

CASE: BARNES #2

THOMAS J. BARNES, ARBITRATOR

COUNTY

Employer,

Officer Termination Grievance

- and -

Grievance No. 00-0000

POLICE OFFICERS UNION

Union.

ARBITRATOR'S OPINION AND AWARD

**Arbitrator Thomas J. Barnes
September, 2005**

CHRONOLOGY

Discharge Date: March 21, 2005

Grievance Filed: March 24, 2005

Hearing Date: September 7, 2005

Briefs Due

Record Closed:

APPEARANCES

Attorney For Employer

Employer Attorney

Attorney For Union

Union Attorney

Witnesses For the Employer:

Sheriff Robert
Undersheriff
Lieutenant

Witnesses For the Union:

Corrections Deputy

FACTUAL BACKGROUND

This is a discharge case of a Corrections officer holding the position of Deputy who had been employed for two and one-half years with the County where the reasons for discharge were "unlawful drug use and untruthful responses during an internal investigation" (Joint Ex. 4). In short, off the job, Grievant used his significant other's vicodin for which she had a prescription from her dentist to treat the aftermath of dental work. Grievant and his significant other broke up on March 6, 2005, upon which she informed a Sergeant who in turn informed the Undersheriff who commenced an investigation which then led to Grievant's termination for the above stated reasons. The case was effectively presented by counsel for the parties and excellent post-hearing briefs were submitted.

The testimony of the parties was as follows:

Sheriff

Sheriff assumed his position on January 1, 2005, and previous to that had worked for many years in the Department, including Corrections, Road Patrol, Detective, Lieutenant, and Undersheriff. Sheriff testified that the Undersheriff has personnel responsibilities and that the Department has Rule and Regulation, one of which, 5.10, provides as follows:

Possession and Use of Drugs or Controlled Substances

Officers will not possess or use any controlled substances, narcotics, or hallucinogens except when prescribed in treatment of officers by a physician or dentist, or when the same is being held as evidence. When controlled substances, narcotics, or hallucinogens are prescribed, officers will notify their superior officer. . . .

Pursuant to the above policy, the Sheriff testified that about two years previously (on August 26, 2003) when he was the Undersheriff, he terminated a former Sergeant for "purchase, possession,

and use of controlled substances including oxycontin and morphine, as well as marijuana" (Employer Ex. 7). The Union arbitrated the discharge of the former Sergeant and in an award issued November 11, 2004, Arbitrator Peter Jason upheld the discharge on the grounds that the use and abuse of controlled substances is a clear violation of Departmental rules, further stating the purchase of these controlled substances from friends "may be criminal" (Employer Ex. 8).

The Sheriff testified that the investigation in this case was conducted by the Undersheriff and a Lieutenant. The investigative report was admitted into evidence (Employer Ex. 9). In addition to relying on the internal investigation regarding the Grievant, the Sheriff also relied upon the statements given by Deputy A. (Employer Ex. 10), Deputy B. (Employer Ex. 11), a statement made by the Grievant himself (Employer Ex. 12), and the prior discipline of the Grievant (Employer Ex. 13).

The Sheriff's testimony was that the discharge decision was based upon Grievant having committed multiple felonies, soliciting illegal drugs, failure to disclose using medications, and lying during an investigation. He further testified that he would have made the decision to terminate Grievant based on the multiple felonies alone, irrespective of the other conclusions.

The Sheriff acknowledged on cross examination he never spoke to Deputies A. or B. about the investigation. He did discuss the internal investigation with a Lieutenant and the Undersheriff. He further testified he did not speak to the Prosecutor but the investigative report indicates the Undersheriff did and that the Prosecutor "did not believe a criminal investigation was warranted in this matter" and "felt this should be dealt with internally" (Employer Ex. 9, page 4). He further testified that in the discharge of the former Sergeant he obtained three drugs illegally and took them for two years, from 2001 to 2003, and he testified that the former Sergeant failed a drug test.

