Arbitration Decision and Award

Arbitrator: Jack Buettner
232 Cheyenne Trails
Malvern, OH 44644
216-618-4093
jackbuetter@yahoo.com

In the Matter of:

State of Ohio
Department of Rehabilitation and Correction Institution

and

SEIU 1199

Case Number: DRC-2023-02066-12

Grievant: Kenneth Owens

Date of Hearing: June 18, 2024

Post Hearing Briefs Received: July 22, 2024

Date Decision Issued: August 19, 2024

Advocate for Management:

Philip Rader
Labor Relations Officer 3
Department of Rehabilitation and Correction
4545 Fisher Road
Columbus, Ohio 43228
philip.rader@drc.ohio.gov

Advocate for the Union:

Josh Norris
Executive VP
SEIU District 1199
1395 Dublin Road
Columbus, OH 43228
JNorris@seiu1199.org

Appearances for Management:

Phil Rader	Labor Relations Officer 3
David Webb	Investigator, DPCS APA
Elgin Shumante	Former Parole Officer/Current Lieutenant at Warren Correctional Institution
Roger Wilson	Deputy Director 6, Authority Appointing DPCS

Appearances for Union:

Josh Norris	Executive VP, SEIU 1199
Ken Owens	Grievant
Beth Hogon	Labor Relations DRC
Jennifer Olsen	Regional Administrator, Lima APA
Angela Foltz	Senior Parole Officer, Lima APA
Chris Niekamp	Parole Officer, Lima APA

Joint Exhibits:

#1 – 2021-2024 Contract between SEIU District 1199 and the State of Ohio

#2 – Audio Files [Daugherty, Wendy; Dudas, Lindsay, Olsen, Jennfier; Owens, Kenneth (2 recordings); Shumate, Elgin; (2 recordings); Wieging, Duane]

#3 – Performance Evaluations of Kenneth Owens

#4 – Pre-Disciplinary Documents ONLY – no Body Worn Camera video or audio recordings shall be considered joint exhibits.

Joint Exhibit Index:

Grievance Trail

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Joint Stipulations:

- Classification: Parole Officer
- Original DOH: 07/09/2012.
- 1199 Seniority: 01/25/2015.
- Date of removal: 07/25/2023.
- The Grievant was current on all training.
- The Grievant had no active discipline at the time of discipline.
- The grievance is properly before Arbitrator Buettner.

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Issue:
Was the Grievant removed from his position of Parole Officer for Just Cause? If not, what shall the remedy be?

Background:
The Grievant, Kenneth Owens, was employed by the Ohio Department of Rehabilitation and Correction (ODRC) for nearly twelve (12) years. He was issued a removal from his position as a Parole Officer on July 25, 2023, for violating the Standards of Employee Conduct. The Union filed a grievance on his behalf on July 26, 2023. A hearing was held on June 18, 2024, at the SEIU District 1199 Headquarters in Columbus, Ohio.

The Union objected to the use of any Body Worn Camera (BWC) footage or video since Management failed to bargain the implementation and effects of such use. The Union contends that Management violated their own commitments made when BWCs were first introduced in that Management maintained that BWC would not be relied upon for discipline. The Union filed an Unfair Labor Practice which has been denied by the State Employment Relations Board. Since BWCs are a widely accepted piece of equipment and ODRC properly notified and ~~-~~trained its employees on the equipment, Management contends that BWC footage should be given the same weight as other evidentiary material. The Union jointly stipulated that the Grievance was properly before the Arbitrator so this Arbitrator will evaluate ~~give consideration to~~ it.

Both Parties were given a full opportunity to present both oral testimony and documentary evidence to support their respective positions.

Further, both Parties waived service of the Arbitrator's report via overnight delivery and agreed upon service via email.

