

**BEFORE ARBITRATOR
GEORGE LEHLEITNER**

CITY'S POST HEARING

NATURE OF CLAIM

This is a claim by Teamsters 299 that the City violated the terms of the collective bargaining agreement when the City terminated former Police Officer Wesley Spitzer.

STATEMENT OF ISSUE

The parties did not stipulate to the issue to be decided by the Arbitrator. The City sees the issue as being whether Wesley Spitzer violated the May 26, 2005 Return to Work – Last Chance Agreement when he illegally used a prescription that was not prescribed to him and when that prescription contained an opiate. The City's position is that due process was provided Mr. Spitzer through the investigation and grievance processes. The City's position is that just cause

for Mr. Spitzer's termination is defined by the terms and conditions of the May 26, 2005 Return to Work - Last Chance Agreement.

RELEVANT COLLECTIVE BARGAINING AGREEMENT PROVISIONS

Article 4 Management Rights:

Section 4.1 (11) To discipline, suspend, demote or discharge an employee so long as such action is not arbitrary, in bad faith or without just cause.

Article 19 The Grievance Procedure

Section 19.1 Grievance Definition. A grievance is a dispute or difference of opinion between a member covered by this Agreement and the City, as to the meaning, interpretation or application of the provisions of this agreement.

Section 19.2 The Grievance Procedure.

Step I. The employee or group of employees, with or without the Association Officer, shall present the grievance(s) or dispute(s) in writing to the employee's or group of employees' immediate supervisor (outside the bargaining group) within 12 days, excluding holidays, of its occurrence or learning of the circumstances or conditions which gave rise to the grievance(s). The written notice shall contain a statement of the grievance, the sections of the contract alleged to have been violated and the remedy sought. The supervisor shall reply to the grievance(s) by the end of 12 calendar days, excluding holidays, after the grievance(s) is (are) presented.

Step II. If the grievance(s) is (are) not resolved in Step 1, or an answer is not given within the time specified, the grievance(s) shall be presented in writing, by the Association Officer to the Police Chief within 12 calendar days after the supervisor's step response, or the day such reply was due, whichever occurs first, excluding holidays. Within 12 calendar days, excluding holidays, after having received the grievance(s) the Police Chief shall respond to the Association Officer in writing.

Step III. If the grievance(s) remain(s) unresolved, the Association Officer shall, within 12 calendar days following receipt of the written response from the Police Chief, file a written request to meet with the City Manager along with their grievance(s). The City Manager shall schedule a meeting within 12 calendar days, excluding holidays, upon receipt of the Union's request to meet. The City Manager shall make a written reply to the Association Officer within 12 calendar days of the joint meeting, excluding holidays.

Step IV. If the grievance(s) is (are) not settled in Step III, the Association may refer the grievance to arbitration by giving written notice to the City Manager within 12 calendar days of receiving the written reply required in Step III. If the parties are unable to agree upon an arbitrator within 12 calendar days of the City Manager being notified of the decision to refer the grievance to arbitration, the parties shall jointly request the Oregon State Employment Relations Board to submit a panel of seven (7) arbitrators who shall be members in good standing of the National Academy of Arbitrators. The party requesting arbitration shall strike the first name and the names shall be alternately struck until one name remains. The person whose name remains shall be the arbitrator provided that either party may reject one panel of arbitrators, before striking any names. The arbitrator selected shall be notified of his selection by a joint letter from the City and the Association. The decision of the arbitrator shall be binding. The arbitrator shall have no right to amend, modify, nullify, ignore, add to or subtract from the provisions of this Agreement. Nor shall an arbitrator have the authority to order a remedy retroactive in its effects earlier than 25 calendar days before the filing of the grievance. He/she shall consider and decide only the specific issue submitted to him/her, and his/her decision shall be based solely upon this Agreement to the facts of the grievance presented. The decision of the arbitrator shall be final and binding.

Expense of the Arbitrator. The fee and expenses of the arbitrator and the cost of a written transcript shall be divided equally between the City and the Association, provided, however, that each party shall be responsible for compensating its own representatives and witnesses.

Representatives at Grievance Meetings. The Association shall not be represented by any more than three representatives, who are City employees, in meetings held in accordance with Step I through Step II; and no more than five (5) representatives who are City employees, in meetings held in accordance with Step III through Step IV. This will not limit the number of representatives the Association may have in attendance, who are not City employees. Necessary Association officials and employees directly involved in the grievance(s) being arbitrated shall be excused from duty, except in emergencies. File Access. Certified Association representatives shall have the right to inspect and obtain copies of all pertinent documents within employee-accessible files, upon written consent of that employee.

Section 28.1 Discipline for employees shall only be for just cause and will normally be progressive in nature beginning with oral reprimand and proceeding to written reprimand, suspension, or demotion, and finally to discharge. Some alternative forms of discipline may occasionally be used as more appropriate to a circumstance than those listed above. If a violation of a City policy or work practice is of a serious enough nature, an employee may be suspended and/or discharged without prior disciplinary warnings.

Section 28.2 All documentation of discipline will be placed in an employees personnel file. Documentation of discipline consists of letters and materials in support of:

1. Oral reprimand
2. Written reprimand
3. Suspensions
4. Termination

Section 28.3 The Department will maintain a complaint investigation procedure. The purposes of this procedure are:

1. To ensure that questions concerning the actions of Department personnel are resolved in a timely manner, which is conducive to good order and discipline.
2. To ensure the constitutional rights of employees are not violated.

OTHER RELEVANT POLICIES

Corinth Police Department Administrative General Orders:

1.9.2 Duties of all Police Department Members

A. General

It shall be the duty of all members of the Corinth Police Department, both sworn and civilian, to maintain a course of conduct that benefits the City and the Police Department, and will not adversely reflect upon the City, the Police Department or the member.

