

**BEFORE
PATRICK HALTER
ARBITRATOR**

In the Matter of a Controversy Between

**Pierce County Deputy Sheriffs'
Independent Guild - Local No. 1889
on behalf of [REDACTED]**

&

**Sheriff's Department
Pierce County - Washington State**

PERC Case No. 134898-P-22

Appearances

For the Guild:

Chris L. Wyrstek
Public Safety Labor Group LLP

For the County:

Jana R. Hartman
Pierce County Prosecuting Attorney

Issue
Discipline

Hearing
September 15-16, 2022

Briefs
October 21, 2022

Decision
Grievance Sustained

Date
November 21, 2022

PROCEEDING

On March 8, 2022, the Washington State Public Employment Relations Commission (“PERC”) received a request from the Public Safety Labor Group on behalf of the Pierce County Deputy Sheriffs’ Independent Guild - Local No. 1889 to appoint an arbitrator from the Law Enforcement Disciplinary Grievance Arbitration Panel. Pursuant to RCW 41.58.070.13 the undersigned was appointed on March 15, 2022, to conduct a hearing and issue an opinion and award in PERC Case No. 134898-P-22.

BACKGROUND

There is a collective bargaining agreement (“Agreement”) by and between Pierce County (“Employer”) and Pierce County Deputy Sheriffs’ Independent Guild - Local No. 1889 (“Guild”) effective January 1, 2018 - December 31, 2021. Bargaining-unit positions represented by the Guild and covered by the Agreement are Deputy, Sergeant, Detective and Lieutenant among others.

On August 22, 1988, [REDACTED] (the “grievant”) entered on duty with Employer Pierce County as a Deputy in the Sheriff’s Department. In 1997 or 1998 she advanced to Sergeant and a promotion in 2007 elevated her to Lieutenant. On multiple occasions during her years of service with the Sheriff’s Department (“PCSD”) Lt. [REDACTED] earned an “Excellence” rating in performance factors appraised for mid-managers/managers and commendations. Lt. [REDACTED] served as the Guild’s President for nine (9) years concluding in 2015 or 2016.

In July 2018 Lt. [REDACTED] was designated as Commander, Special Investigations Unit (“SIU”) within the Criminal Investigations Bureau (“CIB”). Lt. [REDACTED] supervised ten (10) to fifteen (15) officers; she reported to CIB Chief [REDACTED]. Also within CIB is the special weapons and tactics team (“SWAT”). When a threat assessment indicated that service of an SIU obtained warrant involved high risk, SWAT served that warrant. In that situation, the SIU case officer coordinated service with an SIU Sergeant partnering with the SWAT Commander.

On January 15, 2020, SIU Det. [REDACTED] obtained a search warrant (“warrant 1”) signed by Judge Blinn involving a high risk situation with suspect Wales and crimes of unlawful possession of a controlled substance with intent to distribute and unlawful possession of a firearm. Warrant 1 described the property location and apartment where SWAT would serve the warrant:

An approximately 288 square foot unmarked apartment located on the lower level of a mobile home/structure commonly known as 11318 201st Ave east in Bonny Lake. *There are at least 3 separate apartments on the lower level (northwest side) each accessed their own door. The particular structure/apartment to be searched is the middle door of the three. The door is white in color (emphasis added).* This converted apartment has no access to the main home on the property and one has to walk around a well-worn path on the south side around the main structure to reach the backside where the doors are.

[Exh. 113 at 400364]

On January 17, 2020, SWAT Det. [REDACTED] and Sgt. [REDACTED] conducted an onsite survey of the property and mobile home/structure. Det. [REDACTED] provided them with a copy of warrant 1 and a “picture of the ... the dude’s door.” Det. [REDACTED] obtained the picture from a criminal informant (“CI”). Det. [REDACTED] and Sgt. [REDACTED] observed that the structure was three-sided and, on the lower level, they found (1) a white door with glass insert in the upper corner, (2) a glass French door and (3) an indentation around a corner of the structure which appeared to be a door but was not a door. Det. [REDACTED] and Sgt. [REDACTED] determined that the white door with the glass insert in the upper corner was the door in the CI’s picture but the description in warrant 1 did not match. Det. [REDACTED] snapped a picture of the white door and Det. [REDACTED], upon receiving that picture, confirmed it was the target door. Regarding the description of the CI’s target door in warrant 1, Det. [REDACTED] informed Det. [REDACTED] that SWAT “needs this tightened up” with specifics in an addendum to the warrant. Det. [REDACTED]: “I looked at the warrant and I called [REDACTED] and had a personal conversation and I say well first of all there’s not three doors on the backside there’s two and your door is on the left if you’re facing the three side.” There was no discussion about the glass French door. [Exh. 20 at 400151-400159]

On January 20, 2020, Det. [REDACTED] obtained another warrant (“warrant 2”) describing the white door that Det. [REDACTED] had confirmed for Det. [REDACTED] was the target door; Judge Nevin signed warrant 2; Det. [REDACTED] did not obtain an addendum to warrant 1 from Judge Blinn The description in warrant 2 follows:

An approximately 288 square foot unmarked apartment located on the lower level of a mobile home/structure commonly known as 11318 201st ave east in Bonny Lake. There are multiple doors on this lower level. *The particular structure/apartment to be searched is the white door with a glass upper insert located on the northeast corner of the lower level of the structure and is white in color* (emphasis added). This converted apartment has no access to the main home on the property and one has to walk around a well-worn path on the south side around the main structure to reach the backside where the doors are.

[Exh. 113 at 400381]

Det. [REDACTED]’s description in warrant 2 states “[t]here are multiple doors on this lower level” and describes “the white door with a glass upper insert” as the target door. The PCSD and Guild refer to the white door as the “half-moon” door; Det. [REDACTED] and Det. [REDACTED] did not refer to it as a half-moon in January 2020.

On January 21, 2020, SWAT conducted its operational briefing prior to serving warrant 2; the picture shared at the briefing showed the half-moon door and another door. Det. [REDACTED], the case officer, was not present as he was monitoring suspect Wales off property with a pen register and trap and trace warrant. When suspect Wales returned to the property, SWAT served warrant 2 on the half-moon door apartment. SWAT determined that the detained male resident was not suspect Wales; SWAT breeched the wrong door. As SWAT searched the half-moon door apartment, suspect Wales and an associate exited the apartment located adjacent to the half-moon door apartment, that is, the glass French door apartment.

Upon receiving information that SWAT breeched the wrong door and suspect Wales exited from another apartment, SWAT Commander Det. Sgt. [REDACTED] proceeded to the scene. Det.

Sgt. [REDACTED] informed Lt. [REDACTED] about the wrong door breach. Det. [REDACTED] arrived and stated he had a warrant for the apartment from which the suspect exited. Det. Sgt. [REDACTED] was unaware of multiple warrants; the SWAT tactical plan involved one warrant at one apartment. Det. Sgt. [REDACTED] stated to Det. [REDACTED] and Lt. [REDACTED] that once Det. [REDACTED] obtained the warrant for the white door with glass upper insert, e.g., half-moon door apartment (warrant 2 - January 20), it invalidated the warrant (warrant 1 - January 15) for the apartment from which the suspect exited, e.g., glass French door. Det. [REDACTED] disagreed and, in response to Lt. [REDACTED]'s inquiry, represented to her as well as Sgt. Det. [REDACTED] that the warrant (January 15) had not expired.

Notwithstanding this dispute between SIU Det. [REDACTED] and SWAT Commander [REDACTED], Det. [REDACTED] entered the French door apartment to clear it. Based on concerns about authority to enter an apartment different from the one SWAT planned to enter, Det. Sgt. [REDACTED] withdrew SWAT from the scene. Lt. [REDACTED] remained onsite as the highest ranking officer. Relying on Det. [REDACTED]'s statement that he had a valid warrant for the French door apartment, Lt. [REDACTED] entered it. SIU officers followed and seized evidence of firearms and narcotics. SIU arrested suspect Wales and his associate.