The Sheriff further testified that Deputy B. had also not reported to her superior officer taking a controlled substance in accordance with Departmental policy and consequently she was given a counseling memo for her failure to do so. The Sheriff testified that the counseling memo given to Deputy B. was the result of the investigation involving the Grievant which revealed her having the vicodin prescription and not reporting it to the Department. Deputy A. similarly did not report her use and prescription for vicodin and she also was given a counseling memo as an outgrowth of the investigation of the Grievant.

The Sheriff credibly testified that untruthfulness was not the key factor in his decision to terminate the Grievant and he did not recall the specifics in the investigative report involving Grievant having changed his story. According to the Sheriff, the key factor in the discharge was that Grievant had committed multiple felonies and it is plain that a Deputy cannot wear a badge while committing crimes, i.e., taking vicodin not prescribed for him. The Sheriff further testified that the use of any drugs could be very detrimental in an officer's use of a weapon.

Undersheriff

The Undersheriff became Undersheriff on January 1, 2005, and prior to that had several years in the Department as a Deputy in Corrections, as a Deputy, as a Sergeant, and as a Lieutenant. The Undersheriff testified that he was the Grievant's ultimate supervisor and oversaw the internal investigation in this case and authored the discharge letter. At the predetermination meeting, the Undersheriff testified that the Grievant admitted using vicodin and said he may have a problem with it because he liked the way it made him feel. He testified Grievant also said that he didn't believe he was untruthful and may have misunderstood one of the Lieutenant's questions. He also stated that Grievant informed him in the investigation that he threw the remaining vicodin away. The Undersheriff also testified that the Grievant, in bearing

his soul, indicated that he was not going to let this happen again. The Undersheriff acknowledged he did not personally interview Deputy A., B., or the Sergeant who reported the vicodin use to the Undersheriff. The Undersheriff testified he agreed with the decision to terminate the Grievant based upon multiple felonies.

Lieutenant

Lieutenant is the current Jail Administrator having served in that position for two and one-half years and was an Assistant before that. His responsibilities include personnel matters for Corrections officers, which Grievant was. Lieutenant has had a long career with the Michigan State Police in various positions involved with narcotics stretching across several Michigan communities. The Lieutenant prepared the investigative report on the basis of two interviews with the Grievant. The Lieutenant further testified that Grievant prepared a statement (Employer Ex. 12) and he found it on his desk at the conclusion of his investigation.

The Lieutenant testified that vicodin is an analgesic which is opium-based and slows the respiratory system and can cause sleepiness and dizziness and impair motor skills. He also indicates it has a rather euphoric effect and is highly addictive. It is prescribed by doctors and dentists as a pain killer. He further testified that it is a mixture of hydrocodone which is an opiate and acetaminophen and there are several strengths. He testified that vicodin is a first level narcotic and can be used over long periods of time successfully. The Lieutenant further testified that he was not aware of any adverse affects that vicodin had on the Grievant while at work and considered his work record and his ethics good and "was a good employee."

He further testified that he was not aware that Grievant and Deputy B. had a relationship since they both denied it initially but when it came to light, he put them on different teams. He became aware that the relationship was terminated on March 11 when Deputy B. and a Sergeant

came into his office. The Lieutenant also testified that he took Grievant for a drug test on March 11 and received the negative results that day or the next day. He further testified that vicodin stays in your system for at least three days or more if it is chronically used.

The Lieutenant testified that if any officer was taking medication, the first line supervisor was required to be informed, which in this case was the Sergeant. He also testified that the Sergeant would be expected to pass it on to the Undersheriff if the Sergeant thought that drug use would affect the officer's performance. When asked how often the Undersheriff is made aware of employees taking prescribed controlled drugs, he testified "infrequently, less than ten times in the last two years" has it been brought to his attention that an employee is using a prescribed controlled substance. When asked why he administered a drug test to the Grievant, he said he wanted to make sure the Grievant wasn't on duty under the influence of drugs.

