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2 Attorneys for IBT 299

4 BEFORE ARBITRATOR

5 GEORGE LEHLEITNER

6
7 In re the Grievance of:)

8 TEAMSTERS 299,)

9 Union ,)

10 and)

11 CITY OF CORINTH,)

12 Employer.)

13 (Spitzer Termination Grievance))

Statement of Issue and Union Contentions

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16 **STATEMENT OF ISSUE**

17 Was Wesley Spitzer terminated for just cause in accordance with Article 4.1 (11) and
18 28. 1 of the labor agreement?

19 If not, what is the appropriate remedy?

20 The arbitrator is asked to reserve jurisdiction for 60 days to resolve remedial disputes.

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22 **RELEVANT CONTRACT PROVISIONS**

23 **ARTICLE 4 Management Rights:** which states in part:

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

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2 **ARTICLE 28 Disciplinary Process:** which states in part:

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

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- 13 1. The termination of Mr. Spitzer should be based upon just cause principles.
 - 14 a. Mr. Spitzer did not commit an act sufficiently serious to warrant
15 termination of his employment according to generally accepted just
16 cause standards.
 - 17 2. The City's position is that Mr. Spitzer has waived his rights to have his
18 discipline based upon just cause because he signed a "last chance
19 agreement".
 - 20 a. However, the agreement he signed while titled a "last chance
21 agreement" it was not in a "last chance agreement" as that term is
22 commonly known in labor law.
 - 23 i. Calling something a "last chance agreement" doesn't make it so.
 - 24 b. The agreement did not expressly waive Mr. Spitzer's contract rights to
25 just cause.

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- i. For a waiver of contractual rights to be effective, the waiver of rights must be clear and unmistakable.
 - ii. The agreement in this case states: "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."
 - iii. One of the rights under the labor agreement is that Mr. Spitzer can only be disciplined and discharged for just cause.
- c. Further, there is nothing in the agreement which mandates that violations will result in automatic termination.
- i. The agreement states, "...failure to comply with this Agreement, which will result in discipline which may include termination."
 - ii. Consequently, the level of discipline can reasonably be anticipated to vary based upon the severity of the violation of the agreement.
 - iii. The basis for making that determination is a matter of just cause.
- d. Finally, the termination letter itself indicates that Mr. Spitzer did not waive his right to file a grievance.
- i. The termination letter states: "it is your right under the City of Corinth and Corinth Police Officers' Association Agreement Article 19 to grieve this action." (See letter from Chief to Spitzer, September 7, 2006).
3. Mr. Spitzer did not violate the agreement he made with the City.

1 a. The Agreement requires that, among other things, that Mr. Spitzer be
2 tested “only for alcohol, Benzodiazepines and Opiates which are re-
3 activating alcoholism craving prescription medications.”

4 i. Mr. Spitzer’s positive test for Opiates was the result of his taking
5 his son’s ear infection medication with a small amount of
6 codeine.

7 ii. There is absolutely no evidence from any source, including the
8 physicians in this case, that Spitzer’s taking this medication
9 would have caused “alcoholism craving”.

10 1. Dr. McCarley states that codeine “is not a cross-tolerance
11 drug that would normally be considered a trigger for
12 alcohol cravings” (see memo from Captain Salyeri to
13 Chief Bonjurno, July 25, 2006)

14 b. The Agreement also requires that the employee adhere to eight other
15 requirements during the term of the agreement and there is no
16 evidence that he violated any of those terms.

17 4. The law and/or the facts do not support the City’s assertions in its termination
18 letter of September 7, 2006 in this case.

19 a. The City asserts that Spitzer, “knew or should have known that taking
20 a prescription drug that is not prescribed to you is the unlawful
21 possession and use of a controlled substance—a crime under the
22 Oregon Revised Statutes.”

23 i. This statement is contradicted by the District Attorney Scott
24 Howe in Benton County who states in a memo to the
25 department regarding this very question that this is, “a very thin

1 PCS (possession of controlled substance) case at best.” (See
2 memo from Howe to Jon Salyari, July 17, 2006).

3 ii. Mr. Spitzer was neither charged nor prosecuted for this alleged
4 crime.

5 iii. Mr. Spitzer was in control of this substance because the
6 prescription was for his minor son. Consequently, Spitzer was,
7 along with his wife, the custodian of the medication.

8 b. The termination letter also asserts, “Based on your training, the
9 employee handbooks, and the General Orders, you knew or should
10 have known that the city and department have drug-free workplace
11 policies that address the use of prescription drugs.”

12 i. The City policies on prescription drugs is that they can be used
13 unless there is an issue of the employee’s “ability to safely and
14 efficiently perform job assignments” (See policy 3.06.034)

15 ii. There is no allegation that Mr. Spitzer was impaired when he
16 came to work, nor that his ability to safely and efficiently perform
17 his job was in any way compromised.

18 c. The termination letter goes on to assert: “You knew or should have
19 known that the use of a prescription drug that is not prescribed to you
20 is not consistent with the drug-free workplace policies.”

21 i. The polices simply do not cover this topic.

22 d. The termination letter then asserts: “You knew or should have known
23 that you were to report your use of a prescription drug that could affect
24 your work performance to you supervisor”,
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- i. The requirement under the City policy is to report to supervisors medications that impair efficiency and safety. (See policy 3.06.034)
 - ii. There is no allegation that Mr. Spitzer was impaired in any way, much less in a manner that effected safety or efficiency. Thus there was no duty to report the use of the medication to supervisors.
5. The City failed to apply progressive discipline according to Article 28 of the labor agreement and generally recognized principles of just cause referenced in both Articles 4 and 28 of the labor agreement.

Dated this 20th day of March, 2007

Union Lawyer