OPINION AND AWARD

In the Matter of Arbitration

Between

Unit 2 Association

And

State of Ohio

Case Designation

DNR-2018-02152-02

Date of Hearing: June 16, 2020
Date of Briefs: July 17, 2020
Date of Award: August 12, 2020

APPEARANCES

For the Union
Kimberly A. Rutowski, Esq., Lazarus & Lewis, LLC, Advocate
Bret Vetter, Esq., Lazarus & Lewis, LLC, Second Chair

For the Employer
Andrew Shuman, Labor Relations Officer, ODNR, Advocate
Eric Eilerman, Policy Analyst, OCB, DAS, Second Chair

Witnesses
Shaun Lentini, Grievant
Mark R. Smith, Investigator, ODNR
Travis Martin, Lieutenant, ODNR

An arbitration hearing was conducted on Tuesday, June 16, 2020 at the State of Ohio, Office of Collective Bargaining in Columbus, Ohio.

The parties agreed that the matter was properly before the Arbitrator and ready for a final and binding determination. The issue is that of just cause. Specifically, did the Employer have just cause to discipline the Grievant with a one-day working suspension? If not, what shall the remedy be. Both parties were given full opportunity to examine and cross-examine witnesses, pose arguments, and present their respective cases.

The parties submitted the following joint exhibits: the Collective Bargaining Agreement between the parties designated as Joint Exhibit 1 (J1); the grievance trail consisting of the grievance and the step 2 response designated as Joint Exhibit 2 (J2); the disciplinary trail consisting of the pre-disciplinary notice, the pre-disciplinary meeting report, and the final notice of discipline dated May 29, 2018 designated as Joint Exhibit 3 (J3); the Employer's disciplinary policy dated April 10, 2018 designated as Joint Exhibit 3A (J3A); and the Employer's administrative investigation consisting of interview notes, details of investigatory action and exhibits 1-26 designated as Joint Exhibit 4 (J4).

The Employer submitted the following documents as exhibits: an ODNR incident report dated 12/28/16 created by Michael S. Campbell concerning seized marijuana designated as Employer Exhibit 1 (E1); and an investigatory case report dated 9/2/19 created by Eryk R. Grycza concerning the seizure of marijuana as Employer Exhibit 2 (E2).

The Union submitted the following documents as exhibits: the investigatory interview summary dated 3/5/18 concerning Garrett Heasley designated as Union Exhibit 1 (U1); the investigatory report dated 1/22/19 concerning Chad Cruset designated as Union Exhibit 2 (U2); the investigatory interview summary report dated 3/5/18 concerning Don J. Siler designated as Union Exhibit 3 (U3); email between Andrew Shuman and Kim Rutowski dated 5/22/20 designated as Union Exhibit 4 (U4); the investigatory interview summary report dated 3/5/18 concerning Travis R. Martin designated as Union Exhibit 5 (U5); Watercraft Enforcement Guidelines revised 11/7/05 designated as Union Exhibit 6 (U6); a series of End-of-Shift emails designated as Union Exhibit 7 (U7); an incident report created by Kevin G. Peters dated 5/2/17 concerning a marijuana pipe designated as Union Exhibit 8 (U8); a series of Ohio Uniform Incident Reports designated as Union Exhibit 9 (U9); a series of PremierOne Reports designated as Union Exhibit 10 (U10); daily ranger logs dated 11/12/15 and 9/3/16 created by Grievant designated as Union Exhibit 11 (U11); State of Ohio, ODNR job posting for an Investigator position dated 08/21/17 designated as Union Exhibit 12 (U12); instructions to self-schedule an interview dated 12/6/17 designated as Union Exhibit 13 (U13); email notice of public records request #3335 designated as Union Exhibit 14 (U14); a series of emails in response to Union Exhibit 14 designated as Union Exhibit 15 (U15); emails concerning ODNR Investigator position posting #20059839 designated as Union Exhibit 16 (U16).

All exhibits were admitted into the record. Both parties timely submitted post hearing briefs. All materials were reviewed and considered by the Arbitrator in reaching this decision.

