

Thomas J. Nowel
Arbitrator and Mediator
Cleveland, Ohio

IN ARBITRATION PROCEEDINGS PURSUANT TO
AGREEMENT OF THE PARTIES

In The Matter of a Controversy Between:)	Grievance No.
)	28-03-20120227-
Service Employees International Union,)	0003-02-12
District 1199)	
)	ARBITRATION
and)	OPINION AND
)	AWARD
Ohio Division of Parole and Community)	
Service)	DATE:
)	AUGUST 21,
Re: Grievances of William “Jeff” Taraschke)	2012

APPEARANCES:

Leah M. Davis, Esq., Advocate for SEIU District 1199; Andy Bower, Labor Relations Officer and Advocate for the State; and Aimee Szczerbacki for the Ohio Office of Collective Bargaining.

INTRODUCTION

This arbitration arises pursuant to a collective bargaining agreement between the State of Ohio and the Service Employees International Union, District 1199. The parties are in disagreement regarding the interpretation of Article 6, Non-Discrimination, Section 6.02 as it applies to Union member Jeff Taraschke. Grievant Taraschke filed a series of grievances as follows: 28-08-20111201-0008-02-12; 28-03-20111205-0008-02-12; 28-03-20111230-0009-02-12; 28-01-20120412-0003-02-12; 28-01-20120412-0002-02-12; and 28-03-20120227-0003-02-12. These grievances have been consolidated for purposes of this hearing under Case No. 28-03-20120227-0003-02-12.

The Arbitrator was selected by the parties, pursuant to Article 7 of the collective bargaining agreement, to conduct a hearing and render a binding arbitration award. Hearing was held on June 26, 2012 at the offices of District 1199 in Columbus, Ohio. At the hearing, the parties were afforded the opportunity for examination and cross examination of witnesses and for the introduction of exhibits. Witnesses were sworn by the Arbitrator.

ISSUE AND STIPULATIONS

The parties agreed to the following stipulated issue to be decided by the Arbitrator. "Did management violate Article 6.02 of the 1199/State of Ohio collective bargaining agreement and if so, what shall the remedy be?"

The parties agreed to the following stipulations.

1. Grievances referenced above are included in the arbitration for hearing purposes.

2. As of June 15, 2012, the Grievant's state-issued firearm and equipment were restored to him.
3. In June, 2011, the Grievant was laid off properly in accordance with Article 29 of the collective bargaining agreement.
4. The employer agrees to repair or replace the grievant's damaged star as referenced in grievance number 28-03-20120227-0003-02-12.
5. The grievant bid to the Akron Region APA from the Cleveland Region APA.

WITNESSES

TESTIFYING FOR THE UNION:

Jeff Taraschke, Grievant
Tom Guyer, Jr., Union Delegate

TESTIFYING FOR THE EMPLOYER

Steve Vukmer, Regional Administrator
Tyrone Reynolds, Labor Relations Officer
Jill Herman, Supervisor
Tina Smith, Administrative Assistant to Chief of Human Resources
Jennifer Schindler, Disability Claims Representative

RELEVANT PROVISION OF AGREEMENT

Article 6, Non-Discrimination

6.02 Agreement Rights

No employee shall be discriminated against, intimidated, restrained, harassed, or coerced in the exercise of rights granted by this Agreement.

GRIEVANCES

Grievance No. 28-08-20111201-0008-02-12 (Jt. Exb. 2). Filed on November 30, 2011. Statement of Grievance: "Officer Jeff Taraschke has been ordered not to have any contact with Unit Supervisor Sherry Clouser. This order was given by regional administrator Steve Vukmer. This order restricts officer Taraschke's ability to carry out his daily duties and responsibilities in complying with policy."

Resolution Requested: "Assign officer Jeff Taraschke a Medina County case load where he maintains his current supervisor, or relocate Sherry Clouser."

Grievance No. 28-03-20111205-0008-02-12 (Jt. Exb. 3). Filed on December 5, 2011. Statement of Grievance: "On 12-5-2011, Officer Taraschke received a corrective counseling for modifying a word templet. This modification was not a violation of policy, as there is no current policy in place. Officer Taraschke feels that this corrective counseling is in direct retaliation for (h)is pending grievance as well as past grievances filed." Resolution Requested: "As this continued discrimination and retaliation has continued, Officer Taraschke's resolution is to be transferred to Medina County, and have Medina County fall under the responsibility of the Akron Region. Or, once transferred to Medina County Officer Taraschke would not have to report directly to Lorain Unit II Supervisor Sherry Clouser or Regional Administrator Steve Vukmer. Lastly, the corrective counseling needs to be stricken from any personnel file on Officer Taraschke."

Grievance No. 28-03-20111230-0009-02-12 (Jt. Exb. 4). Filed on December 30, 2011. Statement of Grievance: "On 12-29-2011, officer Taraschke was retaliated against, based on his previous, pending grievances. Officer Taraschke had

his weapon pulled and was not put on administrative leave, causing a disparate and unsafe condition. Officer Taraschke did not commit any policy violations, or had any criminal charges to justify this action. Regional Administrator would not give any explanation to pulling officer Taraschke's weapon, other than unspecified behavior. Furthermore, Officer Taraschke was not afforded union representation while having his weapon pulled." Resolution Requested. "Officer Taraschke should be placed in Medina County and Medina County should then fall under the responsibility of the Akron region. Officer Taraschke wants the removal of any paperwork and or mention of this incident from his personnel file. Lastly, Officer Taraschke wants all retaliatory behavior to cease immediately."

