

#1574

**IN THE MATTER OF ARBITRATION**

**BETWEEN**

**THE OHIO DEPARTMENT OF CORRECTIONS  
ADULT PAROLE AUTHORITY**

**AND**

**SEIU 1199 /AFL-CIO**

**Before: Robert G. Stein**

**PANEL APPOINTMENT**

**CASE # 28-05-010131-128-02-12  
Clarence Lee, Grievant**

**Advocate(s) for the UNION:**

**Bill Brandt, Staff Representative  
1199 SEIU AFL-CIO  
1395 Dublin Road  
Columbus OH 43215**

**Advocate for the EMPLOYER:**

**Joan Oliveri, Representative  
ODRC  
Cindy Klein, 2<sup>nd</sup> Chair  
Office of Collective Bargaining  
Bank One Building  
100 E. Broad St., 18<sup>th</sup> floor  
Columbus OH 43215**

## **INTRODUCTION**

A hearing on the above referenced matter was held on March 22, 2002 in Columbus, Ohio. The parties stipulated to the fact that the issue was properly before the Arbitrator. During the hearing the parties were given a full opportunity to present evidence and testimony on behalf of their positions. The parties submitted written closing arguments following the hearing. The hearing was closed on April 3, 2002. The Arbitrator's decision is to be issued forty-five (45) calendar days following the date the hearing was closed.

## **ISSUE**

The parties agreed upon the following definition of the issue:

Was the Grievant, Clarence Lee, terminated for just cause? If not, what should be the remedy?

## RELEVANT CONTRACT LANGUAGE

(Listed for reference, see Agreement for language)

### ARTICLE 8.01 and 8.02 DISCIPLINE/PROGRESSIVE DISCIPLINE

#### BACKGROUND

This case involves the removal of Clarence Lee, Parole Officer, who was first employed with the Ohio Department of Corrections in November of 1983. After a short tenure of work in an institution, the Grievant was promoted to the position of Parole Officer with the Department's Adult Parole Authority (DRC Parole and Community Services).

On January 25, 2001, the Grievant was removed from his position with the Department. He was charged with violation of the following rules:

- 5(b)** purposeful or careless act(s), which result in misuse of property of the State (handcuffs);
- 6** insubordination-disobedience or inappropriate delay in carrying out a direct order of a supervisor;
- 7** failure to follow policies (wore firearm while intoxicated);
- 19** striking, fighting, or otherwise engaging in a physical altercation with a member of the general public;
- 29** purposeful or inappropriate display of weapons;
- 41** use of excessive force toward a member of the general public

The incident that led to the Grievant's discharge occurred on September 2, 2000. Mr. Lee was at a strip bar, "Bare Facts," during the evening of September 2<sup>nd</sup>. In the early morning he left the bar and drove Mr. Gary Moore, a person he met at the bar, to Mr. Moore's parent's (Mr.

and Mrs. Harrington) house at 3085 Janwood Drive, Columbus Ohio. Mr. Moore and the Grievant had been drinking, and when they arrived at the Harrington's house they had a physical confrontation. During the confrontation the Grievant handcuffed Mr. Moore which aided him in subduing him. Mrs. Harrington, Mr. Moore's mother, called 911, and two officers from the Columbus Police Department arrived finding that Mr. Moore was still handcuffed. The Grievant had on his person his Department firearm, a Smith and Wesson 9-millimeter model 5906 serial number TDC0172. His weapon was loaded, and it had one round in the chamber. The Grievant claimed Mr. Moore was a parole violator, but Columbus Police Officers found no evidence of this claim nor did they uncover any warrants for his arrest. However, from his own testimony Mr. Moore is a convicted felon and has had a history of incarceration along with other criminal arrests. The Grievant also informed the police that he was a part-time Police Officer with the City of Gahanna Police Department. The police verified this statement with Gahanna.

The parties stipulated to the fact that on May 20, 1999, the Grievant was given a direct order to resign from his position with the City of Gahanna. The parties also stipulated that the Grievant resigned from the City Gahanna on June 6, 1999, and was re-employed by the City from September 21, 1999 to September 2, 2000.