RELEVANT CONTRACT PROVISIONS:

Negotiated agreement between The State of Ohio and The Fraternal Order of Police, OLC, Inc. Unit 2 effective July 1, 2015 – June 30, 2018

ARTICLE 17 – PERSONNEL FILES

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17.05 Disciplinary Record Removal and Limited Access File

Records of verbal and written reprimands issued on or before June 30, 2016, will not be utilized by the Employer beyond a twelve (12) month period if no further disciplinary action occurs during the twelve (12) month period. All records relating to written reprimands issued after June 30, 2016, will cease to have any force and effect and will be removed from an employee's personnel file twenty-four (24) months after the date of the written reprimand if there has been no other discipline imposed during the past twenty-four (24) months. Records of discipline greater than a written reprimand issued on or before June 30, 2016, will not be utilized by the Employer beyond a twenty-four (24) month period if no further disciplinary action occurs during the twenty-four (24) month period. Records of disciplines greater than a written reprimand issued after June 30, 2016 will not be utilized by the Employer beyond a thirty-six (36) month period if no further disciplinary action occurs during the thirty-six (36) month period. The retention period shall be extended by a period equal to employee leaves of fourteen (14) consecutive days or longer, except for approved periods of vacation leave and compensatory time.

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ARTICLE 19 – DISCIPLINARY PROCEDURE

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 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.

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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 of pay for any form of discipline. The first time fine for an employee shall not exceed three (3) days' pay;
3. Suspension;

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.

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ARTICLE 20 – GRIEVANCE PROCEDURE

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20.09 Arbitration

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4. Decisions of the Arbitrator

The arbitrator shall render his/her decision as quickly as possible, but in any event, no later than forty-five (45) days after the conclusion of the hearing, or submission of the closing briefs, unless the parties agree otherwise. The arbitrator shall submit an account for the fees and expenses of arbitration. The arbitrator's decision shall be submitted in writing and shall set forth the findings and conclusions with respect to the issue submitted to arbitration. The arbitrator's decision shall be final and binding upon the Employer, the FOP Ohio Labor Council and the employee(s) involved, provided such decisions conform with the Law of Ohio and do not exceed the jurisdiction or authority of the arbitrator as set forth in this Article. The grievance procedure shall be the exclusive method for resolving grievances.

The parties may request that the arbitrator, on a case by case basis, retain jurisdiction of a specific case. In that the parties are using a permanent arbitrator, questions of clarifications of awards will normally be submitted to that arbitrator without the necessity of a further grievance or action. This statement, however, does not limit the ability of either party to exercise any other legal options they may possess.

5. Limitations of the Arbitrator

Only disputes involving the interpretation, application of alleged violation of a provision of this Agreement shall be subject to arbitration. The arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement, nor shall the arbitrator impose on either party a limitation or obligation not specifically required by the language of this Agreement. Employees who are terminated and subsequently returned to work without any discipline through arbitration shall have the termination entry on their Employee History on Computer (EHOC) stricken.

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ARTICLE 31 – SELECTIONS, PROMOTIONS, AND TRANSFERS

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31.02 Selection Process

Bargaining unit employees who file timely applications for promotions or transfers shall be considered for the vacant positions. Employees shall file timely applications through the Ohio Hiring Management System (OHMS or careers.ohio.gov). Active discipline above written reprimands shall be a valid criterion for denial of a transfer, lateral transfer, or promotion. Employees with such active discipline shall have no right to grieve non-selection.

