

**CONTRACTUAL
GRIEVANCE PROCEEDINGS**

IN THE MATTER OF)	
ARBITRATION BETWEEN:)	
)	DECISION IN:
STATE OF OHIO)	
DEPARTMENT OF NATURAL RESOURCES)	EMPLOYMENT
)	TERMINATION
-AND-)	(SHAWN D. COFFY)
)	
FRATERNAL ORDER OF POLICE,)	
OHIO LABOR COUNCIL, INC., UNIT 2)	

CASE NO.:	DNR-2017-01919-02
GRIEVANCE:	The Grievance protests the Employment Termination/Removal as lacking Just Cause.
AWARD:	The Grievance is sustained in part; and, denied in part.
HEARING:	October 10, 2017; Columbus, Ohio
ARBITRATOR:	David W. Stanton, Esq.

APPEARANCES

FOR THE EMPLOYER

Nicholas R. Spolarich, Labor Relations Officer
Victor Dandridge, Labor Relations
Administrator - OCB
Andrew Shuman, Labor Relations Officer - ODNR
Pete Angelas, Staff Officer
Richard Corbin, Deputy Chief

FOR THE UNION

Douglas Behringer, General Counsel
Ron Haines, Staff Representative
Renee Engelbach, Paralegal
Shawn D. Coffy, Grievant

ADMINISTRATION

By email correspondence dated September 6, 2017, from Alicyn Carrel, MBA/MPH Arbitration/Mediation Liaison for the State of Ohio, Office of Collective Bargaining, the undersigned was notified of his mutual selection to serve as an impartial Arbitrator to hear and decide Case Number DNR-2017-01919-02 concerning the Employment Termination/Removal of Grievant, Natural Resources Officer, Shawn Coffy then in dispute between these Parties. On October 10, 2017, at the Conference Center of the Office of Collective Bargaining, 1610 West Broad Street, Columbus, Ohio, an Arbitration Hearing was conducted wherein each Party was afforded a fair and adequate opportunity to present testimonial and/or documentary evidence supportive of positions advanced; and, where the Grievant appeared but did not testify. The evidentiary record of this proceeding was subsequently closed upon the Arbitrator's receipt and exchange of each Party's Post-Hearing Brief filed in accordance with the arrangements agreed to at the conclusion of the presentation of evidence. Accordingly, this matter is now ready for final disposition herein.

GRIEVANCE AND QUESTION TO BE RESOLVED

The following Grievance, as set forth in Joint Exhibits Binder, at Tab B, was filed on or about May 20, 2017 and contains the subject matter for disposition herein as follows:

Grievance:	DNR-2017-01919-02
Grievant:	Shawn Coffy

Grievance Chapter:	DNR
Grievance Agency:	DNR

Grievant's Union:	Fraternal Order of Police
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Worksite: DNRTRU

Grievant's Classification No.: 22521
Grievance Classification Title: Natural Resources Officer
Bargaining Unit: 02
Date of Hire: 5/21/2005
Years of Service: 8

Grievance Type: Discipline
Grievance Sub-Type: Termination
Date of Termination: 5/11/2017
Contract Articles: 18, 19, 19.05

Electronic Signature: /s/ Shawn D. Coffy

The stipulated issue for disposition is framed as follows:

Was the Grievant, Natural Resources Officer Shawn Coffy, removed for Just Cause?
If not, what shall the remedy be?

CITED PROVISIONS OF THE
COLLECTIVE BARGAINING AGREEMENT

The following provisions of the Parties' Collective Bargaining Agreement, Joint Exhibit-1 were cited and/or are deemed relevant herein as follows:

(See, pages 22-27 concerning Article 18, titled, "Administrative Investigation," setting forth the "Purpose," "Bargaining Unit Member Rights," "Chemical and Mechanical Tests," Line-up," "Polygraph Machines," "Notification of Disciplinary Action," "No Disciplinary Action Taken," "Disciplinary Action," Off-duty Status," "Criminal Investigation Disposition," and "Anonymous Complaints").

ARTICLE 19
DISCIPLINARY PROCEDURES

19.01 Standard

No Bargaining Unit Member shall be reduced in pay or position, suspended or removed, except for Just Cause.

Any Employee, who as a result of the action of any Court, loses his or her certification and/or ability to carry a firearm, may be charged with serious misconduct and terminated without progressive discipline.

An Employee, who is subsequently convicted of or pleads guilty to a felony, will be subject to disciplinary action, up to termination, irrespective of any previous discipline received for the same or related conduct; and such discipline shall be deemed to satisfy the standards of Just Cause and shall not be grievable.

An Employer representative shall not use the knowledge of an event giving rise to the imposition of discipline to intimidate, harass, or coerce an Employee.