Management's Summary and Position:
Management contends that they had just cause to dismiss the Grievant after the incidents on January 31, 2023, which violated the following Standards of Employee

Conduct (Joint Exhibit pp. 4-5~~?~~):

> 7. Failure to follow post orders, administrative regulations, policies, or written or verbal directives.
>
> 8. Failure to carry out a work assignment or the exercise of poor judgment in carrying out an assignment.
>
> 36. Any act or failure to act that could harm or potentially harm the employee, fellow employee(s) or a member of the general public.
>
> 38. Any act, or failure to act, or commission not otherwise set forth herein which constitutes a threat to the security of the facility, staff, any individual under the supervision of the Department, or a member of the general public.
>
> 41. Unauthorized actions, a failure to act, or a failure to provide treatment that could harm any individual under the supervision of the Department.
>
> 50. Any violation of ORC 124.34-… and for incompetency, inefficiency, unsatisfactory performance, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of such sections or the rules of the Director of Administrative Services or the commission, or any failure of good behavior, or any other acts of misfeasance, malfeasance, or nonfeasance in office.

The Grievant received information that an active Violator at Large (VAL), Shan Russell, had been dropped off at his residence. The Grievant and then Parole Officer Elgin Shumante responded to the area. The officers reported to the Apartment Manager's office to alert them that they were in the area looking for Mr. Russell. The Grievant came into possession of the key to Mr. Russell's apartment~~parent~~ but it is not known if it was given to him or if he requested it. The Officers went to Mr. Russell's approved residence and were met by a police officer from the Lima Police Department (LPD). All~~The~~ three officers arrived at the apartment. The Grievant knocked on the door and announced his presence twice. Getting no response, the Grievant used the key to enter. A search did not produce Mr. ~~Russell,~~Russell; however, Andrew Wolford was in the residence. The Grievant questioned Mr. Wolford who denied knowing Mr. Russell's location. Mr. Wolford was not the leaseholder of the residence nor was he under the supervision of the APA.

The three officers then went downstairs to another residence. The Grievant knocked on the door with no response. As Officers Owens and Shumante headed back to return the key to the Apartment Manager, the Grievant discussed his belief that Mr. Russell was in the downstairs apartment. Officer Shumante questioned their ability to enter since it was not Mr. Russell's approved residence. The Grievant returned the key to the Manager and stated he believed Mr. Russell was in Apartment 45. The Manager offered to send a maintenance employee with him to open the door, and the Grievant accepted.

Upon arriving at Apartment 45, the maintenance employee opened the door and the Grievant entered. He did not knock nor did he identify himself or why he was there. Two individuals were asleep on the couch. The Grievant asked if anyone else was there and moved past them. Officer Shumante stayed with the individuals in the living room. The Grievant continued searching the residence but did identify himself as a Parole Officer until after twenty-two seconds and after he was halfway through the apartment. The Grievant found another individual asleep in a bedroom and eventually encountered the leaseholder at the back of the residence. He asked permission to search her bedroom. At this point in time, he had been in the apartment for approximately one minute. Mr. Russell was not present.

Officer Shumante questioned the Grievant about their actions and ability to enter the residence. PO Shumante reviewed policies regarding forced entry and reported the actions of himself and the Grievant to Senior PO Duane Wieging. PO Wieging believed there was an issue and reported the incident to his supervisors. An administrative investigation was initiated.

During an initial review of BWC it was determined that the Grievant and PO Shumante had drawn weapons and pointed them at Mr. Wolford after entering the first residence. Per policy, this event must be reported although it was not reported to PO Wieging.

Management bases its argument for termination on APA's Search, Arrest and Seizure Policy 100-APA-05. (Joint Exhibit p. 144) Warrantless searches are permitted if the officers "have reasonable grounds, consent, or an exception to the warrant requirement must apply (e.g., protective sweep, search incident to arrest, or exigent circumstances)." The Grievant argues he had reasonable grounds, but Management disagrees since 30 minutes at least had elapsed since Officer Owens received information about Mr. Russell's whereabouts. He did not have consent and none of the exceptions apply. With the downstairs apartment, there was a higher expectation of privacy since this was not an approved residence. According to APA Search and Arrest Procedures, "If the search/arrest location is not the offender's approved residence, the officer may enter and search the premises only with a warrant, consent from the occupant, or exigent circumstances." (Joint Exhibit p. 147) None of these conditions existed yet the Grievant entered and began a search.

