

COMMONWEALTH OF PENNSYLVANIA

Mark Carey	:	State Civil Service Commission
	:	
v.	:	
	:	
Pennsylvania Board of Probation and Parole	:	Appeal No. 29564
	:	
Sidney L. Gold and William Rieser Attorneys for Appellant		John C. Manning and Tim Keating Attorneys for Appointing Authority

ADJUDICATION

This is an appeal by Mark Carey challenging his demotion from regular Probation and Parole District Director 2 employment to regular Parole Agent 2 employment with the Pennsylvania Board of Probation and Parole. A hearing was held on August 4, 2017, at the State Civil Service Commission's Eastern Regional Office, in Philadelphia, Pennsylvania before Commissioner Bryan R. Lentz.

The Commissioners have reviewed the Notes of Testimony, exhibits introduced at the hearing, as well as the Briefs submitted by the parties. The issue before the Commission is whether the appointing authority has established just cause for a demotion.

FINDINGS OF FACT

1. By letter dated January 27, 2017, appellant was advised that he would be demoted from regular Probation and Parole District Director 2 employment to a regular Parole Agent 2 employment with the appointing authority effective January 30, 2017. Specifically, the letter stated:

On December 12, 2016, you were suspended pending investigation, without pay, from your position of Probation and Parole District Director 2, Regular Civil Service status, with the Chester District Office.

The investigation has concluded, and you are being returned to work on Monday January 30, 2017. However, based upon the information obtained in the investigation, including your explanations, it has been determined that your actions, as detailed below, warrant a disciplinary demotion to Parole Agent 2. You are to report to work on Monday, January 30, 2017 at 8:30 a.m. to Supervisor Arthur Rothwell at the Chester District Office. You will be made whole for 35 workdays Monday, December 12, 2016, up to and including Friday, January 27, 2017.

The reason for this demotion is for your failure to properly execute or perform your management level duties, as is expected of a Probation and Parole District Director 2. A pre-disciplinary conference was held with

you on Friday, December 9, 2016, and the responses you provided were not acceptable.

Comm. Ex. A; AA Ex. 14.

2. The appeal was raised before this Commission and was heard under Section 951(a) of the Civil Service Act, as amended.
3. Appellant worked as a Probation and Parole District Director 2 for eight years and was the District Director for the Chester District Office and the sub-office of Norristown. N.T. pp. 23, 319.
4. Appellant had no prior discipline. N.T. p. 320.
5. Appellant signed his most recent Probation and Parole District Director 2 job description on November 11, 2015. N.T. p. 21; AA Ex. 1.
6. A Probation and Parole District Director 2 “manages and directs the total operation and employees of a district, subject only to the Board and Commonwealth Policy guidelines.” N.T. p. 22; AA Ex. 1.

7. A Probation and Parole District Director 2 reviews any report submitted to him through his chain of command. N.T. pp. 23-24.
8. A Probation and Parole District Director 2 has the responsibility to approve or disapprove reports. N.T. pp. 200-201; AA Ex. 16.
9. A Probation and Parole District Director 2 has the responsibility to recommend discipline as warranted for employees who have violated the appointing authority's or Commonwealth's policies and procedures. N.T. pp. 26, 222, 275-276; AA Ex 1.
10. A Probation and Parole District Director 2 has the responsibility to recommend an employee's dismissal. N.T. p. 26; AA Ex. 1.
11. A Probation and Parole District Director 2 "[p]rovides direction, assistance and mandates training to all assigned employees of the District according to Board policy and procedures." N.T. p. 27; AA Ex. 1.

12. A Probation and Parole District Director 2 conducts in-service training on the appointing authority's policies and procedures, such as use of force, report writing, arrests, and search and seizures. N.T. pp. 27-28; AA Ex. 1.
13. A Probation and Parole District Director 2 must ensure all the agents and supervisors under his supervision are trained and knowledgeable about the appointing authority's policies and procedures. N.T. p. 351.
14. According to the Pennsylvania Board of Probation and Parole procedure 4.03.08., control is defined as "the force an employee uses to influence or neutralize the action or resistance of a subject." N.T. p. 34; AA Ex. 2.
15. According to the Pennsylvania Probation and Parole Board procedure 4.03.08., an employee is defined as "all Board staff with detention and arrest power and investigative responsibility, staff safety training responsibility, and/or assigned or issued weapons." N.T. p. 34; AA Ex. 2.

16. According to the Pennsylvania Board of Probation and Parole procedure 4.03.08., an agent is justified in the use of physical control methods for four reasons: protection of self, protection of others, prevention of escape of a subject, or to arrest or detain as authorized by law. N.T. p. 34; AA Ex. 2.
17. According to the Probation and Parole procedure 4.03.08, an employee must complete a response to resistance and control report in the Blue Team reporting software if a taser is successfully deployed as a control method while the employee is on duty. N.T. pp. 35-36; AA Ex. 2.
18. The purpose of the resistance and control report is to describe what occurred that caused the control to be used. N.T. p. 37.
19. A taser download occurs when an agent uses his taser.¹ N.T. pp. 211-212
20. If an employee uses a taser, the taser download report must be attached to the Blue Team report. N.T. pp. 37, 39, 233-234.

¹ When an agent uses his taser, a microchip inside the taser collects data on how long the taser was in use and how many times it was used. The microchip's stored data can then be downloaded to a computer for analysis. N.T. pp. 211-212.

21. If a taser download report is not attached to a Blue Team report, a Probation and Parole District Director 2 must request the taser download report and attach it. N.T. pp. 234, 273.
22. If another employee or agent is present or involved when a control method is used, an employee must attach the witness statements from every employee who witnessed the incident. N.T. pp. 39, 232.
23. An agent does not tase an offender solely to gain access into the content of a cell phone. N.T. pp. 57, 236, 246.
24. If an agent had reasonable suspicion that evidence of a parole violation existed on the offender's phone, he can confiscate the offender's cell phone and obtain a search warrant. N.T. p. 246.
25. On June 14, 2016, an offender was brought into the office for a "Con hearing."² N.T. p. 54; AA Ex. 5.
26. The offender was handcuffed and secured inside a Chester District Office holding cell. N.T. p. 54; AA Ex. 5.

² A "Con hearing" occurs when an agent and a supervisor must address a parole violation with an offender. N.T. p. 54; AA Ex. 5.

27. While the offender was detained in the holding cell, Agent Gannon requested the offender to open his iPhone because a picture of the offender at a location outside of the district was in the phone. N.T. pp. 54-55; AA Ex. 5.
28. The offender was compliant with Agent Gannon's request, but they were unable to open the offender's iPhone. N.T. p. 55; AA Ex. 5.
29. Agent Jon Giunta entered the holding cell to assist Agent Gannon. N.T. p. 55; AA Ex. 5.
30. After failing to open the offender's iPhone, Agent Giunta pushed the offender against the wall and threw the offender onto the floor face down. While the offender was face down on the floor, the offender was still handcuffed behind his back. N.T. pp. 55-56; AA Ex. 5.
31. While Agent Giunta was on top of the offender, Agent Gannon tased the offender with a drive stun³ to gain access into the offender's cell phone. N.T. p. 56; AA Ex. 5.

³ The witness is quoted as calling this a "drive" stun. Reports attached as exhibits describe this as a "dry" stun. It is not clear which term is correct, so we have quoted from the transcript.

32. The offender in the holding cell was neither a threat to others nor a threat to himself because the offender's hands were handcuffed behind his back. N.T. p. 237; AA Ex. 5.
33. A video recording exists illustrating the June 14, 2016 incident. AA Ex. 6.
34. Agent Gannon sent a Blue Team Report to his Supervisor, Joseph Bentzley, on June 17, 2016. N.T. p. 63; AA Ex, 5.
35. Bentzley approved Agent Gannon's conduct and forwarded Agent Gannon's Blue Team Report to appellant on June 17, 2016. N.T. p. 63; AA Ex. 5.
36. Appellant reviewed the Agent Gannon's Blue Team Report on August 1, 2016. N.T. p. 63.
37. Appellant approved Agent Gannon's Blue Team Report without an attached taser download report and without viewing the video recording. N.T. pp. 64, 352.

38. Appellant forwarded Agent Gannon's Blue Team Report and his approval to Eastern Regional Director Thomas Costa on August 1, 2016. N.T. p. 64; AA Ex. 5.
39. Costa reviewed and approved Agent Gannon's conduct, where he forwarded Agent Gannon's Blue Team Report to Director Christian Stephens on August 4, 2016. N.T. p. 64; AA Ex. 5.
40. According to the Pennsylvania Board of Probation and Parole procedure 4.03.06., real property is defined as "any residence or business property of an offender, including all portions of the property to which the offender had access." N.T. p. 42; AA Ex. 3.
41. According to the Pennsylvania Board of Probation and Parole Procedure 4.03.06., a property search is defined as "a warrantless search of real property, vehicle or personal property which is in possession or under the control of the offender." N.T. p. 43; AA Ex. 3.