Grievance No. 28-03-20120227-0003-02-12 (Jt. Exb. 5). Filed on February 24, 2012. Statement of Grievance: "Grievance filed for officer Taraschke: Officer Taraschke was placed on Administrative Leave and subsequently disability due to his filing of grievances. Officer Taraschke has been harassed by management to include not being able to enter the Elyria office of the Adult Parole Authority and collect and inspect his property. It should be noted, when officer Taraschke's property was received via mail, some was damaged." Resolution Requested: "Officer Taraschke should be returned to the Medina Office of the Adult Parole Authority and Medina County should be re-aligned to the Akron region. Officer Taraschke should be compensated for the mileage, tolls and overtime he accumulated since being assigned from Medina County. Officer Taraschke should have any time used while out on disability restored. Regional supervisor Steve Vukmer should attend management/union contract training."

Grievance No. 28-01-20120412-0002-02-12 (Jt. Exb. 6). Filed on April 10, 2012. Statement of Grievance: "In December, 2011, management revoked grievant's authorization to carry his firearm. He was on extended leave pending an IME, but was cleared to return to work after having completed the conditions of his IME. On April 6, 2012, grievant returned to work but was informed by his supervisor and regional administrator that his firearm would not be restored to him. There is no justification for the refusal to allow him to carry his weapon if he has been determined to be fit for duty, and has otherwise satisfied the requirements of the IME. Management's refusal to permit him to carry his duty weapon at work is a furtherance of management's ongoing harassment and retaliation against him." Resolution Requested: "Immediately restore grievant's firearm authorization and return his weapon and equipment."

Grievance No. 28-01-20120412-0003-02-12 (Jt. Exb. 7). Filed on April 10, 2012. Statement of Grievance: "On 4/6/12, grievant returned to work after a leave of absence. Prior to the leave of absence, he had successfully canvassed from the Cleveland Region to the Akron Region, but when he reported for duty in Akron, he was told that his work assignment would be ORAS assessment officer for the unit, but the position he had bid on was a parole officer position that requires field supervision and other regular PO duties, not ORAS assessments exclusively." Resolution Requested: "Reinstate him to regular PO duties, including field supervision."

The Employer denied all of the above noted grievances filed by Mr. Taraschke. By agreement of the parties, all grievances were consolidated as Case No. 28-03-20120227-0003-02-12 and moved to arbitration.

BACKGROUND

Grievant William "Jeff" Taraschke is a Parole Officer employed with the Ohio Division of Parole and Community Services and has been in this position with the Employer for approximately 13 ½ years. The Grievant's work record has been unblemished over the course of his employment with the state, and he has been recognized for his good work record. He has received a number of commendations including Parole Officer of the year and employee of the year. Local police departments have also recognized the Grievant for his good work in particular his involvement in a hostage situation. The Grievant has developed curriculum and training for new Parole Officers and has acted as a mentor for new employees. He has maintained a good working relationship with supervisors. The Grievant has not held positions with the Union.

Due to state budget reductions, a statewide layoff of Parole Officers occurred in 2011, and, pursuant to the collective bargaining agreement, bumping among Parole Officers took place. Although the Grievant was bumped from his position by another bargaining unit employee and moved to another unit, he expressed the belief that he was exempt from the bumping process by previous agreement with the Department. His caseload had been in Medina County, and he had been allowed to work from home in Medina or the local sheriff's office. Mr. Taraschke grieved his

displacement from his position in Medina County; filed a second grievance regarding the layoff; grieved the manner in which he was being taxed; and filed an unfair labor practice charge against the Employer with the State Employment Relations Board. None of these matters are under consideration in this case.

Following the filing of the grievances regarding his displacement from his former position, the Grievant met with his former supervisor, Sherri Clouser, to discuss his grievances and plead his case that he should be reinstated to his position in Medina County. The meeting became confrontational, and a few days later Regional Administrator ordered the Grievant to have no contact with Supervisor Clouser following her filing of an incident report. The Grievant had not been reporting to Ms. Clouser due to the layoff and subsequent bumping. Mr. Taraschke filed Grievance No. 28-08-20111201-0008-02-12 (Jt. Exb. 2) claiming discrimination and retaliation regarding the no contact order and also filed an unfair labor practice charge, which was later dismissed by SERB. The Grievant's proposed resolution to his grievance was reinstatement to his former position in Medina County and relocation of Supervisor Clouser. At hearing, the Grievant testified that the loss of his Medina County assignment, which was near his home, created a hardship because he has two special needs children and was required to take time to care for their needs, sometimes during working hours.

The Grievant was assigned to the Elyria office of the Department. In the past, the Grievant would send an email when requesting a violation sanction hearing. His new supervisor indicated that it would be necessary for him to now complete a form when requesting the hearing. The Grievant felt that this procedure was unnecessary

and that the form was “nonsensical.” He changed the color of the letters on the form and reformatted it. His supervisor sent it back indicating that she could not read it and that it should be completed without change. The Grievant then modified the form a second time by making the font significantly larger (Jt. Exb. 9). The Grievant’s new supervisor then filed an “Incident Report” to her administrator indicating that she felt the Grievant intimidated and harassed her (Jt. Exb. 12). The Grievant received a corrective counseling on December 5, 2011 due to the changes he had made to the forms. (Jt. Exb. 10). Mr. Taraschke then filed Grievance No. 28-03-20111205-0008-02-12 (Jt. Exb. 3) claiming that the corrective counseling was in retaliation for his previous grievances. The requested resolution was to move him back to Medina County and to relocate the Medina caseload to the Akron Region of the Department. He also requested that he not be required to report to Supervisor Clouser or Administrator Vukmer.