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BACKGROUND

The incident giving rise to this disciplinary matter occurred on June 19, 2017. The Grievant is a Natural Resources Officer (a law enforcement officer) employed in the Division of Parks and Watercraft. On the day of the incident, the Grievant was assigned to Buck Creek State Park. On the day of the subject incident, the Grievant was in the Park Office when he heard a radio dispatch for local EMS to the Park's beach. The EMS call pertained to an 18- or 19-year old woman having trouble breathing. The Grievant, two other NROs and a Lieutenant responded to the scene in separate vehicles. When the Grievant arrived on the scene, the unwell female was climbing into the ambulance, while another woman stood nearby. The Grievant spoke to the second female present, who was a friend of the unwell woman. The friend reported that the women had been swimming and had left the water to use the bathroom. While in the bathroom the unwell woman began to have a reaction of hives and difficulty breathing. The friend had called 911. Upon taking this report, the Grievant went into the bathroom to look around for anything related to the incident. When the Grievant exited the bathroom, another of the NROs was kneeling on the ground with the friend, looking through a purse that reportedly belonging to the unwell woman. The Officer was looking for prescription drugs but found a small baggie containing remnants of marijuana. It was determined by the NROs at the scene that the purse search had occurred in such a way as to violate the purse owner's Fourth Amendment rights. Therefore, the woman who owned the purse would not be charged with marijuana possession. Having come upon contraband that could not be returned to the presumed owner, but would not become evidence associated with a criminal charge, the NROs determined that the small amount of marijuana (loose crumbs – less than a gram) would simply be destroyed. The Grievant and a fellow NRO took the small amount of marijuana into the bathroom where the Grievant first attempted to rinse the substance down the sink drain. When that method of disposal failed to work effectively, the Grievant flushed the marijuana down the toilet. The scene was cleared, and the Grievant took responsibility for completing the official incident report. In the narrative potion of his report, the Grievant recorded that he and his fellow officer had destroyed a small amount of marijuana.

Three and a half months later, on October 3, 2017 Mark R. Smith (Randy) from the Office of Law Enforcement was reviewing reports in the Records Management System (RMS) when he came upon the

Grievant's report from the June 19, 2017 incident. Randy Smith, having read therein that the Grievant had destroyed an undetermined amount of marijuana, rather than having logged the marijuana as evidence/contraband in accordance with Departmental policy, determined that the matter merited further investigation. Given that the reported facts of the incident involved destruction of evidence the matter was referred to the Ohio State Highway Patrol (OSHP) for an initial investigation. The OSHP investigation was assigned to Trooper Rachel A. Simmons. Upon completing her investigation, she contacted the Clark County Prosecutor's Office to discuss the case. The County Prosecutor declined the charges as presented and thus the case was closed by the OSHP as of December 18, 2017.

On January 8, 2018, with the OSHP criminal investigation closed, the Department of Natural Resources proceeded with its own administrative investigation, which was assigned to Randy Smith. As a result of the investigation it was determined that the Grievant's actions on June 19, 2017 pertaining to the destruction of marijuana was a violation of the ODNR Evidence/Property Policy. The Grievant attended his pre-disciplinary hearing on April 3, 2018; subsequently he was issued a one-day working suspension for Neglect of Duty – 16: Failure to follow the written policies, procedures, or directives of the Director/Division/Office. The suspension was served on June 18, 2018. Upon conclusion of the administrative investigation the two other NROs who were at the scene on the day of the original incident were issued written reprimands for the same work rule violation as the Grievant – Failure to follow written policies. The Unit Sergeant, not present at the scene on the day of the original incident, had reviewed and approved the original incident report completed by the Grievant was issued a written reprimand for having failed to report a policy violation. The Lieutenant who had been on the scene on the day of the incident was issued a one-day working suspension for Substandard Performance.

Meanwhile, on August 21, 2017, a full-time investigator position for Delaware County was posted for job bids. The job posting closed on August 30, 2017. The Grievant applied for the position and on December 6, 2017 was invited to schedule an interview for the position. On January 10, 2018, the Grievant was made a conditional offer for the investigator position, subject to the outcome of a background check. The Grievant's background check was cleared on January 11, 2018. On January 19, 2018, a representative of the Human Resources Office contacted Captain Paul Baker stating that the background check was complete, and that the HR Office was ready to move ahead with the Grievant's employment offer. Captain Baker was asked to set an effective date for the personnel action. No effective date for the personnel action was set. The Grievant followed up about his pending employment offer and background check on January 26, 2018 and again on February 6, 2018. Emails dated May 30 and 31, 2018 between various human resources personnel and Captain Paul Baker document that the Grievant's offer of employment had been delayed due to the administrative investigation pertaining to the June 19, 2017 Buck Creek State Park incident. On July 10, 2018 the Grievant was notified by the HR Office that the position for which he had received a conditional offer and successfully undergone a background check was not to be filled – the posting had been cancelled. Subsequently, an investigator position for Alum Creek State Park was posted for job bids in 2019. The Grievant bid for the position. By this time, the Grievant had been issued, and served, a one-day working suspension which would remain in the Grievant's file for 36 months. The Grievant was notified by the HR Office that he would not be considered for the position pursuant to the Collective Bargaining

Agreement, Article 31.02 which cites active discipline in a personnel file as a valid criterion for denial of transfer and promotion bids. The CBA goes on to state that employees with active discipline have no right to grieve non-selection.

