

# Arbitration Decision and Award

**Arbitrator: Jack Buettner**  
**232 Cheyenne Trails**  
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**In the Matter of:** )  
 )  
**Ohio Civil Service Employees** )  
**Association, Local 11, AFSCME** )  
**AFL-CIO Union** )  
 )  
**and** )  
 )  
**State of Ohio, Department of** )  
**Rehabilitation and Correction** )

**Grievance #:** DRC-2015-02406-03

**Grievant:** Christopher Barto

**Date of Meeting:** October 25, 2022

**Date Briefs Received:** December 5, 2022

**Date Decision Issued:** January 12, 2023

**Advocate for the Employer:**

Richard B. Shutek  
Labor Relations Officer  
Ohio Dept. of Rehabilitation and Correction  
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**Advocate for the Union:**

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### **Appearances for the Employer:**

Rick Shutek  
Victor Danbridge  
Timothy Hess  
Lori Smolita  
Donna Straquadine  
Crystal Wees  
Dan Peters  
Paul Bumgardner

### **Appearances for the Union:**

Tim Watson	OCSEA
Christopher Barto	Grievant
Scott Stevens	

### **Joint Exhibits:**

- A. Contract: 2015-2018 State of Ohio & OCSEA AFCME Local 11, AFL-CIO
- B. Disciplinary Trail
- C. Grievance Trail
- D. November 1, 2012, edition of Standards of Employee Conduct
- E. 2-House Log Book entries – February 26, 2015 to March 1, 2015

### **Employer Exhibits:**

- A. City of St. Clairsville Weather History for February 28, 2015
- B. Inmate Visitation History for Troy Tomkins, A580138
- C. Contrabands Log

## **BACKGROUND:**

The Grievant, Officer Christopher Barto, was a 15-year employee with the Ohio Department of Rehabilitation and Correction (Hereafter known as the “Employer”). He was working at the Belmont Correctional Institution (BeCL) at the time of his removal. The Grievant was removed on July 6, 2015, based on the violation of three (3) rules of conduct:

Rule 30 – While on duty or on State owned or leased property the: Unauthorized conveyance, distribution, use, or possession of tobacco.

Rule 46 – Unauthorized relationships; A. The exchange of personal letters, pictures, phone calls, or information by any means with any individual currently under the supervision of the Department or any individual within 6 months following their release from custody or supervision of the Department or friend or family of same, without express authorization of the Department.

Rule 46 – Unauthorized relationships; B. Engaging in any other unauthorized personal or business relationship(s) with any individual currently under the supervision of the Department or any individual within 6 months following their release from custody or supervision of the Department or friend or family of same, without express authorization of the Department.

The Arbitration Hearing was held on October 25, 2022, at the Belmont Correctional Institution in St. Clairsville, Ohio. The Parties presented a binder containing the issue to be arbitrated and joint exhibits, all of which the Parties stipulated to the validity, content, and relevancy to the case at hand. They also stipulated to the following:

- Date of hire: April 9, 2000
- Date of Discipline: July 6, 2015
- Type of Discipline: Removal
- Classification: Correction Officer
- Grievant received Standards of Employee Conduct (November 1, 2012, edition)

- Grievant attended Pre-Service Training when his ODRC Employment began and Annual In-Service Training each year since his employment began
- Grievant had no active discipline at the time of his termination.
- This grievance is properly before Arbitrator Buettner.

**ISSUE:**

Did Management have just cause to terminate Correction Officer Christopher Barto?  
If not, what shall the remedy be?

**Employer's Summary and Position:**

The Employer contends that on February 28, 2015, the Grievant placed a 0.22 lb. package of shrink-wrapped tobacco in the Porter Closet of 2-House so that an inmate could retrieve it.

The Employer argues that Officer Barto timed his entrance into 2-House when the assigned officers were away from the entry area conducting count. He did not expect to find Officer Crystal Wees at the Officer's desk. He said he needed to go to the Porter Closet to clean off his boots. This happened just after arriving at work and walking down a paved sidewalk. Employer Exhibit #1, the weather history for that day, and Officer Wees's testimony supported that there was nothing present on the sidewalk to dirty the Grievant's boots.