42. When a parolee moves into a private residence without the appointing authority's approval and the appointing authority is unaware that the parolee lives somewhere else, the new residence becomes an unapproved residence. N.T. pp. 46-47.
43. If a search is of an unapproved residence and prior consent is not obtained, the agent must acquire a search warrant prior to entry. Agents must contact the local police department to secure a search warrant. N.T. pp. 44, 47; AA Ex. 3.
44. If an exception to the warrant requirement exists, then an agent may enter the unapproved residence. N.T. pp. 44-45; AA Ex. 3.
45. An exception to the warrant requirement exists when "an emergency exists where parole supervision staff is engaged in the immediate and continuous pursuit of an offender fleeing arrest or the offender poses a specific and imminent threat of causing serious physical harm to a third party." N.T. pp. 44-45; AA Ex. 3.
46. An agent, with supervisor approval, can "request that a local police department apply for a search warrant if he or she has probable cause to believe

that an offender is being harbored inside a third party or unapproved residence and evidence of the crime exists inside the residence.” N.T. p. 47; AA Ex. 3.

47. On July 13, 2016, an agent and supervisor made a forced entry into an unapproved residence searching for an offender without a search warrant and without permission from any of the residents. N.T. p. 87.
48. The agent requested and borrowed a Halligan Tool, which is a type of battering ram, from the Caln Township Police Department to knock the unapproved residence’s door down. N.T. p. 88.
49. When the unapproved residence’s homeowner arrived, she showed Agent Meikrantz where her handgun was located. N.T. p. 98; AA Ex. 8.
50. An agent is not trained to force doors open. N.T. p. 257.
51. An agent is prohibited from using a breaching mechanism or battering ram from a local police department to enter an unapproved residence. N.T. pp. 256-257.

52. According to the appointing authority's policy, a firearm recovered by an agent should be cleared and made safe. N.T. p. 257.
53. If an agent confiscated a weapon, he should leave a receipt stating that he is in possession of the weapon. N.T. p. 258.
54. According to the appointing authority's procedure, the weapon should not have been turned over to the local police. N.T. pp. 257-258.
55. According to the appointing authority's procedure, an agent must take a confiscated weapon to a district office, not to the local police department. N.T. p. 110.
56. Agent Meikrantz took possession of the owner's loaded firearm and took the firearm to the Caln Police Department. N.T. pp. 98-99, 257; AA Exs. 8 and 9.
57. The firearm was fully loaded with a round in the chamber. N.T. p. 111.
58. According to appellant's memorandum regarding the July 13, 2016 incident, none of the agents

involved had any previous knowledge of the appointing authority's policy or procedure 4.03.06 requiring a search warrant in order to search an unapproved residence. N.T. pp. 100-101; AA Ex. 8.

59. Due to the July 13, 2016 incident, appellant recommended for Agent Meikrantz and Agent Meikrantz's supervisor to be counseled on Pennsylvania Board of Probation and Parole procedure 4.03.06. N.T. p. 99; AA Ex. 8.
60. Counseling is not considered a disciplinary action because it is a verbal discussion between a supervisor and an employee regarding the appointing authority's policies and procedures. N.T. pp. 105-106.
61. During his eight years as Probation and Parole District Director 2, appellant never made a recommendation for any disciplinary action against an agent. N.T. pp. 122, 335.
62. Appellant sent his memorandum regarding the July 13, 2016 incident to Costa. N.T. pp. 89, 94; AA Ex. 8.

63. Based upon the June 14, 2016 and July 13, 2016 incidents, Director Christian Stephens ordered Labor Relations Chief Michelle Musser to investigate these incidents including employees under appellant's supervision. N.T. pp. 19, 92, 93.
64. Pursuant to Stephens' order for appellant's investigation, Internal Affairs conducted an investigative interview with appellant on September 18, 2016. N.T. pp. 111-112.
65. Director of Internal Affairs and Special Services, Scott Woolf and Investigator Michael Lamonto conducted appellant's investigative interview. N.T. pp. 111-113,
66. During the investigative interview, when asked if he understood Agent Gannon's conduct, appellant felt that it was within the realm of use of force. N.T. pp. 203-204; AA Ex. 16.
67. After appellant's investigative interview, Musser, conducted a Pre-Disciplinary Conference (hereinafter "PDC") with appellant on December 9, 2016. N.T. p. 114.

68. The reasons supporting appellant's PDC are stated as follows:

Failure to properly execute or perform your management level duties, as is expected of a Pennsylvania Probation and Parole District Director 2, for the Chester District Office. The Chester District Director supervises the Chester District which includes the Chester District Office and the Norristown Sub-Office. The District Director is responsible for oversight of the entire district. This is a managerial and quasi-judicial probation and parole, and the head of a district office in the Commonwealth's Probation and Parole System. [sic] An employee in this class manages and directs the total operation and employees of a district, subject only to Board and Commonwealth policy guidance. The work of this class involves directing and reviewing the work of subordinate supervisory professional and non-professional employees. It involves continuous evaluation of employee performance, the development of employee abilities through in-service training and the evaluation of the staff development program to assure consistency with training needs.

N.T. pp. 116-117; AA Ex. 11.

69. When asked about his understanding of whether he could recommend discipline, appellant responded that he believed that he was not allowed to recommend discipline and it was not part of his job description. N.T. p. 121.
70. During the PDC, appellant believed the responsibility to recommend discipline was a new duty under his position's description. N.T. pp. 121-122.
71. During the PDC, appellant stated he reviewed and understood use of force procedure but emphasized that he was not a use of force expert. N.T. pp. 123, 124.
72. During the PDC, appellant admitted to not reviewing the video illustrating the June 14, 2016 incident. N.T. pp. 124-125.
73. During the PDC, appellant agreed that agents used excessive force during the June 14, 2016 incident. N.T. pp. 163, 168.

74. During the PDC, appellant acknowledged a search into an unapproved residence should not have occurred without a search warrant. N.T. pp. 127, 152, 282.
75. During the PDC, appellant agreed with the agent taking the loaded firearm from the unapproved residence to the Caln Township Police Department instead of leaving it in the unapproved residence. N.T. p. 153; Ap. Ex. 1.
76. After the PDC, Musser provided Stephens the investigation's findings. N.T. p. 177.
77. Musser met with Stephens and confirmed that appellant would be suspended pending investigation. N.T. pp. 127-128.
78. On December 19, 2016, appellant received his suspension pending investigation letter. The suspension pending investigation letter provided the following reasons supporting the decision:
- This suspension is pending completion of our investigation into allegations of your failure to properly execute or perform your management level duties, as is expected of a PA Probation and Parole District Director 2, for the Chester District Office. The

Chester District Director supervises the Chester District which includes the Chester District Office and the Norristown Sub-Office. The District Director is responsible for oversight of the entire district. On December 9, 2016, you were afforded the opportunity to provide your explanation regarding (2) separate incidents that occurred in your District, to which you are responsible for the oversight. On June 14, 2016, there was an incident where excessive use of force was used against a parolee that was handcuffed behind his back, in a holding cell. And on July 13, 2016, PBPP staff forced entry into an unapproved residence without permission and without securing a search warrant. During that incident there was a weapon seized, however, the handling of the weapon was done in a manner that was in direct violation of PBPP policy.

N.T. pp. 129-130; AA Ex. 12.

79. On January 27, 2017, appellant received a revised suspension pending investigation letter, which corrected a clerical typo incorrectly stating appellant's former position. The reasons for appellant's suspension pending investigation are the same in the December 19, 2016 letter and in the January 25, 2017 letter. N.T. p. 132; AA Ex. 13.

80. Stephens determined that based upon appellant's conduct during both incidents, he was unfit to lead the appointing authority's professional parole agents. N.T. p. 266.
81. Stephens concluded that appellant did not have the ability to supervise others as Probation and Parole District Director 2. N.T. p. 268.
82. Stephens makes the disciplinary determinations. N.T. p. 171.
83. On January 27, 2017, Stephens provided appellant's demotion letter regarding his demotion from his regular employment as a Parole District Director 2 to a regular employment as a Parole Agent 2 with the appointing authority. Comm. Ex. A; N.T. pp. 133-134, 261; AA Ex. 14.
84. Appellant's demotion letter refers to the PDC on December 9, 2016. Comm. Ex. A; AA Ex. 14.

DISCUSSION

The issue in the present appeal is whether the appointing authority has established just cause for appellant's demotion from his regular Probation and Parole District Director 2 employment to regular Parole Agent 2 employment with the appointing authority. The appointing authority charges appellant with failure to properly execute or perform his management level duties, as is expected of a Probation and Parole District Director 2. Comm. Ex. A.

In an appeal challenging the demotion of a regular employee, the appointing authority has the burden of establishing that the employee's work performance was unsatisfactory. 71 P.S. §§ 741.951(a), 741.706; 4 Pa. Code § 105.15. Since a demotion of a regular employee is the removal of the employee from a higher-level position, the appointing authority must establish just cause for removal. *See Pennsylvania Liquor Control Board v. Flannery*, 141 Pa. Commw. 228, 232, 595 A.2d 685, 687 n.2. (1991) ("We approve of the Commission's application of the just cause standard to a regular demoted employee because a demotion is actually a 'removal' from the higher-level position.") Just cause for the removal of a regular civil service employee is demonstrated when the allegations supporting the removal are related to an employee's job performance and touch in some rational and logical manner upon the employee's competence and ability. *Ellerbee-Pryer v. State Civil Service Commission*, 803 A.2d 249 (Pa. Commw. 2002).

In support of its action, the appointing authority presented the testimony of Michelle Musser, Scott Woolf, and Christian Stephens. Appellant testified upon his own behalf and presented the testimony of Thomas Costa.

