

1 Union Lawyer
1000000 Something for Nothing Street
Easy, OR 97000

2 Attorney for IBT 299

4 BEFORE ARBITRATOR

5 GEORGE LEHLEITNER

6 In re the Grievance of:

8 TEAMSTERS 299,

9 UNION , CLOSING STATEMENT

10 AND

11 CITY OF CORINTH,

12 EMPLOYER.

13 (Spitzer Termination Grievance)

15 **I. STATEMENT OF THE ISSUE**

16 Was Wesley Spitzer terminated for just cause in accordance with Article 4.1 (11) and
17 28.1 of the labor agreement?

18 If not, what is the appropriate remedy?

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

20 **II. RELEVANT CONTRACT PROVISIONS**

21 **ARTICLE 4: Management Rights:** This states in part:

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

24
25 **Article 28 Disciplinary Process:** This states in part:

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

8 III. FACTS

9 The basic facts underlying this grievance are not disputed. Officer Spitzer
10 (grievant) has worked for the City of Corinth Police Department (employer/department)
11 since 2002, approximately 4 years. On May 15, 2006¹ at 10:00 p.m., Officer Spitzer
12 was suffering from a cough that had been with him for several weeks. He went to the
13 medicine cabinet in his house and found cold medicine that had been prescribed to his
14 two year old son. He took two tablespoons and went to bed. In the morning Officer
15 Spitzer went to work. As a result of an agreement Officer Spitzer made with the
16 Department, upon arriving at work Officer Spitzer was ordered to conduct the sixth (of
17 six) unannounced follow-up urinalysis/drug tests at the Corinth Occupational Medicine
18 Office.

19 On May 22, 2006 the Department was informed by Occupational Medicine that
20 the test was positive for trace amounts of codeine. Officer Spitzer was placed on paid
21 administrative leave June 2, 2006 and an internal affairs investigation was initiated. On
22 September 7, 2006 Officer Spitzer received his letter of termination of employment from
23

24 ¹ This was the same day that Dr. Fuscia issued the final fitness for duty report stating that Officer Spitzer
25 participated in the final step of the fitness for duty evaluation on May 15, 2006. The letter stated that "...he
has completed the return to work agreement components spanning twelve months required by the
Corinth Police Department"

1 Chief Bonjorno. The letter from Chief Bonjorno refers to a Return to Work- Last Chance
2 Agreement that Officer Spitzer signed on May 25, 2005. Chief Bonjorno states in the
3 letter of termination that Officer Spitzer violated the agreement and was therefore
4 subject to termination because Office Spitzer committed a crime under the Oregon
5 Revised Statute by taking his son's cold medicine. Chief Boldiszar goes on to state that
6 Lieutenant Jon Kelly's investigation into Officer Spitzer's actions documented eight
7 Corinth Police Department Policies.

8 9 **IV. ARGUMENT**

10 Article 4 and Article 28 of the collective bargaining agreement set out a just
11 cause standard for discipline of employees. The agreement signed by Officer Spitzer
12 explicitly retained his rights to just cause under the collective bargaining agreement.
13 Officer Spitzer was not terminated for just cause.

14 15 **A. THE EMPLOYER MUST ESTABLISH BY CLEAR AND CONVINCING** 16 **EVIDENCE THAT SPITZER WAS TERMINATED FOR JUST CAUSE.**

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18 When an employee is discharged for alleged misconduct that carries a stigma of
19 general social disapproval, employers are usually held to a higher burden of proof than
20 would be required in a less severe discipline case. El Kouri and El Kouri, *How*
21 *Arbitration Works* (5th Ed. 1997) at 907. While some arbitrators require proof beyond
22 reasonable doubt, most require at least clear and convincing evidence. *Id.* Here, the
23 Department accused Office Spitzer of committing a crime under the Oregon Revised
24 Statute, yet failed to reference a specific number. The Department also accused Office
25 Spitzer of violating eight Corinth Police Department policies. These are serious

1 accusations against any employee, but especially damaging against a police officer.