Officer Wees became suspicious since the Grievant should have reported to his duty at the Chow Hall. If his shoes needed to be cleaned, they could have been cleaned there. Further, Officer Wees became suspicious since the Grievant had been seen talking to an inmate, Ernest Reynolds, A590283, in the Porter Closet on February 14, 2015.

(Direct Testimony of State's Witness – Crystal Wees) After exiting the Porter Closet, the Grievant reported to the Chow Hall. Officer Wees alerted 2-House Officer Dan Peters of the Grievant's suspicious actions, and after Officer Barto left 2-House, they searched the Porter Closet. Officers Wees and Peters testified that they found a 0.22 lb. bag of vacuum-sealed tobacco.

Officer Dan Peters testified at the Arbitration that he believed the Grievant placed the tobacco in the Porter Closet and that there was no other way it could have gotten in there. The tobacco had to have been dropped off on 1<sup>st</sup> Shift. 2-House had a Late Night, there were inmate porters in the Porter Closet, and it would have been picked up before 3<sup>rd</sup> shift secured the closet. Officer Wees testified that the Porter Closet would have been locked, and no one would have been in there after 3<sup>rd</sup> Shift had secured and accounted for the Porter Closet at 5:07 AM. Officer Barto was the first person in the Porter closet after it had been secured. (Direct Testimony of State's Witness – Crystal Wees)

Paul Bumgardner, BeCI's Institutional Investigator, provided testimony and evidence that the Grievant had unauthorized relationships with inmates and family members of those inmates. Officer Barto had been a person of interest with the Investigator's Office prior to Investigator Bumgardner's tenure. An investigation had been initiated based on kites, inmate letters written to staff or other inmates, and information received through confidential informants that claimed the Grievant was bringing in contraband such as tobacco, marijuana, and cell phones. Investigator Bumgardner showed documented correspondence between Richard Mong and the Grievant. Richard Mong is the brother of Inmate Troy Tompkins, the head inmate involved in inside contraband transactions. The evidence, a subpoenaed cell phone record for Richard Mong, documents twelve (12) text messages over a six (6) day time frame between Officer Barto and Mong. (Arbitration Binder, Section 4, p. 135) The Grievant claims these were for Facebook and newspaper transactions since he sells things on both and that he didn't know who the person was that he was texting. The Employer argues that that might be true, but twelve (12) text messages for a single transaction seems excessive.

The Employer argues that the Grievant had contact with Inmate Reynolds who was the 2-House pick-up man supplying Inmate Tomkins. (Arbitration Binder, Section 4, p. 24, 71 and Direct Testimony of State's Witness – Crystal Wees) The Employer further documented that the Grievant had contact with Inmate Tomkins. (Arbitration Binder, Section 4, p. 46, 47, 48, 67, 58, and 59.)

The Employer contends that the Union offered no defense against the charges. The Grievant did not testify or offer any explanations for the allegations against him. The State's evidence and testimony went unrebutted and unchallenged. Thus, the Employer contends they have just cause for terminating Officer Barto.

### **Union's Summary and Position:**

The Union contends that the Employer does not have sufficient evidence to support the rule violation claims. Further, there is no witness testimony of anyone seeing him possess contraband within the institution.

The Union refutes claims that the Grievant had a business arrangement with Inmate Troy Tomkins. The only link produced was a record of text messages between Officer Barto and Richard Mong, a family member of Inmate Tompkins. Officer Barto stated that he sells items on the internet and at the institution and believes the texts could have been related to his online business. His cell phone number is listed on Facebook and in the newspaper. Officer Barto stated during the investigation he had no idea of the identity of the person who was texting and that they were inquiring about an item he was selling on the internet. Further, the Union contends that if the Grievant had a business relationship with Mr. Mong, there would be more than the eleven (11) text messages over a period of more than three (3) days.