Following the corrective counseling, the Grievant again altered a request for hearing form and added irrelevant questions as follows (Jt. Exb. 11). “How much wood would a Woodchuck shuck....” “What is your favorite flavor of ice cream?” “Why are you requesting the form when no other scheduler in the state of Ohio requires a form....” The hearing scheduler, Patricia Robertson, informed Administrator Vukmer and indicated that she felt intimidated by the actions of the Grievant. Mr. Vukmer directed her to complete an Incident Report regarding the matter, and she did so on December 29, 2011 (Jt. Exb. 12). Following this incident, Administrator Vukmer requested that an investigation into the actions of the Grievant take place, and he then revoked the Grievant’s authorization to carry his

firearm (Jt. Exb. 14). In his report, Administrator Vukmer stated that the Grievant had been upset regarding his loss of the Medina County caseload; that he had confronted his former supervisor; that he had modified hearing request forms on a number of occasions even after having been counseled to utilize the exact form as provided by the scheduler; and that it had been reported that the Grievant had “nearly broke into tears” when interviewing for a supervisor position with the Department. The report went on the state that “It was agreed that Taraschke’s recent odd behavior was cause for concern, and cause to temporarily revoke his Firearms Authorization” (Jt. Exb. 14, pg. 3).

Following the revocation of his authority to carry a firearm, the Grievant filed Grievance No. 28-03-20111230-0009-02-12 (Jt. Exb. 4) claiming that the Employer had taken this action based on retaliation for his prior grievances. He again requested relocation to Medina County and an end to “retaliatory behavior” on the part of the State.

During this period of time, the Grievant’s second unfair labor practice charge was dismissed by the State Employment Relations Board. He continued to argue that the Employer was committing tax fraud based on the manner in which local income tax was being withheld from his pay because he was no longer working in Medina County.

On March 3, 2012 the Union filed a new unfair labor practice charge in behalf of the Grievant stating that his rights had been violated by the revocation of his ability to carry a firearm on the basis that the action was retaliatory due to prior grievances and unfair labor practice charges that had been brought against

Department management (Jt. Exb. 22). SERB deferred this matter to the instant arbitration.

The Employer placed the Grievant on paid administrative leave on January 4, 2012 “pending the results of an Independent Medical Evaluation.” The Grievant was directed to turn in state equipment in his possession and to not come to the work site (Jt. Exb. 24). Tyrone Reynolds, Investigation Administrator, then requested approval for the Independent Medical Examination (IME). Among other concerns expressed in the request, Mr. Reynolds stated that Mr. Taraschke “filed five grievances and two Unfair Labor Practice charges....” (Jt. Exb. 25)

The Grievant was examined by Moshe Torem, M.D. who issued his evaluation on January 31, 2012 (Jt. Exb. 27). The report recommended that the Grievant not engage in employment for a period of at least three months based on the fact that his position “requires him to carry a firearm in the form of a handgun with live ammunition to be used in self defense.” The evaluation indicated that the Grievant was experiencing a high level of stress and anxiety.

The Grievant applied for disability leave to cover his leave of absence following the results of the IME.

On February 24, 2012, the Grievant filed Grievance No. 28-03-20120227-0003-02-12 (Jt. Exb. 5) claiming that he was placed on administrative leave and disability due to filing grievances. The requested resolution was to be returned to his former Medina County caseload, realignment of the Medina County caseload into the Akron Region of the Department, compensation for travel, and assignment of Administrator Vukmer to attend labor management training.

The Grievant was released to return to work from disability in March, 2012. On March 28, 2012, the Department requested additional information from the treating psychologist to ensure that the Grievant was able to perform the essential functions of his job and in particular his ability to carry a firearm (Jt. Exb. 33). Dr. Michelson confirmed that the Grievant was able to resume employment on April 4, 2012.

The Employer decided to withhold authorization to carry a firearm, and Grievant filed Grievance No. 28-01-20120412-0002-02-12 on April 10, 2012 (Jt. Exb. 6). The grievance protested the continued revocation of the firearm and requested that he again be permitted to possess the handgun. On April 12, 2012, Dr. Michelson, at the request of the Employer, considered the issue of the firearm. She stated that the Grievant was emotionally stable and therefore able to carry a firearm (Jt. Exb. 35).

Prior to administrative leave and disability leave, the Grievant had successfully canvassed (bid) to the Akron Region. He testified at hearing that he felt pressured into transferring from the Elyria office. He felt he was not welcome in the office and was concerned about the Clouser no contact order. Upon his return to duty following release from his psychologist, the Grievant reported to the new assignment. His firearm had not been returned to him, and he was given an assignment as an ORAS assessment officer, an in-office position. The Grievant then filed Grievance No. 28-01-20120412-0003-12 on April 10, 2012 (Jt. Exb. 7). This was the same date he had filed the grievance regarding the firearm. This grievance

was an appeal of the ORAS work assignment on the basis that he had successfully canvassed for a field position. He requested that he be returned to field supervision.

The Grievant began calling off work and then decided to re-apply for disability leave. He made daily calls to staff in the office while on sick leave. He continued to express concerns regarding his payroll taxes and prior work location in Medina County. The Employer again placed the Grievant on paid administrative leave on April 30, 2012 and made a second request for an Independent Medical Examination (Jt. Exb. 29). The IME was administered and evaluation rendered on May 25, 2012 (Jt. Exb. 31). Psychologist Tosi reported that the grievant was completely capable of returning to full employment; was capable of carrying a firearm; and had no physical restrictions.

