

proceeded to an arbitration hearing at which the parties were afforded the opportunity to present evidence through the testimony of witnesses and the introduction of exhibits.

ISSUES

Did the Employer have just cause to terminate the grievant? If not, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE IX - DISCIPLINE

9.1 The Employer will discipline employees for just cause only. Discipline will be in the form of:

- Oral reprimand
- Written reprimand
- Suspension
- Demotion
- Discharge

9.2 All discipline will be in written form.

ARTICLE X

10.1 The Employer and the Union agree that nothing in this Agreement shall limit or impair the rights of covered employees under the laws of the United States or the State of Minnesota.

FACTUAL BACKGROUND

Eric Grabmeier has been employed by the Stearns County Sheriff's Department since May 2007 when he began work as a correctional officer in the county jail. He was promoted to the position of Senior Deputy in April 2008. In that capacity, Grabmeier performs front-line law enforcement duties in the patrol division. As a licensed peace officer, Grabmeier carries a weapon and is assigned a patrol vehicle.

During his employment, Grabmeier received performance evaluations indicating that he met expectations in all areas. Prior to the events of August 2010, Grabmeier had never received discipline of any kind from the Employer.

The events leading up to this grievance took place on the evening of Monday, August 30, 2010, and the early morning hours of Tuesday, August 31, 2010. At about 8:00 p.m. on August 30, Grabmeier, who was off-duty, went to a party at the home of Paul Strong and Kaila Savage in Albany, Minnesota, which is about one mile from Grabmeier's residence. He proceeded to drink heavily over the next few hours. At some point, a stranger asked Grabmeier if he want to do some cocaine, and Grabmeier ingested two or three lines of powder cocaine and became extremely high.

At about 2:00 a.m., Grabmeier's wife, Amanda, arrived at the party seeking to bring her husband home. Mr. Grabmeier, however, seeking to avoid a confrontation with his wife, ran out of the party and headed for home on foot. When he arrived at his residence, Grabmeier found himself locked out, without a key, and without a cell phone. Grabmeier then proceeded to the Albany Police Station and let himself in using the code for the service door.

Albany police officer Jeff Eggert, a friend of Grabmeier's, had just finished his shift and was still on the premises when Grabmeier arrived. Grabmeier told Eggert that he was high on something and needed help. He also insisted that Eggert handcuff him so that he would not hurt himself or anyone else.

Grabmeier initially asked Eggert to call Nate Watson, another friend and a fellow deputy sheriff who lived in Albany. When Eggert was unable to reach Watson, Eggert then called Sergeant Kenneth Friday, who was the Sheriff's Office supervisor on duty that evening. There is some dispute in the testimony as to whether Grabmeier or Eggert was the genesis of this call. In

any event, after Sgt. Friday arrived, Grabmeier explained what had transpired and Sgt. Friday transported him to the St. Cloud Hospital.

Upon arriving at the hospital, Friday and Lieutenant Jon Lentz obtained a medical release and a blood draw from Grabmeier. Chief Deputy Bruce Bechtold then transported Grabmeier to an occupational medicine clinic where Grabmeier provided a urine sample. Following these steps, the Employer placed Grabmeier on paid investigative leave.

Sheriff John Sanner assigned Lt. Lentz to conduct an investigation into the incident. Lentz proceeded to interview a number of officers and other witnesses. He also interviewed Grabmeier who admitted that he had used cocaine on the evening of August 30, 2010 and that he had an ongoing drinking problem. Lt. Lentz's report concluded that Grabmeier had violated Sheriff's Office Rules 1.1, 1.4, and 1.5. These rules provide, in pertinent part, that:

- No member will knowingly violate any criminal law or ordinance (Rule 1.1).
- Peace officers will not use narcotics, hallucinogens, or other controlled substances except when legally prescribed (Rule 1.4).
- No member while off-duty will consume alcoholic beverages to an extent that he commits any public act which might bring discredit upon the Office (Rule 1.5).

In spite of these conclusions, however, Grabmeier was never charged with any criminal violation.

On September 24, 2010, Sheriff Sanner provided Grabmeier with a written Notice of Intent to Terminate. In that document, Sanner stated that termination was appropriate because:

. . . your tenure with the Sheriff's Office and service record prior to this incident does not outweigh the fact that use of illegal drugs, whether on or off duty, represents serious conduct that detracts from the respect, confidence, and faith of the community. As an individual charged with upholding the law, when faced with evidence that an individual was in possession of drugs, you did not act in a manner required of a peace officer on or off duty. Rather you chose to participate in the illegal activity.

Grabmeier's termination was effective on September 30, 2010.

Grabmeier enrolled in an outpatient chemical dependency treatment program with Recovery Plus on August 31, 2010. The program director, Tom Vaudt, testified that Grabmeier successfully completed the program despite missing several sessions due to his wife's health problems.