Michelle Musser is employed by the appointing authority as a Labor Relations Chief and has held the position for approximately eleven months. N.T. pp. 17-18. As a Labor Relations Chief, Musser handles the disciplinary process, the grievance process and the ADP process. N.T. p. 18. Musser explained that Director Christian Stephens requested she conduct an investigation into the two separate incidents including employees under appellant's supervision. N.T. pp. 19, 92-93.

Pursuant to appellant's investigation, Musser reviewed appellant's job description as a Probation and Parole District Director 2. N.T. pp. 20-21, 30; AA Ex. 1. Appellant signed his current Probation and Parole District Director 2 position description on November 18, 2015. N.T. p. 21. AA Ex. 1. Appellant was the Probation and Parole District Director 2 for the Chester District Office and sub-office of Norristown. N.T. p. 23. Musser testified that appellant reported to a regional director, which would be the Eastern Regional Director. N.T. p. 23. Musser explained that a Probation and Parole District Director 2 "manages and directs the total operation and employees of a district, subject only to the Board and Commonwealth Policy guidelines." N.T. p. 22; AA Ex. 1. A Probation and Parole District Director 2 reviews any report submitted to him through his chain of command. N.T. pp. 23-24. A Probation and Parole District Director 2 has the responsibility to recommend discipline and recommend an employee's dismissal. N.T. p. 26; AA Ex. 1.⁴

Musser explained that a Probation and Parole District Director 2 "[p]rovides direction, assistance and mandates training to all assigned employees of the District according to Board policy and procedures." N.T. p. 27; AA Ex. 1.

⁴ Specifically, a Probation and Parole District Director 2 "[h]as the responsibility to recommend disciplinary actions as warranted for employees who have violated agency or Commonwealth policies and procedures." AA Ex. 1.

Probation and Parole District Director 2 conducts in-service training on policies and procedures, such as use of force, report writing, arrests, and search and seizures. N.T. pp. 27-28; AA Ex. 1. Musser emphasized that a Probation and Parole District Director 2 administers agency policies and procedures. N.T. pp. 28-29; AA Ex. 1.

Pursuant to appellant's investigation, Musser reviewed the Pennsylvania Board of Probation and Parole procedure 4.03.08 regarding resistance and control. N.T. p. 40; AA Ex. 2.⁵ According to the Pennsylvania Board of Probation and Parole procedure 4.03.08, control is defined as follows:

Control is defined as the force an employee uses to influence or neutralize the action or resistance of a subject. Generally, employees are justified in the use of physical control methods for four reasons: protection of self, protection of others, prevention of escape of a subject, or to arrest or detain as authorized by law.

N.T. p. 34; AA Ex. 2. An employee is defined as "all Board staff with detention and arrest power and investigative responsibility, staff safety training responsibility, and/or assigned or issued weapons." N.T. p. 34; AA Ex. 2. Pursuant to the Pennsylvania Board of Probation and Parole procedure 4.03.08, an employee must read and understand the procedure on an annual basis. N.T. p. 35; AA Ex. 2. Musser testified that the term employee applies to appellant. N.T. p. 40.

Additionally, an employee must complete a response to resistance and control report in the Blue Team reporting software if a control, including a taser, is used while the employee is on duty. N.T. pp. 35-36; AA Ex. 2. Musser explained that the purpose of the resistance and control report is to describe what occurred that

⁵ Appellant stipulated that the Pennsylvania Board of Probation and Parole procedure 4.03.08. was in effect as of June 2016, during appellant's employment as Probation and Parole District Director 2. N.T. pp. 31, 33.

caused the control to be used. N.T. p. 37. Musser clarified that a Blue Team report is used interchangeably with a resistance and control report. N.T. p. 36. If an employee uses a taser, the taser download report must be attached to the Blue Team report. N.T. pp. 37, 39. Musser emphasized that if another employee or agent is involved when the control is used, an employee must also attach the witness statements from everyone who was involved in the incident. N.T. p. 39.

Pursuant to the investigation of the June 14, 2016 incident, Musser reviewed and relied upon a Pennsylvania Board of Probation and Parole Use of Force Report (hereinafter “Agent Gannon’s Blue Team Report”). N.T. p. 53; AA Ex. 5. Musser also reviewed a video recording of the incident occurring within the Chester District Office’s holding cell. N.T. pp. 65-66, 71, 73-74, 76-79, 81; AA Ex. 6. Musser testified that Agent Michael Gannon wrote the report. N.T. p. 53. According to Agent Gannon’s Blue Team Report, on June 14, 2016, an offender was brought into the office for a “Con hearing.” N.T. p. 54; AA Ex. 5. The offender was handcuffed and secured inside a Chester District Office holding cell. N.T. p. 54; AA Ex. 5. Musser explained that parolees are searched prior to being placed into a holding cell. N.T. p. 81. While the offender was detained in the holding cell, Agent Gannon requested the offender to open the offender’s iPhone because a photo of the offender taken while he was outside the district was suspected to be on the cell phone. N.T. pp. 54-55; AA Ex. 5. Musser testified that the offender was compliant with Agent Gannon’s request, but they were unable to open the offender’s iPhone. N.T. p. 55; AA Ex. 5. Soon thereafter, Agent Jon Giunta entered the holding cell to assist Agent Gannon. N.T. p. 55; AA Ex. 5. After failing again to open the offender’s iPhone, Agent Giunta pushed the offender against the wall and threw the offender onto the floor face down. N.T. pp. 55-56; AA Ex. 5. While the offender was face down on the floor, the offender was still handcuffed behind his back. N.T.

p. 56; AA Ex. 5. With Agent Giunta on top of the offender, Agent Gannon tased the offender with a “drive stun” to have him open the cell phone. N.T. p. 56; AA Ex. 5. The offender did not have a weapon. N.T. p. 57. Musser emphasized that a parole agent cannot use force solely for the purpose of gaining access into a cell phone. N.T. p. 57.

Musser and Woolf explained that there are two ways to tase someone. N.T. p. 56. A drive stun occurs when the entire taser is applied to the surface of a person’s skin. N.T. pp. 56, 212. Another form of stunning someone is when the agent pulls the trigger and the prongs enter into a person’s body. N.T. p. 56. When an agent uses his taser, a little microchip within the taser recalls the duration and how many times a taser is used on an individual. N.T. pp. 211-212. A taser download occurs with either type of stun; therefore, the taser download report from this incident would be available for appellant’s review. N.T. p. 212.

Musser testified that Agent Gannon sent his Blue Team Report to his Supervisor, Joseph Bentzley on June 17, 2016.⁶ N.T. p. 63; AA Ex, 5. Bentzley approved Agent Gannon’s decision and forwarded Agent Gannon’s Blue Team Report to appellant on June 17, 2016. N.T. p. 63; AA Ex. 5. Appellant reviewed Agent Gannon’s Blue Team Report on August 1, 2016. N.T. p. 63. Musser further testified that appellant approved Agent Gannon’s conduct. N.T. p. 64. Appellant’s comment supporting his approval is as follows:

Although no clear policy on searching phones exist, it is clear that despite the means the result substantiated the violations. Offender did not seek medical attention, no taser data recorded on drive stun deployment. Offender’s continued resistance to cooperate was indicative that

⁶ Musser testified that the report was sent on this date in 2015, but the stated year is clearly incorrect. AA Ex. 5. Therefore, it has been changed to 2016.

significant violations were incurred.⁷ I was on vacation from 6/13 to 7/5 when this report was originally completed and was unable to forward via chain of command.

N.T. pp. 64, 219; AA Ex. 5. Appellant forwarded Agent Gannon's Blue Team Report and his approval to his supervisor, Eastern Regional Director Thomas Costa, on August 1, 2016. N.T. p. 64; AA Ex. 5.

Pursuant to appellant's investigation, Musser also reviewed Pennsylvania Board of Probation and Parole procedure 4.03.06. regarding arrest, search and seizure procedures. N.T. pp. 41-42; AA Ex. 3.⁸ According to the Pennsylvania Board of Probation and Parole procedure 4.03.06, real property is defined as "any residence or business property of an offender, including all portions of the property to which the offender had access." N.T. p. 42; AA Ex. 3. A property search is defined as "a warrantless search of real property, vehicle or personal property which is in possession or under the control of the offender." N.T. p. 43; AA Ex. 3.

When the homeowner agrees to all the appointing authority's conditions and the appointing authority approves the residence for the parolee, the residence becomes an approved residence. N.T. pp. 45-46. A parolee can only live in an approved residence. N.T. p. 46. When a parolee moves into a private residence without the appointing authority's approval and the appointing authority is unaware that the parolee lives somewhere else, the residence becomes an unapproved

⁷ The transcript says "occurred." However, it is noted that within AA Ex. 5., the comment states that "[o]ffender's continued resistance to cooperate was indicative that significant violations were *incurred*." AA Ex. 5. (Emphasis added.) Therefore, it has been changed here to match the text being quoted by the witness.

⁸ Appellant stipulated that the Pennsylvania Board of Probation and Parole procedure 4.03.06. was in effect as of June 2016, during appellant's employment as Probation and Parole District Director 2. N.T. p. 42.

residence. N.T. pp. 46-47. If a search is to be conducted of an unapproved residence and properly authorized consent has not been obtained, the agent must acquire a search warrant prior to entry. N.T. p. 44; AA Ex. 3. If an exception to the warrant requirement exists, then an agent may enter the unapproved residence without a warrant and without consent. N.T. pp. 44-45; AA Ex. 3. Musser explained that an exception to the warrant requirement exists when “an emergency exists where parole supervision staff is engaged in the immediate and continuous pursuit of an offender fleeing arrest or the offender poses a specific and imminent threat of causing serious physical harm to a third party.” N.T. pp. 44-45; AA Ex. 3. Musser stated that it is possible for a loaded firearm reasonably believed to be located within an unapproved residence where an offender is residing to cause an exigent circumstance. N.T. pp. 145-146.