The Employer determined that the Grievant was capable of returning to duty as a Parole Officer. His firearm was returned to him, and he resumed his field assignment on June 15, 2012.

POSITION OF THE UNION

The Union states that the issues and grievances in the instant case are particularly critical because the State Employment Relations Board has deferred to arbitration its consideration of the third of three unfair labor practice charges filed by the Union in behalf of the Grievant. The provision of the collective bargaining agreement at issue in this case, Article 6, Non-Discrimination, derives its authority from ORC Section 4117. The Union argues further that the Arbitrator in this matter

must decide this case utilizing the statutory analysis of a claim of retaliation and anti-union animus while engaging in protected activity.

The Union states that the Ohio Supreme Court required the State Employment Relations Board to reconsider its findings *In re Ft. Frye Local School District Board of Education* which had been developed using the “but for” test rather the “in part” test. The “in part” standard requires that the analysis focus on the motive of the Employer and involves three steps as follows.

1. The Complainant has the initial burden of showing that the actions by the employer was taken to discriminate against the employee for the exercise of rights protected by R. C. Chapter 4117. Where this burden is met, a prima facie case is created which raises a “presumption” of anti-union animus.
2. The Respondent is then given the opportunity to present evidence that its actions were the result of other conduct by the employee not related to protected activity for the purpose of rebutting the presumption of anti-union animus.
3. The Board then determines, by a preponderance of the evidence, whether an unfair labor practice has occurred.

The Union states that the third step in the analysis is a determination by a preponderance of the evidence, and this is generally the same standard appropriate for labor arbitration.

The Union states that, prior to the layoff/bumping process in June, 2011, the Grievant had never filed a grievance or an unfair labor practice charge and had never held Union office. The Grievant stated that there had been an agreement with management that his work assignment was limited to Medina County. When he

became aware that the layoff would result in another employee bumping him from the Medina County caseload, the Grievant filed the first grievance. Following a step two grievance meeting, Mr. Taraschke felt the necessity to file a second grievance and an unfair labor practice charge against the Employer. He then approached his former supervisor, Ms. Clouser, in an attempt to resolve his grievances, and the retaliation commenced. Regional Administrator Vukmer instructed the Grievant that he was not to discuss grievances or unfair labor practice charges with Supervisor Clouser and in fact was to have no contact with her. The Union argues that this clearly is in retaliation for the filing of the grievances and unfair labor practice charge against the Employer.

The Grievant filed a grievance (the first to be considered here) and an unfair labor practice charge based upon the no contact order and was met with additional retaliatory behavior when he was required to utilize a hearing request form which is not a Department form and is not required by policy or rule. The Grievant clearly felt that requests to utilize the form were an additional act of retaliation. Out of frustration with the manner in which he was being treated in his new work assignment, he made a number of sarcastic modifications to the form. Although he had never received discipline during his tenure as a Parole Officer, the Grievant received a corrective counseling. Administrator Vukmer directed the hearing scheduler, Patty Robinson, to file an incident report against the Grievant. The Union argues that she did not take this action on her own volition.

The Union states that the Grievant's second unfair labor practice charge against the Employer was dismissed, and he had filed a new grievance regarding the

corrective counseling. The Union argues that the next form of retaliation came when the Grievant's authorization to carry his firearm was revoked after he made modifications to a hearing request form. The job description of a Parole Officer requires the carrying of a firearm, and to not do so creates a significant safety concern. Administrator Vukmer's reasoning in withdrawing the Grievant's authorization to carry his firearm specifically includes the grievance and ULP history of the Grievant. The Employer characterized the Grievant's exercise of his contractual and legal rights as "odd behavior."

The Union grieved the firearm revocation, and three days later the Grievant was placed on administrative leave and directed to complete an Independent Medical Examination (IME). The Union states that part of the justification for management's directive regarding the IME was the filing of grievances and unfair labor practice charges on the part of the Grievant. It is clear that the action of the state was retaliatory and discriminatory based on the exercise of rights guaranteed by the collective bargaining agreement and statute. Following the medical examination, a three month leave of absence was recommended, and the Grievant was notified that he would be required to follow this course of action utilizing his own leave time. This forced the Grievant to apply for and utilize disability leave. This benefit has a life-time cap of twelve months.

The Grievant had successfully bid upon a position in the Akron office of the Department. Following the completion of the leave, the Grievant attempted to return to work in Akron. The Union argues that the discriminatory actions of the Employer continued. The Grievant was required to obtain additional

documentation regarding his ability to resume his duties. The Employer refused to restore his firearm, and he was given a non-field assignment as an ORAS assessment officer. The Union states that these actions were in violation of the Agreement and statute as the pattern of retaliation continued. The Union grieved the refusal to reinstate the firearm and work assignment.

The Employer then required the Grievant to complete a second Independent Medical Examination. Again, the Employer's request alluded to grievances filed by Mr. Taraschke, and the report of the Psychologist references the grievances filed by the Grievant. The Union suggests that the second IME report questions the agency's rationale for referring the Grievant for an IME based in part on grievances the he had filed.

The second IME report recommended a return to full employment, and, on June 15, 2012, the Grievant was returned to his field position, and his firearm was restored.

The Union argues that it is clear from these events that Jeff Taraschke was the victim of retaliation and anti union animus. It is clear that the Employer is in violation of Section 6.02 of the Agreement and the Grievant's statutory rights. When the "in part" test is applied, it is clear that the motivation of the Employer was retaliation and discrimination. This being the case, the Arbitrator must, the Union argues, find for the Grievant in all the grievances pending regarding this case based on the obvious motivation to discriminate on the part of the Employer. The Union states that a prima facie case for retaliation exists based on the record of this case.