After Det. Sgt. [REDACTED] withdrew SWAT, he contacted CIB Chief [REDACTED] with his concern that warrant 1 was not valid after Det. [REDACTED] obtained warrant 2. When Chief [REDACTED] shared this concern with Lt. [REDACTED], she instructed Det. [REDACTED] to contact a deputy prosecuting attorney ("DPA"). Det. [REDACTED] provided two DPAs with a verbal description of warrant 1; he reported to Lt. [REDACTED] that the DPAs noted warrant 1 was "messy" but valid. The next day - - January 22 - - CIB Chief [REDACTED] met with Lt. [REDACTED] regarding the warrant service on January 21. After the meeting, Chief [REDACTED] issued an e-mail to SWAT officers Lt. [REDACTED] and Det. Sgt. [REDACTED] with a "cc" to Lt. [REDACTED]:

Subject: Ops Brief Information Sharing

I met with Lt. [REDACTED] today to discuss the warrant service yesterday. She told me that she met with the Prosecutor's Office since that service and explained to them how things unfolded with the two warrants and they assured her it was all legally sound.

Lt. [REDACTED] acknowledged there was a misunderstanding, miscommunication and/or an information gap that occurred and she will be working with SIU to make sure this doesn't happen again.

We both agreed that a key factor that could have prevented most, if not all, of the issues would have been the presence of the case officer at the briefing. The case officer had been pulled away to deal with the mobile suspect but had he been present at the briefing most likely would have filled in the gaps and prevented the misunderstanding.

So, going forward SWAT should not conduct a briefing or move forward with a planned forced entry warrant service for SIU if

the case officer is not present at the briefing, unless mutually agreed upon by SWAT and SIU prior to the scheduled briefing

because of extenuating circumstances and leaders of both units believe an alternate case officer that is present is deeply familiar enough with the case to answer all questions.

[Exh. 1]

On February 11, 2020, DPA [REDACTED] notified Lt. [REDACTED] and she, in turn, notified CIB Chief [REDACTED], that no charges would be filed against suspect Wales. “Detective [REDACTED] did not have a search warrant for the apartment behind the French doors. [REDACTED]’s entry into and the ultimate search of the residence with the French doors is not supported by the facts or the law.” [Exh. 5]

On February 25, 2020, the PCSD initiated internal affairs (“IA”) investigation 20CRT-0009 (“0009”) focusing on the warrant service that occurred on January 21 and whether Det. [REDACTED] violated Policy 100.5 - Constitutional Requirements and Policy 340.3.5(b) - Unsatisfactory Job Performance. Lt. [REDACTED], among others, received the notice; she was identified as a witness. [Exhs. 7-19]

On March 12, 2020, IA investigator Lt. [REDACTED] notified grievant “there is a possibility you may become a subject” in 0009 and the “possible allegation is that on 1.21.2020 you allowed the service of a search warrant that was not valid.” This notice identified Policy 340.3.5(b) - Unsatisfactory Job Performance and Policy 617.4.2 - Threat Assessment Review. [Exh. 25]

On March 24, 2020, Lt. [REDACTED] notified grievant “[y]ou have been identified as a subject in this matter” and, prior to interviewing her the next day, Lt. [REDACTED] provided the admonishment notice and right to representation by the Guild and counsel. SIU Sgt. [REDACTED] received the same notice as grievant; he was assigned to SIU on January 13, 2020. Lt. [REDACTED]: “[REDACTED] should not be involved in this by any stretch of the imagination. . . . he was essentially a warm body.” [Exhs. 9-14; 25-29, Exh. 30 at 400211]

On May 1, 2020, grievant inquired with Lt. [REDACTED] on “any update on the status of the Wales IA and what the administration has decided regarding my involvement?” Lt. [REDACTED] notified grievant on May 4 and 5 “that this investigation is complete and will be forwarded to the chain of command for review” with Lt. [REDACTED] “listed in this investigation as a witness.” [Exhs. 37, 38] Sometime after March 25 when grievant was interviewed as a subject but on or prior to May 4, Lt. [REDACTED] discussed 0009 with Sheriff [REDACTED] and Undersheriff [REDACTED] and the result of that discussion was to remove Lt. [REDACTED] as a subject in 0009.

On June 2, 2020, Lt. [REDACTED] delivered a powerpoint presentation to Sheriff [REDACTED], CIB Chief [REDACTED] and Undersheriff [REDACTED]. [Exhibit 42] Not present was [REDACTED], Chief, Administrative Services Bureau, the reviewing officer in 0009 with responsibility to issue a finding on any policy violation and recommend any discipline.

On July 13, 2020, Sheriff [REDACTED] held his weekly meeting with the chiefs. After the meeting Chief [REDACTED] discussed his review of 0009 with the Sheriff and memorialized that discussion in an e-mail dated July 15, 2020.

I advised you that during my review of the IA investigation into Detective [REDACTED] and his execution of a warrant I believed that the service of the warrant was improper. Detective [REDACTED] entered an apartment based on a warrant that was drafted and approved, however, he obtained a second warrant to clarify the place to be searched. The second warrant was for the wrong location and Detective [REDACTED] then relied on the first flawed warrant to enter the apartment that appeared to be subject to the investigation without getting an addendum to clarify the place to be search[ed] Deputy [REDACTED] entered this apartment to, 'clear' it for, 'officer safety'.

As mentioned in our meeting [i]t appears to [sic] from the IA investigation that after Detective [REDACTED] cleared the apartment Lieutenant [REDACTED] and her team from the [SIU] entered the apartment and conducted a search of that apartment for drugs, weapons and other evidentiary items. As I communicated to you, I believe that this entry to the apartment to search for items of evidence was in violation of Sheriff's Department Policy and that Lieutenant [REDACTED] is responsible for her team's entry and search of this apartment. If the warrant was not valid for Detective [REDACTED] to enter it was not valid for the rest of the team.

Based on the above information you directed me to move forward with initiating an IA investigation into Lieutenant [REDACTED]'s actions or inaction related to Law Enforcement Authority and Performance.

I have a meeting this morning with [IA] Lieutenant [REDACTED] regarding this topic.

[Exh. 51]

During Chief [REDACTED]'s meeting with Lt. [REDACTED] on the 15th, he instructed Lt. [REDACTED] to initiate investigation 20CRT-0043 ("0043") with Lt. [REDACTED] as the subject. Also on July 15 Chief [REDACTED] issued his finding in 0009 that Det. [REDACTED] violated Policy 100.5 - Constitutional Requirements and Policy 340.3.5(b) - Unsatisfactory Job Performance. Chief [REDACTED] recommended discipline of a forty (40) hour suspension without pay. [Exh. 48]

On July 16, 2020, Lt. [REDACTED] assigned 0043 to Lt. [REDACTED] whereupon Lt. [REDACTED] issued notice to Lt. [REDACTED] as the subject. "The complaint is that you and your subordinates entered a residence, without proper authority, and conducted a search." The notice identified Policy 100.5 and Policy 340.3.5(b). Prior to any discipline assessed in 0043, the Guild filed its grievance dated July 28, 2020, with Undersheriff [REDACTED] alleging a violation of the Agreement in Article 19 - Employee Rights.

Lt. [REDACTED] was cleared in 20CRT-0009 and addressed issues raised with Chief [REDACTED] to resolve this. 20CRT-0043 violates due process and should be dropped.

[Exh. 76]

On August 20, 2020, Sheriff [REDACTED] sustained Chief [REDACTED]'s finding that Det. [REDACTED] violated Policy 340.3.5(b) and Policy 100.5 but modified the Chief's recommended suspension. In Personnel Order 20-380 the Sheriff assessed Det. [REDACTED] a forty (40) hour suspension of which eight (8) of the 40 hours would be served concurrently. [Exhs. 48-50]

On September 10, 2020, [REDACTED], Chief, Patrol Bureau, denied the Guild's grievance "related to IPR 20CRT-0009 and IPR 20CRT-0043." Investigation 0009 focused on case officer Det. [REDACTED] and others actions leading up to warrants served at two apartments. Det. [REDACTED] acted on his own to enter the French door apartment. The Chief stated that 0043 examines potential policy violations for decisions leading up to Lt. [REDACTED] entering the French door apartment and her allowing SIU officers to enter and seize property under the authority of a warrant which SWAT had informed her was not valid. Investigation 0043 focuses on employee choices and actions whereas 0009 focused on process. [Exhs. 78-85]

On September 22, 2020, Lt. [REDACTED] interviewed Lt. [REDACTED] in 0043. She stated 0043 involved the same facts and evidence as 0009; Chief [REDACTED]'s e-mail dated January 22, 2020, resolved all issues and served as counseling; Sheriff [REDACTED] determined she was not a subject in 0009 which exonerated her of any misconduct. Investigation 0043 was a "second bite at the apple" representing a due process violation and double jeopardy. [Exhs. 54-57]

On October 6, 2020, Lt. [REDACTED] issued to grievant "Notice of Completed Investigation [0043], Investigative Narrative, and the transcript" for review and comment and, on December 15, 2020, she met with Chief [REDACTED], the reviewing official, to present her position. Lt. [REDACTED]: "The conclusion that's drawn today, that the first issued warrant [January 15] had the most accurate information. The only thing in my opinion that would have invalidated that warrant would've been an addendum, or the warrant was expired, or the information was not accurate[.]" [Exh. 63 at 5]

On December 24, 2020, Chief [REDACTED] issued "Finding and Recommendation" in 0043 wherein he sustained the allegations that Lt. [REDACTED] violated Policy 100.5 justifying a forty (40) hour suspension without pay and violated Policy 340.3.5(b) justifying a twenty (20) hour suspension without pay. The suspensions were to be served consecutively. [Exh. 64] Lt. [REDACTED] appealed the finding and recommendation to Sheriff [REDACTED].