19.02 Administrative Leave

Upon verbal notification followed within seventy-two (72) hours by written delineation of the reasons, an Employee may be placed upon administrative leave with pay at regular rate, except in cases that fall within ORC Section 124.388(B) where an Employee may be placed on unpaid Administrative Leave. The Employees will not lose any pay, fringe benefits, or seniority as a result of Administrative Leave (except in cases that fall within ORC, Section 124.388(B)). Administrative Leave may be instituted as the result of an Employer's reasonable belief that the Employee participated in an event or was in a condition of significant consequence to the Employer, the Employee, or the public. Such Administrative Leave with pay shall be for the purpose of investigating the event or the condition.

Administrative Leave shall not be considered discipline and is not subject to the Grievance Procedure as long as no loss of pay or benefits (except as allowed under ORC Section 124.388(B)) is incurred by the Employee.

19.03 Length of Suspension

No suspension without pay of more than ninety (90) calendar days may be given to Employee.

19.04 Pre-suspension or Pre-termination Meeting

When the Employer initiates disciplinary action which is covered by this Section, written notice of a pre-disciplinary meeting shall be given to the Employee who is the subject of the pending discipline. Written notice shall include a statement of the charges, recommended disciplinary action, a summary of the evidence being brought against the Employee and the date, time and place of the meeting. The meeting will be held at a

location determined by the Employer. The representative of the Employer at this meeting shall be appointed by the Director of the respective agencies or his/her designee, who is impartial and detached; i.e., not having been involved in the incident or investigation giving rise to the discipline.

The Employee may waive this meeting. The meeting shall be scheduled no earlier than three (3) working days following the notice to the Employee. Absent any extenuating circumstances, failure to appear at the meeting will result in a waiver of the right to a meeting. Where the affected Employee is on disability, or applying for disability, and is unable or unwilling to attend the meeting, he/she shall be offered the right to participate by telephone. The call shall be initiated via speakerphone in the presence of the associate and Employer Representative or designee. Failure of the Employee to respond to the offer or phone call shall result in the meeting proceeding without his/her presence. Any action resulting from said meeting shall not be challengeable on the basis of the Employee's absence or lack of participation.

A member who is charged, or his/her representative, may make a written request for a one-time continuance up to forty-eight (48) hours. Such continuance shall not be unreasonably requested nor denied. A continuance may be longer than forty-eight (48) hours if mutually agreed by the Parties, but in no case longer than sixty (60) days. There shall be no transcript or recording made at this meeting by either Party.

The Employee has the right to have a representative of his/her choice present at the meeting. The Employee or his/her representative and the Employer's representative have the right to cross-examine any witnesses at the meeting or have voluntary witnesses present at the meeting to offer testimony, provided however, that the Employer maintains the right to limit the witnesses' testimony to matters relevant to the proposed suspension or termination and to limit redundant testimony. The Employer shall first present the reasons for the proposed disciplinary action. The Employee may, but is not required to give testimony. After having considered all evidence and testimony presented at the meeting, the Employer's representative shall within twenty (20) working days of the conclusion of the meeting, submit a written recommendation to the Employer, the Employee and the Labor Council Representative involved.

The Parties understand that this meeting is informal and not a substitute for the Grievance and Arbitration Procedure.

The Employer shall render a decision within a reasonable period of time to accept, reject, or modify the recommendations.

The Employee and the Labor Council Representative shall be notified by the Employer of the final disposition of the statement of the charges.

19.05 Progressive Discipline

The Employer will follow the principles of Progressive Discipline. Disciplinary action shall be commensurate with the offense. At the Employer's discretion, disciplinary action shall include:

1. One or more written reprimand(s);
2. One or more fines in an amount of one (1) to five (5) days' pay for any form of discipline. The first time fine for an Employee shall not exceed three (3) days pay;
3. Suspensions;
4. Leave reduction of one or more day(s);
5. Working suspension. If a working suspension is grieved, and the grievance is denied or partially granted by an Arbitrator, and all appeals are exhausted, whatever portion of the working suspension is upheld will be converted to a fine. The Employee may choose a reduction in leave balances in lieu of a fine levied against him/her;
6. Demotion;
7. Termination

However, more severe discipline may be imposed at any point if the infraction or violation merits the more severe action. The Employer, at its discretion, is also free to impose less severe discipline in situations which so warrant.

The deduction of fines from an Employee's wages shall not require the Employee's authorization for the withholding of fines from the Employee's wages.

19.06 Suspension Options and Implementation Procedure

If a Bargaining Unit Employee receives a discipline which includes lost wages or fines, the Employer, at its discretion, may offer the following forms of corrective action:

1. Actually having the Employee served the designated number of days suspended without pay; or pay the designated fine; or
2. Having the Employee deplete his/her accrued personal leave, vacation, or compensatory leave bank of hours, or a combination of any of these banks under such terms as may be mutually agreed to between the Employer, Employee, and Union.