As for the one-day working suspension that was issued to the Grievant and served on June 18, 2018, a grievance was filed on June 29, 2018 claiming that the discipline was without just cause. The grievance was heard by the Employer at Step 2 on July 30, 2018 and denied on September 17, 2018. The grievance was appealed to arbitration in accordance with the CBA Article 20.

POSITION OF THE EMPLOYER

The facts of this matter are not in dispute. The Grievant has acknowledged that on June 19, 2017 he responded to an incident at Buck Creek State Park Beach involving a woman who had fallen ill after swimming in the lake and who was being attended by local EMS. At the scene, the Grievant and two fellow NROs became aware that the woman possessed a small amount of marijuana. Knowledge of the marijuana was the result of what was most likely an unlawful search of the woman's purse. Thus, it was decided among the Officers present at the scene, that the woman was not to be charged for possession of the marijuana. However, given that the marijuana was contraband it could not simply be left in the woman's possession. The Grievant, accompanied by a fellow Officer, destroyed the small amount of marijuana by flushing it down a toilet in the bathroom at the Buck Creek State Park Beach. The incident and the disposition of the contraband marijuana was documented in a standard departmental incident report and entered in the Department's Records Management System (RMS).

Destruction of the seized marijuana in the manner used by the Grievant violates the Department's clear policy regarding the handling of evidence/property. The policy defines what constitutes contraband and states that, *"All drugs, contraband, ginseng, firearms and currency will be submitted to an EPR [Evidence Property Room] within 10 working days."* The policy goes on to state, *"Contraband shall be disposed of according to the provisions of ORC Sections 2981.13 and applicable statutory provisions."* Although it is acknowledged that Officers have discretion in deciding whether to write a citation for the possession of a small amount of marijuana (which would be a minor misdemeanor), Officers do not enjoy discretion in the seizing and destruction of contraband. As the policy states, all contraband must be put into the evidence property room until it can be properly destroyed by court order. The Grievant has acknowledged that he was aware of the Department's policy regarding the handling of evidence/property, and he has acknowledged that he did not follow the policy in the handling the marijuana that he destroyed on June 19, 2017.

Furthermore, on April 28, 2017, just two months prior to the June incident the Grievant had attended a training program on the Department's PremierOne Records Management System (P1 RMS) at which he raised the question of unofficial destruction of small amounts of marijuana, commonly referred to as "wind- or air-testing." Major Johnson, the training instructor, responded, *"…possessing marijuana is a reportable offence and that needed to be documented on an OIBR report and there are ways to close the report without an arrest."* Additionally, Law Administrator Pat Brown, who was also present at the training, heard the Grievant's remarks and stated in response, *"I hope we are not doing*

that." Based on this, the Grievant cannot reasonably argue that he did not know that he was acting in contravention of Departmental policy when he destroyed the marijuana on June 19, 2017.

The Grievant was issued a one-day working suspension which is a reasonable and commensurate level of discipline for such a policy violation. The one-day suspension reflects the importance of adhering to established lawful practices when handling contraband and evidence, as well as the unique case facts of the Grievant having been recently trained on the proper reporting and documenting procedure for evidence and contraband, and his role as the Officer who actually destroyed the marijuana on the day of the incident at Buck Creek State Park.

The Grievant's claim that his "make whole" remedy should include promotion to an Investigator position, must fail. The employment offer was never finalized; it never moved beyond the conditional status. The Grievant was never granted the position of Investigator through the job bid process, therefore he cannot be considered to have lost the position, or wrongfully been denied the position. The Grievant was always only a candidate for the position until the time that the offer was finalized – which ultimately it was not. The position for which the Grievant had bid was not filled. It remained vacant for over a year.