At the time of the Grievant's termination he had a written

reprimand on his record. It was dated June 12, 2000, and it was issued for making a derogatory statement on a fellow Parole Officer's voice mail. The Grievant grieved his termination on January 30, 2001, claiming the Employer did not have just cause for its actions.

### **EMPLOYER'S POSITION**

The Employer argues that removal is the appropriate level of discipline for a first offense for all but one of the charges levied against the Grievant. The Employer asserts that the Adult Parole Authority simply cannot tolerate having its employees unlawfully restrain and use excessive force on civilians.

Officer Lee does not dispute that he handcuffed Gary Moore, but he claims that it was out of self-defense. Officer Lee's version of events is suspect, contends the Employer. The Employer claims that the Grievant's story of what happened on September 2, 2000 does not match impartial eyewitness testimony. The Employer cites what it claims are inconsistencies in the Grievant's version of the facts. Officer Lee claims that he was not intoxicated that morning. Columbus Police Officer Terry Stuart and civilian Clarence Harrington testified that he was extremely intoxicated.

Officer Lee claims that he did not go to the front door with Gary Moore. Both Clarence Harrington and Gary Moore testified that he did

come to the front door. Officer Lee claims that he did not drag Gary Moore across the front yard. Harriet Harrington testified that she saw Officer Lee drag her son across the yard while he was handcuffed. Two color pictures exist of bruising on Mr. Moore's wrist. The bruising is consistent with injury caused by handcuffs.

The Employer asserts that neither the police report nor Officer Stuart's testimony support Officer Lee's after-the-fact story that Gary Moore had attempted to car-jack him. In addition, the facts do not support the Grievant's claim that Mr. Moore was a parole violator, argues the Employer.

The Employer asserts that wearing a firearm while under the influence of intoxicants is a violation of the APA Weapons Policy (DRC Policy 501-07). Officer Lee acknowledged that he knew that DRC Policy 501-07 prohibits having a weapon while intoxicated, contends the Employer. The Employer points out that Columbus Police Officer Terry Stuart and civilian Clarence Harrington testified that Officer Lee was extremely intoxicated.

Officer Lee claims that he only placed his weapon on his person after Gary Moore attempted to car-jack him. By his own admission, Officer Lee had enough thought to grab his gun, but not to call 911 on his cell phone, argues the Employer. The Employer asserts that eyewitness testimony and a 911 call support a different version of events. The

Employer concludes that Officer Lee's misuse of his state-authorized weapon and handcuffs and his excessive use of force against a member of the general public warrant a discharge.

However, the Employer claims there are other charges that support termination. It points out that during the investigation of those events the employer discovers that Officer Lee was insubordinate. Officer Lee had been given a direct order to resign from the City of Gahanna Police Department. Unbeknownst to the Employer, Officer Lee was working as a paid part-time police officer for the City of Gahanna. The Union contends that the Employer knew about the employment and approved it. The Employer asserts that this is simply not true.

A memo was sent out to all Adult Parole Authority (APA) officers on April 20, 1999 prohibiting Parole Officers from working in a position in a law enforcement agency where the position involves the possible exercise of arrest or other police powers. The memo clearly states what is permitted. The first condition is that the position is an unpaid volunteer. Officer Lee could not possibly think that a paid position was acceptable. No management representative would say that a paid position is acceptable, contends the Employer.

The Employer claims it also has a history of ordering Parole Officers to resign if it is discovered they are working as a paid Police Officer. On June 11, 2001, Arbitrator Pincus denied a grievance that disputed this

contention. The Employer points out that he decided that the rule regarding Parole Officers' ability to be employed off-duty with local law enforcement agencies is reasonably related to the orderly, efficient, and safe operation of the Adult Parole Authority.

Based upon these facts, the Employer contends it had just cause to terminate the Grievant.

### **UNION'S POSITION**

The Union refutes the charges levied against the Grievant on several grounds. It first contends that the investigation against the Grievant was not impartial. It argues that the investigator, Ray Mussio, treated the Grievant in a "*ridiculing and demeaning*" manner and accused him of drawing his weapon against Mr. Moore without any factual foundation. The Grievant placed his weapon in his shoulder holster when he felt there was a possibility that Mr. Moore, a convicted felon, was going to take his automobile. There was no evidence or testimony that he ever drew his weapon on Mr. Moore, asserts the Union.