The Union refutes the testimony of Officer Wees concerning the Grievant's need to clean his boots. While she testified that she had nothing on her boots after walking from roll call to 2-House, the Grievant stated that he did not go directly to 2-House (Arbitration Binder, Section 4, p. 42-43) and could have something on his boots from another area of the institution. Officer Wees did not notice the floor being wet after he returned from cleaning his boots, but he could have wiped them dry. While the Employer saw this as suspicious, the Union argues that due to his military background, the Grievant always ensured his boots were clean.

The Union further argues that there was no testimony that Officer Barto had contraband in his possession when he went through front entry nor when he was in roll call. The Employer provided no video evidence of what happened after the Grievant left Officer's Wees's desk or of the shake down of the Porter closet. Officers Peters and Wees secured the Porter Closet at 6:25 AM, after the Grievant had left for the Chow Hall. The Officers waited until 6:53 AM, however, to conduct a search. The Officers secured the closet even though it had been secured at 5:42 AM by a Third Shift Officer as per the logbook entry. (Arbitration Binder, Section 4, p. 130) Sergeant Padgelek, in the investigative report, stated that Officer Peters reopened the Porter closet at 6:51 AM to retrieve a broom and then relocked the door. There is no video footage of this happening nor is there any video footage to show that the Porter Closet remained secure between 6:25 AM and 6:51 AM. Someone other than the Grievant could have entered the closet.

The Union argues that the investigation was faulty. Neither Officer Peters or Officer Wees completed contraband paperwork, an incident report, or logged in the logbook that a search had taken place and contraband was found. The chain of events was not relayed to Sergeant Padgelek until 7:03 AM of that morning. Officer Peters, without wearing gloves, gave the contraband to Sergeant Padgelek who put it in his desk. Thirty minutes later the Sergeant placed the contraband into the custody of Lt. Jerry Gianangeli. Much of the investigation was based on hearsay and secondhand

knowledge of the alleged incident.

The Union argues that the Employer did not to adhere to the seven (7) tests for Just Cause.

1. Was the investigation fair and objective?

The Union argues that the Employer did not interview potential witnesses and relied on second hand accounts. Sergeant Padgelek was the first person informed of the search and that contraband had been found. He took possession of it and notified a supervisor. He was never interviewed nor was Officer Sealock, who made the entry into the electronic logbook about the common area shake down. Officer Peters, who found the contraband with Officer Wees, was not questioned regarding his part in the chain of custody nor was Lt. Gianangeli. The Union asked for schedules for Officer Horvath who was working 2-House prior to the incident but was told they were not available. Officer Horvath was allegedly conveying contraband into the institutions, has since been removed, and is serving a prison sentence.

2. Is there substantial evidence that the worker is guilty?

The Union contends that there is no evidence or witness testimony that Officer Barto was in the possession of contraband. The Union further contends that there was no evidence to conclude that the Grievant had a business relationship with Inmate Tompkins.

3. Was the degree of discipline related to the seriousness of the worker's offense and worker's prior work record?

Since there was no direct evidence presented against the Grievant, the Union believes he was not removed for just cause. Further, his prior work record shows no active disciplines, he has received "meets" and "above's" on his performance



evaluations, and he was appointed to the institutional SRT and STAR teams.

For these reasons, the Union feels Officer Barto should not have been removed from employment, should be reinstated to his position as Corrections Officer, and that he is made whole with all lost wages, COVID stipends, leave balances, seniority, retirement contributions, etc.

### **Arbitrator's Summary and Position:**

This instant case occurred over seven (7) years ago which presents many concerns. There are gaps in information and many unanswered questions. These concerns might have been cleared up had the Grievant testified on his own behalf. Arbitrators have noted that a Grievant's failure to testify has left the Employer's case "unrefuted" and that the grievance may have "lacked merit". [May, K. (Ed.) (2016). Elkouri & Elkouri: How Arbitration works, 8<sup>th</sup> Edition. Bloomburg RNA. p. 8-48] This Arbitrator has had to determine the merits of the case based on information provided by the Employer since the Union did not rebut or challenge the State's evidence and testimonies.