According to the Lieutenant, the Grievant initially denied taking the drugs that were hidden. Later, after the Lieutenant informed Grievant that Deputy B. had informed him that Grievant had ransacked her house and had found the drugs, he said he found them and flushed them down the toilet. He further testified that Deputy B. did not want to create problems for the Grievant and she was concerned about the Grievant hurting her.

On re-cross, the Lieutenant testified that the Grievant changed his story from having been given the pills by Deputy B. to her having allowed him to take them. Based on that, the Lieutenant concluded that the distinction between being "given" and "allowed to take" was a clear attempt by the Grievant to change the story so as to protect Deputy B. and put himself in the best light at the same time.

Grievant

The testimony of the Grievant was that he separated from his wife in January 2005 and struck up a relationship with Deputy B. which ended in March of 2005. He testified that on previous occasions he's taken vicodin due to a right pectoral muscle rupture that he incurred while power lifting. He saw an M.D. once or twice for that injury, went to a clinic, and also saw an Osteopath. When he injured his pectoral muscle in November 2003, he received a doctor's prescription for vicodin with one refill. He testified that he took 3/4 of those pills, or approximately 45 out of 60 included in the original prescription and the refill.

Turning to the events in question, Grievant testified that his team on which he was working with Deputy B. was off on a Monday and while he was living with another Deputy he got a telephone call from Deputy B. in which she related she had a vicodin prescription to help her with dental work and she was scared to take them. He proceeded to her house and she indicated that the vicodin made her feel loopy and she didn't want to take them anymore. According to the Grievant, she said if you want to take some, feel free, after she set them next to the microwave. He testified that he had indicated earlier in January and February to Deputy B. that he had back and shoulder pains. He further testified that he took the vicodin that night and over the next week he took four or five more. He further testified he never took them when he was going to be at work the next day - he only took them on nights before his days off.

According to the Grievant, the bottle of vicodin went from next to the microwave to the kitchen drawer, and that about a week or ten days went by and then he came across the pills on a Sunday when he was off and went to Deputy B.'s residence and wrote her a note on a notepad that was in a drawer covering the vicodin. According to the Grievant, since he knew Deputy B. was not taking any more vicodin and he didn't want to be tempted any further, he flushed them down the toilet and there were about six to eight left. He reiterated that Deputy B. had told him

many times that they made her feel nauseous. After Deputy B. came home, he then told her what he had done (flushing the vicodin down the toilet) and she responded "I'm proud of you for doing that."

About ten to fourteen days after that incident, Grievant and Deputy B. ended their relationship and according to Grievant, it was his idea to end it. According to Grievant, when he was riding in the car with the Lieutenant to take the drug test in Brighton he admitted to getting the vicodin from Deputy B. but said he wasn't aware it was a two year felony to use drugs not prescribed for him. He was also worried about the implications for Deputy B. He acknowledged, upon questioning from the Lieutenant, that he found the bottle - said "hold on, wait a second" he was confused, then that he found the bottle and flushed the contents "I backtracked but the truth was told." He further indicated that he was confused about the way the question was asked.

When he was prescribed vicodin in November of 2003 he indicated he informed a Sergeant.

On cross examination, Grievant acknowledged that he saw Dr. Smith for his pectoral muscle rupture and that he had a prescription from that doctor for 30 plus one refill and that he used about 45-50 of that vicodin. They were 750 mg., he took them one at a time, four times a day. He knew it had a potential for addiction.

He acknowledged when he informed supervisor he did so "in passing." Grievant said he learned about the rule requiring a supervisor be notified of any prescription drugs from the new Sheriff in early 2005 when he emphasized it. Grievant said he didn't know about the rule before, however he acknowledged that he was responsible for familiarizing himself with the Department's book of rules and that he did that. He further acknowledged that he discussed

vicodin once or twice with Deputy A. He denied that he ever had a discussion with Deputy A. propositioning her for vicodin that she possessed.