On May 17, 2021, grievant met with Sheriff [REDACTED] in a pre-disciplinary meeting assisted by counsel and the Guild. [Exhs. 67-69] Grievant maintained her position - - exonerated of policy violations in 0009 - - and reiterated her concerns about double jeopardy and due process.

On June 29, 2021, Sheriff [REDACTED] sustained Chief [REDACTED]'s finding that grievant violated Policy 100.5 - Constitutional Requirements and Policy 340.3.5 - Unsatisfactory Job Performance when she entered the French door apartment and allowed SIU officers to enter, search and seize evidence. In Personnel Order 21-351 Sheriff [REDACTED] assessed grievant a 40 hour suspension without pay with 8 hours served concurrently with the 40 hours. The Guild filed a grievance alleging a violation of Article 4.8 - - just cause - - and Article 18 - Grievance Procedure (Guild: "18.1 relating to final discipline imposed by the Sheriff"). [Exhs. 87-89]

On September 15-16, 2022, an in-person hearing convened wherein each party presented its position with argument and evidence and examined witnesses. There are seven (7) PCSD exhibits

and one hundred fourteen (114) Guild exhibits. The Guild recorded the hearing; there is no certified transcript of testimony.

On October 21, 2022, the record in this proceeding closed with the Arbitrator's receipt of the parties' post-hearing briefs.

STIPULATIONS

The Guild and the PCSD stipulated to the following:

1. The parties agree to consolidate the Guild's two (2) grievances (Exhs. 76 and 88) for presentation before the Arbitrator under a just cause analysis.
2. The consolidated grievances are procedurally and substantively arbitrable.
3. The issue before the Arbitrator is whether Pierce County and its Sheriff's Department have just cause to suspend grievant without pay and, if not, what is the appropriate remedy?
4. The parties request that the Arbitrator retain jurisdiction for a period of ninety (90) calendar days after issuing the opinion and award to resolve any remedial issues.

AGREEMENT

ARTICLE 4 - MANAGEMENT RIGHTS AND RESPONSIBILITIES

The Employer retains and reserves all powers and authority to manage its operations in an effective manner with the sole and unquestioned right and prerogative in accordance with applicable law, regulations, and the Pierce County Charter, subject only to the limitations expressly stated in this Agreement:

* * *

- 8) To discipline, suspend and discharge employees for just cause (probationary employees without cause)[.]

POLICY MANUAL

LAW ENFORCEMENT AUTHORITY

Section 100.5 Constitutional Requirements

All members shall observe and comply with every person's clearly established rights under the United States and Washington Constitutions.

STANDARDS OF CONDUCT

Section 340.3 Conduct Which May Result in Discipline

The following list of causes for disciplinary action constitutes a portion of the disciplinary standards of this department. This list is not intended to cover every possible type of misconduct and does not preclude the recommendation of disciplinary action for specific action or inaction that is detrimental to efficient department service:

* * *

340.3.5 - Performance

* * *

- (b) Unsatisfactory work performance including, but not limited to, failure, incompetence, inefficiency or delay in performing and/or carrying out proper orders, work assignments or instructions of supervisors.

CONSTITUTION OF THE UNITED STATES

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the places to be searched, and the persons or things to be seized.

Summary of the County’s Position and Argument

The County’s position and argument are set forth in its opening statement, examination and cross-examination of witnesses, exhibits and post-hearing brief.

Called by the PCSD to testify were the following persons: [REDACTED], Chief - Administrative Services Bureau; [REDACTED], Detective-Sergeant, SWAT Commander; [REDACTED], Deputy Prosecuting Attorney, Pierce County Prosecuting Attorney’s Office; and [REDACTED] (retired), Chief - Criminal Investigations Bureau.

Burden of Proof

The County acknowledges that the burden of proof resides with it to (1) establish just cause with preponderant evidence that grievant violated policies and (2) demonstrate that the 40 hour

suspension (8 hours served concurrently) without pay is appropriate for the violations. At the same time “the employer is under no burden to try to disprove any and all suggestions, allegations, or implications regarding purported ulterior motives for the investigation or discipline decision.” [Br. at 2]

Regarding the burden of proof for any affirmative defense, it resides with the Guild. The assertion that no employee has been subjected to discipline for a mistake when serving a warrant does not prove the affirmative defense. The Guild must show that grievant was subjected to discipline for reasons other than the asserted mistake in warrant service on January 21, 2020. The disposition of this grievance pivots on the validity of the County’s motivation and reasoning “in contrast with their previous ‘untruthfulness’ or ‘unconstitutional violation’ disciplinary decisions.” [Br. at 2]

County’s Position

1. January 21, 2020 - Warrant Service

Judge Blinn signed warrant 1 on January 15, 2020, authorizing the search of suspect Wales’ residence. Det. [REDACTED] described suspect Wales’ location in warrant 1 based on information he obtained from a CI and his personal observation:

There are at least 3 separate apartments on the lower level (northwest side) each accessed their own door. The particular structure/apartment to be searched is the middle door of the three. The door is white in color.

There are multiple doors on the lower level of the structure/mobile home; however, in Det. [REDACTED]’s description in warrant 1 did not identify (1) a white door with glass insert in the upper corner, (2) a glass French door apartment and (3) a door in the alcove or indentation area around the corner of the building set apart from the other doors.

In preparing to serve warrant 1, SWAT conducted a pre-raid surveillance on January 17, 2020. On the lower level of the structure, Det. [REDACTED] and Sgt. [REDACTED] observed two doors for apartments, not three doors for apartments. They examined a picture forwarded by Det. [REDACTED] which he represented as identifying the target door. Det. [REDACTED] and Sgt. [REDACTED] determined that the description in warrant 1 did not match the door in the picture; Det. [REDACTED] snapped a picture of the door he observed on the lower level which more accurately matched the description in warrant 1. Upon reviewing that picture Det. [REDACTED] confirmed it as the target door. Det. [REDACTED] informed Det. [REDACTED] that a more specific and accurate description in warrant 1 was needed in an addendum.

Instead of obtaining an addendum from Judge Blinn with a specific and accurate description for the target door, Det. [REDACTED] obtained a second warrant (“warrant 2”) from Judge Nevin on January 20, 2020 with the following description:

The particular structure/apartment to be searched is the white door with a glass upper insert located on the northeast corner of the lower level of the structure and is white in color

Warrant 2 described the apartment to be searched as “the white door with a glass upper insert” referred to as the half-moon door apartment. The door for the apartment next to the half-moon door apartment is referred to as the French door apartment. SWAT prepared a threat assessment for warrant 2 - - the half-moon door apartment. No threat assessment was prepared for the French door apartment. SWAT planned to serve one warrant (warrant 2) on one apartment (half-moon door). There was no plan or discussion to execute a warrant on the French door apartment. SWAT breeched the half-moon door; it was not suspect Wales’ apartment. Shortly after the breach, suspect Wales voluntarily emerged from the French door apartment with an associate.

Det. Sgt. [REDACTED], SWAT Commander, received information that warrant 2 was served on the half-moon door but it was the wrong apartment, that is, not suspect Wales’ residence. Det. Sgt. [REDACTED] initiated discussion with Lt. [REDACTED] about the wrong door. Det. [REDACTED] arrived and stated he had a valid warrant (warrant 1 - January 15) for the French door apartment. This was the first time Det. Sgt. [REDACTED] was informed about warrant 1; he informed Lt. [REDACTED] that warrant 1 was not valid because Det. [REDACTED] obtained warrant 2; he stated there was no legal authority for SWAT to enter the French door apartment, which was not described in warrant 2, and no threat assessment had been executed for it.