B. Obedience to Orders

Each member of the Police Department shall obey and fully execute any lawful order, written or oral, given by a supervisory member, which shall include, but not necessarily be limited to the Rules and Regulations, General and Special Orders and the Policies and Procedures of the Police Department. The term lawful order shall be construed as any duty prescribed by law or by these Rules and Regulations, or for the preservation of good order, efficiency and proper discipline.

P. Rules of the City of Corinth

Members of the Police Department shall comply with all City of Corinth rules and procedures as they pertain to City employees, including information in the City Employee Handbook and in the City Administrative Policy Manual.

1.9.3 Prohibited Acts

C. Possession/Purchase or Use of Cannabis or Controlled Substances
Possession/Purchase and/or use of Cannabis and/or Controlled Substances except when the possession/purchase is as a result of official duties or the purchase/use is in compliance with a prescription and the orders of a licensed physician.

AJ. Conduct Unbecoming a Member

Conduct which adversely affects the morale or efficiency of the Police Department, or conduct that tends to bring the Police Department or the member into disrepute, or conduct that reflects discredit upon the member as an element of the Police Department or member.

AV. Violation of Law

Violation or attempted violation of any Federal, State, County or Municipal law while on or off duty.

AAH. Duty to Read/Understand/Comply With Orders

Failure to read, understand or comply with Rules and Regulations, Policies and Procedures, General and Special Orders or Written or Verbal orders of a supervisor.

City of Corinth, Administrative Policy AP 96-3-06, Drug Free Workplace

3.02.022 Prescription medication is specifically defined as medication prescribed for the employee.

3.06.033 The unlawful manufacture, distribution, sale, dispensation, possession, or use of a controlled substance on City premises or while conducting City business off of City premises is absolutely prohibited and will not be tolerated. City action is not contingent on conviction.

3.06.034 Normal use of prescription medication is not grounds for disciplinary action. However, employees taking prescription medication that may impede or otherwise affect their ability to safely and efficiently perform job assignments shall report the medication to their manager or Department Director prior to beginning work. An effort will be made to place this employee in a position that will not create a safety problem for either the employee or others around him/her. If the employee fails to report this medication and is determined to be "impaired," he/she will be subject to the same discipline as any other employee who comes to work impaired.

Relevant Terms from the Return to Work - Last Chance Agreement for Officer Wesley Spitzer:

This Agreement is hereby entered into between the City of Corinth and Officer Wesley Spitzer. This agreement is in no way intended to restrict the rights guaranteed City or Employee pursuant to Federal, State or City laws, rules, or labor agreements. In order to return to work and as a condition of continued employment, employee agrees to adhere to the terms specified below. Employee agrees to actively participate in the designed treatment plan including extended care, follow up requirements, and sustained participation in treatment. Employee understands that it is my employer's

intent and obligation to have a work environment that is free from the effects of alcohol and this treatment plan is considered to be in employee and Cities best interests.

Employee agrees to adhere to the terms specified below:

3. While in residential treatment, participate in a comprehensive psychiatric evaluation for medication management by a treating psychiatrist to be designated as the only physician authorized to prescribe psychoactive medications and coordinate prescription medications for twenty-four months.

6. Participate in extended care for a minimum of twelve months following completion of IOP.

10. Participate in external controls by the Corinth Police Department that support recovery in the form of six unannounced follow-up alcohol/drug tests for twelve months. Occupational Medicine, Dr. Ferguson, will administer the process which screens only for alcohol, Benzodiazepines and Opiates which are re-activating alcoholism craving prescription medications.

11. Employee agrees to adhere to all Federal, State, County, City laws, and City and Police Department rules and regulations.

FACTS

In this case, there is very little dispute about the facts. The parties stipulated to the admission of a number of documents. Read together, these documents show the following:

1. In early 2005 Wesley Spitzer, while employed as a police officer by the City, attempted to enter an alcohol rehabilitation program. He did not complete this program. He admits that he is an alcoholic.
2. In March 2005 Wesley Spitzer, off-duty, but while employed as a police officer by the City, was arrested for driving under the influence of intoxicants (DUII). He entered into a court diversion program to deal with the criminal charges.
3. In May 2005, related to his arrest for the DUII, Wesley Spitzer entered into an agreement with the City, rather than face termination. The agreement with the City included the following elements:
 - a. Mr. Spitzer was suspended for 160 hours (4 weeks of work) without pay.
 - b. On May 26, 2005, Mr. Spitzer signed a document titled "**Return to Work - Last Chance Agreement for Officer Wesley Spitzer**" City Exhibit Tab. 2, pages 1 & 2.
 - c. The treatment plan incorporated within the terms of the Return to Work - Last Chance Agreement originated with the City's Employee Assistance Program mental health and substance abuse specialist, Dr. Thomas Fuscia. Dr. Fuscia provided the terms of the treatment plan to Captain Jon Salyari. Captain Salyari then incorporated the terms of the treatment plan into the

Return to Work - Last Chance Agreement. Among the terms of the treatment plan were:

3. While in residential treatment, participate in a comprehensive psychiatric evaluation for medication management by a treating psychiatrist to be designated as the only physician authorized to prescribe psychoactive medications and coordinate prescription medications for twenty-four months.

10. Participate in external controls by the Corinth Police Department that support recovery in the form of eight unannounced follow-up alcohol/drug tests for twelve months. Occupational Medicine, Dr. Ferguson, will administer the process which screens only for alcohol, benzodiazepines and Opiates which are re-activating alcohol craving prescription medications.

11. Employee agrees to adhere to all Federal, State, County, City. There are 10 terms and conditions but a numbering error leaves no term #9 laws, and City and Police Department rules and regulations.

4. Union representatives Mr. Clayton Blaster and local President Michael Manson

negotiated terms of the **Return to Work - Last Chance Agreement** with City Police Chief Bonjurno. As a result of those negotiations, the City reduced the number of unannounced drug tests set out in term 10 from eight to six. Procedurally, the Union representatives asked to have the number of tests reduced, the Police Chief called Captain Salyari to ask if the number could be reduced, and Captain Salyari called Dr. Fuscia to ask if six tests would meet the same treatment goals. When Dr. Fuscia agreed, the number of tests was reduced.