The Grievant was aware of the policies since he received yearly training on Policy 100-APA-05. Management established that he attended the trainings, passed tests associated with the training, and even facilitated trainings for other staff members. (Joint Exhibit pp. 202, 203) Mr. Owens was considered a Subject Matter Expert and knew the limits to his ability to search a residence as well as an unapproved residence.

David Webb, Investigator for the Division of Parole and Community Services' Adult Parole Authority, was assigned the administrative investigation into the allegations that the Grievant had forced entry into two residences and pointed his firearm at a citizen without reporting it. Mr. Webb testified that it was his determination that the Grievant did not have consent to enter the upstairs residence. While PO Owens had probable cause due to a tip he received to believe Mr. Russell was in the apartment, thirty minutes elapsed before the Grievant approached the apartment. This lapse in time lowered the certainty of Mr. Russell being present. Further, he heard nothing on the other side of the door.

Mr. Webb established the downstairs residence as a “third party residence”, meaning no one residing there was under the supervision of APA. No information supported that the Grievant had probable cause to believe the VAL was downstairs. No noise was heard from the other side of the door, the Grievant made no attempt to knock, announce himself, nor did he request permission to enter.

Further, it was ultimately determined the Grievant drew his weapon upon Mr. Wolford in the upstairs apartment and did not report it. Policy 104-TAW-01, the APA firearms policy, mandates that staff report a drawn weapon as soon as possible. (Joint Exhibit p.~~p. 150,~~155) The Gg~~g~~rievant could have done this when he spoke to Senior PO Wieging but did not.

~~Thus, Mr.~~Thus, Mr. Web’s investigation determined:

1. The Grievant did not have consent to enter either residence.
2. The Gg~~g~~rievant did not have sufficient probable cause to enter the residences.
3. The Gg~~g~~rievant did not have exigent circumstances to enter the residences.
4. The Gg~~g~~rievant failed to properly report he pointed his firearm at someone.

Due to the above circumstances, the Grievant went beyond his scope of authority as a Parole Officer. Mr. Webb testified that any entry without consent is considered a forced entry.

Mr. Shumante, who was with the Grievant during the two searches, testified he did not believe they had the authority to enter the downstairs residence. He testified that he specifically questioned the Grievant about their ability to entry the second residence which is corroborated by BWC video. (~~-~~Owens BWC footage 29:42 time~~s~~ stam~~to,~~p 22:00-23:00) Officer Shumante ~~only~~ followed along because~~since~~ the Grievant was the senior officer and his trainer as well as to provide a safe environment for the Grievant.

Roger Wilson, ~~Appointng~~Appointing Authority for DPCS testified that the ~~Grievsnt's~~Grievant's actions created significant threats to the safety of occupants, fellow officers, and apartment complex staff. Further, the Grievant's actions violated citizens' civil rights as well as Fourth Amendment rights.

Management contends that termination was the appropriate penalty for the incidents as stated above and also because the Gg~~g~~rievant provided false statements at the hearing. The Grievant testified at the hearing that he had an informant providing real-time information to him about the whereabouts of Mr. Russell. This informant was never mentioned in the report submitted a day after the incidents, during the investigatory interview which took place about 5 weeks later, at his Pre-~~Diciplinary~~Disciplinary Hearing, the Step 2 Hearing, nor his mediation hearing. The Gg~~g~~rievant claims he was in contact with PO Duff a couple of times during the search of the upstairs apartment and that PO Duff's stepdaughter was advising them that Mr. Russell was in the downstairs residence. BWC, however, revealed only one call between the Gg~~g~~rievant and PO Dd~~d~~uff. T~~ and t~~he Grievant stated he didn't think Mr. Russell would be downstairs. (Owens BWC footage 29:42 time stamp: 8:07-11:40). Even the Grievant admitted he could not support the claim of receiving information from PO Duff or his stepdaughter via BWC footage. Management cited five prior arbitration awards in which arbitrators have held deception to be an egregious offense worthy of termination.