Notwithstanding the discussion between Det. Sgt. [REDACTED] and Lt. [REDACTED] concerning the validity of a warrant occurring in the presence of Det. [REDACTED], he proceeded to enter the French door apartment for purportedly “officer safety” and Lt. [REDACTED] did not instruct or otherwise act to restrain or restrict Det. [REDACTED]. Lt. [REDACTED] did not freeze the scene until the authority-to-serve dispute could be clarified by the court or between SIU and SWAT. Once the French door apartment was cleared, Lt. [REDACTED] entered and SIU officers followed to search and seize evidence - - .22 caliber revolver, Glock 9 mm pistol, narcotics.

2. No Charges Filed

DPA [REDACTED] did not file charges (“NCF”). Three senior DPAs reviewed warrant 1 and concluded it did not provide legal authority to enter the French door apartment. According to DPA [REDACTED] the description in warrant 1 (January 15) contained insufficient information, was overly broad and vague and inconsistent with information Det. [REDACTED] attributed to the CI, thus, it was invalid on its face. Furthermore, warrant 2 (January 20) describing the half-moon door apartment was an addendum to and superseded warrant 1. DPA [REDACTED] stated that Det. [REDACTED] has obtained hundreds of warrant during his over twenty (20) years of service with the PCSD; he knew warrant 1 was not valid.

The PCSD requested legal guidance from the Washington Association of Prosecuting Attorneys (“WAPA”) which advised the County warrant 1 was not valid as it lacked sufficient particularity. That is, the description in warrant 1 did not match the picture and information provided by the CI or obtained by SWAT during its pre-raid surveillance. Once SWAT and SIU discovered the half-moon door apartment (warrant 2) was the wrong door and given SWAT’s legal concern for the French door apartment (warrant 1), the proper response would have been to secure the premises of the French door apartment and apply for a new search warrant.

Despite grievant’s decades of experience as a law enforcement officer, she failed to act on the legal issue and take the proper course of action. Lt. [REDACTED] initiated no action to inform herself of the relevant circumstances. Lt. [REDACTED] was at the scene for hours but never read the two warrants. A facial reading of them exposes the inconsistencies in the descriptions and

raises the constitutional issue that entering the French door apartment relying on the invalid warrant 1 constituted an illegal search and seizure.

3. Chief [REDACTED] - Lt. [REDACTED]

On January 22, 2020 - - the day after serving warrant 2 at the incorrect half-moon door apartment and illegally entering the French door apartment under warrant 1 - - CIB Chief [REDACTED] met with Lt. [REDACTED] to discuss the situation. Thereafter Chief [REDACTED] issued an e-mail - - "Subject: Ops Brief Information Sharing" - - directed to SWAT Lt. [REDACTED] and Det. Sgt. [REDACTED] with a "cc" to Lt. [REDACTED]. The e-mail does not represent discipline or counseling of grievant.

Grievant's assertion that the meeting and discussion with Chief [REDACTED] was hostile and disciplinary is unfounded. In this regard grievant testified in an unfair labor practice hearing before the PERC on March 17, 2021, where she described her meeting with Chief [REDACTED] as a collaborative discussion, that is, she "worked with" her chain of command to "resolve any concerns that were raised as a result of the Wales warrant service." [Exh. 204 at 152]

4. 20CRT-0009

This IA investigation conducted by Lt. [REDACTED] focused on Det. [REDACTED]'s obtaining two warrants and his entry into the French door apartment notwithstanding his knowledge and awareness there was a dispute between SWAT and SIU over the warrant's legality. Lt. [REDACTED] received notice she was a witness in 0009. [Exhs. 8-33]

On March 24, 2020, Lt. [REDACTED] received another notice from Lt. [REDACTED] that she was a subject in the warrant service on January 21st. During her interview on March 25 Lt. [REDACTED] issued her an admonishment of rights as a measure of prudent caution. Lt. [REDACTED] inquired on May 1, 2020, whether a decision had been rendered by the Sheriff's Department on her involvement in 0009. Lt. [REDACTED] responded that she would not be listed as a subject "in *this* investigation" (emphasis added). [Exh. 37]

When investigative report 0009 issued, Lt. [REDACTED] was not listed as a subject. Chief [REDACTED], the reviewing officer in 0009, rendered no finding about her action or inaction on January 21, 2020, and issued no recommendation on any discipline.

5. 20CRT-0043

This IA investigation conducted by Lt. [REDACTED] focused on Lt. [REDACTED]'s entry into the French door apartment after it had been cleared by Det. [REDACTED]. The investigation focused on grievant's failure to read the warrants and obtain clarification of legal authority or obtain another warrant from the court prior to entry and search of suspect Wales' residence. The focus in 0043 is distinct and different from the focus in 0009.

6. Discipline

Chief [REDACTED], the reviewing official in 0043, rendered a finding that grievant violated Policy 100.5 - Constitutional Requirements which justified a 40-hour suspension without pay and violated Policy 340.3.5(b) - Unsatisfactory Job Performance which justified a 20-hour suspension without pay.

The Chief recommended a more severe suspension for grievant compared to Det. [REDACTED]'s suspension because she was the ranking officer on the scene with the responsibility to resolve the conflict between the warrants as well as the conflict between SIU and SWAT. Chief [REDACTED] expected she would have known to contact the court for clarification because there were no exigent circumstances present once Det. [REDACTED] cleared the French door apartment.

Upon review of this recommended discipline, Sheriff [REDACTED] imposed discipline on grievant that was the same discipline imposed on Det. [REDACTED] by Sheriff [REDACTED] - 32-hour suspension without pay.

County's Argument

1. Rule

There is no dispute that grievant was subjected to discipline under the PCSD Policy Manual, Sections 100.5 and 340.3.5(b).

LAW ENFORCEMENT AUTHORITY

Section 100.5 Constitutional Requirements

All members shall observe and comply with every person's clearly established rights under the United States and Washington Constitutions.

STANDARDS OF CONDUCT

Section 340.3 Conduct Which May Result in Discipline

The following list of causes for disciplinary action constitutes a portion of the disciplinary standards of this department. This list is not intended to cover every possible type of misconduct and does not preclude the recommendation of disciplinary action for specific action or inaction that is detrimental to efficient department service:

* * *

340.3.5 - Performance

* * *

- (b) Unsatisfactory work performance including, but not limited to, failure, incompetence, inefficiency or delay in performing and/or carrying out proper orders, work assignments or instructions of supervisors.

[Exhs. 64, 205]

2. Active Violation

Chief [REDACTED] testified that the illegal entry into the French door apartment under warrant 1 violates one of the most revered and treasured rights in this nation - - the Fourth Amendment to the United States Constitution.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the places to be searched, and the persons or things to be seized.

The Fourth Amendment specifies “houses” as a place where a person has a right “to be secure ... against unreasonable searches and seizures” and requires particularity in the description of the house to be searched. This embodies the uppermost expectation of privacy in one’s house. PCSD officers are held to the highest standards to protect constitutional rights which enhances public trust in law enforcement and avoids liability for the PCSD.

Although grievant states warrant 1 - - French door apartment - - was valid because a judge did not determine it was invalid, that statement is without merit given the preponderance of legal opinion by WAPA and senior, experienced DPAs reviewing this matter.

It defies common sense that a police officer can execute a warrant that is invalid on its face, then argue no constitutional violation because the warrant was so obviously invalid that criminal charges could not even be initiated to bring the matter before the Court.

[Br. at 11]

Lt. [REDACTED] testified that Det. Sgt. [REDACTED] did not raise or present a serious concern to her; however, he testified to informing Lt. [REDACTED] that warrant 1 was not valid or legal authority for entering the French door apartment because it was invalidated when Det. [REDACTED] obtained warrant 2. Lt. [REDACTED]’s claiming this is not a “serious concern” reflects her unsatisfactory job performance and failure to recognize constitutional requirements. Her failure to read the warrants at the scene in an effort to understand the legal authority dispute is unacceptable. As the ranking officer there is no justification for her to ignore or bypass legal concerns, fail or refuse to review warrants and fail or refuse to seek clarification from a court. Her entering the French door apartment is a clear and active constitutional violation and demonstrates unsatisfactory job performance.

3. Investigation

Investigations 0009 and 0043 are separate investigations. The former (0009) did not investigate grievant’s violation of Policy 100.5 - Constitutional Requirements and the later (0043) occurred after 0009 had been completed wherein Chief [REDACTED]’s review focused on Det. [REDACTED] as the subject with policy violations. When Chief [REDACTED] reviewed 0009, he determined a separate investigation was warranted to address grievant’s decision to enter the French door apartment as well as allowing SIU officers to enter, search and seize evidence.