FACTUAL BACKGROUND

The operative facts which gave rise to the filing of this Grievance, challenging the employment termination of the Grievant, Natural Resources Officer, Shawn D. Coffy, are, except where otherwise indicated, essentially undisputed. The State of Ohio, Division of Parks and Watercrafts, Northeast District, under the auspices of the State of Ohio, through its Ohio Department of Natural Resources, hereinafter referred to as "ODNR" operates and manages 74

State Parks throughout the State of Ohio. It is party to a Collective Bargaining Agreement, Joint Exhibit-1 with the Fraternal Order of Police, Ohio Labor Council, Inc., Unit 2, hereinafter referred to as the "FOP" and/or the "Union" which sets forth the terms and conditions of employment concerning all permanently appointed full and part-time Employees employed in the classifications and positions listed in "Appendix A" of the Collective Bargaining Agreement, including that of Natural Resources Officer; the position the Grievant held at the time of his removal.

This matter involves the employment termination of the Grievant, Shawn D. Coffy, concerning an incident that occurred on February 24, 2017. The Grievant was employed as a Natural Resources Officer assigned to the ODNR Department of Parks and Watercrafts Northeast District, Mosquito Creek State Park. The primary responsibilities of his position include protection, safety and service to public visitors, including the issuance of citations and effectuating arrests, gathering evidence in investigations, enforcing applicable laws and regulations, and to assist prosecuting attorneys and district court officers representing the ODNR in administrative hearings, etc. Tantamount to these job duties and responsibilities is the knowledge of the rules outlining ethical standards. Natural Resource Officers, hereinafter referred to as "NRO's" must successfully pass an extensive background check, including a polygraph and psychological examination and honesty and integrity are emphasized as paramount in their job activities. As the record demonstrates, the Grievant had been employed with the Department since 2005 and had been a Park (Law Enforcement) Officer effective July 3, 2011. His job title changed to Natural Resources Officer effective March 5, 2017 He previously worked as a seasonal employee as a Natural Resources Specialist effective May 21, 2005.

The events in question occurred on Friday, February 24, 2017 wherein the Grievant was patrolling in the Nelson Kennedy State Park. The Grievant's Log Sheet, Employer Exhibit D-6, indicates the Grievant had an encounter with a 21-year-old Park visitor named Kayla Nail. The rules of the Parks system require visitors leave the premises at dusk. Gates will be locked and no further access will be permitted. The Grievant indicated he encountered at least 39 individuals in the Park after dusk and in violation of Park rules. His log indicates he gave each "offender" a verbal warning and explained the hours of operation. With respect to the above-referenced female, he noted he had an encounter with a "troubled 21 y/o female". The evidence of record demonstrates she, too, was in the Park after hours and he gave her the "typical three to five-minute speech" concerning rules and regulations and expectations of visitors to the Ohio Parks System. The evidence of record demonstrates that during the encounter with this female visitor, she initially alleged the Grievant was "flirtatious" with her and she used that to her advantage because she believed she may be in some sort of trouble.

The Grievant characterized the night in question as "busy with lots of people in the Park after dark." He indicated he parked his Cruiser at the entrance of the Nelson Ledges parking lot blocking those from leaving so he could be sure to make contact with them prior to their departure and explain the hours of operation, etc. He indicated the female was one of the last people to come out of the Park and only two other vehicles were in the parking lot when he made his initial contact with her. She came out alone and there was no one in close proximity when he began his verbal exchange with her. He asked for her ID and gave her a typical three to five-minute speech about being in the Park after dark and gave her a verbal warning. During the course of his encounter with the female visitor, she advised him she had been in the Park with some friends who were smoking of marijuana. She indicated she did not partake and agreed to

allow the Grievant to search her and her purse. The Grievant indicates in the Investigation Report he found no signs of her being impaired, nor did she have in her possession any illegal drugs. The events that followed ultimately led to the Grievant's removal.

According to the Grievant, she then asked if she could talk to him, but prior to doing so he had to address another visitor that had just arrived at the parking lot. He indicated he had cleared this contact and two other people that came out of the Park again giving them the same three to five-minute speech. According to the Grievant, the female could have left the Park since she had already received her three to five-minute speech and her verbal warning; however, she remained at the Park. He indicated he began speaking to the female at her car and he characterized this occasion as being more "personal in nature". The Grievant alleges the female asked him "do you want to kiss me?" To which he replied, "well, you are a beautiful girl" and thought about it, but told her he was working. He then claimed she grabbed his face and kissed him. His initial reaction was to put his left hand on her face and his right hand on her hip to push her away. He indicated he hesitated and the kiss went on for a few seconds and then he heard someone else approaching which required his attention. He admits he kissed her back. He indicated he believed there were two to three people approaching as the kiss continued. As the record indicates the Grievant began to question the intentions of the female based on this encounter.

The Grievant claims that prior to their parting ways, the female asked for his phone number to which the Grievant obliged. He claims he had missed a phone call from her later in the night and retrieved her phone number in that fashion. Both the female and Coffy seemingly agree she made a statement to him she had to get home because her Father required her to be home. She also indicated, according to Coffy, she could in fact stay around longer if he wanted

her, or something to that effect. Coffy indicates he remained in the parking lot after the female left to complete paperwork.