The Union proposes the following remedies for this matter. First, the Grievant must be made whole. Second, the Ohio APA must cease and desist all retaliatory, intimidating and coercive behavior against the Grievant. The Grievant should be returned to his pre-layoff caseload in Medina County. All time utilized as disability leave be restored to the leave bank of the Grievant. The personnel file of the Grievant be purged of all documents relating to administrative leave, the two IMEs, revocation of the firearm and all incident reports filed in relation to the matters relevant to this case.

POSITION OF THE EMPLOYER

The Employer argues that there is no violation of Section 6.02 of the collective bargaining agreement. It states that there has never been a specific parole officer assignment in Medina County. The Grievant was assigned to the Elyria office of the Department and was permitted to work from his home since his caseload consisted of Medina County cases. Due to the layoff of parole officers in 2011, the Grievant was bumped from his Medina County caseload pursuant to the layoff provisions of the Agreement, Article 29. The Grievant's new position, following the bumping procedure, required a caseload outside the Medina County area. Four of the six grievances under consideration in this matter request a return to his Medina County caseload. The Employer states that this is not possible due to the legitimate bumping which occurred during the 2011 layoff. In addition, the Union stipulated that the bumping process was in accordance with the Agreement. The Employer argues that the requested remedy regarding the Medina caseload is not possible and

would be in violation of the agreement. The Employer states further that the Grievant successfully canvassed into a position in the Akron office.

The Employer states that, at the time of the incident involving Supervisor Clouser, the Grievant had been bumped and therefore had a different supervisor. It was not necessary for the Grievant to have contact with Ms. Clouser making the Administrator's no-contact directive appropriate and not in violation of the Grievant's right to discuss grievances with his supervisor. Ms. Clouser had no authority to grant the demands of the Grievant, and his discussion with her was confrontational and coercive.

The Employer states that the request to utilize a specific form to schedule a violation hearing was legitimate. Although the Grievant may not have utilized forms in his prior assignment, his current supervisor required the completion of hearing forms, and, the Employer argues, most offices in the Department require the completion of forms designed for each specific region. After altering the forms on two occasions, the Grievant legitimately received a Corrective Counseling for his "general unprofessional behavior." The Employer argues that the Corrective Counseling was not based on retaliation and is not a form of discipline as it is not placed in an employee's personnel file. The Corrective Counseling was specific regarding the changes made to the hearing request forms by the Grievant and had nothing to do regarding past grievances.

The Employer states that the request of the Grievant to have time spent on disability returned to him cannot be granted. The Employer does not place an employee on disability. An employee requests this as a benefit for periods of

approved and appropriate absence. The Grievant was not placed on administrative leave due to retaliation for filing grievances and unfair labor practice charges. Likewise the administering of the Independent Medical Examinations was not based on retaliation. "The actions of supervisor(s) were in direct response to his proven misconduct and erratic behavior." (Employer post-hearing brief, pg. 5) In any event, the Employer states, the Grievant was found to be unfit for duty by the physician who performed the first IME. None of this was based on retaliation for the filing of grievances and unfair labor practice charges. One of the primary reasons for the recommended leave involved the requirement to carry a firearm. The physician, who evaluated the Grievant, felt that he should not carry a firearm due to his emotional state.

The Grievant was cleared to return to work in less time than that recommended by the physician who performed the IME. Due to this, the Employer requested additional documentation from the treating psychologist. The Employer states that this delay had nothing to do with anti union animus or retaliation.

The Grievant returned to work at the Akron office. His firearm was not immediately returned to him at that point, and he was assigned to a non-field position as an ORAS assessment officer. The Employer argues that it has the right to make assignments and withhold the authority to carry a firearm. The Grievant's Akron supervisor, Ms. Herman, assigned him to a non-field assignment based on not having his firearm.

The Employer argues that the second IME had nothing to do with retaliation or the filing of grievances. The Department wanted assurances that the Grievant

was fit for duty. He seemed upset regarding his firearm and ORAS assignment and became emotional when meeting with his supervisor and regional administrator. Additionally, the Grievant called in sick and reapplied for disability leave. He called the personnel office daily and was again fixated on his former Medina County caseload and taxes. The Employer states that the IME process is very expensive, and the Department would not pursue this course of action without serious concerns regarding the behavior of the Grievant.

The Employer argues that, if its motivation was retaliation and discrimination, the Grievant could have been disability separated from employment. Instead, the Department worked with the Grievant who appeared to have mental health issues.

The Employer argues that none of the Union's claims in this matter are meritorious, and the requested resolutions would violate the contractual rights of other bargaining unit employees. The actions of management were based on the erratic behavior of the Grievant and not on the grievances and unfair labor practice charges he filed. Two of the grievances before the Arbitrator have been resolved. The Grievant's firearm has been returned to him, and he has resumed his field assignment. There is no merit to the other pending grievances and should be denied by the Arbitrator.

DISCUSSION

The parties have stipulated that the issue before this Arbitrator is the potential violation of Section 6.02 of the Agreement and remedy if it is determined that the Employer is in violation. This case involves multiple issues, and the State Employment Relations Board has deferred the Union's unfair labor practice charge to arbitration. Nevertheless, the Arbitrator is limited to the stipulation of the parties and the provision of the collective bargaining agreement they have referenced. It must be determined then if the Grievant was discriminated against, intimidated, restrained, harassed, or coerced in the exercise of his rights as granted by the Agreement.