On September 30, 2020, Lt. [REDACTED] interviewed grievant in 0043. During that interview the Guild requested a limitation on the investigative scope: “We do expect that Lt. [REDACTED]’s and other transcripts will be included from 20CRT-0009 . . . and that any questions today will solely be in addition to what she’s already provided in her previous

transcript.” [Exh. 57 at 2] At the same time that the Guild seeks to limit the investigative scope for 0043, which the County consented to, the Guild asserts that the interview was too short and the investigation produced no new evidence.

There is no dispute about the unusual manner in which grievant was identified as a subject in 0009 - - witness, subject, witness - - but the Guild cites no authority to support its assertion that changing grievant’s status during that investigation is a due process violation and double jeopardy in 0043.

In response to the Guild’s reliance on *Pacific Intermountain Express Co.*, 215 NLRB 588 (1974) for its position that grievant has been subjected to double jeopardy, that case is distinguished because it involved the duty of fair representation and the exclusive representative withholding information about discipline imposed on the employee whereas Lt. [REDACTED] was not subject to any discipline in 0009.

4. Discipline - Suspension

An IA investigator does not render a finding or recommendation. The investigator presents the interviews and documents obtained during the investigation to management and those officials render a finding and recommendation. Since Lt. [REDACTED] was not listed as a subject in 0009, Chief [REDACTED] could not render a finding or recommendation addressing her action or inaction on January 21, 2020. He was unaware that grievant had been notified she was a subject in 0009; when Chief [REDACTED] reviewed 0009 grievant was listed as a witness.

Based upon the facts obtained by Lt. [REDACTED] during interviews and document collection in 0009, Chief [REDACTED] determined it was appropriate to initiate IA investigation 0043 into whether Lt. [REDACTED] violated policy when she entered the French door apartment. The Guild, aware Chief [REDACTED] was in the review path for 0009 and would continue in that review path in 0043, did not request to exclude the Chief as it had in other cases where the Guild excluded Undersheriff [REDACTED].

With respect to other officers serving a warrant on the wrong door or serving an expired warrant on the correct door and no officer subjected to discipline, those situations involved a mistake and not, as here, where Lt. [REDACTED] intentionally decided to disregard concerns about a constitutional right.

In assessing grievant discipline, the County reviewed her record and followed progressive discipline. That is, she received a written reprimand in 2003 for failing to supervise and, in 2020, there was a pending criticism for abuse of power and falsification of reports. Lt. [REDACTED] received a commendation in 2008. Chief [REDACTED] recommended grievant be suspended for a total of sixty (60) hours for two policy violations; however, Sheriff [REDACTED] imposed a lesser penalty - - 32-hour suspension without pay - - which was the same penalty imposed on Det. [REDACTED] by Sheriff [REDACTED].

Since the County established by a preponderance of the evidence that grievant violated policies, there is just cause for discipline. The 32-hour suspension without pay assessed to grievant is appropriate for her violations. Therefore the grievance should be denied.

Summary of the Guild’s Position and Argument

The Guild's position and argument are set forth in its opening statement, examination and cross-examination of witnesses, exhibits and post-hearing brief.

Called by the Guild to testify were the following persons: Lieutenant [REDACTED] (retired), Internal Affairs - Supervisor; Lieutenant [REDACTED] (retired), Internal Affairs - Investigator; and Lieutenant [REDACTED], Special Investigations Unit - Commander. Present during the hearing was Guild President Det. Sgt. [REDACTED].

Guild's Position

During 2019 and continuing into 2020, Det. [REDACTED] monitored suspect Wales, a reputed drug dealer. In January 2020 Det. [REDACTED] obtained 3 warrants. On January 10 he obtained a pen register and trap and trace warrant from Judge Nelson; this warrant is undisputed but the other warrants are disputed:

- (1) January 15: Search Warrant - Judge Blinn
- (2) January 20: Search Warrant - Judge Nevin

The description for suspect Wales' residence in warrant 1 (January 15) states:

An approximately 288 square foot unmarked apartment located on the lower level of a mobile home/structure commonly known as 11318 201st ave east in Bonney Lake. *There are at least 3 separate apartments on the lower level (northwest side) each accessed their own door. The particular structure/apartment to be searched is the middle door of the three. The door is white in color (emphasis added).* This converted apartment has no access to the main home on the property and one has to walk around a well worn path on the south side around the main structure to reach the backside where the doors are.

SWAT served warrant 1 because suspect Wales presented a high risk situation. In preparation for serving warrant 1, SWAT Det. [REDACTED] and Sgt. [REDACTED] conducted a pre-raid surveillance on January 17. They determined warrant 1 required additional detail in describing suspect Wales' residence. Det. [REDACTED] agreed and obtained warrant 2 (January 20) describing suspect Wales' residence:

An approximately 288 square foot unmarked apartment located on the lower level of a mobile home/structure commonly known as 11318 201st ave east in Bonney Lake. *There are multiple doors on this lower level. The particular structure/apartment to be searched is the white door with a glass upper insert located on the northeast corner of the lower level of the structure and is white in color (emphasis added).* This converted apartment has no access to the main home on the property and one has to walk around a well-worn

path on the south side around the main structure to reach the backside where the doors are.

On January 21, 2020, SWAT served warrant 2 at the white door with the “glass upper insert” referred to as the “half-moon” door. During service of warrant 2, suspect Wales and an associate exited from the apartment with the glass French doors which was located next to the half-moon door apartment. “At this time there was confusion about whether authority existed to search the unit behind the French-style doors.” [Br. at 3]

SWAT Commander Det. Sgt. [REDACTED], Lt. [REDACTED] and Det. [REDACTED] discussed the situation. Det. [REDACTED] stated he had a valid warrant (“warrant 1”) for the suspect’s apartment. Det. Sgt. [REDACTED] questioned the validity of warrant 1; he had not seen it nor was he aware of it prior to Det. [REDACTED]’s statement. Without a threat assessment for the French door apartment SWAT was not prepared for a second entry. SWAT withdrew from the scene; Lt. [REDACTED] and SIU officers remained. Det. [REDACTED] entered the French door apartment to clear it. Lt. [REDACTED] entered the apartment and SIU officers followed whereupon they searched and seized evidence.

After leaving the scene, Det. Sgt. [REDACTED] contacted CIB Chief [REDACTED]. The next day (January 22) Chief [REDACTED] met with Lt. [REDACTED] to discuss the warrant service on January 21 and, thereafter, Chief [REDACTED] issued an e-mail to SWAT Lt. [REDACTED] and Det. Sgt. [REDACTED] setting forth a new operational procedure for service of a warrant, that is, the SIU case officer must be present for the briefing with SWAT before SWAT executes warrant service. Dissatisfied with this outcome, Det. Sgt. [REDACTED] contacted DPA [REDACTED].

On February 24, 2020, IA investigation 20CRT-0009 commenced into whether Det. [REDACTED] “served a search warrant [warrant 1] that is believed to have no longer been valid at the time of service.” The next day (February 25) Lt. [REDACTED] received notice she was identified as a witness in 0009 followed by another notice on March 12 that “there is a possibility you may become a subject” and it identified policies potentially breached (Unsatisfactory Job Performance and Threat Assessment Review). Approximately two weeks later (March 24) grievant received notice she “had been identified as a subject” in 0009 and violated policy “regarding service of a search warrant on 1.21.2020.” Prior to Lt. [REDACTED]’s interview on March 25, IA investigator Lt. [REDACTED] issued the admonishment notice to Lt. [REDACTED]. The Guild’s representative and counsel were present during the interview. [Exhs. 7, 9, 25, 27, 30]

On May 1, 2020, Lt. [REDACTED] contacted Lt. [REDACTED] and inquired “what the administration has decided regarding my involvement” in 0009. Lt. [REDACTED] responded that she and SIU Sgt. [REDACTED] “will not be listed as subjects in this investigation.” In June 2020 Lt. [REDACTED] delivered a powerpoint presentation of 0009 to Sheriff [REDACTED], Lt. [REDACTED] and Undersheriff [REDACTED]. Not present was Chief [REDACTED], reviewing official in 0009.

On July 13, 2020, reviewing official Chief [REDACTED] met with Sheriff [REDACTED] regarding 0009 and two days later (July 15) the Chief issued a finding on policy violations and a recommendation on discipline for Det. [REDACTED] in 0009. Thereafter, Sheriff [REDACTED] imposed discipline on Det. [REDACTED] with a 40 hour suspension (8 hours served concurrently) without pay.