Finally, Grievant testified that he had a hunch that Deputy B. turned him in (the Employer observing that Exhibit 14 indicates more than just a hunch). Grievant finally testified that he offered to submit to drug testing because he believed it was a *possibility* he had a drug problem. He acknowledged he has not undergone any treatment at the present time.

ANALYSIS AND DISCUSSION

While varying in degree of importance, the Employer had four purported reasons for the discharge, viz: commission of multiple felonies, soliciting illegal drugs, failure to disclose using medications, and lying during an investigation. Each of those reasons, of course, must be examined to determine whether there was just cause as required under the contract for the discharge of Grievant.

The Department has a policy (510) requiring an officer who uses any controlled substance to "notify their superior officer." The reason for the rule is well-founded and undisputed in that police officers in their use of patrol vehicles, weapons, and their need to be physically fit would be a hazard to themselves, the community, and perhaps other officers in the event the controlled substance impaired their performance. That being said, however, that alone is clearly not a basis for discharge. Deputies A. and B. both had prescriptions for vicodin and neither were discharged for failing to report their use of that controlled substance, albeit they were given written warnings once it became apparent through the investigation of the Grievant that they had also not reported their use of controlled substances under rule 510.

Moreover, it became clear from testimony at the hearing that it would appear that the rule is honored more in the breach than in the observance since there were very few people according

to the Lieutenant who have reported using controlled substances under that rule. While there is a rule, it is clear that a violation of the rule will not result in discharge and it is also evident that rule is certainly not regularly observed given the number of employees covered by it with few reporting their prescriptions although Grievant acknowledged that when the Sheriff assumed his position in early 2005, he emphasized it. The Employer presented no other evidence as to how much it had stressed that rule or what it had done to impress upon officers the importance of reporting their use of controlled substances pursuant to prescription.

Next, the Employer relied on Grievant having lied during the investigation by the Lieutenant. In this regard, the Sheriff testified that untruthfulness was not the key factor in the decision to discharge the Grievant and, in fact, he did not recall the specifics in the investigative report involving Grievant having changed his story when being questioned by the Lieutenant. According to the Lieutenant, he asked Grievant if he had obtained the vicodin that Deputy B. had hidden in her home and Grievant denied any knowledge of this. When the Lieutenant then informed the Grievant that Deputy B. had said that he admitted to her finding the drugs, he then changed his story admitting he had found the drugs but that he disposed of them by flushing them down the toilet in order to avoid the temptation of using them. The Union's version of what occurred is that when the Lieutenant asked Grievant if he had found and taken the drugs hidden in the drawer, Grievant stated no, "knowing that he had not ingested the pills, but he immediately recognized the complex question and clarified that he had come across the pills in the kitchen drawer but he had flushed them down the toilet."

I find that the testimony of the Lieutenant is the most creditable given his long years of service doing what he does, his obvious competence and credibility displayed at the hearing, and having no dislike for the Grievant since he considered his ethics good and considered him a good

employee. There were other inconsistencies in Grievant's two interviews with the Lieutenant and therefore Grievant cannot be credited on what occurred with the drugs hidden in the drawer and, as previously indicated, there is no reason to question the Lieutenant's credibility. There is reason, and arbitrators acknowledge, to doubt whether Grievant told the truth since that may be an attempt to put himself in the best possible light. Complex question or not, the inconsistency or untruthfulness is a minor part of this case. That is not to say that truthfulness in a police department is not critical; it is. On the facts of this particular case it is already acknowledged that Grievant had used some of Deputy B.'s vicodin and so whether he used anymore of it or flushed it down the toilet matters not with respect to the ultimate reasons for the discharge. As the Sheriff acknowledged, he did not rely on the untruthfulness in agreeing to the discharge decision. While Deputy B. was not called to testify, as the Union observed, that too is of little relevance since it is not clear at all that she would have been able to credit or discredit Grievant's change of story.