According to the evidentiary record, on or about March 8, Park Manager, Josie McKenna contacted Lieutenant Brian Andrews regarding information on a “complaint call” she had received at Mosquito Lake State Park. The complainant, Jason Sop, advised Park Manager McKenna his girlfriend had been approached by an Officer at Nelson Ledges State Park at dusk on or about February 24, 2017. The complainant indicated Coffy was on foot clearing visitors when he encountered Kayla Nail, who Sop claimed to be intoxicated. According to Sop, the Officer forced himself on her, kissed her, and wanted more. He claims she refused and slept in her car in the Quarry parking lot. Sop also advised McKenna the Officer had been texting and “Snapchatting” with the female and was to meet her after work, but that never happened. Copies (screenshots) of the text messages were provided and statements from both Jason Sop and Kayla Nail were obtained. Sop indicated during the investigation that when Nail was heading back toward the parking lot she felt she had to kiss the Grievant in order to "get out of trouble." She indicated at page 11 of Joint Exhibit D that "I kissed him. That's why I didn't make the ... it was Jason making the complaint." The investigator asked, okay, so it was not an unwanted action? To which she responded, "I mean, yeah, I kissed him. Like...yeah...I don't know."

Based on the evidence of record, the text messages initiated by the Grievant were as follows: "Hey beautiful, make it home yet? Do you want to hang out sometime? Do you even remember who I am LOL". During the investigation, the Grievant indicated he had received numerous text messages he characterized as threatening in nature. He provided “screenshots” from his cellular phone of these text messages. Based on further investigation, these messages had been sent from the female's boyfriend, Jason Sop, who filed the initial complaint, via

telephone, regarding the Grievant. The record demonstrates the Grievant also received dozens of phone calls from Sop totaling approximately 40 missed phone calls and 14 text messages. The record demonstrates at one time Sop phoned the Grievant 17 times in a 41-minute period of time. The record demonstrates that rather than report these messages he deemed threatening in nature, he contacted his Union Representative. He indicated he finally realized it was connected to his encounter with the female when Sop specifically referred to Nelson Ledges. Further in the investigation, the Grievant acknowledged he should have brought these forward to his Employer.

As set forth at page 1 of the Investigative Report, Investigator, Pete Angelas, found:

1. Officer Coffy had an improper contact by kissing a Park visitor while on duty and in uniform during the evening of February 24, 2017;
2. Officer Coffy did not report or warn his coworkers of threats he had received resulting from his contact with Kayla Nail. These threats could have been aimed at any male Park Officer at Nelson Ledges State Park. Officer Coffy had 25 days to volunteer this information, but only made ODNR aware during his interview and,
3. Officer Coffy falsely answered several questions during his interview and changed his answers after being confronted with facts.

Based on the investigation, the Grievant was charged with violating the ODNR Disciplinary Policy, including “Violation of an applicable Uniformed Officer's Code of Conduct or similar Division specific policy, procedure, or directive, and Exercising poor judgement.” Such is set forth in Joint Exhibit E, titled, “Park Officer Code of Conduct” 1-101-04, “Unbecoming Conduct.” Following the completion of the investigation, the findings set forth therein and the charges as previously identified, the Employer effectuated the employment termination Notice to the Grievant effective May 12, 2017 as a result of the incident that occurred on February 24, 2017. This action was met with the filing of the pending Grievance. That Grievance was processed through the negotiated Grievance Procedure and denied

throughout the various steps thereof. When the Parties' efforts to resolve this matter through the course thereof proved unsuccessful, the employment termination and Grievance of Natural Resource Officer Shawn D. Coffy was appealed to Arbitration hereunder.

CONTENTIONS OF THE PARTIES

EMPLOYER CONTENTIONS

The Employer contends it established Just Cause to effectuate the Removal of the Grievant, Shawn Coffy, for his conduct on February 24, 2017 while patrolling Nelson Kennedy State Park. Simply stated, he approached a 21-year-old female and engaged in inappropriate conduct while in uniform and while on-duty. At approximately 7:00 p.m. he recorded in his "Daily Officer Log," (Exhibit D-6) he encountered approximately 39 different individuals who were in violation of Park rules based on the closing time for which he issued verbal warnings and informed them of the hours of operation. He also noted he encountered a "troubled 21 y/o female" - Kayla Nail. The Grievant claims he was concerned about her well-being. The Employer emphasizes he engaged in a kiss with the female that lasted several seconds. Based on the Investigative Report (Exhibit - D) the Grievant placed one hand on the female's face and the other on her lower back; and, when the Grievant became aware that other attendees in the Park were approaching and may be witnessing this encounter, he pushed her away.

During the Investigative Interview, the Employer emphasizes the Grievant admitted to kissing the female with knowledge, based on her assertion to him, she may be under the influence of illegal drugs. The Employer emphasizes the Grievant was manipulated by a Park visitor who was in fear of legal trouble after admitting to the utilization of drugs with friends and placed himself in an extremely vulnerable situation by allowing someone within close proximity of his duty firearm. The Employer asserts the Grievant had no concern while engaging in this

kiss with this female until he felt that it may be witnessed by other Park visitors. After the kiss ended, the Grievant provided the female his personal phone number stating his purpose was to follow-up to ensure she was okay. The Employer notes the Grievant had a state issued cellular phone in his possession, but stated he could not remember the number for that phone and therefore gave the female his personal phone number. He also argued he has not been provided business cards and had he been so provided he could have provided one to the female.