The Union argues that any determination in this matter must be the result of the "in-part" test as described by the Ohio Supreme Court and therefore utilized by the State Employment Relations Board in the Ft. Frye Local School District case. This is not an unreasonable suggestion since the Grievant and his Union have the initial burden to show that the Employer discriminated and retaliated against him for the exercise of protected rights as referenced in Section 6.02 of the Agreement, and the determination will be based upon a preponderance of the evidence which is a standard typically relevant to labor arbitration. The "in-part" test requires a focus on the intent or motivation of the Employer which is appropriate in this matter. The filing of grievances and unfair labor practice charges are clearly rights which are granted by the Agreement, and the Employer must not interfere, intimidate, harass, restrain or retaliate. Both parties to this matter would surely agree.

Four of the grievances in this matter propose, in the resolution request, that the Grievant be returned to his former Medina County caseload, and the Union's post-hearing brief seeks the same resolution. But this is not possible as the State laid off parole officers pursuant to the collective bargaining agreement, and subsequent bumping was consistent with Article 29. Additionally, the parties have stipulated that "the Grievant was laid off properly in accordance with Article 29...."

The Grievant was frustrated that he had been bumped from his Medina County caseload and lost the ability to work from his home. Any working agreement he had in the past was nullified by the 2011 layoff and bumping process based upon the provisions of the layoff procedure contained in the collective bargaining agreement. Additionally, the Grievant failed to provide at hearing any written agreement that would have circumvented the bumping process that moved him out of the Medina County caseload position. Following the bumping process, the Grievant approached Ms. Clouser who had been his Medina County supervisor. He was aggressive in his verbal demand that she return him to his former caseload. He also threatened Ms. Clouser with litigation that she believed could have an adverse impact on her family. The Grievant should have known that his former supervisor did not have the authority to return him to his former position. The layoff was mandated by the State of Ohio, and bumping had occurred across the state. Ms. Clouser's concern and fear regarding the manner in which the Grievant confronted her was legitimate. The Employer was therefore justified when it directed the Grievant to not have further contact with his former supervisor as his behavior toward her had been intimidating and disrespectful. Evidence indicates that the no

contact order was reasonable and not retaliatory because of the earlier grievances and unfair labor practice charge. Ms. Clouser was no longer the Grievant's supervisor, and she had no authority to adjust his grievances.

Mr. Taraschke's former caseload in Medina County allowed him to work from his home or other nearby location. It appears that he functioned well with minimal supervision. His work record was impeccable, and he had served as a trainer and mentor for new employees. Following the bumping process, the Grievant found himself in unfamiliar territory. He had a new caseload in a new geographic location, new supervisor and was required to physically report to the Elyria office. This changed his local tax status which caused him considerable concern and anger. His new supervisor had designed a form which parole officers were expected to complete when requesting violation hearings. The Grievant had never been required to complete forms of this nature in the past, and evidence indicates that he felt this was unnecessary paperwork. Testimony at hearing also indicates that most regional offices of the Department utilize forms, which are designed locally, for violation hearings. The Grievant was directed to complete a violation hearing form by his new supervisor but modified it and emailed it back. Not being able to read the form, the supervisor returned it to the Grievant who modified it again by significantly changing the font size which made it difficult to read. Although the Union suggests that requiring the Grievant to complete violation hearing forms was related to retaliation for filing grievances and unfair labor practice charges, evidence indicates that similar forms are common throughout the Department and other parole officers are routinely required to complete them.

The supervisor reported these incidents to her Administrator who asked that she put her concerns in writing in an incident report. The Union argues that this directive on the part of the administrator was a form of retaliation, but there is no evidence to suggest that this is true. It is common practice to put a concern or complaint in writing in order to have a record and not be forced to rely on memory.

Following the second modification of the violation hearing form, the Grievant was presented with a "corrective counseling." The Union argues that this is another form of retaliation, but the evidence does not support this contention. The Employer argues that the counseling was not a disciplinary action and is not placed in the personnel record of the Grievant. The Employer's argument has merit. The Grievant engaged in unprofessional behavior when he modified the violation hearing forms and could have been disciplined for insubordination following the second occurrence. The supervisor had the right to expect completion of the form irrespective of the fact that the Grievant had not been required to complete a form from his former supervisor and felt it was unnecessary. The Employer's motivation was to correct unprofessional and insubordinate behavior and not retaliation for the filing of grievances. The Union suggests that other employees have not been the subject of counseling for making sarcastic changes to the violation hearing forms. But no evidence was presented that other parole officers engaged in the same activity as the Grievant. This argument, that the Grievant was treated in a different manner, lacks merit.

Following the corrective counseling, the Grievant was again required to complete a violation hearing form. He again, a third time, modified the form, adding

questions such as favorite flavor of ice cream of parolee and wording about a wood chuck. He also responded to legitimate questions on the form with sarcastic responses and wrote a criticism of the scheduler stating that the form was not necessary. This third occurrence and behavior became a concern for Administrator Vukmer, and he temporarily revoked the Grievant's authorization to carry a firearm. The Union argues that the revocation of the firearm is another form of retaliation. But the Grievant was clearly insubordinate when he modified the form a third time. The form is a request for information regarding issues which have the potential to be of a serious community concern. The Administrator's concern over this behavior justified the revocation of the Grievant's firearm. The Grievant had a long history of excellent service and behavior, and now the Employer was concerned about repeated acts of defiance and uncooperative behavior, including the prior confrontation with his former supervisor, fixation on his tax status and continued demand to be returned to the Medina caseload when it was clear that the layoff and bumping process was not in violation of the Agreement. The concerning behavior continued when the Grievant re-submitted a hearing request form and again added irrelevant statements and then claimed that the Department had committed tax fraud and falsification of government documents. The revocation of the firearm was justified under these circumstances, and the Department was not motivated by anti-union animus or discrimination against the Grievant. The motivation was the safety of other employees, the public and the Grievant himself.