5. The second paragraph of the **Return to Work - Last Chance Agreement for Officer Wesley Spitzer** states: In order to return to work and as a condition of continued employment, employee agrees to adhere to the terms specified below. Employee agrees to actively participate in the designed treatment plan including extended care, follow up requirements, and sustained participation in treatment. Employee understands that it is my employer's intent and obligation to have a work environment that is free from the effects of alcohol and this treatment plan is considered to be in employee and Cities best interests. Employee agrees to adhere to the terms specified below: City Ex. 2, p. 1.

6. Immediately following the 10 specific terms and conditions of the **Return to Work- Last Chance Agreement for Officer Wesley Spitzer**, and prior to the space for signature, the agreement contains the following language: Employee understands this Agreement does not guarantee employment or compensation for any period of time and acknowledges that strict adherence to these terms and conditions is required. Employee understands that refusal to cooperate and comply in any way with all the conditions delineated above and/or successfully complete the diversion program will constitute a failure to comply with this Agreement, which will result in discipline which may include termination.

Your signature below confirms that you have reviewed and considered the terms of this Agreement and agree to comply with the conditions of this Agreement. Ex. 2, p. 2.

7. Union representatives and the City continued to negotiate the details of the **Return to Work - Last Chance Agreement for Officer Wesley Spitzer** after Mr. Spitzer signed it on May 26, 2005. The Union and City

negotiated issues regarding how the cost of Mr. Spitzer's residential treatment would be paid (with the City agreeing to continue medical coverage and City contributions towards insurance coverage and to pay for any portion of Mr. Spitzer's residential treatment not covered by health insurance, during his 160 hour suspension and time off work while Mr. Spitzer was in treatment). The City and the Union executed two Letters of Agreement regarding the terms of the **Return to Work - Last Chance Agreement for Officer Wesley Spitzer**. City Exhibit 23(1) and 23(2). In addition to the City agreeing to cover costs

outside of the Collective Bargaining Agreement, the Letter of Agreement dated June 1, 2005 states:

1. That Police Officer Wesley Spitzer is required to participate in a 21 day Level III residential alcohol treatment program per a Last Chance Agreement and supplemental requirements of Dr. Tom Fuscia."

5. This LOA represents the complete resolution of all issues relating to the issuance and acceptance of a **Return to Work - Last Chance Agreement for Officer Wesley Spitzer**." Ex, 23(2).

8. In April of 2006, Captain Gustino counseled Officer Spitzer about the Last Chance Agreement. Dr. Fuscia, in a mid-treatment fitness for duty report, relayed concerns regarding Officer Spitzer's compliance with the alcohol treatment program to Captain Gustino. Captain Gustino prepared to terminate Officer Spitzer as a result of Dr. Fuscia's report, according to the terms of the Return to Work - Last Chance Agreement, but was convinced by Dr. Fuscia and union representatives that Officer Spitzer's behavior changed between March 24 and April 6, 2006. In an April 17, 2006, memorandum counseling Officer Spitzer regarding the Last Chance Agreement, Captain Gustino clearly and unambiguously put Officer Spitzer on notice that any future perception that Officer Spitzer was not adhering to the terms and conditions of the Return to Work – Last Chance Agreement would not be tolerated. Ex. 3.

9. On May 16, 2006, Mr. Spitzer took his last unannounced alcohol/drug test. Ex. 1, P 2 -3.

10. The test showed the presence of opiates in Mr. Spitzer's urine. Ex.1, p. 2.

11. On May 22, 2006, prior to releasing the results of the test to the City, the office of the occupational physician, Dr. Ferguson, contacted Mr. Spitzer and Mr. Spitzer's supervisor, to see if Mr. Spitzer had an explanation for the opiates in his system.

12. Mr. Spitzer told Dr. Ferguson's office and his supervisor that he had consumed prescription codeine cough medicine. The prescription was for his child, not for Mr. Spitzer. Because the prescription was not for Mr. Spitzer, Dr. Ferguson considered the urinalysis positive for opiates. Ex. 1, p. 1.

13. The results of the test were received by the City on May 24, 2006. Ex. 1, p. 1.

14. The City began an internal investigation process on May 31, 2006. Mr. Spitzer was informed in writing of the purpose and scope of the investigation and his rights to representation. Ex. 5.

15. In an interview conducted during the course of the internal investigation, in the presence of union representatives, and after receiving Garrity assurances regarding any use of his statements during a criminal

investigation, Mr. Spitzer was again informed of the purpose and scope for the investigation. Ex. 13 & 15. During that interview, Mr. Spitzer confirmed that he had taken and consumed a prescription cough medicine containing codeine, even though the medicine was not prescribed to him. Ex. 15, p. 6 - 11.

16. The Benton County District Attorney, Scott Howe, reviewed the Oregon State Police memorandum on this incident, and stated the following in an email dated July 17, 2006:

Jon,

I have a memo from OSP Lt. Davenport responding Chief Bonjurno's request that OSP look into Officer Spitzer's positive UA for opiates. As Chief Bonjurno foreshadowed in his memo to Lt. Davenport, given the way Officer Spitzer's positive UA result came to light (via compelled disclosure as part of ongoing employee disciplinary process and investigation involving a "Return to Work - Last Chance Agreement") criminal prosecution of Officer Spitzer for his use of his son's prescribed medication (a very thin PCS case at best, assuming we even

have venue in Benton County) is not possible as Officer Spitzer has immunity for

this conduct. ORS 663.265; Garrity v. New Jersey, 385 US 493, 87 Sct 616 (1967), as applied in Oregon, given that Oregon is a "transactional immunity" state rather than a "use immunity" state, (see, generally, State v. Soriano, 68 OR App 642 affirmed 298 OR 392 (1984)).

Let me know if you have any questions. Thanks. SAH Ex. 21.