2 If Officer Spitzer's termination is sustained by the arbitrator, these accusations
3 will stigmatize him within his own community and within law enforcement in general. In
4 light of the seriousness of these allegations, the Department must be required to
5 establish its case by clear and convincing evidence that Officer Spitzer was terminated
6 for just cause or that he was subject to a valid last chance agreement which explicitly
7 waived his right to just cause.

8 **B. THE AGREEMENT OFFICER SPITZER SIGNED WAS NOT A VALID LAST**
9 **CHANCE AGREEMENT AND THEREFORE DID NOT WAIVE JUST CAUSE.**

10 The Department discharged Officer Spitzer on September 7, 2006 for alleged
11 violation of a Last Chance Agreement (Agreement) because on May 16, 2006 a random
12 drug test determined that Officer Spitzer had trace amounts of codeine in his urine.
13 J-27. However, the Agreement signed by Officer Spitzer was not a Last Chance
14 Agreement, despite its title, as that term is commonly used in labor relations, for several
15 reasons. First, the Agreement did not expressly waive Officer Spitzer's contract rights
16 to just cause. J-2. For a waiver of contractual rights to be effective, the waiver must be
17 clear and unmistakable. The Agreement in this case states: "The Agreement is in no
18 way intended to restrict the rights guaranteed City or Employee pursuant to Federal,
19 State or City laws, rules or labor agreements." J-2. One of the rights under the labor
20 agreement is that Officer Spitzer can only be discipline and discharged for just cause.
21 J-24.

22 Second, there is nothing in the Agreement which mandates that a violation will
23 result in automatic termination. The Agreement states, "...failure to comply with the
24 Agreement, will result in discipline, which may include termination." J-2. Consequently,
25 the level of discipline can reasonably be anticipated to vary based upon the severity of

1 the violation of the agreement. Third, the only party who signed the Agreement was
2 Officer Spitzer. J-2. Management did not sign the agreement and neither did the
3 union. Captain Gustino testified that he drafted the Agreement with the assistance of
4 Dr. Fuscia and that this was only the second Last Chance Agreement the Department
5 had ever drafted. Even though Captain Gustino had very little training or experience in
6 drafting Last Chance Agreements, he, apparently, did not run this agreement by the City
7 attorney.

8 Fourth, the termination letter itself indicates that Officer Spitzer did not waive his
9 rights under the contract which include filing a grievance. The termination letter states:
10 "it is your right under the City of Corinth and Corinth Police Officers' Association
11 Agreement Article 19 to grieve this action" J-24 P-7. Finally, Captain Gustino
12 acknowledged during his testimony, on cross examination, that no clear waiver existed
13 and that he believed terminating Officer Spitzer was keeping with the policy of
14 progressive discipline. Management acknowledged in the Agreement, in their
15 termination letter, and verbally that Officer Spitzer retained his rights under the contract.
16 Officer Spitzer signed an Agreement titled a Last Chance Agreement, but it was not a
17 Last Chance Agreement in substance or in form. Since no valid Last Chance
18 Agreement existed, Officer Spitzer retained his right to be terminated only for just
19 cause.

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21 **C. ASSUMING THE AGREEMENT WAS VALID, OFFICER SPITZER DID NOT**
22 **VIOLATE THE AGREEMENT.**

23 The Agreement requires that, among other things, Officer Spitzer be tested "only
24 for alcohol, Benzodiazepines and Opiates which are reactivating alcoholism craving
25 prescription medications." J-2. Officer Spitzer's positive test for opiates was the result

1 of him taking his son's cold medicine with a small amount of codeine. There is
2 absolutely no evidence from any source, including the physician reports in this case,
3 that Officer Spitzer's taking this medication would have caused "alcoholism cravings".
4 In fact, Dr. Mustacholi, the doctor designated to coordinate Officer Spitzer's medication
5 by the Department, stated that codeine "is not a cross-tolerance drug that would
6 normally be considered a trigger for alcohol cravings." J-25. Officer Spitzer did not have
7 an alcoholic relapse as a result of taking his son's medication nor did it reactivate his
8 alcoholism cravings.