POSITION OF THE UNION

The Employer has failed to establish just cause for the disciplinary suspension levied on the Grievant. At the time of the incident, the Grievant had been employed by the Department for five years as an Officer and had a clean work record with no prior discipline. He serves as a Field Training Officer and instructs new Officers. The Grievant had no reason to believe that his decision to destroy a minimal amount of marijuana while issuing a warning could lead to disciplinary consequences. The destruction of minimal amounts of marijuana, when no charges are issued, is a common practice among the Officers at Natural Resources. So common in fact that the term air-test, which refers to the destruction of small amounts of marijuana by crumbling and dispersing it into the air, is recognized 'cop talk' among Officers. Other ODNR Officers from the Southwest Unit have submitted End-of-Shift reports in which they describe having destroyed minimal amounts of marijuana or drug paraphernalia when only a warning is issued and there are no charges filed. Local frontline supervisors have reviewed and approved reports of such contraband destruction. There are multiple documented examples of cases where other ODNR Officers reference in their reports having found varying amounts of marijuana in connection with a call/stop, and for which there is no corresponding report number to show that the marijuana was collected as evidence. It is self-evident that in such instances the marijuana/contraband was destroyed at the scene. Officers, other than the Grievant, have not been disciplined for engaging in the same conduct for which the Grievant received a one-day suspension.

The Union also believes that the investigation into this matter was not handled fairly or objectively. Although the investigating officer has many years of experience as a criminal investigator, he was not knowledgeable about several central facts/aspects of the case. For example, when the ODNR investigating officer referred the case to the Ohio State Highway Patrol for a criminal investigation the matter was incorrectly described to OSHP as the destruction of suspected narcotics rather than correctly

as the destruction of a minimal amount of marijuana. The investigator also stated that he did not know what amount of marijuana constitutes a misdemeanor in the State of Ohio. Furthermore, the investigator has acknowledged that he did not realize at the time of the investigation that ODNR Officers have discretion in issuing warnings for minor misdemeanors, which would include the minimal amount of marijuana found in association with the June 19, 2017 incident at Buck Creek State Park Beach.

Finally, the level of discipline is excessive and not in keeping with the principles of progressive discipline. The unreasonableness of the one-day suspension for such a minor matter has prevented the Grievant from being promoted to an investigator position after having been given a conditional offer in January 2018. It further prevented him from being eligible for the same promotional opportunity when it came around a second time in August 2019.

The discipline is without just cause; it should be overturned, expunged from the record and the Grievant be made whole, to include promotion to the investigator position he was denied in 2018.

DISCUSSION

There are three main elements of any just cause disciplinary case – notice, proof, and reasonableness. Each of these three elements is addressed below.

<u>The Element of Proof</u>

For the most part, the central facts of this case are not in dispute. There is no disagreement as to the specifics of what occurred on June 19, 2017 that brought the three ODNR Officers and their Lieutenant to the Buck Creek State Park beach, or what transpired once they arrived. The ODNR personnel responded to a Clark County Sheriff's Office dispatch of a deputy and local EMS to the Park beach to attend a woman who reported having hives and difficulty breathing after having been swimming in the lake. There is agreement among those involved in the matter, that the search of the woman's purse was not a lawful search. Thus, the marijuana found in the purse would not lead to charges, but a simple warning. From their investigatory statements it is established that the amount of marijuana found was small, a minimal amount, less than a gram. Of the three Officers present at the scene, two acknowledge that it was a group decision to destroy the marijuana; one acknowledges that he was present when the decision was made and that he witnessed the destruction of the marijuana. The Grievant acknowledges that he, accompanied by a fellow Officer, destroyed the marijuana by flushing it down a toilet in the public restroom at the beach. In addition to the investigatory interview statements of the three Officers, the basic facts of the case are recorded in the narrative attachment to the Investigatory Case Report authored on the day of the incident by the Grievant. In this narrative the Grievant records that, "Officer Heasley and I destroyed the small amount of marijuana." It is also established that at the time of the incident the Department had a published policy regarding the collection and handling of evidence, property, and contraband. Specifically, the policy states at subsection 6.4 *"All drugs, contraband, ginseng, firearms and currency will be submitted to an EPR within 10 working days."*

These undisputed facts form the basis for the subsequent OSHP criminal investigation, the ODNR administrative investigation, and ultimately, the disciplinary suspension imposed on the Grievant. With these facts, the Employer has met its burden to prove by a preponderance of evidence that conduct occurred that was contrary to a published written policy.