At the arbitration hearing, the Employer submitted evidence concerning additional conduct issues discovered following the discharge. This evidence purportedly shows that Grabmeier used marijuana approximately five times during the year prior to termination and that he has ongoing impulse control problems.

The Union, in turn, elicited testimony from Ted Boran, the former interim chief of police for the City of Albany. He testified that he hired Grabmeier after his discharge in spite of Grabmeier's problems with the county and that Grabmeier has performed well as a part-time police officer.

POSITIONS OF THE PARTIES

Employer

The Employer contends that it had just cause to terminate Mr. Grabmeier for his off-duty use of cocaine. As an initial matter, it is undisputed that Grabmeier ingested cocaine while intoxicated at a party. The Employer asserts that this conduct violated valid work rules prohibiting officers from public intoxication, from the off-duty use of hallucinogens, and from engaging in criminal behavior. In terms of remedy, the Employer claims that this conduct warrants discharge because such behavior poses a serious safety risk and inhibits the successful performance of law enforcement duties. The Employer further argues that after-acquired evidence of additional illegal drug use and impulse control problems also renders reinstatement inappropriate. The Employer additionally maintains that discharge under these circumstances

does not violate the Minnesota Drug Testing in the Workplace Act (MDATWA) because this statute does not bar the termination of an employee for misconduct, even if drug-related. Finally, the Employer asserts that its discharge decision does not constitute disparate treatment under the circumstances.

Union

The Union does not dispute that Grabmeier used cocaine on the evening of August 30, 2010, but points out that he never was charged with a crime. More significantly, the Union argues that discipline is not appropriate because the Employer has failed to show a nexus between this off-duty conduct and Grabmeier's ability to perform his peace officer job duties. The Union additionally contends that discharge is too severe of a sanction in any event for a number of reasons. First, Grabmeier has a good work record which was not blemished by his off-duty struggles with alcohol. Second, the Union claims that Grabmeier was seeking help for his substance abuse problems when he went to the Albany police station during the early morning hours of August 31, and that his discharge under these circumstances is impermissible under the MDATWA. Third, Grabmeier successfully completed a rehabilitation program and has remained clean since that time. Fourth, the Union claims that the Employer's discharge of Grabmeier is inconsistent with its more lenient treatment of another Sheriff's office employee. Finally, the Union argues that the after-acquired evidence asserted by the Employer did not influence its discharge decision and is irrelevant to the just cause analysis.

DISCUSSION AND OPINION

In accordance with the terms of the parties' collective bargaining agreement, the City bears the burden of establishing that it had just cause to support its disciplinary decision. This inquiry typically involves two distinct steps. The first step concerns whether the City has

submitted sufficient proof that the employee actually engaged in the alleged misconduct or other behavior warranting discipline. If that proof is established, the remaining question is whether the level of discipline imposed is appropriate in light of all of the relevant circumstances. *See* Elkouri & Elkouri, *HOW ARBITRATION WORKS* 948 (6th ed. 2003). Each of these steps is discussed below.

The Alleged Misconduct

As its basis for discipline, the Employer alleges that the grievant ingested cocaine, an illegal substance, while off-duty and intoxicated on the evening of August 30, 2010. The Employer contends that this conduct violated work rules barring officers from public intoxication, from the off-duty use of hallucinogens, and from engaging in criminal behavior. Although the Union points out that Grabmeier never was charged with engaging in a criminal act, it does not dispute the occurrence of the alleged conduct and at least two of the cited rule violations.

The Union argues, however, that the conduct in question occurred while the grievant was off duty and that the Employer has not established a sufficient connection between the off-duty conduct and the grievant's job. As a general matter, the Union is correct in asserting that an employee's off-duty time is his own and that non-work related conduct is not an appropriate basis for discipline. An exception exists, however, when off-duty conduct has a nexus with the employee's job. Thus, it is well recognized that off-duty misconduct may be grounds for discharge or discipline where the misconduct has a substantial impact on the employer's business or reputation. *DISCIPLINE AND DISCHARGE IN ARBITRATION* 392-93 (Brand & Biren, eds., 2nd ed. 2008).

The conduct at issue in this grievance clearly has a sufficient nexus to job duties. The use of hallucinogens, even off-duty, can inhibit a deputy's ability to perform safety-sensitive functions with adequate skill and judgment. An officer who is high on cocaine on a Saturday night may not be trustworthy in operating firearms or a vehicle on a Sunday morning. In addition, an essential function of a deputy's job is to enforce the law. By publicly engaging in unlawful behavior, the grievant's conduct undercuts this fundamental mission and undermines public confidence in both law compliance and law enforcement. Finally, an important role of a peace officer is to testify in court. A deputy who has engaged in the use of unlawful substances will lose credibility as a witness and impede the effective enforcement of the criminal law code.