9 The Agreement also requires Officer Spitzer to adhere to eight other
10 requirements during the term of the agreement. There is no evidence that Officer
11 Spitzer violated any of those terms. On May 15, Doctor Fuscia issued Officer Spitzer's
12 Final Fitness for Duty Progress report. J- 4. Dr. Fuscia stated that Officer Spitzer "has
13 completed the return to work agreement components spanning twelve months required
14 by the Corinth Police Department." J-4. Neither the law, nor the facts support the
15 Department's assertion that Officer Spitzer violated the Agreement because he took his
16 son's prescription cough medicine. Officer Spitzer did not violate the Oregon Revised
17 Statutes, City Policies or City regulations.

18 However, even during the arbitration hearing held on March 22, 2007, Captain
19 Gustino remained convinced that Officer Spitzer was guilty of a class C felony. No facts
20 presented to Captain Gustino could change his mind. Officer Spitzer was not charged
21 with violating the law nor prosecuted by the Linda County D.A.'s office. In fact, no
22 criminal investigation regarding Officer Spitzer's action was undertaken by any police
23 department. Further, the accusation that Officer Spitzer committed a Class C Felony is
24 contradicted by the District Attorney Scott Howe in Benton County. District Attorney
25 Howe states in a memo to the Department regarding this very question that this is, "a

1 very thin PCS (possession of a controlled substance) case at best". J- 21. Officer
2 Spitzer was in control of his son's cough medicine because his son is a minor child.
3 Consequently, Officer Spitzer along with his wife, are the custodians of the medication.
4 However, Officer Spitzer was terminated because Captain Gustino decided, in his own
5 mind, that Officer Spitzer violated the law. The termination letter did not site the ORS
6 the Office Spitzer supposedly violated. When Captain Gustino read the ORS which he
7 believed was relevant, it clearly did not apply to Officer Spitzer's possession of his son's
8 cold medicine.

9 Even the interview with Dr. Frankie who administered the drug tests shows the
10 Officer Spitzer's positive test was extremely low. If the test would have been lower than
11 2,000, then Dr. Frankie would have called the test negative and done no further testing.
12 J- 14. This 2,000 mark was an arbitrary decision of Dr. Frankie because before he set it
13 at that level, he had to call everyone back because they had eaten poppy-seed muffins
14 for breakfast. J-14. If the test goes over the 2,000 level, then Dr. Frankie does further
15 testing. J-14. Lieutenant Kelly assumed that the 2,000 level must be very high and
16 that Officer Spitzer must have taken more than just a mouthful or spoonful to get to that
17 level. J-14. However, Dr. Frankie corrected him and said that Officer Spitzer's level
18 was consistent with taking two tablespoons of cough medicine and was a relatively low
19 dose. J-14. Officer Spitzer's test was 8,136. J-14. In comparison, someone taking
20 Tylenol III once or twice a day would have 20,000-30,000. J-14.

21 The termination letter also asserts, "Based on your training, the employee
22 handbook, and the General Orders, you knew or should have known that the city and
23 department have drug-free workplace policies that address the use of prescription
24 drugs." J-27. The City policy on prescription drugs is that they can be used unless there
25 is an issue of the employee's "ability to safely and efficiently perform job assignments."

1 See policy 3.06.034. There is no allegation that Officer Spitzer was impaired when he
2 came to work, nor that his ability to safely and efficiently perform his job was in anyway
3 compromised.

4 The termination letter goes on to assert: "You knew or should have known that
5 the use of a prescription drug that is not prescribed to you is not consistent with the
6 drug-free workplace policies." J-27. However, the policy simply does not cover this
7 topic. Officer Spitzer testified that he did not bring the medicine to work and no
8 evidence to the contrary was presented. The termination letter then asserts: "You
9 knew or should have known that you were to report your use of a prescription drug that
10 could affect your work performance to your supervisor." J-27. The requirement under
11 the City policy is to report to supervisors medications that impair efficiency and safety.
12 See policy 3.06.034. As Officer Spitzer testified, he was not impaired when he arrived
13 at work. Officer Spitzer did not violate the drug free workplace policy adopted by the
14 City or violate any other City policy or regulation. The Department failed to substantiate
15 any accusation they made against Office Spitzer in evidence or in testimony.
16 Therefore, his termination was not based on just cause and he did not violate the
17 agreement he made with the City.