Had any of the incidents that gave rise to the termination happened in isolation, they may not have arisen suspicion. Unfortunately, the Grievant was already a party of interest in a long-standing internal investigation concerning the conveyance of drugs and tobacco for inmates. Kathy Cole, the previous BeCI Institutional Investigator, initiated an investigation on the Grievant based on information received through confidential informants and "kites" which are inmate letters written to staff or other inmates. He was mentioned as bringing in contraband such as tobacco, marijuana, and cell phones.

The string of events in this instant case appears to be more than coincidental. The Grievant went to the Porter Closet in 2-House to clean his shoes. He was supposed to report to the Chow Hall and could have cleaned his boots there if they did, indeed, need

cleaning. He had also been seen in the same Porter Closet talking with an inmate the week before. The contraband was discovered shortly after he left the Porter Closet which had been previously secured.

The Union argued that someone else could have put the contraband in the closet. The Porter Closet was secured and accounted for after 3<sup>rd</sup> Shift at 5:42 AM. There were Inmate Porters in the closet prior to it being secured so one would think the contraband would have been retrieved had it been in there. Logically, it would then seem that the contraband was placed during 1st shift. Officer Barto arrived at 6:15 AM and entered the closet to clean his boots. Officer Peters secured the closet at 6:25 AM since an issue was suspected. The only time the closet was opened was at 6:51 AM to retrieve a broom for an inmate. It was then relocked. They conducted a search at 6:53 AM and found the contraband. While there was no video footage to show whether or not someone else had entered the closet, the officers testified that it was, indeed, secured except when the broom was retrieved. There was a very short window of time from 6:25 AM to 6:51 AM when someone else could have left the contraband. The officers testified, however, that the closet had been secured, and no one else was reported as going into the closet.

To add further suspicion, Officer Wees testified that the Grievant was seen talking with an inmate, Ernest Reynolds, inside the Porter Closet on February 14, 2015. Other unexplained interactions were cited with Inmate Troy Tompkins, head inmate involved in inside contraband transactions. Video footage shows the Grievant and Inmate Tompkins in the Secretary's Old Office in 1-House with the lights off and the door closed on January 20, 2014. Yet another incident had Tompkins coming to 2-House, talking to the Grievant, going to the Porter Closet with a chemical jug, and leaving with the same jug and same amount of chemical.

Further, during the Administrative Investigation, the Grievant was asked, "O.K., so you are telling me that there's a possibility that your DNA could be on that, that vacuum sealed tobacco that was in here today." The Grievant replied, "Yes." (Arbitration Binder,

Section 4, p. 63) Officer Barto's explanation was that he sometimes brought vacuum sealed items into the institution. His account does not allow for how a used bag would get resealed and vacuum packed.

The Employer showed that the Grievant did, indeed, have contact with a family member of an individual under the supervision of the Department of Corrections. Documented evidence (Arbitration Binder, Section 4, p. 135), in the form of a subpoenaed cell phone record, showed twelve (12) texts over a 6-day time frame, January 13, 2014 to January 19, 2014, with the brother of Inmate Troy Tompkins, Richard Mong. The Grievant's explanation was that he did not know that Mong was related to an inmate. He also stated he was probably buying or selling something from Mong although he couldn't remember what. He further stated that he could not get copies of the text messages. The day after, January 20, 2014, the Grievant was seen in a darkened, locked office with Inmate Tompkins. Tomkins carried a bowl into the office, left the office, and then distributed something from the bowl to another inmate. Video footage captured this. Yet another event, mentioned only in the Employer's opening comments but never expounded on, was that the girlfriend of Inmate Tompkins transferred money onto a pre-paid Visa card owned by the Grievant. The events illustrate unauthorized relationships with a family member and a friend of an individual under the supervision of the Department and "the exchange of personal letters, pictures, phone calls, or information by any means" is prohibited as stated in Rule 46 of the Standards of Employee Conduct. (Arbitration Binder, Tab 5) These text messages most likely led to a "business relationship" to bring contraband in to the facility which is also prohibited by Rule 46.