Musser testified that an agent, with supervisor approval, can “request that a local police department apply for a search warrant if he or she has probable cause to believe that an offender is being harbored inside a third party or unapproved residence and evidence of the crime exists inside the residence.” N.T. p. 47; AA Ex. 3. Musser emphasized that a search warrant cannot be requested to search for evidence of violations of probation and parole. N.T. p. 47. If a parolee is within an unapproved residence, an agent must request the local police department to obtain a search warrant in order to enter an unapproved residence. N.T. p. 47; AA Ex. 3.

Pursuant to the appellant’s investigation, Musser reviewed a second specific incident which occurred on July 13, 2016 that correlates to appellant’s supervision duties as Probation and Parole District Director 2. N.T. pp. 86-87, 93. On July 13, 2016, a solo agent and a supervisor made a forced entry into an unapproved residence to search for an offender without a search warrant and without

permission from the residents. N.T. p. 87. Specifically, an agent requested from his supervisor whether he could enter the unapproved residence and the supervisor granted the entry. N.T. pp. 87-88. After obtaining permission, the agent requested and borrowed a Halligan Tool, which is a battering ram, from the local police department to knock the unapproved residence's door down. N.T. p. 88.

Pursuant to the investigation of the July 13, 2016 incident, Musser reviewed appellant's memorandum sent to Costa. N.T. pp. 89, 94; AA Ex. 8. Within the memorandum, appellant noted how the agents gained access into the unapproved residence as follows:

After this information was relayed to Supervisor McGowan and considering the amount of time that had elapsed, Agent Meikrantz sought permission to forcibly enter the residence based on the recent information relayed to the agents at the front of the residence and based on the totality of information known to the agents up to that point in regards to the offender being in the evidence as reported by police. The offender's apparent behavior and use of a firearm and that firearm purportedly used in the previous two incidents was indeed registered to the paramour that was renting 8 Johnson Avenue and that the offender was apparently living. The agents requested tools to remove the door and shortly after forcing entry, the agents discovered that the offender was not present in the residence despite being told otherwise by the Caln Township Police Department. The house was cleared by agents and the police department.

N.T. pp. 97-98; AA Ex. 8. Once the homeowner arrived, she showed Agent Meikrantz where her firearm was located. N.T. p. 98; AA Ex. 8. Agent Meikrantz took possession of the owner's firearm and took the firearm to the Caln

Township Police Department. N.T. pp. 98-99; AA Ex. 8. Musser confirmed that appellant did not mention that firearm was loaded with a round in the chamber. N.T. p. 111; AA Ex. 8.

Due to the July 13, 2016 incident, appellant met and discussed with Agent Meikrantz and Agent Meikrantz's supervisor about what occurred. N.T. p. 100; AA Ex. 8. After his conversation with Agent Meikrantz and Meikrantz's supervisor, appellant determined that they had knowledge of an existing imminent threat leading to exigent circumstances. N.T. p. 100; AA Ex. 8. Appellant's memorandum noted that neither Agent Meikrantz nor Meikrantz's supervisor knew the exact policy verbiage regarding unapproved residence searches. N.T. p. 100; AA Ex. 8. Pursuant to appellant's assessment of the July 13, 2016 incident, none of the agents during the incident had any previous knowledge of the appointing authority's policy or procedure requiring a search warrant in order to search for an offender in an unapproved residence. N.T. pp. 100-101; AA Ex. 8.

Due to the July 13, 2016 incident, appellant recommended for Agent Meikrantz and Agent Meikrantz's supervisor to be counseled on Pennsylvania Board of Probation and Parole procedure 4.03.06. N.T. p. 99; AA Ex. 8. Musser emphasized that counseling is not considered as a disciplinary action because it is a verbal discussion between a supervisor and an employee regarding policies and procedures. N.T. pp. 105-106. Musser testified that appellant recommended district training to ensure agents and supervisors understood the search and seizure policy and recommended agency wide frequent training on the appointing authority's search and seizure procedure and updated caselaw. N.T. p. 99; AA Ex. 8.

Pursuant to the investigation of the July 13, 2016 incident, Musser reviewed an incident report from the Caln Township Police Department. N.T. p. 102; AA Ex. 9. According to the incident report, the police received the owner's handgun fully loaded with a round in the chamber. N.T. p. 103; AA Ex. 9. Musser explained that according to the appointing authority's written procedure, an agent must take a firearm to a district office instead of the local police department. N.T. p. 110. An agent must also render the firearm safe before he takes it from the residence. N.T. p. 110. Musser testified that appellant did not mention the condition of the owner's handgun when comparing appellant's report with the police's incident report. N.T. p. 103; AA Exs. 8, 9. Musser confirmed that appellant did not report how the police attempted to contact with collateral homeowners regarding the unapproved residence. N.T. p. 104; AA Ex. 9. According to the incident report, the Caln Police Department noted Pennsylvania Board of Probation and Parole (hereinafter "PBPP") staff were conducting a compliance check of the offender's residence due to the offender moving without permission and due to receiving a phone call about the offender threatening individuals with a firearm. N.T. p. 148.

Pursuant to the investigation of the July 13, 2016 incident, Musser reviewed the Record of Interview Reports. N.T. p. 106; AA Ex. 10. Musser testified that both Agent Christopher Meikrantz and Agent Jon Giunta wrote 259 reports. N.T. p. 107; AA Ex. 10. Musser stated that an inconsistency between the 259 reports and appellant's memorandum was a reference to a suspected smell of marijuana and liquor in the unapproved residence. N.T. p. 108; AA Exs. 8, 10.

Pursuant to appellant's investigation, Musser reviewed an investigative interview with appellant. N.T. p. 113. Internal Affairs conducted an investigative interview with appellant on September 18, 2016. N.T. pp. 111-112. Director of Internal Affairs Scott Woolf and Investigator Michael Lamonto were present at the investigative interview. N.T. p. 112.

Scott Woolf is employed by the appointing authority as the Director of Internal Affairs and Special Services and has held the position for approximately four years. N.T. pp. 180, 182. As the Director of Internal Affairs and Special Services, Woolf oversees internal investigations within the appointing authority. N.T. pp. 180-181. Woolf was not involved in appellant's disciplinary determination. N.T. p. 223.

Woolf testified he records investigative interviews. N.T. p. 182. After reviewing the video recording illustrating the June 14, 2016 incident, Woolf determined that an investigation was necessary. N.T. p. 184. Woolf testified that Investigator Michael Lamonto assisted him with appellant's investigation. N.T. p. 184. Pursuant to appellant's investigation, Lamonto emailed appellant on August 31, 2016, to notify him that he will be the subject of an investigative interview regarding the June 14, 2016 incident. N.T. p. 187; AA Ex. 15.

Pursuant to appellant's investigation, Woolf conducted a recorded investigative interview with appellant in September 2016. N.T. pp. 184-185; AA Ex. 16. The scope of the investigative interview inquired about what took place on June 14, 2016. N.T. p. 218. Woolf explained that when he asked appellant about his job duties, appellant stated "my job is to monitor district operations, ensure that supervision is being conducted, review reports, and submit reports as necessary and

as directed by my regional director, hire and fire people, et cetera.” N.T. pp. 199-200; AA Ex. 16. When Woolf asked appellant what he reviews Blue Team reports for, appellant answered “[s]pelling accuracy. It depends on what kind of report I get. I get many reports.” N.T. p. 200; AA Ex. 16. Woolf stated that appellant explained that he reviews Blue Team reports because “[s]omeone may be summarizing something. Someone may be doing a special field report requesting that someone be waived in supervision fees, a special condition removed. So, I’m just looking for the context of what it is that they’re asking for.” N.T. p. 200; AA Ex. 16. Woolf testified that appellant understood that it is his job to approve or disapprove reports. N.T. pp. 200-201; AA Ex. 16.

When he asked what factors are used when appellant approves a Blue Team report, appellant answered as follows:

There is no --- there is no guidance. There is no instruction on the Blue Team report, nor is there any requirement that we make any determination of the level the event that we’re --- that we’re looking at in that report. All my previous reports in the Blue Team have been submitted in the same fashion in which I put approved. I made no recommendation. I made no reference to whether they did this wrong or that wrong. That had never been prior precedent with the submission of a Blue Team report.

N.T. pp. 194-195; AA Ex. 16. When Investigator Lamonto asked if there has been an occasion when appellant’s review of a report caused concern, appellant answered “[n]one that I’ve ever --- none that I’ve previously---.” N.T. p. 196; AA Ex. 16. When asked if his review has ever caused concern where he would have to investigate further, appellant replied “[n]or have I ever been told that there was concern after it’s been reviewed by my regional and/or Defensive Tactics Unit.” N.T. p. 196; AA Ex. 16.

During the investigative interview, appellant admitted to reviewing Agent Gannon's Blue Team Report. N.T. p. 203; AA Ex. 16. When asked if he understood Agent Gannon's report, appellant responded as follows:

Right. I wouldn't say I was confused. I would say it was a little tough reading and trying to chain --- follow the chain of events. But overall, I felt that it was within the realm of use of force as it --- as applicable to the use of the dry stun and what was described as what the offender was doing.