18 The letter of termination that Officer Spitzer received from Chief Bonjorno was
19 predicated on a letter Chief Bonjorno received from Captain Gustino on July 5, 2006.
20 J-25 P-4. In Captain Gustino's letter, he stated that Officer Spitzer's action was a clear
21 and absolute violation of the Last Chance Agreement and that the Last Chance
22 Agreement must be taken literally. Captain Gustino called Officer Spitzer's conduct
23 egregious and indicated that Officer Spitzer sullied his private life by taking the cold
24 medicine. Finally, Captain Gustino ended his letter by stating that it was his "absolute
25 belief that the spirit and intent of the Last Chance Agreement must be upheld (that

1 Officer Spitzer had one and only one more opportunity to demonstrate he is worthy and
2 capable of continued employment) it is my recommendation that Officer Spitzer's
3 employment with the Corinth Police Department be terminated immediately. This letter
4 makes it clear that Captain Gustino did not understand the Agreement that Officer
5 Spitzer signed and also does not understand the concept of progressive discipline and
6 just cause.

7 Captain Gustino decided in his own mind that Officer Spitzer was unfit for duty,
8 had committed a crime and was unable to continue his job as an Officer. In his
9 testimony, Captain Gustino stated that he felt the agreement had to be applied literally
10 meaning that Officer Spitzer had to be terminated. However, if the agreement had been
11 interpreted literally by management, then they would have only been able to test for
12 drugs that in fact induced alcohol cravings as per the agreement. Dr. McFarley did not
13 consider codeine a drug that would induce alcohol cravings. No evidence was submitted
14 by management that codeine in fact induces alcohol cravings. If codeine does not
15 induces alcohol cravings, Officer Spitzer should not have been tested for codeine under
16 a literal interpretation of the agreement. Further, if the agreement Officer Spitzer
17 signed were interpreted literally by management, Officer Spitzer retained all of his rights
18 under the collective bargaining agreement which includes just cause for termination.

19 Officer Spitzer complied with every step of the recovery program outlined in the
20 Agreement he made with the Department. He did not violate any law or city policy or
21 regulation. Termination for his reflexive decision to take cold medicine is unduly harsh.
22 Further, this reflexive action caused no harm to the employer. Officer Spitzer is fit for
23 duty and should be reinstated to his job.

24 25 **V. REMEDY**

1 Article 5 and Article 28 of the bargaining agreement requires that the
2 Employer discipline for just cause. The Department did not have just cause to
3 terminate Office Spitzer. Officer Spitzer did not waive his rights to just cause by signing
4 the "Last Chance Agreement" presented to him from the Department. Even if the
5 arbitrator finds the "Last Chance Agreement" to be valid, Officer Spitzer's action did not
6 violate the agreement. Office Spitzer completed every step of the Agreement as
7 acknowledged by the employer's hand written check marks next to each requirement.
8 The termination of Officer Spitzer is base on management's mistaken understanding of
9 the Agreement Officer Spitzer signed and false belief that Officer Spitzer committed a
10 crime and deserved to be terminated. Given that the employer's decision to terminate
11 Officer Spitzer was based solely on the employer's erroneous understanding of the
12 agreement and their unsubstantiated belief that Officer Spitzer committed a crime which
13 violated the Oregon Revised Statute and City policy, the employer lacked just cause to
14 sustain Officer Spitzer's discharge. Thus, the appropriate remedy here is for the
15 Department to reinstate Officer Spitzer, with back pay.

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17 Dated this 17th day of April, 2007

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19 Union Lawyer
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