the publisher is not engaged in rendering legal or professional services. Although the publication is prepared by professionals, it should not be used as a substitute for professional services. If legal or other professional advice is required, the services of a professional should be sought.