The Union cited disparate treatment of the Grievant since he was dismissed and Officer Shumante was not. Management, however, contends the two cannot be held to the same standard. Officer Shumante was new to the role of Parole Officer and had no experience conducting field work. He was following the lead of senior officer Owens, a significantly more experienced PO who was known as a training officer in field tactics. Management further contends that~~e~~ Officer Shumante's actions are protected under whistleblower laws.

In conclusion, Management states that the Grievant did not have consent or probable cause to enter either residence. No exigent circumstances existed to allow him to enter

either residence since at least fifteen times he admitted via BWC that he did not know where Mr. Russell was.

Management contends that they have shown a preponderance of evidence through eye witness testimony, admissions by the Grievant, a thorough investigation, and BWC that the Grievant violated SOEC rules. Termination is appropriate since the Grievant was well versed in the clear expectations concerning warrantless searches. He violated policy, ORC, individual civil rights, and the Fourth Amendment. The Grievant placed nine people, including six private citizens, in potentially deadly situations. Therefore, Management asks that the Arbitrator deny the grievance in its entirety.

Union's Summary and Position:

The Union argues that Management did not have just cause for removing the Grievant from his position. With the first residence, upon entering the officers found pools of blood on the floor, a blood trail in the apartment, blood stains on furniture, and holes punched in the walls. Further, the occupant they found had overdosed the previous day on methamphetamines, and they found fentanyl, other drugs, and drug paraphernalia. Knowing the VAL's violent history and in light of what was found, the Grievant felt he had "exigent circumstances" to proceed with the warrantless search according to APA's Search, Arrest and Seizure Policy 100-APA-05. (Joint Exhibit p. 144)

Since the initial search did not lead to the arrest of Mr. Russell, the Grievant attempted to make contact in the second apartment where he believed the VAL was hiding. No one responded to his knock but people could be heard inside. The Grievant explained the situation to the apartment manager who sent a maintenance man to escort the officers to the apartment. The ~~Greivant~~Grievant did not request a key, did not request entry, and did not mislead the apartment manager in any way. The ~~managr~~manager wanted the ~~apartment searched~~apartment searched and has the authority to enter the apartment of her ~~leasees~~leases at any time. The ~~maintemnce~~maintenance employee unlocked the door, the officers entered, and secured permission of the legal resident to search the apartment. Again, the VAL was not found. The officers returned to the Lima

APA office, uploaded their BWC video, and briefly discussed the happenings with Senior PO Weining who was effectively the supervisor in charge.

The Union argues that termination was too harsh of a remedy for the circumstances as outlined above. The Union argues that there were, indeed, exigent circumstances that Management refused to consider. Further, the incident occurred on January 1, 2023 and the Grievant was not put on administrative leave until May 22, 2023—nearly four months after the incident. The APA did not take his weapon, did not place him on desk duty, and did not immediately place him on administrative leave. There was no forewarning of the penalty that was imposed, no progressive discipline, and no attempt to correct the alleged behavior. Officer Owens never received any form of discipline during his nearly 12-year career and has had exemplary performance evaluations throughout.

The Union further argues that the discipline issued was disparate. Officer Shumante, who acted along with the Grievant, was given a written reprimand, allowed to complete his probationary period, and remains employed by ODRC. The Grievant was terminated.

The Union referenced the Seven Tests of Just Cause in making their case for sustaining the grievance. These will be referred to below.

Arbitrator's Award and Decision:

Termination of an employee is a decision that is not taken lightly. Virtually all CBAs, including the one between the State of Ohio and SEIU District 1199, Article 8, provide that the employer shall discharge and discipline employees for just cause. ~~(Joint Exhibit #1, Article 5).~~ 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 employer give the employee forewarning and knowledge of the possible consequences of the employee's conduct?