The Element of Notice

Generally, the element of notice in a disciplinary case is satisfied when there is evidence of a published rule and that the Grievant was aware of the rule before the matter arose. The Employer has relied upon this basic showing of a written policy and in-service training to establish that the Grievant had prior knowledge of the relevant workplace rules.

The Grievant was charged with Neglect of Duty – 16: Failure to follow the written policies, procedures, or directives of the Director/Division/Office. Specifically, the Grievant was investigated and disciplined for having failed to follow the ODNR Evidence/Property Policy, subsections 3, 5.1, 6.1, 6.4, 6.15, 7.2, 7.9 and 7.11. These policy subsections set forth procedures for establishing custodianship and chain of custody for evidence/contraband; storage of evidence/contraband in temporary facilities and evidence property rooms (EPR); and final disposition of, and disposal of, evidence/contraband. In addition, the Grievant was found to have violated the ODNR Voice Radio & Mobile Data Communications Directive in as much as he failed to create an OIBRS report of the June 19, 2017 incident.

Policies/directives are posted on the Department's website and the Grievant has demonstrated that he has a working knowledge of the content of these policies/directives. Among the documents entered as evidence is the Grievant's training certificate for 16 hours of specialized training in managing the property and evidence room. Also entered into the record is documentary evidence of the Grievant having attended annual in-service training pertaining to legal updates and policy reviews on a wide range of topics including search and seizure laws, the 5th Amendment, and open carry laws among others. It was also established through documentary evidence that the Grievant attended an in-service training session on April 28, 2017 regarding the P1 RMS. At this training, the Grievant raised a question about air-testing marijuana and not collecting it as evidence. Major Doug Johnson reports in a written statement that he explained to the Grievant that possessing marijuana is a reportable offense and needed to be documented on an OIBRS report. Also, in response to the Grievant's comments during this training, Law Administrator Patrick Brown reports in a written statement that he said, "I hope we are not doing that" referencing air-testing marijuana. In both his investigatory interview and his hearing testimony (which was subject to cross-examination) the Grievant acknowledged this training conversation. He described it as being more broadly focused than air-testing marijuana and about whether a substance/contraband was in-fact evidence when no charges are filed. The Grievant's recollection of the training conversation was that it did not end with a definitive objection to, or prohibition on, the practice of destroying contraband, rather than collecting it, when only a verbal warning is issued.

The significance and relevance of establishing the element of notice in a disciplinary case is to show not just that employees are aware of the Employer's written policies and rules, but to establish a workplace expectation that failure to follow the policies and rules can lead to a prescribed, known disciplinary consequence. This being the case, laxness in enforcement of a written policy, or an ongoing practice that is divergent from the written policy can defeat the basic form of notice.

In the case at hand, there is substantial evidence in the hearing record that at the time of the incident at Buck Creek State Park (June 2017) it was not uncommon for small amounts of marijuana to be destroyed by Officers rather than collected and logged, when a warning was given and no violation or charge was filed. U7 is a sampling of four End-of-Shift emails authored by Officers in the ODNR Parks and Watercraft SW District, Units A & B, and circulated to Officers and frontline supervisors. The emails are a standard practice among the personnel in the Units; they document incidents and interactions of note during the shift. The sample that make up U7 each document an occasion when an Officer issued a warning and destroyed marijuana/contraband at the scene without collecting and logging it into the EPR. The End-of-Shift reports are dated in 2015, 2016 and 2017. U9 is a sampling of seven Ohio Uniform Incident Reports prepared by various ODNR Officers dating from 2012 – 2016. The Reports in U9 document incidents at Buck Creek State Park, Shawnee State Forest, and Sycamore State Park when Officers destroyed varying amounts of marijuana at the scene without collecting it and logging it into the EPR. The Grievant was the reporting officer on four of seven of these documents authored in 2015 and 2016. The Reports show that the Grievant was transparent to his coworkers and supervisors in his handling of small amounts of marijuana in his years as an Officer prior to the June 19, 2017 incident. Despite his having reported this very same course of action on several occasions he was never instructed by his supervisors not to do as he had done. U10 is a sampling of 17 Dispatch Reports from various locations across the State and ranging in date from 2020 – 2015. The Reports each document an ODNR Officer responding to an incident, issuing a verbal warning for marijuana or drugs (signal 69), and not collecting and logging the contraband into the EPR. Several of the Reports indicate in the narrative portion of the form that the substance was destroyed. All incidents in exhibit U10 were cleared at the scene and none of them have a corresponding report number, thus indicating that in each instance the contraband was not taken in as evidence.