17. On July 25, 2006, prior to closing the internal investigation, Captain Dan Gustino called Dr. Tim Mustacholi, the treating psychiatrist designated as the only physician authorized to prescribe psychoactive medications and coordinate prescription medications for Mr. Spitzer, pursuant to Term 3 of the Return to Work - Last Chance Agreement. Captain Gustino asked Dr. Mustacholi the following two questions:

a. Do you consider codeine to be a psycho-active drug capable of triggering alcohol craving? Dr. Mustacholi said codeine is controlled substance and is an opiate drug. Dr. Mustacholi said because codeine is an opiate, it is not a cross-tolerant drug that would normally be considered a trigger for alcohol cravings. Dr. Mustacholi said benzodiazepines are the drugs that could trigger the cravings, not opiates.

b. Whether you would have prescribed the cough syrup he (Officer Spitzer) consumed – the cough syrup containing codeine? Dr. Mustacholi said he would not have prescribed cough syrup containing codeine, he would have prescribed an over-the counter cough syrup. Ex. 22.

18. When asked in the internal investigation interview why he used his son's prescription medication, Mr. Spitzer stated the following:
Basically on the night of the 15, Monday night. For my Friday shift Tuesdayth morning. That was the couple of weeks there that I had the whopping [sic] cough. I don't know if you heard me around work or not. Horrible cough. Basically what happen was that night, Tuesday night, correction Monday night, I basically ran out of my meds from my sleep meds. It was around ten

o'clock, couldn't get to sleep. No sleep medication. There was, I had went to the counter to try to find something to comfort my cough or let me sleep. My son had some codeine, it was codeine and, ah, pseudometaphine and codeine which he got for an ear infection a day or two earlier. I took what I guess was about two tablespoons and went to bed and went to sleep and that's how the next morning must have come back. I honestly thought it would be out of my system. It was around ten o'clock when I took it, and I think the test was around ten o'clock. I was, I was surprised it was in my system. Basically took it so I could get some relief from the cough so I could get sleep for my Friday. Ex. 15. P. 6 of 11.

19. When asked if this was a prescription for his son, Mr. Spitzer agreed. Ex. 15. P 7 of 11.

20. When the interviewer stated that Dr. Mustacholi was the only one allowed to give Mr. Spitzer prescription drugs, Mr. Spitzer agreed that the interviewer's statement was correct. Ex. 15. P. 7 of 11.

21. During the interview, Mr. Spitzer described the process for getting prescription drugs approved by Dr. Mustacholi. Ex. 15, p. 7 of 11.

22. During the interview, Mr. Spitzer explained that he knew that codeine was a prescription drug, and that he understood the last change agreement says the he will not take prescription drugs except as allowed by Dr. Mustacholi. Ex. 15, p. 8 of 11.

23. When asked if he was aware of the City's Drug Free Workplace Policy, Mr. Spitzer said: I had it a few times. I honestly didn't think, you know, it said four to six hours on the prescription. I thought I was well within that by going to sleep about 10 o'clock at night. I didn't see that I was going to lead over into anything the next day. I didn't think it was an issue. Ex. 15, p. 9 of 11.

24. When asked if he was aware that Codeine, the opiate is a precursor for the

alcohol, Mr. Spitzer and the interviewer had the following exchange:

Q: Are you aware that the Codeine, the opiate is a precursor for the alcohol.

A: They say it activates.

Q: Activates your urge.

A: It re-activates it. That's true. And I understand that. I wasn't looking at it to reactivate my alcohol but to relieve my cough and to go to sleep. That was my

main, my purpose. Ex. 15, p. 9 - 10.

25. Based on the internal investigation, the City sustained allegations that Mr. Spitzer had violated the following Police Department General Orders and City Policies:

General Order 1.9.2 Duties of All Police Department Members

A. General

It shall be the duty of all members of the Corinth Police Department, both sworn and civilian, to maintain a course of conduct that benefits the City and the Police Department, and will not adversely reflect upon the City, the Police Department or the member.

B. Obedience to Orders

Each member of the Police Department shall obey and fully execute any lawful order, written or oral, given by a supervisory member, which shall

include, but not necessarily be limited to the Rules and Regulations, General and Special Orders and the Policies and Procedures of the Police Department. The term lawful order shall be construed as any duty prescribed by law or by these Rules and Regulations, or for the preservation of good order, efficiency and proper discipline.

P. Rules of the City of Corinth

Members of the Police Department shall comply with all City of Corinth rules and procedures as they pertain to City employees, including information in the City Employee Handbook and in the City Administrative Policy Manual.

General Order 1.9.3 Prohibited Acts

C. Possession/Purchase or Use of Cannabis or Controlled Substances

Possession/Purchase and/or use of Cannabis and/or Controlled Substances except when the possession/purchase is as a result of official duties or the purchase/use is in compliance with a prescription and the orders of a licensed physician.

AJ. Conduct Unbecoming a Member

Conduct which adversely affects the morale or efficiency of the Police Department, or conduct that tends to bring the Police Department or the member into disrepute, or conduct that reflects discredit upon the member as an element of the Police Department or member.

AV. Violation of Law

Violation or attempted violation of any Federal, State, County or Municipal law while on or off duty.

AAH. Duty to Read/Understand/Comply With Orders

Failure to read, understand or comply with Rules and Regulations, Policies and Procedures, General and Special Orders or Written or Verbal orders of a supervisor.

City of Corinth Administrative Policy AP 96-3.06 Drug Free Workplace

3.06.033 The unlawful manufacture, distribution, sale, dispensation, possession, or use of a controlled substance on City premises or while conducting City business off of City premises is absolutely prohibited and will not be tolerated.

City action is not contingent on conviction.