The Union also argues that the Grievant did not use state-issued handcuffs when he subdued Mr. Moore during their confrontation on September 2, 2000. The accusations that the Grievant was insubordinate regarding his outside part-time employment with the City of Gahanna are unfounded, asserts the Union. It argues that the numerous other



employees, including management employees of the Department of Corrections, work outside jobs in law enforcement. The Union argues that the Employer's attempt to draw a distinction between the APA and the Department of Corrections is flawed because the Department of Corrections is the parent organization. It views the allegation of a Rule 6 violation levied against the Grievant to be a case of stacking charges.

The Union argues that on September 2, 2000 the Grievant had no choice but to physically defend himself against the actions of Gary Moore. The amount of force used by the Grievant to defend himself against Mr. Moore was necessary to control him and was not excessive, argues the Union.

Based upon the above, the Union requests the grievance be granted.

## **DISCUSSION**

The facts and testimony in this case point to several probable conclusions. Some of these conclusions support the charges against the Grievant, and some fall short of meeting a clear and convincing standard required in cases of discharge.

On September 2, 2000 the Grievant went to a nightclub and met Gary Moore. He drove Mr. Moore to his parent's house, and it was there that a confrontation of sorts ensued. There was no evidence of punches

being thrown or any other blows being struck that caused either man serious physical harm. It was not a fight in the classic sense. By all credible accounts (based on reports by Mr. Moore, Mr. Harrington, Officer Terry Stewart), the Grievant and Mr. Moore were very drunk. They engaged in some type of physical struggle that ended up with Mr. Moore being handcuffed by the Grievant. The Grievant was not convicted of a crime for his actions on September 2, 2000. He was directed to receive counseling for abusing alcohol. There was no evidence of Mr. Moore or his family filing any charges against the Department or the Grievant.

It is clear from the evidence and testimony that the Grievant placed a state-issued firearm on his person prior to his confrontation with Mr. Moore (Grievant, Mr. and Mrs. Harrington's statements and testimony). I find sufficient evidence to support a violation of Rule 7 in this case. He placed his firearm on his person while intoxicated and engaged in a confrontation with Mr. Moore. It was loaded and one round was in the chamber (Officer Stuart's testimony). Although the act was thoughtless and foolish, I do not find that it represented a purposeful or inappropriate display of weapons.

Mr. Mussio's report of October 23, 2000 began with the statement, *"It was alleged that on 9-2-2000 at 2:35 a.m., Officer Lee drew his state-authorized firearm on civilian, Gary Moore and handcuffed him."* Where was this alleged? Nowhere in the evidence or statements made by

anyone in this case prior to or at the hearing was it stated that the Grievant "*drew his state-authorized firearm on civilian, Gary Moore.*" This is a very serious allegation to make against an employee in a report that represents the conclusions of an official investigation. It is misleading and inflammatory, and it undermines the Employer's legitimate need to discover the truth. It also exposes the Employer to counter-actions by an employee.

Union's witness, Debbie Kelly, also stated during the hearing that Mr. Mussio said to the Grievant, "*We pay you to be a parole officer and not to be on a caseload.*" Under direct-examination Mr. Mussio stated, "*I told the Grievant he was on thin ice.*" While it is not clear why this statement was made, such statements have no place in the conduct of an official impartial investigation of charges against an employee. This is particularly true in an agency that values the importance of sound investigative practices. Such conduct undermines the credibility of the Department with its employees and others.

The Grievant stated under examination by the State "*...I did not show Gary my weapon.*" And, Mr. Moore testified under cross-examination that during the confrontation with the Grievant on September 2nd he "*... did not know he had a gun on him.*" During the hearing the Department stipulated to the fact that the Grievant's weapon "*...was never pulled.*" The Employer failed to prove with clear

and convincing evidence that the Grievant violated Rule 29-purposeful or inappropriate display of weapons.

The Grievant admits to using handcuffs to subdue Mr. Moore and insists they were his own handcuffs. There was no definitive evidence to prove the handcuffs used were state-issued. Therefore, I do not find an evidentiary basis to establish a violation of Rule 5 (b)-purposeful or careless act(s), which result in misuse of property of the State (handcuffs).