He acknowledges interacting with the female for a significant amount of time and had he intended to follow-up with her on a professional basis, he could have provided her with the appropriate workplace contact information. Despite his assertions that his contact was “law-enforcement oriented,” his text messages sent to her do not support his contention. The Employer notes his text message wherein the Grievant wrote, "Hey beautiful, make it home yet? Do you want to hang out sometime? Do you even remember who I am? LOL". The Employer argues these messages can hardly be defended as “law-enforcement oriented” as alleged by the Grievant. The Grievant was readily aware she was under the influence of drugs. Why else would he ask her if she remembered him?

During the Arbitration Hearing, neither the Grievant nor the Union provided any rebuttal to the Grievant's interaction with the female or his intent in following-up with her. He encountered a female he described as “troubled,” and initially was resistant to her kiss based on the fact that he was on duty and in uniform. He stopped because the Grievant was afraid other Park visitors had witnessed their encounter. The Employer insists Officers do not need to have a written policy, as suggested by the Union, to demonstrate the inappropriateness of becoming intimate with a potential perpetrator, much less one who admitted to recently ingesting illegal and mind-altering substances.

The Grievant's actions in this matter could have potential caused liability for himself, the Department, and his co-workers based on the emails/texts and phone calls initiated by the "jealous boyfriend". The Grievant received approximately 14 text messages and 40 missed phone calls from the female's boyfriend, who exhibited erratic behavior in his incessant attempts to make contact with the Grievant. Many of the texts came in the middle of the night and at one point he called the Grievant 17 times in a 41-minute time period. The Grievant felt the messages were threatening in nature; however, he did not report them to his Employer for fear his encounter with the female would be exposed. This State Park where this incident occurred could be patrolled by multiple uniformed Law Enforcement Officers, or other Employees wearing similar uniforms to those of the Natural Resources Officers. His failure to report the threats of physical harm as set forth in the messages sent by the female's boyfriend places him and his co-workers in imminent fear of physical harm.

The Grievant failed to perform his job duties in a manner becoming of an Officer and chose to engage in a situation he knew to be inappropriate and unacceptable. This incident simply cannot be portrayed as a single mistake or brief lapse in judgement. The Grievant exhibited a pattern of poor decisions compounded over several weeks' time even though he believed he could conceal the messages from the boyfriend the Grievant described as threatening in nature and then chose to preserve himself over the integrity of the Department and the safety of his co-workers and visitors in the Parks.

The ODNR simply cannot risk the liability associated with a Law Enforcement Officer who promotes his own sexual desires over the integrity of the Department and the safety of himself, the citizens who visit the parks and his co-workers. These Officers always make encounters with individuals in secluded areas. Some are offered bribes by suspected perpetrators

as a *quid pro quo* to “get out of trouble” and in this matter the Grievant has proven he cannot be trusted to make appropriate decisions as a Natural Resources Officer.

For these reasons, the Employer requests the Grievance be denied.

UNION CONTENTIONS

The Union contends the Employer failed to prove the Grievant violated any law or the rules of the Ohio Department of Natural Resources that would be worthy of separation of employment. Additionally, the Employer failed to follow Progressive Discipline as required by the Collective Bargaining Agreement and failed to meet its burden of proof the Grievant was discharged for Just Cause.

It emphasizes a finding of “conduct unbecoming” for which the Grievant was charged, denotes more than a lapse in judgement. Deputy Chief Corbin testified the Grievant can no longer perform his duties as a Law Enforcement Officer. The Union contends he was not charged with theft or bribery, he did not lie under oath; in fact, the Grievant's former Supervisor indicated he would have no problem working with the Grievant in the future if he were to return to work. He served as the Grievant's Sergeant prior to his retirement and had served in law enforcement for over 20 years with this Employer.

To refute the Employer's assertion that kissing while on duty brings discredit to the Division, the Union emphasizes there is no rule prohibiting kissing in the Park while in uniform. The Union emphasizes the perception of the witnesses of the Employer based on what is and is not acceptable are subject to whatever expectations were of their former Agency. Staff Officer Pete Angelas admitted it was common for Employees to kiss their wives or girlfriends while in uniform at these Parks. Moreover, Angelas testified there would be no way for any Park visitor to know the female was not the wife or the girlfriend of the Grievant. The Park was closed and

only a few visitors remained in the Park when this incident occurred. The Employer has not been adversely affected by this incident and it did not make the local news. It was not publicized and a limited number of Employees are even aware this incident occurred.