The Union filed a grievance over the revocation of the firearm, and three days later, the Employer placed the Grievant on paid administrative leave pending an

Independent Medical Examination. The Union argues that this was simply another form of retaliation, and it might seem so, coming so close to the filing of the new grievance. But the record indicates that the Employer had concerns regarding the stability of the Grievant and his ability to carry out his job responsibilities. It is critical to remember that the Grievant is a member of the law enforcement continuum, and he carries a firearm to protect himself and others when dealing with paroled and former convicts.

The Union argues that the letter from Administrator Tyrone Reynolds requesting the IME includes a statement that the Grievant filed five grievances and two unfair labor practice charges and this proves anti union animus and retaliation. At hearing, Mr. Reynolds admitted that he should not have written the statement and that it was a mistake. He testified that the reason for the IME request was the behavior of the Grievant and not retaliation. The record in this case is consistent. The motivation of the Employer regarding the request for the IME was based on a concern that the Grievant was temporarily unfit to carry out the duties of a parole officer. Mr. Reynolds written statement regarding grievances and unfair labor practices is unfortunate and should not have been included in the request. Under the appropriate circumstances, the Employer has the right to refer an employee for an IME but certainly not in retaliation for filing grievances or exercising rights granted by the collective bargaining agreement or Ohio Revised Code. The evidence in this matter confirms that the motivation of the Employer was not retaliation based. Had this been the case, the IME physician/examiner could have come to this conclusion or noted such. The examiner concluded instead that the Grievant

suffered from adjustment disorder and a high level of stress and anxiety which suggested, based on the duties of a parole officer, that a three month leave of absence was necessary.

The Grievant returned to work earlier than the original recommendation of the physician who conducted the IME. The Union suggests that withholding the authorization to carry a firearm and assigning the Grievant to desk duty as an ORAS officer was a continuation of retaliation. But in light of the early return, the Employer wanted to be certain that it was safe for the Grievant to carry his firearm. It would have been a safety concern to allow the Grievant to meet with parolees and potential offenders without his firearm. So he was assigned to a non-field position upon his return from leave. One can question the propriety of not allowing the Grievant to resume his regular field assignment in the Akron office, but retaliation was not a motivating factor in the decision. When the Grievant displayed anger and frustration over the assignment and firearm issue, he began to call off sick. Evidence also indicates that he became emotional in the presence of management and made multiple calls to department staff while on sick leave concerning his tax concerns and previous Medina County caseload. Again, the Employer's actions in placing the Grievant on administrative leave and ordering a second IME are open to question, but the motivation is not retaliation or anti union animus but instead management's concern regarding the ability of the Grievant to carry out his duties in a safe and efficient manner. The request for the second IME (Jt. Exb. 30), written by Administrator Reynolds, states the following. "I am requesting that a complete psychological examination be conducted to determine Mr. Taraschke's fitness for

duty, given the unique requirements of his position (position description attached) and the unique safety and security issues associated with the working environment of law enforcement. Of particular concern is his ability to handle stress and not overreact to situations he could face on the job. As a Parole Officer he must be stable mentally, be able to supervise ex-offenders in a professional manner, and be able to respond appropriately under duress and in a crisis situation.” The motivation and concern of the Employer appear sincere and reasonable.

The Union suggests that the report from the second IME is “replete with references to Jeff’s grievance trail,” but, in drafting the analysis, Psychologist Tosi makes references to these matters only based on statements made by the Grievant (Jt. Exb. 31, pg. 4). The report of Psychologist Tosi, the second IME (Jt. Exb. 31), sheds some light on the Grievant himself and his actions following his loss of the Medina County caseload. The analysis states the following: “Levels of brooding over problems exist to the point where he may lose control of his thought processes.” “He is very self-righteous, moralistic....” “...often has hostile feelings when others do not live up to his standards.” “Mr. Taraschke can be so rigid and rule oriented that he is judgmental, critical and authoritarian.” “Mr. Taraschke demands that others do things his way and resists control by others.” “Mr. Taraschke can be so strongly focused on details that he ‘can’t see the forest for the trees.’ His attention is rigid and narrow with him having an inordinate need for closure.”

Nevertheless, Psychologist Tosi stated in his analysis that the Grievant was capable of resuming his duties as a parole officer and was capable of safely carrying

a firearm. He recommended that the Grievant continue counseling. On June 15, 2012, the Grievant was permitted by the Department to return to work and his firearm was restored to him.

The analysis of this case and conclusions must be based on the collective bargaining agreement, Section 6.02, consistent with the stipulation of the parties, but the Fort Frye School District case, as referenced by the Union, provides a model that is helpful in the instant case. The State Employment Relations Board initially found for the Respondent (Employer) in this matter, but the court required SERB to reconsider based on the “in-part” test. SERB applied this test and found again that the school district did not violate the protected rights of the Complainant. In its decision regarding the charge of discrimination brought against the Employer by the Complainant, Mr. Miller, SERB stated that “Respondent presented sufficient evidence to rebut the presumption (of anti –union animus) and (3) a preponderance of the evidence supports the findings that the Respondent did not act, at least in part, to discriminate against Mr. Miller for the exercise of his protected rights, and, consequently, that an unfair labor practice did not occur. Respondent’s decision not to hire Mr. Miller...was not based on any reason other than the business justifications advanced by the Respondent.”