N.T. pp. 203-204; AA Ex. 16. Appellant acknowledged to being familiar to use of force procedure. N.T. p. 203; AA Ex. 16. When asked how he understood how his agents are acting in his district, appellant responded by stating, "I wasn't present at that particular incident. I was not ----. I was on vacation, actually, for three weeks. And the first time that landed in my box was July 29th." N.T. p. 206; AA Ex. 16. Woolf testified that when he asked appellant if he made any mistakes relating to the June 14, 2016 incident's Blue Team Report, appellant responded as follows:

And I'm telling you now that if I could have done it better, then yes. I go through a hundred reports that, out of routine, I say yes or no. There may be some things that I ask people --- I ask agents to add reports. Mr. Woolf, this report and this incident, and the way it was handled by me, I will freely admit, was not the best way that it was handled, only because the first incident that occurred --- that this incident has occurred in the office like this, the length of time between the incident, and the fact that I was just back in the groove of getting back into the district ---. I could have done a better job of evaluating that and making those proper additions or corrections that I needed to. But I never put my mind in that of being an investigator and going forward, getting video, talking to agents, saying, hey, this could be serious. I want to remain impartial on

an incident so that people don't --- or make it appear as if I'm trying to go in there and change the facts of this incident.

N.T. pp. 206-208; AA Ex. 16. Woolf testified that appellant asserted that the incident on June 14, 2016 is the first of its kind within his District. N.T. p. 215. Woolf stated that when Investigator Lamonto asked about appellant's review of the video illustrating the June 14, 2016 incident, appellant responded as follows:

Right, do you know, that something happened, that it's one of concern. And it's not that I'm being blind to it. It's just that in my mind it's ---. I didn't watch the video because I didn't want to taint what is an investigative process, because there's always Internals Affair --- Internal Affairs that does that. I didn't want to do this; I didn't want to do that. It happened. But I never --- in my stimulus of what my normal pattern was of looking at Blue Team reports, I never recalled getting any response back.

N.T. pp. 197-198; AA Ex. 16. Woolf explained that appellant had access to review the video illustrating the June 14, 2016 incident prior to the investigation and nothing would have prevented appellant from reviewing the video prior to the investigation. N.T. pp. 198-199.

Woolf testified that a Probation and Parole District Director 2 would have twenty-four to forty-eight hours to submit a received Blue Team report to the next chain in command. N.T. pp. 209-210. Appellant did not submit Agent Gannon's Blue Team Report for several weeks after receiving it. N.T. pp. 210-211. After the investigative interview, Investigator Lamonto provided a report describing the interview to Musser. N.T. p. 214.

After her review of the investigative interview, Musser conducted a PDC with appellant on December 9, 2016. N.T. p. 114. Musser provided appellant notice through email regarding the PDC. N.T. pp. 114-115; AA Ex. 11. Musser described the reasons behind appellant's PDC as follows:

Failure to properly execute or perform your management level duties, as is expected of a Pennsylvania Probation and Parole District Director 2, for the Chester District Office. The Chester District Director supervises the Chester District which includes the Chester District Office and the Norristown Sub-Office. The District Director is responsible for oversight of the entire district. This is a managerial and quasi-judicial probation and parole, and the head of a district office in the Commonwealth's Probation and Parole System. An employee in this class manages and directs the total operation and employees of a district, subject only to Board and Commonwealth policy guidance. The work of this class involves directing and reviewing the work of subordinate supervisory professional and non-professional employees. It involves continuous evaluation of employee performance, the development of employee abilities through in-service training and the evaluation of the staff development program to assure consistency with training needs.

N.T. pp. 116-117; AA Ex. 11. Musser created questions for the PDC. N.T. p. 149; Ap. Ex. 1. When asked about his understanding of his job duties, appellant responded with a broad overview of his responsibilities for the supervision, training, and hiring of employees. N.T. pp. 120-121. Musser indicated that in his response, appellant noted his responsibility of reviewing investigations. N.T. pp. 120-121.

Musser testified that when asked about his understanding of whether he could recommend discipline, appellant responded that he believed that he was not allowed to recommend discipline and it was not part of his job description. N.T. p.

121. Appellant believed the responsibility to recommend discipline was a new duty under his position's description and was uncomfortable recommending discipline. N.T. pp. 121-122. Appellant had never recommended discipline of any employee. N.T. p. 122.

Musser testified that when asked about how he reviewed an agent's report, appellant responded that it was his understanding that he did not have the authority or the responsibility to make a recommendation. N.T. p. 123. Although appellant reviewed and understood use of force procedure, he emphasized that he was not a use of force expert. N.T. p. 123. During the PDC, appellant asserted that he relied upon the staff safety team to be the use of force expert. N.T. p. 124.

Musser testified that appellant did not review the video illustrating the June 14, 2016 incident. N.T. pp. 124-125. During the PDC, appellant stated that he did not review the video because he did not want to have any bias toward what occurred and did not want to "affect the investigation" of the June 14, 2016 incident.⁹ N.T. p. 125. Musser stated that appellant spoke with the agents regarding the June 14, 2016 incident but did not remember the conversation. N.T. p. 126. During the PDC, appellant agreed that the agents used excessive force during the June 14, 2016 incident. N.T. pp. 163, 168.

Musser testified that regarding the July 13, 2016 incident, appellant stated he was not going to answer questions about it because Internal Affairs did not discuss it with him during the investigative interview. N.T. pp. 151-152. Musser indicated that appellant did discuss the July 13, 2016 incident with the involved

⁹ It is not clear from the context whether this choice of words is appellant's or Musser's. Therefore, they are not attributed to appellant.

agent and the agent's supervisor. N.T. p. 127. During the PDC, appellant agreed that a search into an unapproved residence should not have occurred without a search warrant. N.T. pp. 127, 152. Musser confirmed that appellant did agree with the agent's decision to take the loaded firearm from the unapproved residence to the Caln Township Police Department instead of leaving it in the residence. N.T. p. 153; Ap. Ex. 1.

After the PDC, Musser provided Stephens with her investigation's findings. N.T. p. 177. Musser met with Stephens and confirmed that appellant would be suspended pending investigation. N.T. pp. 127-128. Musser testified that Stephens makes disciplinary determinations. N.T. p. 171. Musser signed appellant's suspension pending investigation letter on December 19, 2016. N.T. pp. 128-129; AA Ex. 12. Musser testified that the reasons for appellant's suspension pending investigation were as follows:

This suspension is pending completion of our investigation into allegations of your failure to properly execute or perform your management level duties, as is expected of a PA Probation and Parole District Director 2, for the Chester District Office. The Chester District Director supervises the Chester District which includes the Chester District Office and the Norristown Sub-Office. The District Director is responsible for oversight of the entire district. On December 9, 2016, you were afforded the opportunity to provide your explanation regarding (2) separate incidents that occurred in your District, to which you are responsible for the oversight. One June 14, 2016, there was an incident where excessive use of force was used against a parolee that was handcuffed behind his back, in a holding cell. And on July 13, 2016, PBPP staff forced entry into an unapproved residence without permission and without securing a search warrant. During

that incident there was a weapon seized; however, the handling of the weapon was done in a manner that was in direct violation of PBPP policy.

N.T. pp. 129-130; AA Ex. 12. On January 25, 2017, appellant received a revised suspension pending investigation letter correcting a clerical typo incorrectly stating appellant's former position. N.T. p. 132; AA Ex. 13. Musser explained that the reasons for appellant's suspension pending investigation were the same in the December 19, 2016 letter and the January 25, 2017 letter. N.T. p. 132. On January 27, 2017, appellant received a letter regarding his demotion from his regular Probation and Parole District Director 2 employment to a regular Parole Agent 2 employment with the appointing authority. Comm. Ex. A; N.T. pp. 133-134; AA Ex. 14. Musser explained that the reason for his demotion was for his failure to properly execute or perform his management level duties as is expected of a Probation and Parole District Director 2. N.T. p. 135. Musser testified that appellant was responsible to offer his opinion regarding forms of discipline and failed to participate in the decision. N.T. pp. 137-138. Musser explained that appellant reviewed both incidents but failed to notify his chain of command of any violations or problems with the agents' conduct. N.T. p. 141. Musser emphasized that both incidents involved serious violations of policy which rose to a high level of discipline. N.T. p. 144.

Christian Stephens is employed by the appointing authority as the Director of the Office of Field Supervision and has held this position for approximately one year. N.T. pp. 227-228. As a Director, Stephens manages all operations in ten districts within the Commonwealth and oversees the actions of

Regional and District Directors. N.T. p. 227. While appellant was a Probation and Parole District Director 2, he reported directly to Eastern Regional Director Thomas Costas, who report directly to Stephens. N.T. pp. 230-231.