The conduct engaged in by the Grievant does not give rise to the level of discipline implemented for what can be considered as negligible misconduct. When the Park began closing, the Grievant began to talk to Park visitors advising them of the hours of operation, when he happened upon this female who was one of the last to exit the Park on the night in question. He took her ID and he gave her his usual “three to five-minute speech” about being in the Park after dark. He also noted she may have been under the influence of alcohol or drugs. When he questioned her, she acknowledged her friends had been smoking marijuana earlier that day. At that point, he asked if it was permissible to search her bag for evidence of marijuana whereupon he found nothing and determined she was okay to drive and issued her a verbal warning.

When other visitors approached the entrance to the Park where his Cruiser was parked blocking their departure, he indicated to her he would have to address these visitors and interrupted his interaction with this female. She had every opportunity to leave the Park at that time, but she did not. When the Grievant returned, she moved forward, kissing the Grievant. He claims he received a call from her later that evening, but missed the call. Initially, she indicated the Grievant became “flirty” with her and she was responding to him fearing she was in some sort of trouble. She later recanted her story admitting she became flirtatious with him because she thought she might be in trouble. Contrary to the assertions of Deputy Chief Corbin, the Grievant was not using his position to try to “pick-up” the female. In his eight (8) years of service with the Agency, he has had no discipline and the Employer offered no evidence regarding adverse evaluations or written warnings demonstrating any employment deficiencies.

After the incident occurred, the Grievant began receiving text messages and phone calls/messages from an unknown number whereupon the Grievant contacted his Union representative to discuss the calls and texts. His representative, Ron Haines, advised him to be vigilant, but he did not see them as threatening in nature. He, himself, based on his years of service, received many such calls and texts from intoxicated individuals, jealous boyfriends, etc. He identified this individual as a jealous boyfriend. If in fact the Employer thought its Officer was really in danger, they had the ability to file criminal charges against the jealous boyfriend; however, there is no evidence this occurred. Indeed, the Grievant was foolish to allow himself to be placed in this position and despite her initial assertion, the female Park visitor eventually admitted she was the one who made the advances.

Additionally, the Union insists the Employer failed to follow Progressive Discipline as required in the Collective Bargaining Agreement. The Grievant has maintained a clean personnel record for over eight (8) years and this leap in discipline to effectuate termination for this offense, is not warranted and does not constitute serious misconduct, a criminal or heinous act. The Union argues that despite Deputy Chief Corbin's assertion the Grievant's credibility was compromised based on his untruthfulness during the Investigation, the Grievant was not charged with dishonesty. He admitted to his indiscretions based on this incident and the penalty imposed is not commensurate with the nature of the offense.

With respect to the Employer's reliance upon the "Disciplinary Grid," the Union insists the Employer has tried to substitute this Disciplinary Grid for the language contained in the Collective Bargaining Agreement. Reliance upon the Disciplinary Grid does not require termination in this matter. The Grievant exercised poor judgement that should have resulted in a written reprimand or suspension; not termination. The Union has never agreed to permit the

substitution of this Disciplinary Grid for the language the Parties bargained and memorialized in the Collective Bargaining Agreement. It is not now, nor has it ever been, part of the Collective Bargaining Agreement between the Parties.

Just Cause requires the Employer to apply discipline that is commensurate with the offense and one incident does not create a “pattern” as suggested by the Employer. There is absolutely no reason to end the career of a good Employee with a clean record for a first offense. The Employer presented no evidence to demonstrate the Grievant is not a good Employee worthy of return to his position. He did not violate any rules, regulations, or statutory laws that would prevent his return to duties. The Employer's case was entirely based on hearsay, since no one had personal knowledge of any of the facts relevant to this matter. In this regard, he was denied the opportunity to confront his accuser and the complaint made by the boyfriend, who had no first-hand knowledge of the incident, should be afforded little, if any, weight. The female made it clear she did not want to file a complaint and she had no interest in pursuing charges. She was repeatedly pressed for information and statements all because a jealous boyfriend contacted the ODNR, but never filed a formal complaint.

With respect to the Investigation, the Union insists the Investigator never listened to the initial recording that precipitated the Investigation, nor was a copy thereof provided to the Union. At least two (2) interviews with the female and one (1) with the boyfriend were never provided to the Union. The Investigator admitted the interviews should have been recorded. He never verified he was talking to the female or the boyfriend which he admitted was improper. The Investigator made statements and drew conclusions that were not supported by the facts of this matter. He indicated at the Arbitration Hearing the Grievant said to him he wanted to have an intimate relationship with the female; a statement that was never made by the Grievant. The

recorded interview of the Grievant clearly indicates this statement was never made. The Investigator drew conclusions about the honesty of the Grievant that ODNR Management admitted was not supported by the facts. He answered the questions he was asked and provided clarification when it was requested.

Based thereon, the Employer has failed to meet its burden of proof that it was justified in ignoring Article 19 of the Parties' Agreement, requiring Progressive Discipline, when it terminated the Grievant without Just Cause and with no prior discipline in his personnel file.

For these reasons, the Union requests the Grievance be sustained; the Grievant be returned to his former position; and, he be made whole, including any back-pay and benefits that would be due and proper.