Next is the solicitation of illegal drugs assertion as a basis for the discharge. According to the Lieutenant's investigation, Deputy A. had informed him in the interview with her on March 12, 2005, that on several occasions Grievant had asked her if he could get some vicodin as he was aware she had been prescribed the medication. He also requested Deputy A. provide a written statement regarding Grievant's repeatedly asking her for vicodin and she did (Employer Ex. 10). Deputy A. did not testify. In any event, there is no reason to question or doubt the Lieutenant's conclusion that Grievant had, on more than one occasion, attempted to obtain vicodin from Deputy A. and there is no reason to doubt her written statement of March 12 which is very explicit. While it was not subject to cross examination it is part of the investigative record and as a business record is creditable evidence. There is also no reason to question the

veracity of Deputy B.'s very specific written account. Whether the solicitation of vicodin as a criminal offense is dealt with below, however I use the evidence of Grievant having gone beyond his girlfriend's vicodin to ask yet another Deputy for vicodin as an indication that the Grievant may well have a problem with, at least, vicodin. He acknowledged in the investigation with the Lieutenant that he liked it, that it made him feel good. While I do not find that is a basis for discharge standing alone, it is a basis to conclude that Grievant is susceptible to illegal drug use and needs monitoring.

The core issue and the primary reason that the Sheriff terminated the Grievant was because of his commission of multiple felonies and it was clear that a Deputy cannot wear a badge while committing crimes, i.e., taking vicodin not prescribed for him. Grievant testified that he was not aware that taking someone else's vicodin was a criminal offense. I credit the Grievant's testimony on that point since I think arbitral notice can be taken of the fact that many people would not regard that necessarily as a crime let alone a felony. It certainly happens with a great degree of frequency in families and among friends. Moreover while vicodin, clearly according to the Lieutenant, has some addictive affect, it is not in a class of drugs such as oxycontin, marijuana, and morphine. When recreational drugs are implicated, it doesn't appear that vicodin is very high on anyone's list. To sustain a discharge based on a criminal offense, there has to be clear notice of the law and the consequences of violating it. That does not appear in any of the briefs filed in this case. Moreover, this matter was taken to the prosecutor and he refused to pursue this as a criminal matter and considered it an internal matter. He was not called to testify either so I can't say that he would have considered it a crime under the circumstances. There was no showing that Grievant was in any way impaired in his work and

the drug test the Lieutenant took him for was negative. In short, there was no harm perpetrated on Grievant's fellow officers or upon the public by his foolish conduct in this case.

Under the Michigan Controlled Substances Act, Mich. Comp. Laws §333.7101 et seq., hydrocodone or dihydrocodeinone is defined as a Schedule II controlled substance. See Mich. Comp. Laws §333.7214. Similarly, the federal Controlled Substances Act, 21 U.S.C. §801 et seq., generally defines any opiate, such as hydrocodone or dihydrocodeinone, as a Schedule II controlled substance. See 21 U.S.C. §812. However, under both the Michigan and federal statutes, if the amount of hydrocodone or dihydrocodeinone is 15 milligrams or less per dose (in this case 5 milligrams), the drug is described as a Schedule III controlled substance. See 21 U.S.C. § 812; Mich. Comp. Laws, § 333.7216(g)(iii)-(v). Most therapeutic doses of vicodin are between 5 and 10 milligrams. Accordingly, under both the Michigan and federal narcotics laws, vicodin is defined as a Schedule III controlled substance.