The testimony and evidence (Mr. Moore and Mrs. Harrington testimony and photographs) also support the accusation that the Grievant, in his inebriated state and with the aid of handcuffs, dragged Mr. Moore across the lawn of his parent's house. By his own admission Mr. Moore stated he and the Grievant were "*very intoxicated,*" when this occurred. He also testified that the handcuffs were very tight and "*that is why it left a bruise.*" (See Moore's testimony). The combination of the handcuffs being tight and then being used to drag him across the lawn most likely contributed to the bruising of Mr. Moore's wrist. It is also noted that both men were so intoxicated they could hardly maintain their balance (See Pre-D hearing, p. 4).

Mr. Moore admitted to being a convicted felon and to having served time in jail for possession of cocaine. He also admitted to being arrested for assault in 1997 and an open container violation in April of 1999. The Employer stipulated to the fact that Mr. Moore has a long

record of arrests for assault. This type of record raises legitimate questions about Mr. Moore's culpability in the confrontation that occurred with the Grievant on September 2, 2000. When you add the fact that Mr. Moore was extremely intoxicated, it is not unreasonable to surmise that Mr. Moore was more than a victim in this encounter.

The Employer also charged the Grievant with a violation of Rule 19-striking, fighting, or otherwise engaging in a physical altercation with a member of the general public and Rule 41-use of excessive force toward a member of the general public. However, in analyzing what occurred on September 2, 2000, it is essential that the Employer establish whether the Grievant's actions with Mr. Moore were as a private citizen or were conducted as an employee of the Department. In this regard, the statements of Officer Stuart and Lombardo are critical in establishing a nexus between the Grievant's off-duty misconduct and his employment.

*"Management has an interest in regulating the private lifestyles of its employees to the extent, and only to the extent that a nexus exists between the employer's product or reputation and the conduct at issue. Absent a clear showing that the private, off-duty, personal activities of the type that would otherwise be protected by the constitutional guarantee of privacy, speech, or association have a nexus or relationship to an employee's job performance or the employer's product or reputation, the decision should be in favor of the employee."*  
*Marvin F. Hill, Jr. and James A. Wright, "Employee Lifestyle and Off-Duty Conduct Regulation", (BNA Books, 1993).*

The Grievant established the nexus between his conduct on September 2, 2000 and his work. He conveyed to the Columbus Police

Officers, who were called to the scene, that he subdued Mr. Moore because he thought he was a parole violator. He identified himself as a Parole Officer and had his identification badge tied around his neck (See Pre-D hearing, p. 3). The Grievant stated to one of the Columbus Police Officers, Officer Teresa Lombardo, that Mr. Moore was a parole violator and that he had a file on him in a black bag in his car. The police checked this out. There was no file in his trunk and Mr. Moore was not wanted for any parole violations. These statements, as well as several other details that he conveyed, seriously undermine the Grievant's credibility.

During the hearing the Grievant stated that his motive for handcuffing Mr. Moore was prompted by his grabbing of the Grievant's car keys. In the words of the Grievant, *"He grabbed my keys and exited ...I thought I could get my keys back without a gun... I handcuffed him because he [Moore] was combative. I did not want him to get my weapon...I just wanted my keys back and to end the situation."* These details that the Grievant could so readily recall subsequent to the day of the incident, and which provide a motive for his actions, were never conveyed to police at the time (according to testimony of Officer Stuart and the Police Report). This story appears contrived and self-serving.

Other inconsistencies do further damage to the Grievant's credibility. He told the police that he *"followed Moore to 3085 Jadwood*

Dr." (See Police Report). During the hearing the Grievant stated, "I drove Gary home." During the hearing the Grievant stated he "...did not go to the door of his [Moore's] home." This was rebutted by Moore, Mr. Harrington, and Mrs. Harrington's testimony. The Grievant minimizes his consumption of alcohol on September 2, 2000. By the police account, the Grievant produced a strong odor of an alcoholic beverage from his breath, had trouble standing, displayed severely slurred speech, seemed confused, did not know his immediate location or where he lived, cried in the back of the cruiser, and was emotional. There is sufficient evidence to convince a reasonable person that the Grievant was highly intoxicated on September 2, 2000 and attempted to use his position as a Parole Officer (and part-time police officer in Gahanna) to physically subdue Mr. Moore without any apparent lawful reason.