26. The investigation found the allegation that Mr. Spitzer had violated the following City Policy to be unsubstantiated:

3.06.034 Normal use of prescription medication is not grounds for disciplinary action. However, employees taking prescription medication that may impede or

otherwise affect their ability to safely and efficiently perform job assignments shall report the medication to their manager or Department Director prior to beginning work. An effort will be made to place this employee in a position

that

will not create a safety problem for either the employee or others around him/her. If the employee fails to report this medication and is determined to be "impaired," he/she will be subject to the same discipline as any other employee who comes to work impaired.

27. Based on the results of the internal investigation, the City terminated Mr. Spitzer.

28. The union grieved Mr. Spitzer's termination pursuant to Article 19 of the Collective Bargaining Agreement.

29. The City denied the grievance at each step, and the parties put the matter before this Arbitrator.

ARGUMENT

Mr. Spitzer violated the specific and general terms and conditions of the Return to Work- Last Chance agreement. His continued employment with the City was conditioned upon his complying and adhering with those terms and conditions. The City properly terminated Mr. Spitzer. The underlying facts in this case are not in dispute, although the parties certainly are likely to characterize them differently. Mr. Spitzer entered into the Return to Work – Last Chance Agreement. The Union and the City negotiated the terms of that agreement. The

Union affirmed its acceptance of the Return to Work - Last Chance Agreement in the negotiated Letters of Agreement executed on May 27, 2005 and June 1, 2005. Dr. Fuscia provided the specific provisions of the Return to Work - Last Chance Agreement, including all of the provisions related to alcohol or drug treatment. Mr. Spitzer, the City and the Union agreed that Mr. Spitzer would comply with the treatment requirements in the Return to Work – Last Chance Agreement. Ex. 23(2). Mr. Spitzer, the City and the Union agreed that all the issues regarding the issuance and acceptance of the Return to Work – Last Chance Agreement were resolved as of June 1, 2005. Ex. 23(2). The Union does not seem to dispute the accuracy of the drug/alcohol test, or the fact that the drug/alcohol test was limited to screening for the substances listed by Dr. Fuscia. The City has accepted at face value Mr. Spitzer's statements that the opiates that were in his system were the result of taking a prescription

medication, although the tests do not rule out a different source. The Union does not seem to dispute the factual findings or the process of the City investigation, and does not seem to dispute the fact that Mr. Spitzer was given due process in terms of the investigation and grievance processes. The Union did not provide any evidence that calls into question whether the prescription medication at issue contained codeine, or whether the illegal possession of the prescription medication at issue constitutes a felony.

Mr. Spitzer knew or should have known he was committing a felony when he consumed a prescription medication prescribed to another person.

The internal investigation correctly concluded that Mr. Spitzer had violated department policies and orders prohibiting criminal behavior on the part of

employees. Although the Union has attempted to characterize Mr. Spitzer's actions as commonplace and trivial, they are not. The Union has implied that Mr. Spitzer's actions were so innocent that they should not be seen as criminal in nature. But when Mr. Spitzer took and consumed a prescription medication containing codeine that was not prescribed to him, he committed a felony. He knew that the medication was not prescribed to him. He knew it contained codeine. As police officer he knew or should have known that a prescription medication containing codeine is a controlled substance. As a police officer he knew or should have known that possession through consumption of a controlled substance is a crime. As a police officer, he knew or should have known that there is no exception allowing family members to share prescription drugs. Mr. Spitzer's statements in the internal affairs interview seem to show that when he consumed the drug, part of his reasoning was that the amount he took would leave his system and be undetectable prior to his return to work the next day, based on the dosage frequency information on the package. Ex. 15, p. 9 of 11.

Mr. Spitzer was not charged with or convicted of a felony. But he admitted that he did, in fact, take the prescription drug, knowing that it was a prescription drug, and knowing that it was not prescribed to him. There was no testimony or evidence introduced that indicated that this behavior was not a crime and that the crime would not be classified as a felony. There was some questioning of management that inquired as to whether Mr. Spitzer, as a parent, was the custodian of his children's prescription drugs, and so had legal possession of the medication. This is true, as far as it goes, but, once Mr. Spitzer ceased to keep the drugs for his children and began self-medicating, he committed a felony. While probably his consumption of the drug constituted use and possession through consumption, it could also be seen as illegal distribution(to himself) of a controlled substance. Mr. Spitzer's status as a parent of a child with a prescription did not give him permission to distribute this opiate to any other person, including himself. The email from the District Attorney, Ex. 21, does not state that Mr. Spitzer was not guilty of a crime, or even say that there was insufficient evidence to form probable cause that Mr. Spitzer committed this felony. The email indicates that without Mr. Spitzer's admissions and without the urinalysis, there would not likely be sufficient evidence of the felony to proceed with the case. Whether Mr. Spitzer was charged or convicted is largely irrelevant. His behavior was a felony and he admitted that he did it. There simply is no basis for the idea that this felony is a trivial matter that anyone with a cough or sleepless night would commit. Earlier in the grievance process, the Union argued that because he was tired and coughing, Mr. Spitzer was unable to form a criminal intent. Instead, his action was merely thoughtless. Mr. Spitzer's account doesn't support this interpretation. He knew, for example, that he had run out of his prescription sleep aid. He knew that his son had been given this prescription a day or so before, and he knew the effect that codeine had on him. He also calculated that at ten o'clock at night he could give himself a

two-tablespoon dose, and not be impaired when he returned to work (in the alternative, he calculated that if tested it would no longer be detectable when he returned to work). Mr. Spitzer's statements seem to indicate that he knew what he was doing, what he was taking, that he knew what the effect of that medication would be, but that he made an incorrect assumption about when the medication would leave his system. In his interview, Mr. Spitzer's surprise seems to be directed toward the fact he got caught, not that he had done something criminal in nature. Mr. Spitzer also testified that establishments that could have sold him over the counter cough aids were mere minutes from his home. Instead, he looked for and found prescription medication that he knew he was not supposed to use, because he knew and desired the way codeine affected him.

This is not mere thoughtlessness, this was Mr. Spitzer's conscious choice to do the wrong thing.