The documentary evidence and hearing testimony leads to the conclusion that policing practice in the field does not strictly follow written Departmental policy. Furthermore, it is reasonably clear that there is no *mens rea* underlying the Grievant's conduct. The Grievant has not denied his conduct, he has openly reported his practice in official formats and forums on repeated occasions, as have other Officers. Frontline supervisors have read and approved reports submitted by the Grievant and other Officers documenting the very conduct for which the Grievant has been disciplined. It appears, from this record, that there is a genuine misunderstanding or disconnect about how to treat contraband when Officers exercise their discretion and issue a verbal warning rather than file charges. By using the Department's own records, the Union has adequately called into question whether the Grievant was effectively on notice that his conduct could lead to discipline. It is not the Union's burden to show that the practice is widespread across the Department, or that all Officers and frontline supervisors engage in

the same practice. It is enough to show that at the time of the incident and at the Grievant's work location he and other Officers openly engaged in the practice without correction or consequence.

The Element of Reasonableness

Has the Grievant been treated fairly in comparison to other employees who have engaged in the same misconduct and who have a similar work record and tenure? Is the disciplinary penalty fitting and commensurate with the misconduct? The Grievant was issued a one-day working suspension for failing to follow written policies, procedures, and directives of the Department. The other two Officers involved in the Buck Creek State Park incident on June 19, 2017 each received a written reprimand for their part in the matter. They were both similarly charged with failure to follow written policy. The Grievant's Sergeant, who read and approved the Grievant's report, also received a written reprimand for failing to report a policy violation. The District Lieutenant received a one-day working suspension for substandard performance.

The Officers' investigatory interviews reveal that the Grievant and one other Officer present at the scene, described the decision to destroy the found marijuana as a "group decision." The third Officer did not admit to being part of the decision; however, did admit to accompanying the Grievant into the restroom and witnessing the destruction of the marijuana. This Officer did not state in his investigatory interview that he had objected to the decision or the action. These other two Officers both received written reprimands for their part in the matter, whereas the Grievant received a one-day suspension. The Employer has very finely parsed the culpability so as to place the heavier burden on the Grievant; presumably for having operated the flushing mechanism on the toilet while his fellow Officer stood by and watched. Certainly, there are cases where coworkers involved in the same disciplinary incident are treated differently because they have varying degrees of involvement or responsibility or intent in their actions. In the case at hand, it is difficult to see how the other two Officers failed to follow written policy any differently than the Grievant. This is not a minor detail, because the consequence of the Employer having issued a one-day suspension to the Grievant was far reaching.

On August 18, 2017, one month after the incident at Buck Creek State Park, and one and a half months prior to the start of the investigation into the Buck Creek incident, the Grievant applied for a promotion when an ODNR Investigator position was posted for Delaware County. The Grievant interviewed for the position on December 14, 2017. He was the successful candidate, and received a conditional offer pending the outcome of a background check. On January 11, 2018, the Grievant passed the background check and the ODNR Human Resources Office requested an effective date for the Grievant's promotion from the Division. Meanwhile during the intervening months of October thru December, the OSHP criminal investigation into the Buck Creek matter had been both opened and closed with no charges filed. On January 8, 2018, the ODNR administrative investigation began. Despite having passed the background check on January 11, 2018 the effective date for the Grievant's promotion was delayed six months while the ODNR investigation slowly proceeded. Internal emails in May 2018, between the HR Office and the Division, reveal an ongoing dialogue pertaining to the Grievant's eligibility for the promotion in light of the administrative investigation and pending disciplinary action. On June 15, 2018, the Grievant was issued a one-day suspension. On July 10, 2018,