DISCUSSION AND FINDINGS

The disposition of this matter hinges upon the determination of whether the Employer has established Just Cause to effectuate and uphold the employment termination/removal of the Grievant, Shawn D. Coffy, for the events which occurred on February 24, 2017 and those that followed, when he was performing his duties as a Natural Resources Officer.

The Employer insists the evidence of record clearly demonstrates the Grievant engaged in egregious misconduct when he engaged/kissed the 21-year old female in an intimate fashion for numerous seconds in the presence of other Park visitors in violation of various work rules and policies. Moreover, it insists this serious lapse in judgement simply cannot be tolerated. It emphasizes the Grievant engaged in “conduct unbecoming” when he engaged the visitor in this kiss and followed up with her through subsequent correspondence which simply cannot be viewed as law enforcement related. His conduct resulted in a complaint being levied from the female's boyfriend resulting in numerous text messages the Grievant himself characterized as

threatening in nature and various phone messages left for the Grievant and not reported to his Employer. The Employer emphasizes that on any given day, numerous Employees dressed in similar uniforms could have been mistaken for the Grievant if in fact the "jealous boyfriend" decided to take some retaliatory action based on this incident. It claims the Grievant engaged in dishonesty during the investigation that simply cannot be tolerated based on the tantamount need for honesty and integrity as a Law Enforcement Officer. The Grievant engaged in this misconduct which he admits and failed to report it to his superiors.

The Union contends the Employer has failed to establish Just Cause to effectuate the employment termination/removal of the Grievant based on what it contends is conduct that does not give rise to separation of employment, but would more adequately be addressed through progressive steps as required under the Agreement. Moreover, it submits the Disciplinary Grid referenced by the Employer, is not part of the Collective Bargaining Agreement, nor is it negotiated between the Parties. That for which the Grievant was charged does not rise to the imposition of termination/removal based on the disciplinary format contained therein. The Union insists the Employer's reputation was not disparaged in any way, the Park was closed at the time and there is no rule prohibiting any Employee from kissing his wife or girlfriend while in uniform and while on duty. Very few Employees were aware of these circumstances and the Grievant's Supervisor with 20-years seniority, prior to his retirement, testified that indeed the Grievant was worthy of reinstatement. He had an unblemished work record and served the Department well in his eight-plus years of employment.

The Collective Bargaining Agreement, under which the Arbitrator's authority is conferred, recognizes, specifically at Article 19, the Employer has the contractual right to effectuate disciplinary action for Just Cause. In other words, the Employer must establish, based

on the evidence of record, the Grievant engaged in misconduct which served as the basis for disciplinary action and the disciplinary action imposed is commensurate with the nature of the infraction committed. Here, the Grievant admits, against his interest, he engaged in a kiss with the female Park visitor – he “kissed her back”. He admits he initiated “Law Enforcement-related” contact with her when he initially engaged her about the Park hours, etc. His initial contact with this female is found to be within his duties and responsibilities as a Natural Resources Officer. However, based on the content of the Grievant’s subsequent text messages clearly indicates his “follow-up” with her cannot be viewed as “Law Enforcement-related”. His reference to her as "beautiful" and other comments in relation thereto simply cannot be viewed as law enforcement related.

Clearly, based on his admission against interest; and, the existence of his subsequent text messages to her, it is clear the Grievant's questionable act of kissing someone who could be a suspect/witness in an investigation wherein she indicated friends were in fact partaking in illegal drugs, are simply inescapable. Additionally, the Grievant, by his own acknowledgement, recognizes he should have made the Employer aware of the “responses” he received from the female's boyfriend rather than advising his Union Representative. The act of first notifying one's Union representation of such accounts suggests the individual knew, and was preparing for, potential, adverse consequences of his actions. It could be argued that indeed the Grievant, at that juncture, became aware once he learned who the sender was of the correspondence, there was some potential for adverse action levied by the Employer.

Based on this evidentiary record, it is clear the Grievant did indeed engage in, by his own admission, the conduct which served as the basis for the disciplinary action. Such prompted an Internal Investigation wherein statements were taken, including an audiotape. It is clear based on

the complaint of the boyfriend that a description of the event in question was cast in a more adverse light against the Grievant than what the female eventually acknowledged as was initiated by her to avoid possible consequences of being in the Park after hours, and more importantly her acknowledgement she was with friends who were partaking in the utilization of marijuana – she thought, she “might be in trouble”. Based on the inconsistencies of the female's initial account and her subsequent account where she basically acknowledged she was indeed the “initiator” of the kiss, to avoid further consequences based on her perceived actions of possibly “...being in trouble...”, it is clear the characterization of this matter by the boyfriend and her initially is, at best, suspect. Clearly, the Grievant allowed himself to be placed in a precarious situation and could have maintained better control over these events as they developed; however, he failed in that regard, thus warranting disciplinary action.