Drug Free Workplace Administrative Rules

The arbitrator should note that the internal investigation correctly resulted in a finding that Mr. Spitzer violated the City's Drug Free Workplace rules. When Mr. Spitzer came to the workplace after self-medicating, he clearly violated this City Policy. The Union has argued that Mr. Spitzer did not violate the policy, focusing on language in Section 3.06.034 of the Policy. This argument requires ignoring significant portions of the policy. Within this policy, Section 96-3.06 defines prescription medicine: "Prescription medication is specifically defined

as medication prescribed for the employee." Ex. 20, p. 1 of 5. Section 3.06.034 states that "[n]ormal use of prescription medication is not grounds for disciplinary action. However, employees taking prescription medication that may impede or otherwise affect their ability to safely and efficiently perform job assignments shall report the medication to their manager or Department Director prior to beginning work. ***" Ex. 20, p. 2 of 5.

Mr. Spitzer knew that codeine was a controlled substance. He knew that the codeine he took was not prescribed to him. He knew or should have known that codeine had a narcotic effect on him. He knew or should have known that taking a controlled substance without a prescription "may" have impeded or otherwise affected his ability to safely and efficiently perform his job assignments. Mr. Spitzer knew or should have known that he was required to report his use of codeine to his supervisor. Failure to do so was a violation of the City policy.

Even if the policy does not anticipate a person reporting his illegal use of prescription drugs to his supervisor, Mr. Spitzer's use of his son's prescription drug was clearly not a "normal use of prescription medication" as defined and allowed under the policy. Finally, Section 3.06.033 of the policy is clear that "[t]he unlawful manufacture, distribution, sale, dispensation, possession, or use of a controlled substance on City premises or while conducting City business off of City premises is absolutely prohibited and will not be tolerated. City action is not contingent on conviction." Ex. 20, p. 2 of 5. When Mr. Spitzer reported to work with opiates in his system that came from his consumption of a prescription medication that was not his own, he was in

possession and using a controlled substance, while he was either on City premises or while conducting City business as a police officer. The arbitrator should note that this policy does not require the employee to be impaired or impeded in any manner by such a controlled substance. Mr. Spitzer's felonious act in taking the controlled substance the night before resulted in this violation of the City Drug Free Workplace policy when he reported to work the next day.

Violation of the Last Chance Agreement

Mr. Spitzer violated the provisions of the Return to Work – Last Chance Agreement, in part because he committed a crime, but the fact that consuming the prescription medication in this case was both illegal and a violation of City policy is not the only violation of the agreement. Under the provisions of the Return to Work – Last Chance Agreement, he was required, "as a condition for continuing employment". . . "to adhere to the terms specified" in the agreement. Ex. 2, page 1. The last specific term of that agreement is that Mr. Spitzer was required to "adhere to all Federal, State, County, City laws, and City and Police Department rules and regulations." Ex. 2, page 2. Mr. Spitzer failed to adhere to the law when he illegally consumed the prescription medication. The same action violated the Police Department rules and regulations regarding following orders, complying with City policies, the possession and use of a controlled substance, conduct unbecoming a member, violation of law, and the City Drug Free Workplace Policy. As his signature on various documents in evidence demonstrates, Mr. Spitzer was aware of these rules and regulations. E.g. Ex. 7 & 8

. In violation of the Law Enforcement Code of Ethics, Mr. Spitzer failed to be exemplary in obeying the laws of the land and the regulations of the department. In this case, for his own conduct, he asks the City to compromise with him regarding this particular crime, again in violation of the Law Enforcement Code of Ethics. Ex. 8. In short, Mr. Spitzer's behavior was a clear violation of Term 11 of the Return to Work – Last Chance Agreement. On this basis alone, the City has the right to terminate his employment. He has clearly failed to meet this condition for continued employment.

Most seriously, in terms of Mr. Spitzer's employment, even if Mr. Spitzer had obtained the prescription for himself (so that his possession and consumption of the drug had not been illegal, and therefore had not been a violation of the City's Drug Free Workplace policy), as long as Mr. Spitzer failed to coordinate this prescription through Dr. Mustacholi, Mr. Spitzer still would have violated the Return to Work – Last Chance Agreement and still would be subject to termination. While in this case, Mr. Spitzer did violate the law, he also violated the agreement by failing to have the use of this prescription medication approved or coordinated with Dr. Mustacholi. Term 3 of the agreement requires Mr. Spitzer, as a condition for continued employment, to have "a treating psychiatrist to be designated as the only physician authorized to prescribe psychoactive medications and coordinate prescription medications for twenty-four months." Ex. 2, p.1. Mr. Seltzer's self-medication is a violation of Term 3.

He failed to meet this condition for continued employment. He failed to do so through a deliberate and criminal act.

Regarding Term 10, Mr. Spitzer may not have technically violated this term of the agreement. He did submit to the tests. The City properly a Doctor administer the tests. As long as he took the tests, and as long as the MD tested for the substances listed in the term, there could be no violation of Term 10. Of course, implied in Term 10 is that there will be no positive results for any of the listed substances in any of the six tests for alcohol, benzodiazepines, or opiates. Of course, Mr. Spitzer's illegal use of a controlled substance calls into question whether the treatment plan was successful in Mr. Spitzer's case. Given the short amount of time left for the City to retest, the stern memo from Captain Gustino, and the intensive nature of the treatment plan, it is hard to imagine how Mr. Spitzer could have made a worse choice.

Validity of Return to Work – Last Chance Agreement

In the earlier stages of the grievance process and in the Statement of Issue and Union Contentions dated March 20, 2007, the Union took the position that the Return to Work – Last Chance Agreement is not a last chance agreement “as that term is commonly known in labor law.” The Union has given several reasons for this rationale: the agreement does not specifically eliminate due process, the agreement does not require the City to terminate the employee, and the agreement does not specifically waive “just cause” provisions for justifying termination.