   Management cited six (6) rules from the Standards of Employee Conduct that the Grievant allegedly violated. The Standards allow for progressive discipline which the Grievant did not receive. Management also referenced Ohio Policy 100-APA-05, Seach and Arrest ~~Prcedures~~Procedures. No penalties are listed therein for violations so the Collective Bargaining Agreement (CBA) procedures on discipline would ~~prvail~~prevail. The CBA calls for progressive discipline.

   The Union contends that forewarning must be clear and specific and that this was not the case. The Grievant did not know or reasonably believe that his actions would subject him to termination. Further, the rules cited were all encompassing and the application of them to this situation was subjective.

   This Arbitrator will agree that t~~T~~he Grievant had no forewarning that his ~~beahvior~~behavior was so egregious that it warranted termination. He was kept on the job for months after the incident. One would reasonably conclude that if the behavior was so contentious, the Grievant would have been put on leave immediately. Further, it is also reasonable to expect that progressive discipline would be applied.

2. The employer's rules are reasonable and related to the safe operation of the facility.

   The Employer's rules concerning an officer's standard of conduct certainly relate to the safe operation of the facility. Management also cited ODRC/APA policies on Search and Arrest Procedures as well as Firearms Policies, all of which are reasonable.

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

   Mr. David Webb ~~The Employer~~ conducted an administrative investigation ~~internal investigation~~ in order to determine if any rule(s) had been violated. Mr. Webb has nearly twenty-five years' experience with more than sixteen of those years working on a task force dedicated to developing leads, locating and arresting VAL fugitives, and is considered a subject matter expert on these topics.

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

   Management's investigation was heavily based on BWC evidence which has been a controversial issue. Key individuals such as the Lima Police Officers that were on the scene, the apartment manager, the maintenance employee, the individual in the first apartment, or any of the individuals in the second apartment were never questioned. Mr. Webb interviewed individuals who were involved after the fact and who were in managerial or senior staff positions. The Grievant and Officer Shumante were the only individuals at the scene who were interviewed. It would seem that the investigation could have been more objective and inclusive of other possible witnesses.~~The Employer conducted a very thorough investigation. (Employer Exhibit #10) OAG phone systems and investigative data bases were reviewed to see if the Grievant had used them to access information improperly. These included the Grievant's OAG issued phone, LEADS, OHLEG, CLEAR, LexisNexis, and ACCURINT. Interviews were conducted with multiple parties: Special Agent Supervisor Tobey Culler, Special Agent Brad Hammer, Special Agent Supervisor Greg Mounts, Special Agent Ashley Cretella, and Anna Haffner. Mr. Mahoney was also interviewed and given a chance to tell his~~

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~~side of the story.~~

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

Management contends that the Grievant did not have consent to enter either residence. At the first residence, the Grievant did not have consent to enter. At the second residence, the apartment manager supposedly gave permission for the search but was never interviewed to determine the veracity of that. Once inside, the Grievant did obtain consent from the resident.

Management contends that the Grievant did not have probable cause to enter either residence. It is questionable as to whether there was sufficient and timely information as to the VALs location that could give rise to probable cause. Mr. Russell's past history and threats could be considered exigent factors. Once inside, the blood and destruction can reasonably be considered exigent factors for the search, especially knowing the violent history of the VAL. In the second apartment, probable cause is less likely. The statements from the Grievant about a confidential informant do not hold up, and Mr. Wolford admitted he did not know where the VAL was. Thus, there was no clear cause to search the second apartment.

Mr. Chris Niekamp, a Union witness, testified that POs have never had the authority to enter third party residences without consent, exigent circumstances, and permission from the Regional Administrator. The Grievant had none of these.

Lastly, the Grievant did not properly report drawing his firearm in the first apartment. He had every opportunity to do so when he initially met with Officer Wieging. It was not until PSS Daugherty reviewed BWC footage

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that this issue was brought up. AP Firearms Policy 104-TAW-01 (Joint Exhibit p. 155) states:

> Whenever an employee points a firearm at a supervisee or a citizen, the employee shall notify their supervisor/designee as soon as possible.