What the evidence does indicate is: the Grievant, by his own admission, engaged in the kiss - “kissed her back” - for numerous seconds, his subsequent follow-up with her via text message and a few failed attempts at a phone conversation with her. More importantly, the Grievant failed to notify his superiors following the text messages he received, which, he himself, characterizes as threatening in nature, from the “jealous” boyfriend. Certainly, some of those messages can clearly be viewed as threatening in nature which could have potentially subjected himself, his family, co-workers and the Department to some adverse action; thankfully, nothing transpired nor was the Department subjected to public discredit. The female acknowledged it was the boyfriend who initiated the complaint and she initiated the “kiss” based on her acknowledgement “she may be in trouble” and did not want to proceed further with any form of official action. Based thereon, the Grievant’s actions were more reactionary than deliberate.

The question now becomes whether the discipline as imposed is commensurate with the nature of the infractions committed. By his own admission, the Grievant acknowledged his transgressions. The equities of Just Cause require consideration of both aggravating and/or mitigating circumstances/factors with respect to the level of disciplinary action imposed. The evidence of record demonstrates this Employee has enjoyed an eight-plus year employment history with an unblemished record and based on the testimony of his prior Supervisor, Sergeant Haines, consideration for reinstatement is warranted.

There is no evidence that would suggest the Department in any way was disparaged publicly, nor is there any evidence which would suggest anyone was placed in any jeopardy. Indeed, the Grievant engaged in conduct that simply should have been avoided. The Disciplinary Grid, relied upon by the Employer with respect to the disciplinary action imposed herein, suggests varying levels of discipline. The Grievant's actions do not adversely affect the ability of the Grievant to continue in his current capacity, nor do they adversely affect the ability of the Employer to carry out its service and protection of the State Parks throughout the State of Ohio. Importantly, there is no evidence of record demonstrating any criminal charges were filed against the boyfriend, Jason Sop, based on the characterization by the Employer that the text messages and phone calls were threatening in nature rising to the level of imminent threats of potential harm to anyone directly or remotely involved. The Grievant did not commit a criminal act; he did not engage in fraud; nor was he charged with dishonesty. While the Grievant's admitted actions are found ill-advised and unprofessional, the totality of the evidence of record suggests, they do not rise to removal/termination of an eight-year employee with an otherwise unblemished employment history.

The Collective Bargaining Agreement requires adherence to principles of progressive discipline and recognizes the ability of the Employer to bypass progressive steps where serious and egregious misconduct has occurred. The record clearly demonstrates the Grievant admitted to the indiscretions that resulted from the incident in question. At page 8 of the “Disciplinary Policy and Procedure” titled, “Commissioned Officers Only (including plain clothed officers)” Paragraph A, 1) indicates for “[v]iolation of an applicable Uniformed Officer's Code of Conduct or similar Division specific policy, procedure, or directive”, which is set forth in the April 28, 2017 charges levied against the Grievant, the “first offense results in a verbal reprimand - removal. Second offense, written reprimand - removal, Third offense, suspension - removal. Fourth offense - removal. This suggests that indeed the concept of Progressive Discipline is recognized in this Disciplinary Policy and Procedure with varying levels that can be levied based on the seriousness of the offense. While deemed ill-advised, the Grievant’s indiscretions do not warrant or give rise to the level of disciplinary action imposed as contemplated by the Disciplinary Grid, progressive discipline or the equities of Just Cause.

Indeed, the Grievant exercised poor judgement based on his admissions against interest. The equities of Just Cause indeed recognize mitigation with respect to various factors, including an Employee's work record. Here there is no evidence the Grievant has experienced any other disciplinary action, nor were there any evaluations presented that would suggest the Grievant, in any way, has a propensity for such transgressions, or did not perform his job duties in an acceptable manner. Based on these circumstances and acknowledging the Grievant's admissions adverse to him, the evidence of record indeed supports consideration of reduction of the penalty of termination/removal.

While taking into consideration the Grievant's unblemished work record, the disciplinary action imposed is severe in light of the offense committed. The Grievant was not charged with dishonesty as was found in the investigative conclusion and therefore such cannot serve as the basis for bolstering the Employer's action of effectuating termination/removal. Moreover, the act itself, while not deemed by the Arbitrator as heinous or egregious in nature, and did not subject the Employer to any adverse publicity, nonetheless rises to the level of conduct that simply has no place in law enforcement. Based on this determination, the removal/termination shall be reduced to a Suspension; the Grievant, within ten (10) calendar days from the date of this Opinion and Award, shall be reinstated to his previous position without loss of seniority or rank; however, the Grievant shall not receive any form of back pay as a result. The Grievant shall maintain his shift and shall have restored all other contractual entitlements from the date of his termination until the date of his reinstatement. The Arbitrator shall retain jurisdiction over this matter for 60 calendar days, from the date of this Opinion and Award, to assist the Parties' with any implementation issues that may arise.

AWARD

The Grievance is sustained in part; and, denied in part.

David W. Stanton

David W. Stanton, Esq.
NAA Arbitrator

December 27, 2017
Cincinnati, Ohio