Regarding the Union's position that a valid last chance agreement may not allow for due process, the Union has turned a current controversy on its head. There is a considerable controversy as to whether a last chance agreement can be enforced at all if it contains language purporting to eliminate due process provisions from a collective bargaining agreement. The late Arbitrator Carlton J. Snow authored a 1991 Willamette Law Review article: SHOULD ARBITRATORS HAVE THE LAST WORD ON “LAST CHANCE” SETTLEMENT AGREEMENTS? (27 Willamette L. Rev. 513, attached). In that article, Arbitrator Snow argues convincingly that a last chance agreement which requires an employee to waive any future right to appeal any subsequent discipline would render that agreement over-broad because it would conflict with any Collective Bargaining Agreement which did not specifically provide an exception to the grievance/arbitration process for last chance agreements. Arbitrator Snow correctly assumes that thoughtful employers would prefer to have the grievance/arbitration rights set out in the Collective Bargaining Agreement apply to last chance agreements, because it allows the employer to receive an endorsement of the employer's action to terminate by the Arbitrator and removes from the employee any suspicion that the employer acted capriciously. Snow, p. 2 (515).

Arbitrator Snow's advice was echoed in Elkouri & Elkouri, HOW ARBITRATION

WORKS, 5 Edition, 1997: Citing Arbitrator William Daniel for the proposition that

Arbitrators generally encourage the use of last chance agreement, Elkouri notes: "The arbitrator did note, however, that such agreements do have some limitations, and that neither the union nor the employee can, by the terms of the agreement, be deprived of access to the grievance and arbitration procedure."

While this case is a curious example of a union arguing that an employer provided too much due process in terminating an employee, the argument that the Return to Work – Last Chance Agreement in this case should be invalid because it did not require the employee and union to waive due process, has no basis in labor law.

AGREEMENT DOES NOT REQUIRE TERMINATION

The Union states that this particular agreement, despite the title "Return to Work – Last Chance Agreement" does not require the City to terminate Mr. Spitzer if he violated the agreement, and somehow that degree of discretion in favor of the City should render the agreement invalid. From the City's perspective, this argument must be considered in the context of just cause. If the City had terminated Mr. Spitzer for a violation of a Police Department rule or City policy that was completely unrelated to the underlying purpose of the Return to Work – Last Chance Agreement, then, regardless of the terms of the agreement, the termination would not have been for just cause and would not have been consistent with the terms of the Collective Bargaining Agreement. While it is possible to arrive at hypothetical violations that illustrate situations where Mr. Spitzer should not have been terminated (insufficient attention to reports or an unsightly uniform), it is not particularly fruitful to do so. The concrete situation presented by Mr. Spitzer's behavior in this case is entirely related to his substance abuse problem, entirely related to the underlying purpose of the agreement and therefore sufficient to show "just cause" for his termination.

Mr. Spitzer entered into a last chance agreement because he committed a crime related to his substance abuse problem. The agreement is focused on treatment for his substance abuse problem. The treatment plan was provided by a substance abuse professional and incorporated into the agreement. Mr. Spitzer violated that agreement and, in the course of doing so, again committed a crime related to his substance abuse problem. A last chance agreement does not require a waiver of "just cause" because, if the agreement is narrowly focused and properly applied, violation of the agreement will always constitute "just cause." The Arbitrator should view the last chance agreement as the parties agreement that violating the terms of the agreement is just cause for termination.

The agreement at issue contains unambiguous language that Mr. Spitzer's successful completion of all the terms of the agreement is a condition for his continued employment with the City:

In order to return to work and as a condition of continued employment,

employee agrees to adhere to the terms specified below. Employee agrees to actively participate in the designed treatment plan including extended care, follow up requirements, and sustained participation in treatment. Employee understands that it is my employer's intent and obligation to have a work environment that is free from the effects of alcohol and this treatment plan is considered to be in employee and Cities best interests.

Employee agrees to adhere to the terms specified below:

The Union focuses on language in the agreement that states: Ex. 2, p. 1.

Employee understands this Agreement does not guarantee employment or compensation for any period of time and acknowledges that strict adherence to these terms and conditions is required. Employee understands that refusal to cooperate and comply in any way with all the conditions delineated above and/or successfully complete the diversion program will constitute a failure to comply with this Agreement, which will result in discipline which may include termination. Ex. 2, p. 2.

Read together, in context, this agreement put Mr. Spitzer on clear and unambiguous notice that his job was at stake. He needed to strictly adhere to the terms of the agreement or he could be terminated.

Arbitrator Snow's article includes an example of a narrowly tailored last chance

agreement. That example, like the one in this case, specifically includes language that warns the employee that the consequences for failing to comply with the terms of the agreement "will subject you to disciplinary action up to and including discharge." Snow, FN 8, p. 16.

In this case, the Return to Work – Last Chance Agreement was entered into after Mr. Spitzer committed a criminal act associated with a controlled substance. He drove while he was drunk. Instead of terminating him, the City agreed to enter into a Return to Work – Last Chance Agreement. The Return to Work – Last Chance Agreement was narrowly tailored to require Mr. Spitzer to rehabilitate himself through treatment for his substance abuse problem. No reasonable person reading the plain language of the Return to Work – Last Chance Agreement could come to the conclusion that Mr. Spitzer was not on notice that he was required to successfully complete certain tasks as a condition of continued employment. The agreement made it clear that Mr. Spitzer's continued employment was conditioned upon successfully completing those tasks, and that if he failed to "strictly adhere" to the terms of the agreement, he would be subject to discipline, "which may include termination." The City's requirement that Mr. Spitzer complete these tasks and also that he not violate any law, is clearly related to the City's orderly, efficient and safe operation of the Police Department and to Mr. Spitzer's performance as a police officer. The City completed a fair and objective investigation. The investigation provided the City with substantial evidence that Mr. Spitzer committed a felony, and had violated the City's Drug Free Workplace Policy, in addition to failing to comply with the specific terms of the Return to Work – Last Chance Agreement regarding prescription drugs. The City has used similar Return to Work – Last Chance Agreements for other employees who

had DUII charges. Termination in this case resulted from Mr. Spitzer again violating the law in a manner that was again related to his use of a controlled substance. Based on these facts, the City had “just cause” to terminate Mr. Spitzer. See Snow p. 3 (*517-518) and FN 23, setting out Arbitrator Carroll Daugherty’s guidelines for “just cause”.