Thus, the Grievant did violate several rules of conduct as well as established policy.

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~~The internal investigation did show evidence that the Grievant engaged in conduct unbecoming of an employee in the OAG's office. The unacceptable behavior cited was the repeated and unwanted communications with former OAG employee Anna Haffner. The Grievant did have unwanted contact with Ms. Haffner, and in August of 2020 he was given a no contact directive from OAG Human Resources. He had no further contact with her for the remainder of her employment which ended in July of 2021. In January and later in February and March of 2022 the Grievant again texted Ms. Haffner even though she said she was not interested in him, and Ms. Haffner asked him to stop contacting her.. Further, during December of 2022, the Grievant contacted several co-workers and questioned them about Ms. Haffner. While the directive issued to the Grievant barred him from contact with Ms. Haffner, it did not bar him from contacting his co-workers. To question co-workers about Ms. Haffner, a person you have been directed to have no contact with, did not, however, show good judgement. It does not portray "a reputation for integrity and respect for the law" as specified in the CBA. (Joint Exhibit #1, Employer Exhibit #22: Article 21)~~

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

~~No evidence was provided by either Party to substantiate that any other employee had been similarly charged.~~ The Union argues that there was

disparate treatment since Officer Shumante, who was with the Grievant throughout the incidents, received a written reprimand while the Grievant was terminated. This Arbitrator does not view the differences in penalties as disparate. Officer Shumante was new to his role as a PO. His previous position had focused on transportation duties so he had very little field experience. The Grievant was the senior officer, fully trained in search, arrest, and field tactics and had many years of experience in the field. Officer Shumante questioned the Grievant's actions but ultimately followed the lead of the more experienced person in order to provide backup in a potentially dangerous situation. That the two officers were treated differently is not unreasonable.

7. Was the degree of discipline administered by the employer in this 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?

This Arbitrator would have to say that the discipline administered was not reasonably related to the seriousness of the Grievant's offense. He did violate rules and policy but the purpose of discipline is to remediate improper behavior. That is why progressive discipline is a part of the CBA. The Grievant did not receive any opportunity to correct his behavior.

Further, t~~T~~he Grievant had not received any form of discipline during his career.~~in his career with the OAG which dates back to June 13, 2013. There were no allegations that he had previously failed to follow policies and no bad employment reviews.~~ His performance evaluations have been good, having received "exceeds expectations" in most categories. The Employer did note, however, that over the last three (3) rating periods the Grievant has been admonished by his supervisors concerning his attitude and customer service.

As per the usual practice of most arbitrators, all of the standards of just cause need to be met in order to sustain a termination. In light of the above criteria, this Arbitrator agrees that there was just cause for **discipline** of the Grievant. The Grievant's entrance into both apartments based on probable cause is questionable. Also, PO Owens did not immediately report that he had drawn his weapon upon a civilian which is a clear violation of policy. He placed numerous people, including private citizens, in a potentially dangerous situation. Also, the Employer contends and BWC evidence supports that the Grievant was untruthful during the hearing concerning his confidential informant. Termination, however, is~~was~~ too harsh of a penalty. ~~given the evidence, testimony, and information.~~ As stated above, the Grievant had no expectation that his behavior would result in dismissal. He continued to work his exact same caseload for almost four (4) months at which time he was put on administrative leave. As a veteran employee with almost 12 years of experience and no previous forms of discipline, this Arbitrator recommends that he be given an opportunity to improve and correct his behaviors.

The remedy shall be that the Grievant is returned to his previous position. Due to the severity of the policy violations and the potentially dangerous situation he put civilians in, he will receive no back pay. Seniority will be accrued in accordance with the CBA.

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CERTIFICATE OF SERVICE

The foregoing report was delivered via email on this the 19th day of August, 2024

Philip Radar

philip.radar@drc.ohio.gov

and

Josh Norris

JNorris@seiu1199.org

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Jack Buettner
Jack Buettner
Arbitrator