The termination of an employee is a decision that is not taken lightly. Virtually all CBAs, including the one between the Parties, provide that the Employer may discipline only for "just cause". Arbitrator Carroll Daugherty enumerated seven tests of just cause [Nolan, Dennis. (1998) *Labor and Employment Arbitration*. West Group] and this Arbitrator must consider each.

1. Did the company give the employee forewarning and knowledge of the

possible consequences of the employee's conduct?

The Grievant received the Standards of Employee Conduct, effective November 1, 2012, which prohibits conveying or trafficking in contraband and includes standards for personal conduct.

2. Was the company's rule or managerial order reasonable related to (a) the orderly, efficient, and safe operation of the company's business and (b) the performance that the company might properly expect of the employee?

The rules regarding contraband and unauthorized relationships with inmates and their friends or family certainly are related to the operation of any correctional facility. That an employee would abide by those rules is behavior one would properly expect.

3. Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order from management?

Yes. An investigation was initiated by Michele Miller, Warden of BeCI. Preliminary facts were gathered including a subpoenaed phone record for the Grievant's phone. Video footage was gathered showing suspicious activity between the Grievant and Inmate Tompkins. A sequence of events on the day of the incident that Sergeant Padgelek gathered from Officer Peters was included. A sequence of events that Sergeant Padgelek observed on February 28, 2015 was included. Officer Cody Foraker was interviewed and relayed an incident whereby Inmate Reynolds admitted to a relationship with the Grievant. Officers Wees and Peters were also interviewed. The Grievant was interviewed on February 28, 2015 and on May 29, 2015. The Employer made every attempt to conduct a thorough investigation.

4. Was the company's investigation conducted fairly and objectively?

The Union raised several procedural issues. The first issue was raised during the pre-disciplinary meeting. Additional video was added late, but the Union did agree to proceed after a break. During the grievance step meeting on August 12, 2015, the Union again raised an issue that a video was added late. The Union could have once again taken a break to review it. This issue does not impact the fairness of the investigation.

Another issue raised by the Union was the time period of the packet from the initial investigation. This was unavoidable since the Ohio State Highway Patrol (OSHP) was involved in a criminal investigation pertaining to the Grievant and had to provide the Institution the ability to proceed with their Administrative Investigation.

The Union raised the issue that they were not given the opportunity to meet with the inmates involved. Since this was an ongoing criminal investigation by OSHP, those individuals cannot be interviewed until given permission by OSHP.

5. At the investigation, did the judge obtain substantial evidence or proof that the employee was guilty as charged?

Yes. While some of the evidence was circumstantial, there was enough reasonable evidence to connect the Grievant to the contraband. The phone records clearly show that the Grievant had contact with a family member of an inmate, thus establishing a relationship through the multiple texts.

6. Has the company applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?

Yes. The Employer stated that the Standards on Employee Conduct are applied equally to all employees.

7. Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the company?

The principles of just cause do allow an employee to be terminated without progressive discipline for an incident of very serious misconduct. [May, K. (Ed.) (2016). Elkouri & Elkouri: How Arbitration works, 8<sup>th</sup> Edition. Bloomberg RNA. p. 2-57] While the Grievant had no active disciplines at the time of his termination and had good evaluations, the offense is certainly serious and would warrant termination.

In conclusion, this Arbitrator rules that the Grievant was removed for just cause. While the evidence of Officer Barto bringing in contraband is circumstantial, it is sufficient and reasonable to conclude that the Grievant did violate Rule 30. The Employer produced evidence showing that the Grievant had an unauthorized relationship via text messaging with a relative of an inmate thus violating Rule 46 A. Evidence connecting the text messages to the conveyance of contraband provided reasonable evidence that the Grievant also violated Rule 46 B. Grievance is denied.

## **CERTIFICATE OF SERVICE**

The foregoing report was delivered via email on this the  
12<sup>th</sup> day of January, 2023

Richard B. Shutek  
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and

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*Jack Buettner*  
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