The instant case is analogous to Fort Frye. The Employer did not violate the protected rights of the Grievant as contained in Section 6.02 of the collective bargaining agreement. Although on one or two occasions representatives of the Employer referenced grievances and unfair labor practice charges in documents used to support its actions or requests for medical examinations of the Grievant, the

actions and intent of the Department in this case were based on sound and reasonable business justifications and not in retaliation for rights guaranteed in Section 6.02 of the Agreement.

Further, the Grievant was never disciplined, and the Employer did not interfere with his right to canvass to the Akron office. Prior to hearing in this matter, the Employer returned the Grievant's firearm, and he resumed his regular duties as a field based parole officer.

AWARD

Grievance No. 28-08-20111201-0008-02-12. The Employer was justified in directing the Grievant to have no contact with Supervisor Clouser. Ms. Clouser was no longer the supervisor of the Grievant. She had no ability to resolve and adjust his grievances. The Grievant was confrontational in his meeting with Ms. Clouser. The Grievant's requests that he be re-assigned his former Medina County caseload and that the Employer reassign Supervisor Clouser are not supported by the collective bargaining agreement or stipulations of the parties. The Employer did not violate Section 6.02 of the Agreement. Grievance is denied.

Grievance No. 28-03-20111205-0008-02-12. The Employer was justified in issuing a corrective counseling when the Grievant, on multiple occasions, modified violation hearing request forms. The Grievant could have been disciplined for his insubordinate response to his supervisor's request to complete the form without changes in font or color and without irrelevant comments. There is no evidence that the corrective counseling was based on retaliation for the filing of grievances. The

Grievant's requests that he be transferred to Medina County, that the Medina County caseload be transferred to the Akron region of the Department and that the Employer agree that he would not be required to report to Supervisor Clouser or Administrator Vukmer are not supported by the collective bargaining agreement or the stipulations of the parties. Additionally the Grievant's request that the corrective counseling be removed from his personnel record is moot. The corrective counseling is not a form of discipline, and the Employer has indicated that it has not been placed in the personnel file of the Grievant. There is no violation of Section 6.02 of the Agreement. Grievance is denied.

Grievance No. 28-03-20111230-0009-02-12. The Grievant was not retaliated against when the ability to carry a firearm was revoked. The Employer had sufficient business reason when it made this decision. Further there was no evidence that this was a matter which required Union representation. It was not disciplinary in nature. The requests of the Grievant to be re-instated to the Medina County caseload and transferring Medina County to the Akron region of the Department are not supported by the Agreement or the stipulations of the parties. There is no violation of Section 6.02 of the Agreement. Grievance is denied.

Grievance No. 28-03-20120227-0003-02-12. The placing of the Grievant on Administrative Leave was not based on retaliation or anti-union animus. The Grievant requested and was granted disability leave, a benefit available to state employees to assist in maintaining income while on medical leave. The prohibition against entering the work place while on leave is a typical and reasonable request for any employee who is on medical leave. The Employer has agreed to reimburse

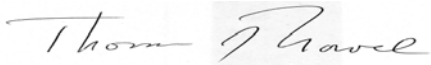
the Employee for any damage as a result of mailing his personal property. The requests of the Grievant to be re-instated to the Medina County caseload, re-alignment of Medina County to the Akron Region and requirement that Administrator Vukmer attend labor management relations training are not supported by the Agreement or the stipulations of the parties. Additionally, requests for reimbursement of travel based on the Grievant's assignment following the layoff and bumping process and restoration of his disability leave are not supported by the Agreement. There is no violation of Section 6.02 of the Agreement. Grievance is denied.

Grievance No. 28-01-20120412-0002-02-12. The Employer did not harass or retaliate against the Grievant when the ability to carry a firearm was not restored when he returned from the initial leave of absence which was a result of the first IME. This decision by management may or may not have been appropriate based on the release from leave by the Grievant's psychologist, but there is no evidence that it was based on retaliation or anti-union animus. There is no violation of Section 6.02 of the Agreement. Prior to hearing in this matter, Grievant's ability to carry a firearm had been restored as has been stipulated by the parties. Grievance is denied.

Grievance No. 28-01-20120412-0003-02-12. Following the Grievant's return to duty following his initial leave of absence, he was placed in a non-field position conducting ORAS assessments. The Grievant's firearm had not been returned to him at this point, and the Employer felt his safety could be jeopardized if he resumed contact with parolees in the field. This decision was not based on retaliation or

discrimination. There is no violation of Section 6.02 of the Agreement. Prior to hearing in this matter, Grievant was assigned to his regular field duties as his firearm had been restored. Grievance is denied.

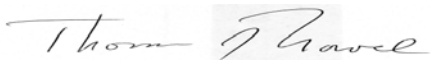
Signed and dated this 21st Day of August, 2012 at Cleveland, Ohio.

A handwritten signature in cursive script, reading "Thomas J. Nowel". The signature is written in dark ink on a light-colored background.

Thomas J. Nowel
Arbitrator

CERTIFICATE OF SERVICE

I hereby certify that, on this 21st Day of August, 2012, a copy of the foregoing Award was served upon Leah M. Davis, Esq. representing SEIU District 1199; Andy Bower, representing the Ohio Division of Parole and Community Service; Aimee Szczerbacki, representing the Ohio Office of Collective Bargaining; and Alicyn Carrel, representing the Ohio Office of Collective Bargaining, by way of electronic mail.

A handwritten signature in cursive script that reads "Thomas J. Nowel". The signature is written in black ink on a light-colored background.

Thomas J. Nowel
Arbitrator