On July 16, 2020, IA investigation 0043 commenced. In this regard, when Chief [REDACTED] met with the Sheriff on July 13 about Det. [REDACTED] in 0009, he also discussed Lt. [REDACTED] and persuaded the Sheriff to reverse his earlier decision not to discipline her in 0009. Chief [REDACTED]'s intervention on July 13 resulted in 0043 with Lt. [REDACTED] the subject and violations of Policy 340.3.5(b) - Unsatisfactory Job Performance and Policy 100.5 - Constitutional Requirements. [Exhs. 50, 51, 53, 54] Investigation 0043 uncovered no evidence or testimony that had not been addressed and presented in 0009. Nevertheless, Chief [REDACTED] issued a finding on Christmas Eve - - December 24, 2020 - - that grievant violated policies and he recommended discipline with a sixty (60) hour suspension without pay.

On June 29, 2021, Sheriff [REDACTED] imposed on grievant a 40 hour suspension without pay with 8 hours served concurrently based on violations of Policy 100.5 and Policy 340.3.5(b). [Exh. 74]

Guild's Argument

The PCSD failed to establish just cause for grievant's suspension and, in failing to prove just cause, the PCSD violated due process and the double jeopardy principle as reflected in its manner or handling of IA investigations 0009 and 0043.

Seven Tests

The Guild presents the following tests in the seven tests for just cause: (1) whether the PCSD forewarned grievant of the consequences of her actions; (2) whether the PCSD conducted a fair and objective investigation; (3) whether the PCSD obtained substantial evidence of grievant's culpability; (4) whether PCSD applied its rules, orders and penalties equally to all employees; and (5) whether the discipline assessed was reasonably related to the seriousness of the offense based on the history of discipline in PCSD.

1. Forewarning - Consequences

The Guild states that, sometimes, the validity of warrants are challenged. Testimony by Chief [REDACTED], Det. Sgt. [REDACTED] and Lt. [REDACTED] established that warrants have been served on the wrong address or served when the warrant had expired. Prior to this grievance, mistakes or errors serving a warrant did not result in discipline for the officer.

For example, in 2014 officers under SWAT Commander Det. Sgt. [REDACTED] served a warrant on the wrong door detaining innocent civilians and then served an expired warrant on the correct door. [Exh. 107] CIB Chief [REDACTED] issued no discipline despite Det. Sgt. [REDACTED] "begging to be fired or disciplined" for policy violations - - constitutional requirements and unsatisfactory job performance. [Br. at 15] These are the same policies relied on by the County in this grievance for suspending Lt. [REDACTED]. Although Chief [REDACTED] testified he had heard of discipline for policy violations connected with errant warrant service, he could not identify or articulate any particulars.

There is no progressive disciplinary scheme in the PCSD. Employees read the policies; they receive no training or information on possible consequences for a policy violation. [Exh. 205]

Since no officers have been subjected to discipline for acts similar to those of Lt. [REDACTED] and given the absence of a definitive disciplinary scheme in the PCSD, the grievant was not on notice or forewarned about the consequences for allowing service of a search warrant which, in the opinion of counsel for the State, was invalid.

2. Investigation - Fair and Objective

Investigation 0043 was not fair or objective; it violated due process and the principle of double jeopardy. “Fundamental concepts of justice and fairness require that once an employee has been disciplined for misconduct, the employee will not be subjected to discipline for the same offense. This is particularly true when all the facts are known to the employee at the time the initial discipline is issued.” [Br. at 8]

The principle of double jeopardy applies in a situation where, as here, the prior event or incident did not result in formal discipline. In other words, any prior discipline or other corrective action for an incident is not a basis for another round of discipline for the prior incident. As stated in *Pacific Intermountain Express Co.*, 215 NLRB 588 (1974):

For it is a widely accepted principle in grievance arbitration that after an employee has been punished once for an offense he may not be subjected to additional and more severe penalties for the same offense unless it is made clear that the initial penalty is subject to the possibility of further discipline. Borrowing from criminal law, such dual punishment is termed double jeopardy and is eschewed.

Grievant was subjected to an unfair investigation lacking objectivity. The Guild’s witnesses - - retired IA Investigator Lt. [REDACTED] and retired IA Supervisor Lt. [REDACTED] testified that the investigation was unfair. Noteworthy is the County’s failure to call Lt. [REDACTED] to testify since the burden of proof resides with the PCSD. A negative inference should be drawn that the County likely knew Lt. [REDACTED]’s testimony would be unfavorable.

Lt. [REDACTED] testified that towards the end of investigation 0009, he presented it to Sheriff [REDACTED] and the Sheriff decided to remove grievant from the subject list. Lt. [REDACTED] testified that if there was sufficient information to likely find a policy violation by grievant in 0043, that finding should have been issued in 0009 instead of initiating another investigation. Lt. [REDACTED] expressed confusion as to the PCSD pursuing discipline in 0043 when it could have been addressed in 0009 given there are no material differences in the investigations. Lt. [REDACTED] noted that the IA policy and practice is to provide the subject of an investigation, such as grievant in 0009, with a “close out document” stating that he or she is no longer a subject. Failure by the PCSD to follow this policy and practice should not be sanctioned as a loophole to initiate and pursue grievant in another investigation over the same facts and circumstances.

Lt. [REDACTED] testified that at the time Lt. [REDACTED] presented investigation 0009 to Sheriff [REDACTED], grievant was on the subject list. Sheriff [REDACTED] determined that grievant was not culpable for wrongdoing and, thus, not a subject. Lt. [REDACTED], as well as Lt. [REDACTED], testified to their view that grievant did not violate policy. Regardless, she received counseling, Lt. [REDACTED] testified, in CIB Chief [REDACTED]’s e-mail dated January 22, 2020. Lt. [REDACTED] acknowledged he is friends with Lt. [REDACTED],

therefore, he was not involved with 0043 on a day-to-day basis. Even with this acknowledgement of their friendship at the hearing, the County did not cross-examine him for potential bias.

On July 15, 2020, Chief [REDACTED] directed Lt. [REDACTED] to initiate IA investigation 0043 with Lt. [REDACTED] as the subject. Lt. [REDACTED] states this represents a “second bite of the apple” and presents due process concerns and pre-judgement by Chief [REDACTED]. That is, when the Chief and Lt. [REDACTED] discussed 0043 on the 15th, Lt. [REDACTED] concluded that Chief [REDACTED] expressed a pre-determination of grievant’s policy violations and misconduct by articulating his belief of her violation rather than potential violation. As distinguished in *Black’s Law Dictionary*, 11th ed., “believe” is “to feel certain about the truth of” and “to accept as true” whereas “potential” is “capable of coming into being; possible if the necessary conditions exist.” In support of pre-judgement Lt. [REDACTED] refers to Chief [REDACTED]’s email dated July 15: “I believe that this entry to the apartment to search for items of evidence was in violation of Sheriff’s Department Policy and that Lieutenant [REDACTED] is responsible for her team’s entry and search of this apartment.” [Exh. 51] This confirms that 0043 represents a *pro forma* sham investigation.

With respect to Chief [REDACTED]’s testimony, he claimed that the PCSD complied with policy when it determined Lt. [REDACTED] was a subject in 0009 because she received notice of investigation, allegations and afforded her rights. Chief [REDACTED] testified that when a subject is no longer a subject, that person receives a disposition of the charges; the Chief acknowledged no disposition was issued for Lt. [REDACTED]. The Chief’s justification for no disposition is disingenuous - - she was not presented to him in 0009 as a subject.

Chief [REDACTED] initiated the complaint in 0043 and served in the review path as the reviewing official authorized to render a finding and recommendation. Although the Sheriff is identified as the complaint initiator, Chief [REDACTED] testified he initiated it. Listing the Sheriff is an attempt to skirt the impropriety of the initiator - - Chief [REDACTED] and his pre-judged belief that Lt. [REDACTED] violated policy - - also serving as the reviewing officer. [Exh. 53]

When Chief [REDACTED] met with grievant in 0043, he acknowledged she had been a subject in 0009 and, later in that investigation, was not a subject. He refused to discuss his knowledge about her status in 0009 during the pre-disciplinary meeting in 0043. [Exh. 63] This shows lack of a neutral decision-maker in the review process and a prejudged conclusion by that reviewing official. Lt. [REDACTED] could not object to Chief [REDACTED] in the review path because the PCSD identified Sheriff [REDACTED] as the initiator reporting party.