Stephens reviewed Agent Gannon's Blue Team Report illustrating the June 14, 2016 incident. N.T. p. 231; AA Ex. 5. Stephens reviewed the chain of command approval document, as well. N.T. p. 232. Stephens explained that an agent is required to have knowledge of search and seizure policies. N.T. p. 286. Stephens further explained that the appointing authority's policy mandates the attachment of a taser download report when an agent tases someone. N.T. p. 233-234. Stephens testified that the taser download from the incident should have been attached to the report. N.T. p. 232; AA Ex. 5. Stephens explained that "DFO"¹⁰ is the appointing authority's training unit. N.T. p. 234. Appellant was required to contact DFO to request DFO to retrieve the taser download. N.T. p. 234. Also, appellant could have requested a taser download report from Bentzley. N.T. p. 238. Stephens indicated that appellant should have attached the available taser download report if he noticed it unattached. N.T. p. 273. Stephens explained that all agents who were involved in the incident should have written and then attached a witness statement describing what occurred. N.T. p. 232; AA Ex. 5. Stephens was concerned that appellant's remarks in the report articulated "the ends justify the means." N.T. p. 233. Stephens emphasized that an agent cannot legally tase an individual merely to gain access into a cell phone. N.T. p. 236. A taser may be used to prevent an escape and to effect an arrest. N.T. pp. 236-237. Stephens confirmed

¹⁰ The acronym was used but the witness did not explain each letter's meaning.

that the offender in the holding cell was not a threat to others and not a threat to himself from the agent's perspective with the offender's hands handcuffed behind his back. N.T. p. 237; AA Ex. 5.

Stephens reviewed the video recording illustrating the June 14, 2016 incident, as well. N.T. p. 237; AA Ex. 6. Stephens testified that appellant could also have retrieved and reviewed the video recording when he reviewed the report because the video was located within his district. N.T. pp. 237-238. Stephens testified that appellant could have debriefed the agents involved in the incident. N.T. p. 238. Stephens explained that normally, when an offender is placed in a holding cell, his hands are cuffed in front of his body. N.T. p. 239. According to the video recording, the offender in the holding cell had his hands handcuffed behind his body. N.T. p. 240; AA Ex. 6. Stephens indicated that according to the video, the agents and supervisor in the holding cell did not search the offender. N.T. p. 249; AA Ex. 6. Stephens observed that according to the video recording, the offender complied with the agents in order to gain access into his cell phone before he was tased. N.T. p. 241-242; AA Ex. 6.

Stephens emphasized that an agent does not physically assault or use excessive force to gain access into a cell phone. N.T. p. 246. If an agent had reasonable suspicion that a parole violation existed on the offender's phone, he can confiscate the offender's cell phone and obtain a warrant. N.T. p. 246. According to the video recording, Agent Giunta pushed the offender against the wall and threw him onto the floor. N.T. p. 245; AA Ex. 6. Stephens indicated that according to the video recording, Bentzley attempted to use the offender's thumb to open the cell phone while the offender is forced onto the ground. N.T. p. 247; AA Ex. 6. Stephens confirmed that according to the video recording, Agent Gannon tased the offender

and picked the offender up off the floor. N.T. p. 249; AA Ex. 6. After reviewing the video recording, Stephens reviewed the 259 reports and the describing the arrest sequence. N.T. p. 251.

Stephens reviewed appellant's memorandum describing the July 13, 2016 incident. N.T. pp. 251-252; AA Ex. 8. Stephens directed Costa to have appellant create the memorandum describing the July 13, 2016 incident. N.T. pp. 252-253. Stephens asked appellant to make a disciplinary recommendation relating to the July 13, 2016 incident, as well. N.T. p. 253. Stephens also reviewed the Caln Township Police Incident Report in connection with appellant's memorandum. N.T. p. 254; AA Ex. 9. Stephens explained that a Probation and Parole District Director 2 must ensure that an agent under his supervision is trained regarding the appointing authority's policies and procedures. N.T. pp. 254-255. Stephens testified that according to appellant's memorandum, none of the agents were aware of the appointing authority's policy or procedure regarding entries into unapproved residences. N.T. p. 254; AA Ex. 8. Stephens emphasized that the events within the July 13, 2016 incident qualified for a stronger recommendation than appellant's recommendation for "counseling." N.T. p. 256.

Stephens explained that an agent is not trained on using a battering ram. N.T. p. 257. An agent is not trained to force doors open. N.T. p. 257. An untrained agent should never use a breaching mechanism or battering ram from a local police department to enter an unapproved residence. N.T. pp. 256-257. Stephens testified that according to both appellant's memorandum and the Caln Township Police Incident Report, agents nevertheless used a breaching mechanism to enter an unapproved residence. N.T. p. 257; AA Exs. 8, 9. Stephens confirmed that appellant acknowledged that a search warrant was required before the agents entered the

unapproved residence. N.T. p. 282. Stephens explained that according to the appointing authority's policy, a firearm should be cleared and made safe. N.T. p. 257. Stephens further explained that according to the appointing authority's procedure, the firearm should not have been turned over to the local police. N.T. pp. 257-258. Stephens stated that if an agent confiscated a firearm, he would have left with the home provider a receipt that he was in possession of the weapon. N.T. p. 258. The owner's firearm was handed over to the police with a fully magazine and a round in the chamber.¹¹ N.T. p. 257; AA Ex. 9. Stephens explained that the agents should not have confiscated the owner's firearm because it was lawfully owned by the owner and the owner is not on parole. N.T. p. 258. Stephens testified relating to the July 13, 2016 incident, he heard appellant say, "we got another gun off the street." N.T. p. 401. Stephens testified that the agents had the opportunity to request a search warrant to enter the unapproved residence. N.T. p. 259. Stephens remembered directly ordering appellant to debrief the agents involved in the July 13, 2016 incident regarding the appointing authority's search and seizure policy. N.T. pp. 399-400.

After his review, Stephens sent the reports to Internal Affairs. N.T. p. 261. Stephens directed appellant to remove Agent Gannon, Agent Giunta, and Bentzley. N.T. p. 262. Stephens reviewed the investigative interview's transcript. N.T. p. 263; AA Ex. 16. Stephens reviewed the PDC's findings. N.T. p. 263. Stephens explained that a Probation and Parole District Director 2 has the responsibility to recommend disciplinary action. N.T. pp. 275-276. Stephens testified that according to the PDC's findings, appellant believed that it was not his responsibility or job duty to recommended discipline. N.T. pp. 263-264. Stephens

¹¹ The witness stated that there was a round in the "cartridge." However, it is clear from the context, and the attached exhibits, that he meant to say "chamber." AA Ex. 9.

explained appellant's belief was that "his responsibility in reviewing reports is to be a grammar checker does not align with the duties and expectations of a District Director." N.T. p. 264. Stephens testified appellant did not initially find the agents in the June 14, 2016 incident were violating the appointing authority's policies or procedures. N.T. p. 266. Stephens acknowledged appellant did prepare a modified report on August 15, 2016, in which appellant concluded that agents used excessive force during the June 14, 2016 incident. N.T. p. 271. Stephens testified appellant did not provide guidance to the agents involved in the July 13, 2016 incident. N.T. p. 266. Stephens emphasized that based upon appellant's conduct during both incidents, he was unfit to lead professional parole agents of the appointing authority. N.T. p. 266. Stephens concluded that because appellant did not have the ability to supervise others, appellant was demoted to Parole Agent 2 with no supervisory responsibilities. N.T. p. 268. Stephens testified to providing appellant his demotion letter. N.T. p. 261; AA Ex. 14.

In response to the appointing authority's case, appellant presented the testimony of Thomas Costa. N.T. p. 293. Thomas Costa is currently retired from his position with the appointing authority as an Eastern Regional Director. N.T. p. 293. Costa held the position for over seventeen year prior to his retirement. N.T. p. 293. Costa testified to being appellant's supervisor for approximately five years. N.T. p. 295. Costa asserted appellant's job performance qualified as excellent in the annual performance evaluations. N.T. p. 295.

Costa testified that according to his experience as Eastern Regional Director, Labor Relations was responsible for taking disciplinary action. N.T. pp. 296-297. Costa asserted appellant's responsibility was to recommended discipline but not to take disciplinary action against an agent. N.T. p. 296. Costa stated for

disciplinary action to occur, Labor Relations or Internal Affairs began an investigation. N.T. p. 297. Costa stated after an investigation, Labor Relations or Internal Affairs conducts a PDC, which could result in disciplinary action. N.T. pp. 297-298.

Costa reviewed the Agent Gannon's Blue Team Report describing the June 14, 2016 incident. N.T. p. 298; AA 5. Costa testified at the time of the incident, he did not believe the agents involved violated the appointing authority's policies or procedures. N.T. p. 299. Costa explained appellant was on vacation when the June 14, 2016 incident occurred. N.T. p. 311. Costa further explained that due to appellant's vacation, appellant took a long time for him to review Agent Gannon's Blue Team Report. N.T. p. 311. Costa did not review the video recording illustrating the June 14, 2016 incident because of technical difficulties. N.T. p. 299.

In response to the appointing authority's case, appellant argued that throughout his employment as Probation and Parole District Director 2 for the Chester District Office, he was instructed by the Chief of Personnel in Office of Probation and Parole Supervision meetings to not recommend discipline, despite what his job description stated. N.T. pp. 373-374. Appellant asserted that throughout his employment as Probation and Parole District Director 2 for the Chester District Office, he was never trained on the guidelines for recommending various forms of discipline and that recommending discipline was not within his job duties. N.T. pp. 334-335. Appellant emphasized that during his eight years as Probation and Parole District Director 2, he never made a recommendation for any disciplinary action against an agent. N.T. p. 335. Appellant presented that he did not have any disciplinary history with the appointing authority. N.T. p. 320. Appellant stated during his eight years as Probation and Parole District Director 2,

he has never been verbally counseled about any transgressions against the appointing authority's policies or procedures. N.T. pp. 320-321. Appellant testified he was never contacted by Internal Affairs for not placing a disciplinary recommendation on previous report submissions. N.T. p. 335.