the Grievant was informed that the investigator position would not be filled. The Grievant was not promoted. Article 31.02 of the CBA states, *"Active discipline above written reprimands shall be a valid criterion for denial of a transfer, lateral transfer or promotion. Employees with such active discipline shall have no right to grieve non-selection."* Had the Grievant been issued a written reprimand for his part in the Buck Creek matter, as were his fellow Officers and his immediate supervisor, the Grievant would have remained eligible under the CBA for the promotion. The Union has credibly demonstrated, with the Employer's own emails (U15), that there is a straight line of connected dots between the Grievant's one-day suspension and the Employer's 180-degree turnaround on his eligibility for promotion. Furthermore, pursuant to CBA Article 17.05 suspensions stay active in a personnel file for 36 months. This provision effectively denies the Grievant promotional or transfer options for three years. The Union further demonstrated with Departmental emails (U16) that the Grievant was denied a subsequent promotional opportunity in 2019 for this very reason. The one-day suspension has amounted to a significant loss in contractual rights for the Grievant.

When it comes to judging the reasonableness of a disciplinary penalty, arbitrators are cautioned not to substitute their own opinion for that of the Employer's if just cause is established and the difference between the arbitrator and the Employer is simply one of penalty magnitude. This Arbitrator accepts that normative guidance so long as the principles of just cause are established. In the case at hand, the Grievant was treated differently than his fellow Officers and his immediate supervisor, with no credible explanation as to the rationale for doing so. The Grievant's disciplinary penalty was elevated to a suspension whereas other bargaining unit employees involved in the same matter and at essentially the same level of culpability received reprimands. Furthermore, the Employer has not successfully carried its burden to show that the Grievant was on proper notice that his conduct could result in discipline. He was not engaged in a dishonest endeavor or intentional disregard of the Employer's policy, but believed he was acting in accordance with his training and common policing practice in the field. For these reasons, the principles of progressive discipline (subsumed in the just cause standard) would suggest that corrective counseling or a simple warning would have corrected the conduct.

The Employer has failed to establish just cause for the discipline imposed on the Grievant. The element of notice is not satisfied and there has been disparate treatment.

Summary

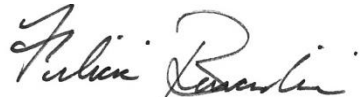
The Employer has successfully shown, through its administrative investigation and in the hearing record, that the Grievant acted in a manner inconsistent with Departmental written policy, when on June 19, 2017 he, along with his fellow Officers, undertook to destroy a small amount of marijuana discovered in the course of what was most likely an unlawful search. These facts, however, are insufficient to establish just cause for discipline. The Employer did not credibly establish that the Grievant had sufficient prior notice of the possible disciplinary consequences of his decision and action due to lax policy enforcement and follow-through in ensuring that police practice in the field aligns with written policy statements. Furthermore, the Grievant was singled out by the Employer and given a suspension rather than a written reprimand as was given to the other involved bargaining unit members. This too undermines the justness of the Employer's disciplinary action. The Grievant, in his

written grievance sought a make whole remedy. Additionally, the parties stipulated their submission to the Arbitrator and included a request that the Arbitrator determine the rightful remedy should the grievance be upheld. The Union has sufficiently established (at a simple preponderance level) that a consequence of the Employer's wrongful discipline was the withdrawal of a promotional opportunity on which the Grievant had bid and was the successful candidate. This being the case, it is reasonable to consider the promotion as an element of a just remedy.

AWARD

For the reasons herein stated the grievance is sustained. The one-day working suspension shall be expunged from the Grievant's file and the Grievant restored in pay or benefits, in whatever manner the suspension was originally charged against the Grievant, in accordance with Article 19.06 of the collective bargaining agreement. In addition, the Grievant is to be promoted to Investigator and made whole in pay and benefits with a retroactive effective date to June 15, 2018 (the date the Grievant was wrongfully disciplined).

Respectfully submitted at Columbus, Ohio, August 12, 2020.



Felicia Bernardini, Arbitrator