Based on the above, the Employer has carried its burden of establishing that the grievant engaged in the conduct alleged as the basis for discipline. Because this conduct is itself sufficient to constitute just cause for termination, the additional grounds asserted by the Employer based upon after-acquired evidence need not be considered.

The Appropriate Remedy

The Employer argues that the same logic that establishes a nexus between off-duty misconduct and peace officer job duties also establishes a just cause basis for termination. Peace officers are charged with the safety-sensitive task of serving as the front-line enforcement of society's legal norms of conduct. An officer who flaunts those norms by engaging in serious illegal behavior no longer can effectively perform those safety-sensitive tasks. Arbitrators routinely find that such conduct warrants the penalty of discharge. *See, e.g., City of Fairborn and Fairborn New City Lodge No. 48, FOP, 119 LA 754 (Cohen, 2003); Cass County Sheriff's Department and Teamsters Local 346, BMS Case No. 02-PA-40 (Bognanno, 2002).*

The Union, nonetheless, urges that a lesser sanction is appropriate on several grounds. The Union first contends that progressive discipline is warranted because of the grievant's good work record. In this regard, the Union points out that Grabmeier had no prior disciplinary record in spite of dealing with his off-duty drinking problems. While that assertion is accurate, it is important to note that Grabmeier served as a licensed peace officer in Stearns County for little more than two years prior to the disciplinary incident. That short time frame is insufficient to mitigate the very serious nature of the offense in question.

The Union cites to the MDATWA as a second line of defense. The Union claims that Grabmeier went to the Albany police station on the morning of August 31 for the purpose of seeking help for his substance abuse problems and that he thereafter voluntarily entered and successfully completed a rehabilitation program. The Union contends that the Employer's discharge of Grabmeier in this context violates the spirit if not the letter of the MDATWA.

Under the MDATWA, Minn. Stat. § 181.953, an employer may not discharge an employee for an initial positive test result without affording the employee an opportunity to participate in a counseling or rehabilitation program. The Union argues that Grabmeier's voluntary entry into a rehabilitation program following his one-time use of cocaine also should be treated as sheltered by the MDATWA because it serves the same rehabilitative purposes.

While I have some sympathy for this line of argument as a matter of policy, I do not think it will shield the grievant in this instance. For one thing, it is doubtful that Grabmeier proceeded to the Albany police station for the purpose of seeking help with his substance abuse problems. More likely, he was looking for a safe haven at which to recover from his cocaine trip. In addition, he had not previously availed himself of the Employer's Employee Assistance Program which would have guaranteed a protected route to rehabilitation. Instead, Grabmeier entered the

rehabilitation program only after being caught using illegal drugs. As such, this situation is similar to that addressed by the Minnesota Court of Appeals in Matter of Copeland, 455 N.W.2d 503 (Minn. Ct. App. 1990). In that case, the court ruled that a positive test result under MDATWA does not bar a termination based on misconduct as opposed to a positive test result, even where the misconduct was directly related to chemical dependency. 455 N.W.2d at 507. Here, too, the termination decision was not premised on the outcome of a drug test, but on the misconduct of using illegal drugs in a public setting.

A third asserted ground for leniency relates to Grabmeier's participation in a rehabilitation program. Tom Vaudt, a psychotherapist with Recovery Plus, testified that Mr. Grabmeier successfully completed the rehabilitation program and that he has a good prognosis for the future.

The completion of a rehabilitation program is often cited by arbitrators as a basis for giving a troubled employee a second chance at retaining his job. DISCIPLINE AND DISCHARGE IN ARBITRATION 274-75 (Brand & Biren, eds., 2nd ed. 2008). The risk-benefit calculus for permitting a second chance, however, becomes more difficult with respect to an employee with front-line peace officer responsibilities. In this context, the potential consequences of further misconduct are sufficiently severe that an employer generally does not act without just cause in concluding that a second chance is not a good bet.

Finally, the Union argues that the Employer's termination decision in this instance constitutes disparate treatment. The Union submitted evidence showing that a corrections officer employed in the Sheriff's Office received only a five-day suspension for twice reporting to work while under the influence of alcohol. The Union suggests that a similar sanction or its equivalent should apply in this instance. Two distinguishing factors, however, are important. First, the

employee in question in that case was a correctional guard rather than a sworn, front-line peace officer. Second, alcohol is a legal substance while cocaine is not.

Based on the foregoing, I conclude that the Employer's discharge decision is supported by just cause.

AWARD

The grievance is denied.

Dated: August 4, 2011

Stephen F. Befort
Arbitrator