Appellant testified he was familiar with the appointing authority's policies and procedures. N.T. p. 322. Appellant reviewed Agent Gannon's Blue Team Report describing the June 14, 2016 incident. N.T. p. 329; AA Ex. 5. Appellant saw specific references to the offender's resistance and the agent's reaction against it. N.T. p. 329; AA Ex. 5. Appellant stated he compared the use of force continuum chart to Agent Gannon's tasing. N.T. p. 329. Appellant testified according to the use of force continuum chart; a drive stun is a lower form of response to resistance. N.T. p. 329. Appellant concluded based upon the perceived resistance by the offender and the drive stun's level of response, Agent Gannon's conduct was appropriate. N.T. pp. 329-330. After he reviewed the appointing authority's resistance and control policy, appellant changed his stance stating agents used excessive force during the June 14, 2016 incident. N.T. p. 331-332. Appellant testified during his investigative interview where he admitted the agents used excessive force during the June 14, 2016 incident. N.T. p. 338.

Appellant claimed to review the video recording illustrating the June 13, 2016 incident. N.T. p. 332; AA Ex. 6. Appellant admitted on cross examination that he did not watch the video recording. N.T. p. 352. Appellant testified he sent his report for further review and determination by senior staff as to whether an investigation was appropriate regarding the June 13, 2016 incident. N.T. p. 332. Appellant explained, "[a]t the time of this reviewing of the report for this particular incident, I did not put my mind in the frame of an investigator in terms of

internal affairs.” N.T. p. 332. Appellant’s report with commentary was sent to Costa. N.T. p. 333. Appellant stated that regarding a taser download attachment, he would ask for it if the agent had contacted the defensive tactics unit and requested a taser download. N.T. p. 326. Appellant stated that during his employment as a Probation and Parole District Director 2, no one has been disciplined for not attaching a taser download to a Blue Team report. N.T. p. 337.

Appellant asserted that regarding the July 13, 2016 incident, he debriefed the agents involved. N.T. p. 339. Appellant explained the agents informed him that they believed an offender with a gun was within an unapproved residence. N.T. p. 340. Appellant further explained that based upon their beliefs, the agents thought they had exigent circumstances to enter the unapproved residence. N.T. p. 340. Appellant confirmed the agents did not understand they needed to acquire a search warrant before entering the unapproved residence. N.T. p. 342. Appellant emphasized exigent circumstances are considered an exception to the requirement for a search warrant before entering an unapproved residence. N.T. p. 343. Appellant explained an exigent circumstance includes an offender that would pose a threat of harm to others, especially with a loaded firearm. N.T. p. 343. Appellant testified that in response to the July 13, 2016 incident, he ensured that a copy of the appointing authority’s search and seizure policy was distributed to all staff. N.T. p. 344. Appellant indicated that he ensured that the agent and supervisor involved in the July 13, 2016 incident be counseled on the appointing authority’s search and seizure policy. N.T. p. 345. Appellant asserted that regarding the July 13, 2016 incident, he never said “we got a gun off the street.” N.T. p. 349.

Appellant testified to being on vacation from June 13, 2016 to July 5, 2016. N.T. p. 393. Appellant acknowledged the Pennsylvania Board of Probation and Parole's technical violation arrest report. N.T. p. 393; AA Ex. 17. Appellant testified the computer program responsible for generating arrest reports automatically placed his signature in the technical violation arrest report. N.T. pp. 394-395.

Appellant acknowledged to reading the Probation and Parole District Director 2 job description. N.T. p. 372; AA Ex. 1. Appellant agreed the Probation and Parole District Director 2 job description states that a Probation and Parole District Director 2 has a responsibility to recommend disciplinary actions for employees who have violated the appointing authority's or Commonwealth's policy. N.T. p. 372; AA Ex. 1. Appellant acknowledged that a Probation and Parole District Director 2 position is a managerial position. N.T. pp. 374-375.

Appellant admitted he was to ensure all the agents under his supervision were to be trained and knowledgeable about the appointing authority's policies and procedures. N.T. p. 351. Appellant asserted he ensured that agents under his supervision received a copy of the appointing authority's policies and procedures. N.T. p. 387. Appellant testified supervisors under his supervision knew the appointing authority's policies and procedures. N.T. p. 388. Appellant admitted he would just approve Blue Team reports when he received them. N.T. p. 351. Appellant acknowledged that he did not want to taint the June 14, 2016 investigation by reviewing the video recording. N.T. p. 352. Appellant agreed force can only be used for protection of self, protection of others, prevention of escape, or to arrest, according to the appointing authority's resistance and control procedure. N.T. p. 353. Appellant agreed force should not be used to gain access into a cell phone.

N.T. p. 353. Appellant admitted that although the taser download for the June 14, 2016 incident was not available, he approved Agent Gannon's Blue Team Report. N.T. p. 354; AA Ex. 5. Appellant acknowledged that he should have disapproved Agent Gannon's Blue Team Report because the taser download was not attached. N.T. pp. 354-355; AA Ex. 5. Appellant agreed that involved agents must attach their witness statements within a Blue Team report. N.T. pp. 356-357. Appellant acknowledged that Agent Gannon's Blue Team Report did not contain the involved agents' witness statements. N.T. p. 356; AA Ex. 5.

Appellant confirmed that Bentzley forwarded Agent Gannon's Blue Team Report on June 17, 2016. N.T. p. 355. Appellant asserted that Agent Gannon's Blue Team Report was not in his e-mail box when he returned from vacation. N.T. p. 356. Appellant testified to rejecting a Blue Team report in the past because it did not have the required information. N.T. p. 357. Appellant admitted on cross examination that he has approved every Blue Team report. N.T. p. 358.

Appellant confirmed that according to the Pennsylvania Board of Probation and Parole procedure 4.03.06., if consent is not obtained to enter an unapproved residence, agents must obtain a search warrant unless an exception to the warrant requirement exists. N.T. p. 368; AA Ex. 3. Appellant further acknowledged that an exception to the warrant requirement would be if an offender poses a specific and imminent threat of causing serious physical harm to a third party. N.T. p. 368; AA Ex. 3. Appellant asserted that the agents involved in the July 13, 2016 incident believed they had exigent circumstances to enter the unapproved residence. N.T. pp 365-366. Appellant explained that the agents involved received information from the Caln Township Police Department that the offender was threatening people with a firearm. N.T. pp. 366-367, 370. Appellant

further explained that they believed the offender was inside the unapproved residence with a firearm. N.T. p. 370. Appellant acknowledged that the agents involved in the July 13, 2016 incident did not request a search warrant to enter the unapproved residence. N.T. p. 367. Appellant agreed that there was no one within the unapproved residence during the July 13, 2016 incident. N.T. p. 371. Appellant admitted that the agents involved in the July 13, 2016 incident were not aware of the appointing authority's search and seizure policy. N.T. p. 389. Appellant agreed that agents are prohibited from using a battering ram to force entry into an unapproved residence. N.T. p. 389. Appellant acknowledged that the agents involved violated the appointing authority's policy when they handed a fully loaded firearm with a round in the chamber to the Caln Township Police Department. N.T. pp. 390-391.

Before deciding this appeal on the evidence presented at the hearing, the Commission must first address appellant's preliminary motion to dismiss appellant's demotion asserting the appointing authority's failed to provide legally sufficient notice of appellant's charges. N.T. pp. 15-16. Pursuant to Section 950 of the Civil Service Act, as amended, notice is described as follows:

Written notice of any personnel action taken pursuant to the provision of this act shall be provided to the affected employee. Such notice shall be furnished within the time limits prescribed by the rules of the commission. Copies of such notices shall be provided to the director upon request. The notice shall in the case of permanent separation, suspension for cause, or involuntary demotion of a regular employee set for the reason or reasons for the action.

71 P.S. § 741.950. The removal notice must "include a clear statement of the reasons therefore, sufficient to apprise the employee of the grounds upon which the charges are based." 4. Pa. Code § 105.3. The removal notice "must be framed in a manner

which enables the employee to discern the nature of the charges and to prepare adequately his defense.” *Chavis v. Phila. Co. Bd. Of Assistance*, 29 Pa. Commw. 205, 208-209, 370 A.2d 445, 446 (1977) citing *Benjamin v. State Civil Service Commission*, 17 Pa. Commw. 427, 332 A.2d 585 (1975). “Due process of law is afforded when the employee is informed with reasonable certainty of the substance of the charges.” *Id.* See *Bosnjak v. State Civil Service Commission*, 781 A.2d 1280, 1284 (Pa. Commw. 1977). Although a listing of specific incidents of an employee’s behavior in the removal notice can be considered unnecessary, “the reasons listed should at least refer specifically to those aspects of the employee’s responsibility in which he was found deficient.” *Id.*

Both parties support their positions through the unreported Pennsylvania Commonwealth decision of *Sisofo v. State Civil Service Commission*, 2017 Pa. Commw. Unpub. LEXIS 317 (Pa. Commw. May 4, 2017). In *Sisofo*, the Commonwealth Court held that the Pennsylvania Department of Transportation’s suspension letter was too general to allow Sisofo to prepare an adequate response. *Id.* at *7. Specifically, the PDC letter and the suspension letter informed Sisofo that “he was being suspended without pay from his position for a period of five days due to his ‘inappropriate behavior and safety violations.’” *Id.* at *7-8. As such, the Commonwealth Court determined that the Pennsylvania Department of Transportation “failed to provide a ‘clear statement of the reasons for the charges,’ and therefore, was similarly deficient.” *Id.* at *8.