For the record, it should be noted that Mr. Moore's account of the events was also filled with inconsistencies. For example, on September 13, he told investigator Mussio that the Grievant handcuffed him when he entered the Grievant's car while they were at the bar (See Investigative Report). During the hearing Mr. Moore testified that the Grievant placed handcuffs on him while he was at his parent's front door. He also said to Mr. Mussio that the Grievant instructed him to get into his car. During the hearing Mr. Moore stated the Grievant gave him a ride home. Mr. Moore also told Investigator Mussio that the Grievant told him he had a gun while

they were outside of the Bare Facts bar. However, during the hearing he stated, "I did not know he had a gun on him." Even though many of Mr. Moore's statements are suspect, it does not change the fact that the Grievant physically accosted Mr. Moore. He did so not as a private citizen who had too much to drink, but as a Parole Officer. I find there is sufficient evidence to support a violation of Rule 19 and 41.

The Employer's accusation of a Rule 6- Insubordination-disobedience or inappropriate delay in carrying out a direct order of a supervisor (continued employment) is based upon the Grievant's work as a part-time Police Officer for the City of Gahanna from September 21, 1999 to September 2, 2000. The parties stipulated to the fact that after the Grievant resigned from his position from the City of Gahanna on June 6, 1999, he rejoined the force and worked for almost a year. I find that this work was in violation the April 20, 1999 memo from APA Chief John F. Kinkela. The memorandum specifically states:

*"Therefore, employment in any position with a law enforcement agency where the position with the law enforcement involves the possible exercise of arrest or other police powers is not permitted and is grounds for discipline." [emphasis added]*

This memo is clear and includes a penalty for such actions. This rule was subsequently grieved by the Union and on June 11, 2001 Arbitrator Pincus found the rule to be reasonable. The Union was certainly within its rights to challenge this rule when it was issued. However, in order to avoid an erosion of organizational discipline, an employee must adhere to the



principle of "obey now and grieve later." Until this issue was finally resolved through the formal grievance procedure, the Grievant or anyone else in the bargaining unit had an obligation to adhere to Mr. Kinkela's April 20, 1999 memo. The Union raised several valid points regarding the Department's selective application of this rule in APA versus the Department of Corrections. It suggested that a double standard was in operation. It also stated that employees have not been fired for violating it in the past. Although this unrefuted information does not justify disobeying a directive, it may serve to mitigate the penalty levied against the Grievant.

Based upon the discussion above, I find the Employer provided clear and convincing evidence that the Grievant violated Rules 6, 7, 19, and 41. In terms of reviewing the Employer's penalty for the above rule violations, it is important to consider the history of enforcement of rules in a department. I find the APA has practiced leniency when it comes to addressing an employee who demonstrates a problem with alcohol abuse, even when they have violated other rules in the course of the abuse.

The Union provided unrefuted testimony that the APA has suspended, but not terminated Parole Officers for such serious acts as pointing a weapon at a client's mother while intoxicated and having a state-issued-weapon stolen while intoxicated (See testimony of Union

witness, Kelly). Ms. Kelly also testified that the Employer gave a second chance to a Regional Director who was intoxicated at work.

The Grievant is a long-term employee with over seventeen (17) years of service. At the time of his termination he had a written warning on his record. By all accounts he appears to still have a serious problem with alcohol abuse in spite of the fact he has had substance abuse treatment in the past. However, what compounds the Grievant's violations in this matter and sets them apart from the other examples of leniency provided by the Union is a realization by the Grievant that he was wrong. I find no evidence to indicate that the Grievant understands the gravity of his actions or is contrite about them. His testimony during the hearing underscores his continual denial of wrongdoing even after he had many months to evaluate his actions. Furthermore, his deliberate act in getting rehired by the City of Gahanna, after resigning in June of 1999 and in direct defiance to Mr. Kinkela's directive, demonstrates a pattern of indifference and defiance to directives by superiors that erodes the discipline necessary in any law enforcement agency.

**AWARD**

The grievance is denied.

Respectfully submitted to the parties this 19<sup>th</sup> day of May, 2002

A handwritten signature in black ink, appearing to read 'R. Stein', written over a horizontal line.

Robert G. Stein, Arbitrator