A negative inference should be drawn from the PCSD’s failure to call Sheriff [REDACTED] to testify; he exonerated grievant of wrongdoing in 0009 but, after meeting with Chief [REDACTED], the Sheriff agreed to investigate grievant in 0043 even though an allegation in 0043 was the same policy violation - - unsatisfactory job performance - - addressed in 0009. The case in 0043 relies on the same information, evidence and testimony as in 0009.

The PCSD’s failure to comply with IA policy and practice and issue a disposition letter to grievant in 0009 is not a loophole to justify punishing grievant with investigation 0043 and discipline. Initiating 0043 and imposing discipline on her after grievant’s counseling with Chief [REDACTED] on January 22 and her exoneration in 0009 constitutes double jeopardy.

3. Substantial Evidence

The evidence in 0009 is the evidence in 0043. No new evidence was obtained during investigation 0043; this supports the Guild's position that 0043 is a "second bite of the apple" by the PCSD. The evidentiary record in 0009, standing by itself, shows that the PCSD failed to obtain substantial evidence of grievant's culpability.

The PCSD relies on hindsight - - Lt. [REDACTED] should have reviewed warrant 1 - - to support its claim of grievant's unsatisfactory job performance. In the PCSD's view, since Det. Sgt. [REDACTED] raised a concern about warrant 1 and Det. [REDACTED] disagreed, Det. Sgt. [REDACTED]'s concern justifies discipline of grievant. Since Det. Sgt. [REDACTED] did not read warrant 1 for the French door apartment, he was in no position to opine it was invalid. His concern that he had not seen warrant 1 is connected to SWAT not prepared for a second entry.

Lt. [REDACTED] testified that she asked Det. [REDACTED] whether the warrant was valid; she relied on his statement that warrant 1 provided legal authority to enter the French door apartment. In this regard, she trusted Det. [REDACTED] as she had been supervising his exemplary work since July 2018. Also, she had witnessed situations in the past where multiple warrants were obtained for the same location. Contrary to the PCSD's characterization of grievant as not acting at all or not acting enough, Lt. [REDACTED] testified she obtained information which formed a reasonable basis for her to enter the French door apartment.

Chief [REDACTED] acknowledged that police officers have disagreements over legal issues surrounding a warrant as occurred in this situation. Rather than unsatisfactory job performance and suspension, counseling and training are appropriate; they were delivered by Chief [REDACTED] to Lt. [REDACTED] when he met with her to discuss warrant service on January 21 followed by his e-mail on January 22.

As for Policy 100.5 - Constitutional Requirements, it defines the requirement of observing and complying "with every person's clearly established rights under the United States and Washington Constitutions." WAPA's legal opinion solicited by the PCSD concluded that warrant 1 was invalid and service of it violated a person's "clearly established rights" under the Constitution. The Guild maintains that if the warrant was invalid there would have been no need to solicit a legal opinion plus that opinion did not consider the good-faith warrant exception.

Chief [REDACTED] relied on WAPA's faulty legal opinion and DPA [REDACTED]'s NCF for his conclusion that warrant 1 was invalid. Grievant did not violate a person's "clearly established rights" under the Constitution. A review of warrant 1 and warrant 2 shows no material distinction in specificity regarding the description of the target door; however, the PCSD concluded that warrant 2 was valid and rendered warrant 1 invalid. Although Lt. [REDACTED] did not review the warrants, she testified that had she read them she would have responded in the same manner since the descriptions in the warrants matched her observations at the scene.

4. Apply Rules, Orders and Penalties Equally

When SWAT officers under Commander Det. Sgt. [REDACTED] served a warrant on the wrong door thereby detaining innocent civilians and served an expired warrant on the correct door, no discipline was issued despite his statement it was warranted. [Exh. 107] Any difference between Det. Sgt. [REDACTED]'s situation and Lt. [REDACTED]'s situation is *de minimis* and inconsequential. Lt. [REDACTED] has been subjected to different treatment.

Present with Lt. [REDACTED] on January 21 was Sgt. [REDACTED]. He received no discipline. Chief [REDACTED] testified that Sgt. [REDACTED] was not a supervisor whereas grievant was a supervisor and the ranking officer at the scene, thus she was held to a higher standard. Sgt. [REDACTED] was investigated in the same manner as grievant in 0009 - - witness, subject, witness - - but he was not investigated in 0043.

5. Discipline Proportional to Offense

Sheriff [REDACTED], the deciding official in 0043, did not testify. Without his testimony, the PCSD cannot demonstrate that the discipline imposed is proportional to grievant's infraction. The Guild asserts the Arbitrator is "left to guess how the degree of discipline was reasonably related to Lt. [REDACTED]'s alleged misconduct, particularly in light of any prior disciplinary history." [Br. at 16]

6. Remedy

Since the PCSD did not prove just cause for its imposition of discipline on grievant, the grievance should be sustained and the following remedy granted:

. . . Lt. [REDACTED]'s suspension should be rescinded and all reference to this matter should be purged from her personnel file. Lt. [REDACTED] should be made whole in all ways for any lost wages, benefits, seniority, and rank, together with interest. In addition, the Guild asks that Lt. [REDACTED] be awarded any such other relief as may be appropriate under the circumstances, not the least of which should be a requirement that, if the Arbitrator rescinds the discipline, PCSD post the Decision and Order of this Arbitrator on its public facing website and at PCSD and to notify every member of the Guild of this Arbitrator's decision in writing.

[Br. at 17]

Findings and Conclusions

The Guild filed two grievances which have been consolidated for the purpose of hearing and disposition. This collective grievance is advanced to arbitration without procedural or substantive encumbrances and is before the Arbitrator for a decision on the merits of the following stipulated issue:

Whether Pierce County and its Sheriff's Department have just cause to suspend grievant without pay and, if not, what is the appropriate remedy?

The just cause standard is contractual as it arises from the Agreement where Article 4.8 states the Employer may discipline, including suspend and discharge, an employee for just cause:

ARTICLE 4 - MANAGEMENT RIGHTS AND RESPONSIBILITIES

The Employer retains and reserves all powers and authority to

manage its operations in an effective manner with the sole and unquestioned right and prerogative in accordance with applicable law, regulations, and the Pierce County Charter, *subject only to the limitations expressly stated in this Agreement:*

* * *

8) *To discipline, suspend and discharge employees for just cause (probationary employees without cause)[.]*

[Emphasis added.]

The Guild advances a just cause analysis based on the “seven tests” articulated by Arbitrator Carroll Daugherty in *Enterprise Wire Co.*, 46 LA 359 (1966). The tests are well-known and widely disseminated in labor relations through treatises and commentary. Representative of those treatises and commentary are Koven and Smith, *Just Cause: The Seven Tests*, 2nd ed. (1992) and Dunsford, *Arbitral Discretion: The Tests of Just Cause: Pt. I*, 42 NAA 23 (1990).

The core of the just cause standard is that an employer must establish cause for imposing discipline on an employee and the discipline imposed must be just in relation to the cause, e.g., proportionality between the offense and penalty. Just cause is not synonymous with fault for an employee may violate a rule which merits discipline even when the employer cannot prove the employee intended the violation.

A matter of fairness surfaces when an employee is subjected to discipline for conduct which, unknown to the employee, is unacceptable. Elemental to fairness is the employer articulating the rules it expects an employee to follow with forewarning of consequences for a breach. PCSD Policy 340 - Standards of Conduct sets forth standards and guidelines that the County expects its employees to comply with even though the expectations in the Policy are not presented as “an exhaustive list of requirements.” Nevertheless the Policy places an employee on notice that his or her conduct must “reasonably conform to the guidelines set forth herein.”

An employee’s failure to “reasonably conform” with the expectations may be cause for discipline. The progressive disciplinary scheme in Policy 340 is designed to correct the employee’s misconduct where minor violations result in low-level, informal discipline for a first time offender and additional, continuing violations by the employee result in higher-level, formal discipline. Progressive discipline is an elastic and flexible scheme suitable to the circumstances where, as here, PCSD Policy 100 - Law Enforcement Authority “encourage[s]” officers to exercise “sound discretion” in performance and conduct. Of course, some workplace expectations and rules are so obvious that an employee is presumed on notice of the penalty from the get-go. [*Texas Lime Co.*, 83 LA 116 (Neas 1984) (immediate discharge for smoking in dynamite factory)]

Four of the seven tests for just cause focus on due process such as forewarning of consequences. As pertinent in this grievance, Lt. [REDACTED] acknowledged during cross-examination that she is intimately aware of the rules and potential consequences based on her thirty (30) plus years of service with the PCSD which includes 9 years as Guild President representing officers in disciplinary proceedings. More likely than not, grievant was aware or knew that her performance and conduct on January 21, 2020, could be subjected to examination under the PCSD Policy Manual. Specifically, whether she reasonably conformed to expectations in Policy 340 and, if not, a consequence proportional to her infraction could be assessed.