Testing for Opiates

It is possible that the union will argue that the language in the Return to Work – Last Chance Agreement regarding the unannounced drug/alcohol test screening only for “alcohol, benzodiazepines and Opiates which are re-activating alcohol craving prescription medications” does not accurately reflect the best medical or scientific thinking regarding opiates, and therefore the results of the test showing opiates in Mr. Spitzer’s system should not be considered as violation of the agreement. A better way to view this is that neither Mr. Spitzer nor the Union raised an issue with the inclusion of the opiate screen in the testing procedure as a substance which would induce alcohol craving. When Dr. Fuscia included opiates as part of the treatment plan, he may have been mistaken regarding the effect of opiates on alcohol craving, but if he was, the City, the employee, and the union did not know that. At the time Mr. Spitzer was interviewed during the internal investigation, Mr. Spitzer agreed that he had

been told opiates would reactivate his craving for alcohol. Mr. Spitzer was clearly on notice that he would be tested for these substances, and he was clearly on notice that if he had opiates in his system the consequences would be dire. Dr. Mustacholi, the designated psychiatrist, said he would not have prescribed codeine cough medicine for Mr. Spitzer. The Union objected to testimony about why Dr. Mustacholi would not have prescribed this medication for Mr. Spitzer,

as the City learned this information after Mr. Spitzer was terminated. Just as the City did not know why Dr. Mustacholi would not have prescribed codeine to Mr. Spitzer prior to discipline, none of the parties had any reason to believe that opiates would not create an alcohol craving issue for Mr. Spitzer prior to discipline. There was no testimony from Dr. Fuscia (or Dr. Mustacholi for that matter) about whether Mr. Spitzer’s specific treatment plan included this language because of some reason peculiar to Mr. Spitzer’s problems.

Regardless, the agreement contained this language, the parties agreed that Mr. Spitzer would be tested for opiates, the test was properly conducted, and Mr. Spitzer illegally had opiates, a controlled substance, in his system while he was at work for the City as a police officer on the day of the test.

Waiving the Right to Terminate by Not Terminating for Earlier Violations

Finally, the Union may argue that Captain Gustino’s April 17, 2006, memo reflecting the counseling Mr. Spitzer received (after Dr. Fuscia reported that Mr. Spitzer was not actively participating in his treatment) shows that the City “waived” its right to terminate Mr. Spitzer, because once the City failed to enforce the agreement and terminate Mr. Spitzer for violating the agreement,

Mr. Spitzer was lulled into a sense of false security and had no reason to believe the City would enforce the agreement in the future. In this case, just cause required the City to make it clear to Mr. Spitzer that the City intended to enforce the agreement in the future. A reasonable person reading the plain and forthright language from Captain Gustino's April 17, 2006 memo cannot come to any conclusion other than Mr. Spitzer having clear notice that the City intended to enforce the agreement in the future. The only question is how, less than a month after Captain Gustino provided Mr. Spitzer with this plain set of expectations, Mr. Spitzer could still think he would be employed after he acted in a manner which violated the agreement and the criminal law.

PROGRESSIVE DISCIPLINE

In this case, even if Mr. Spitzer's termination is not justified by the Return to Work – Last Chance Agreement itself, termination for his criminal behavior is consistent with the principles of progressive discipline and the Collective Bargaining Agreement. Due to his poor decision to drive under the influence of alcohol, and the resulting arrest on May 19, 2005, Mr. Spitzer, received discipline. That discipline included a suspension without pay for 160 hours. Ex. 25(3).

In May of 2006, when Mr. Spitzer made a second poor decision regarding his use of a controlled substance, the next logical step in progressive discipline after such a lengthy suspension is termination. Collective Bargaining Agreement Sections 28.2 and 28.2. Collective Bargaining Agreement Section 28.1 also specifically allows discharge when a violation of a City policy or work practice is of a serious enough nature. In this case, where a police officer committed a felony controlled substance violation, while still in a treatment program paid for, at least in part by the City, the behavior is serious enough to allow discharge. Accordingly, whether under the Return to Work – Last Chance Agreement, under the principles of progressive discipline as set out in the Collective Bargaining Agreement, or as a violation serious enough to allow discharge without progressive discipline, the City acted appropriately in terminating Mr. Spitzer's employment as a police officer.

Conclusion

In this case, the parties entered into a last chance agreement because Mr. Spitzer had committed a criminal offense which could have resulted in his termination. Instead, he received a lengthy suspension, but also received financial support from the City to accommodate his treatment for alcoholism. The agreement was narrowly tailored to address Mr. Spitzer's substance abuse problem, and the terms of the agreement were largely dictated by a substance abuse professional. The agreement did not deprive Mr. Spitzer of his rights under the Collective Bargaining Agreement to grieve and arbitrate discipline administered under the agreement. Without getting approval from his Doctor, Mr. Spitzer used a prescription containing codeine in violation of the last chance agreement. This use was also a felony. The codeine was still in Mr.

Spitzer's system when he returned to work and was later tested for opiates, which was a violation of the City's Drug Free Workplace Policy. Mr. Spitzer admitted that he had taken the prescription medication without the permission of his Doctor.

The City provided Mr. Spitzer with due process. The Return to Work – Last Chance Agreement, and Mr. Spitzer's criminal behavior, constitute just cause for his termination.

For all these reasons, the Arbitrator should find in the City's favor, reject the grievance and sustain the termination of Wesley Spitzer.

Respectfully submitted,
CORINTH CITY ATTORNEY'S OFFICE

By: _____
Cruel Hearted Employer Lawyer