However, the instant matter before the Commission is distinguishable to *Sisofo*. The appointing authority, through the credible testimony of Michelle Musser¹², established that on December 19, 2016, appellant received a written letter describing the reasons supporting appellant's suspension pending investigation. N.T. pp. 128-129; AA Ex. 12. Within the December 19, 2016 letter, the reasons for appellant's suspension pending investigation were presented as follows:

This suspension is pending completion of our investigation into allegations of your failure to properly execute or perform your management level duties, as is expected of a PA Probation and Parole District Director 2, for the Chester District Office. The Chester District Director supervises the Chester District which includes the Chester District Office and the Norristown Sub-Office. The District Director is responsible for oversight of the entire district. On December 9, 2016, you were afforded the opportunity to provide your explanation regarding (2) separate incidents that occurred in your District, to which you are responsible for the oversight. One June 14, 2016, there was an incident where excessive use of force was used against a parolee that was handcuffed behind his back, in a holding cell. And on July 13, 2016, PBPP staff forced entry into an unapproved residence without permission and without securing a search warrant. During that incident there was a weapon seized however, the handling of the weapon was done in a manner that was in direct violation of PBPP policy.

N.T. pp. 129-130; AA Ex. 12. Unlike *Sisofo*, where the Pennsylvania Department of Transportation provided generalized reasons for Sisofo's five-day suspension, the appointing authority in this matter cited to appellant's Probation and Parole District Director 2 responsibilities of oversight, management, and supervision of the Chester District. AA Ex. 12. Additionally, the appointing authority specified the details of

¹² It is within the purview of the Commission to determine the credibility of the witnesses. *State Correctional Institution at Graterford, Department of Corrections v. Jordan*, 95 Pa. Commw. 475, 478, 505 A.2d 339, 341 (1986).

the June 14, 2016 and the July 13, 2016 incidents, where appellant is considered responsible for managing, overseeing, and supervising the Chester District agents. AA Exs. 12, 13. The appointing authority explained that the revised January 25, 2017 letter corrected a clerical typo incorrectly stating appellant's former position. N.T. p. 132; AA Ex. 13. Nevertheless, the appointing authority established that the reasons for appellant's suspension pending investigation were the same in the December 19, 2016 letter and the January 25, 2017 letter. N.T. p. 132; AA Exs. 12, 13.

The appointing authority, through the consistent, credible testimonies of Michelle Musser and Christian Stephens, illustrated that on January 27, 2017, appellant received a letter regarding his demotion from his regular Probation and Parole District Director 2 employment to a regular Parole Agent 2 employment with the appointing authority. Comm. Ex. A; N.T. pp. 133-134, 261; AA Ex. 14. Similarly, the appointing authority presented the reasons supporting appellant's demotion as "for your failure to properly execute or perform management level duties as is expected of a probation and parole District Director two." Comm Ex. A; N.T. p. 135; AA Ex. 14. The appointing authority established that the reasons for appellant's suspension pending investigation and appellant's demotion were identical in nature. Comm. Ex. A; AA Exs. 12, 13, 14.

Within the January 27 demotion letter, the appointing authority stated that "[a] pre-disciplinary conference was held with you on Friday, December 9, 2016 and the responses you provided were not acceptable." Comm. Ex. A; AA Ex. 14. During the PDC, appellant provided responses directly relating to his responsibility to recommend discipline. N.T. pp. 121-123. Additionally, during the PDC, appellant provided responses directly relating to whether his agents violated the

appointing authority's procedures and policies during the June 14, 2016 and July 13, 2016 incidents. N.T. pp. 127, 152-153, 163, 168. Through the appointing authority's PDC questions and his responses, appellant was able to discern the nature of the investigation and charges against him relating to his conduct as a Probation and Parole District Director 2.

Within the suspension pending investigation notice letter and the demotion letter, appellant was provided with clear statements of the reasons correlating to his execution and performance of his Probation and Parole District Director 2 management level responsibilities in which he was found deficient. *Chavis, supra*. Accordingly, the appellant's motion to dismiss is hereby denied.

Having carefully reviewed the record, the Commission finds that the appointing authority met its burden to show just cause to demote appellant from his regular Probation and Parole District Director 2 employment to a regular Parole Agent 2 employment. In support of our conclusion we find credible the testimonies of Michelle Musser, Scott Woolf, and Christian Stephens.

As to the charge of appellant's failure to properly execute or perform his management level duties, as is expected of a Probation and Parole District Director 2, there are multiple instances where appellant failed to perform his management level duties properly.

The appointing authority established appellant agreed to the Probation and Parole District Director 2 job description, including the position's duties and responsibilities. As Probation and Parole District Director 2, appellant was held to a responsibility of providing "direction, assistance and [mandatory] training to all

assigned employees of the District according to Board policy and procedures” and to conduct in-service training on policies and procedures, such as use of force, report writing, arrests, and search and seizures. Appellant admitted that he was to ensure all the agents under his supervision were to be trained and knowledgeable about the appointing authority’s procedures and policies. Appellant acknowledged that the Probation and Parole District Director 2 job description confirms the responsibility to recommend disciplinary actions for employees who have violated the appointing authority’s or Commonwealth’s policy.

Regarding the June 14, 2016 incident, the appointing authority established that the agents involved must adhere to Pennsylvania Board of Probation and Parole Procedure 4.03.08. Instead the agents used excessive force solely to gain access into an offender’s cell phone and thereby, violated the appointing authority’s policies and procedures. Appellant admitted that after his review of the June 14, 2016 incident, he initially considered the agents’ actions appropriate, did not recommend any employee discipline, and approved Agent Gannon’s Blue Team Report without a taser download report attached. Appellant should have obtained and attached the available taser download report if he noticed it unattached. Appellant admitted that he did not watch the video recording of the June 14, 2016 incident.

Appellant’s initial approval of the involved agent’s conduct during the June 14, 2016 incident, when their conduct violates the appointing authority’s policies and procedures, is considered a failure to perform his management level duties. Appellant’s failure to make disciplinary recommendations for the agents involved in the June 14, 2016 incident is considered a failure to perform his management level duties. Appellants failure to acquire the taser download before

making his approval is considered a failure to perform his management level duties. Appellant's failure to review the video recording of the June 14, 2016 incident is considered a failure to perform his management level duties.

Regarding the July 13, 2016 incident, the appointing authority established that agents must adhere to the Pennsylvania Board of Probation and Parole procedure 4.03.06. Appellant confirmed that according to the Pennsylvania Board of Probation and Parole procedure 4.03.06., if consent is not obtained to enter an unapproved residence, agents must obtain a search warrant unless an exception to the warrant requirement exists.

The agents involved in the July 13, 2016 incident failed to acquire a search warrant before entering the unapproved residence to search for an offender. Appellant acknowledged that the agents involved in the July 13, 2016 incident used a battering ram from the Caln Township Police Department to gain access into the unapproved residence without a search warrant. Appellant agreed that agents are prohibited from using a battering ram to force entry into an unapproved residence. Appellant agreed that the agents involved violated the appointing authority's policy when they handed a fully loaded firearm with a round in the chamber to the local police. Appellant admitted that the agents involved in the July 13, 2016 incident were not aware of the appointing authority's search and seizure policy. When he reviewed the incident report, appellant only recommended counselling for the agents involved in the July 13, 2016 incident, which is not considered a disciplinary recommendation. Appellant failed to notify his chain of command of any violations that occurred during the July 13, 2016 incident.

Appellant's failure to ensure that the agents involved in the July 13, 2016 incident were sufficiently trained on the appointing authority's procedures on search and seizures is considered a failure to perform his management level duties. Appellant's failure to recommend disciplinary action relating to the agents' violations against the appointing authority's procedures and policies during the July 13, 2016 incident is considered a failure to perform his management level duties. Appellant's failure to notify his chain of command of any other violations that occurred during the July 13, 2016 incident is considered a failure to perform his management level duties.

Appellant's failures to properly execute or perform his management level duties as a Probation and Parole District Director 2 are directly related to his job performance and rationally and logically touch upon appellant's competence and ability. *Ellerbee-Pryer, supra*. Accordingly, we enter the following:

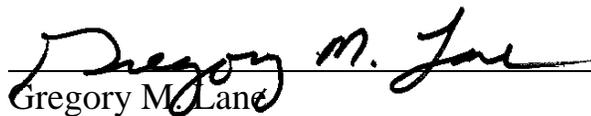
CONCLUSION OF LAW

The appointing authority has presented evidence establishing just cause for imposing a demotion from Probation and Parole District Director 2 to Parole Agent 2 under Section 706 of the Civil Service Act, as amended.

ORDER

AND NOW, the State Civil Service Commission, by agreement of two of its members,¹³ dismisses the appeal of Mark Carey challenging his demotion from regular Probation and Parole District Director 2 employment to regular Parole Agent 2 employment with the Pennsylvania Board of Probation and Parole and sustains the action of the Pennsylvania Board of Probation and Parole in the demotion of Mark Carey from regular Probation and Parole District Director 2 employment to regular Parole Agent 2 employment effective January 30, 2017.

State Civil Service Commission



 Gregory M. Lane
 Commissioner



 Bryan R. Lentz
 Commissioner

Officially Mailed: July 24, 2019
 Emailed: July 24, 2019

¹³ Chairman Teresa Osborne, who took office March 22, 2019, did not participate in the discussion of or decision for this appeal.