Grievant's knowledge of forewarning and consequence is considered in the context of her assertion that she received counseling from CIB Chief [REDACTED] for January 21. In this regard, PCSD Policy 340.4.1 - Discipline Findings, Section A, Informal Discipline and Management Control, states:

Counseling is a discussion between a supervisor and a subordinate for the purpose of clarifying a rule or procedure, correcting a problem, or developing an understanding of proper procedures. Counseling is appropriate when the situation involves a lack of understanding rather than an intentional disregard of rules, regulations, or proper procedures.

The supervisor issuing the counseling shall document the fact that counseling was given on a certain date and that the employee was notified of the consequences of continuing to exhibit such behavior[.]

Applying Section A to grievant's assertion, the Arbitrator finds their discussion and the e-mail do not constitute counseling. The e-mail does not notify grievant "of the consequences of continuing to exhibit such behavior" and Chief [REDACTED] did not document their discussion as counseling. Discipline is personal and private to the employee; notice to the employee would not be a "cc" at the bottom of a memorandum or email directed to others without a need to know. Instead of counseling, the discussion and e-mail summarized an operational briefing to improve communication and coordination between SWAT and SIU.

Aside from forewarning and consequence, due process in just cause includes a fair and objective investigation exemplified by lack of bias or pre-judgement by the investigator and others rendering findings and decisions during the review process. In the circumstances of this grievance, investigation 0043 was not fair and objective because grievant's culpability was pre-judged.

Investigations 0009 and 0043 are one and the same. Chief [REDACTED], reviewing official in 0009 and 0043, acknowledged during cross-examination that the facts and documents - - evidence - - are substantively and materially the same for both IA investigations but the inquiry in 0043 was different from the inquiry in 0009. Chief [REDACTED]'s grievance response, dated September 10, 2020, stated the inquiry in 0009 focused on process and the inquiry in 0043 would focus on employee choice and actions. [Exh. 78] When the IA investigator interviewed grievant as subject in 0043, there was no inquiry into choice and actions. The 0043 investigative report includes the same information and documents that the PCSD relied on in 0009 where the County determined that grievant was not a subject for violations of Policy 100.5 and Policy 340.3.5(b). There was no new or different inquiry in 0043; Chief [REDACTED] acted on the record in 0009 to render his finding and recommendation in 0043.

Even at the review level the PCSD could have distinguished the 0043 inquiry by following the course of action set forth in Policy 1020 - Personnel Complaints, Section 1020.11 - Reviewer Responsibilities: "Prior to forwarding recommendations the reviewer may return the entire investigation to the assigned investigator for further investigation or action." Chief [REDACTED] did not return the 0043 investigative file to the IA investigator. Instead, he accepted 0009 as sufficient to address grievant's choice and action in 0043. Even the deciding official Sheriff, under Section 1020.11.3 - Sheriff Responsibilities, could have returned the investigative record for "further investigation or action" but he did not.

Chief [REDACTED]'s actions are considered in the timeline of events. On July 13, 2020, the Chief informed the Sheriff that he [[REDACTED]] believed grievant was culpable in the same manner as Det. [REDACTED] in 0009 and for the same policy violations (100.5, 340.3.5(b)). This discussion on July 13 followed the Sheriff's weekly meeting with the chiefs. Chief [REDACTED] advised the Sheriff that if Det. [REDACTED]'s culpable for misconduct by entering the French door apartment without a valid warrant then grievant is culpable for the same misconduct. This was more than a nudge or suggestion toward a potential violation as confirmed by Chief [REDACTED]'s e-mail dated July 15, 2020, to the Sheriff.

I advised you that during my review of the IA investigation into Detective [REDACTED] and his execution of a warrant I believed that the service of the warrant was improper. Detective [REDACTED] entered an apartment based on a warrant that was drafted and approved, however, he obtained a second warrant to clarify the place to be searched. The second warrant was for the wrong location and Detective [REDACTED] then relied on the first flawed warrant to enter the apartment that appeared to be subject to the investigation without getting an addendum to clarify the place to be search[ed] Deputy [REDACTED] entered this apartment to, 'clear' it for, 'officer safety'.

As mentioned in our meeting [i]t appears to from the IA investigation that after Detective [REDACTED] cleared the apartment Lieutenant [REDACTED] and her team from the [SIU] entered the apartment and conducted a search of that apartment for drugs, weapons and other evidentiary items. As I communicated to you, I believe that this entry to the apartment to search for items of evidence was in violation of Sheriff's Department Policy and that Lieutenant [REDACTED] is responsible for her team's entry and search of this apartment. If the warrant was not valid for Detective [REDACTED] to enter it was not valid for the rest of the team.

Based on the above information you directed me to move forward with initiating an IA investigation into Lieutenant [REDACTED]'s actions or inaction related to Law Enforcement Authority and Performance.

The Chief did not hesitate acting on his belief expressed to the Sheriff on July 13. On July 15 Chief [REDACTED] issued his finding that Det. [REDACTED] violated Policy 100.5 and Policy 340.3.5(b) and recommended a suspension and, on the same date, he instructed Lt. [REDACTED] to commence IA investigation 0043 as the Chief initiated a complaint against grievant as subject and his belief she violated Policy 100.5 and Policy 340.3.5(b). The Chief believed Lt. [REDACTED] was in the same culpability category as Det. [REDACTED] with the same violations. Not returning investigative file 0043 to address choice and actions and accepting 0009 as sufficient evidence in 0043 shows that the Chief's belief articulated in his July 15 e-mail to the Sheriff was firm and not to be dislodged.

Investigation 0043 was perfunctory, not fair and objective. The reviewing official initiated the complaint in 0043 against the grievant, questioned her on December 15, 2020, in a manner consistent with his belief about her culpability and rendered a finding of policy violations with a recommendation of discipline he described as a "severe" suspension. The responsibility to conduct a fair and objective investigation resides with the PCSD and that includes avoiding a

situation where an official in the review path serves multiple roles to confirm a pre-determined belief.

In 0009 the County determined by a preponderance of evidence that grievant was not a subject for violating Policy 100.5 and Policy 340.3.5(b). As a subject in that investigation and, subsequently, removed and returned to the witness list, grievant reasonably believed further investigation of those policy violations lodged against her had concluded. Nevertheless, after the PCSD closed 0009, the County recycled 0009 as 0043 where it increased the consequence of making no finding or recommendation in 0009 to “severe” discipline in 0043. This is tantamount to double jeopardy. Even though the County issued no finding or recommendation on grievant in 0009, it took explicit notice of her performance and conduct by solely relying on it in 0043 to find culpability. Had the County continued its investigation in 0009 by returning the record to the IA investigator, then there would be no basis for grievant’s belief that the matter had been closed. Instead, the County’s closing 0009 served as its final act in that inquiry and closure for grievant.

This finding that grievant was denied due process and subjected to double jeopardy is not confirmation that her action or inaction on January 21, 2020, reasonably conformed with Chief [REDACTED]’s expectation that grievant should have obtained another warrant or, alternatively, read the warrants. Lt. [REDACTED] and CIB Chief [REDACTED] attributed the confusion to an information gap and misunderstanding. Regardless, disputes arising during service of a warrant with problematic validity can violate policies and result in discipline.

In sum, the answer to the stipulated issue for arbitration is answered in the negative. That is, the PCSD violated Article 4.8 when it did not afford grievant due process under a just cause standard and this contributed to the County’s subjecting grievant to double jeopardy. On that basis, the grievance will be sustained. The **Award** that follows sets forth the remedy.

Award

1. The grievance is sustained.
2. The PCSD violated Article 4.8 - just cause.
3. Grievant’s suspension is rescinded and all reference to it shall be purged from the PCSD’s records and files.
4. Grievant is made whole with back pay for lost wages, benefits, seniority, rank and, in accordance with any applicable law, interest.
5. The Arbitrator retains jurisdiction for ninety (90) calendar days, beginning November 22, 2022, to resolve any remedial issues submitted by the parties.

Patrick Halter /s/
Patrick Halter
Arbitrator

Signed on this 21st day
of November 2022