It is illegal to possess without a prescription a controlled substance under both the Michigan and federal statutes. Under the Michigan statute, it is illegal to knowingly or intentionally possess a controlled substance unless the controlled substance was "obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of the practitioner's professional practice" See Mich. Comp. Laws § 333.7403. Using nearly identical language, the federal statute also makes it illegal to knowingly or intentionally possess a controlled substance "unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice" 21 U.S.C. § 844. In addition, Michigan also has a separate statutory section making it a crime to use a controlled substance without a valid prescription. See Mich. Comp. Laws §333.7404 ("A person shall not use a controlled substance . . . unless the substance

was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of the practitioner's professional practice, or except as otherwise authorized by this article.").

Under Michigan law, simple possession of a controlled substance without a prescription is a felony punishable by imprisonment of not more than two years or a fine of not more than \$2,000, or both. See Mich. Comp. Laws §333.7403. Illegal use of a controlled substance without a valid prescription under Michigan law is a misdemeanor punishable by imprisonment of not more than one year or a fine of not more than \$1,000.00 or both. Mich. Comp. Laws §333.7404(1)(b). Under federal law, a person convicted of simple possession of a Schedule III controlled substance may be punished up to one year in jail and fined a minimum of \$1,000 or both. See 21 U.S.C. §844.

Accordingly, under federal and state law, it is a crime to knowingly possess vicodin without a valid prescription. See e.g., *People v. Minnifield*, No. 247769, 2004 WL 1778790 (Mich. App. Aug. 10, 2004) (noting the defendant's previous criminal conviction for possession of vicodin); *People v. Laerzio*, No. 206877, 1999 WL 33446749 (Mich. App. April 23, 1999)(affirming the defendant's conviction for fraudulently obtaining vicodin by false prescription).

In view of these statutes, there seems little doubt Grievant could have been prosecuted. In fact, however, the prosecutor refused to take up the case - for whatever reason we do not know because he did not testify.

I entertain serious doubts that Grievant knew he was committing misdemeanors and felonies. I would further observe the average citizen, including the undersigned who is unskilled in criminal law, was equally unaware of the serious consequences. As a Schedule III controlled

substance (under 15 milligrams), it is not in the highest drug category according to their potential for abuse. The Physicians Desk Reference ("PDR") describes Schedule III controlled substances thusly:

Some Potential for Abuse. Use may lead to low-to-moderate physical dependence or high psychological dependence. Prescriptions may be oral or written. Up to 5 renewals are permitted within 6 months.

Ignorance of the law is no excuse, but I don't find Grievant alone in his naiveté in taking his significant other's vicodin.

In order to uphold a discharge on the felony basis, I would have to conclude that an employee was at least reasonably chargeable with notice of or aware of the consequences of his misdeeds that could lead to discharge. Up to 2 years' imprisonment and a \$2,000 fine is not something I can find on the evidence that Grievant was remotely aware of. For these reasons, the ending of a deputy's career cannot stand.

One last matter needs assessment and that is the prior discharge of the former Sergeant, a 13-year employee, on August 26, 2003. The Employer observes that in November 2004 Arbitrator Peter Jason upheld the discharge. I find that case to be distinguishable for several reasons. First that Sergeant had been using drugs for two years. The Sergeant obtained oxycontin from a friend, at first for free and just a few pills but later purchased them from the friend for seven or eight months. The Sergeant also made a deal with another friend whereby he bought oxycontin from that friend who had a prescription to relieve pain from a hip injury. He took that oxycontin for several months and then was able to obtain morphine tablets from yet a third friend. Later he testified he found an old bag of marijuana in his basement and used that to see if it would relieve his pain. In that case, the Sergeant was discharged for violating the rules

of the Department by abusing those drugs and not reporting that he was using prescription drugs and that he had "possibly violated the law." That is a far different set of facts than in this case where there is no proof that Grievant is addicted, he did not fail a drug test as did the former Sergeant and he did not take highly addictive oxycontin or extremely potent morphine.

CONCLUSION

For the foregoing reasons, there is not just cause for the discharge. Discharging someone for a claimed criminal offense has to be shown with a greater degree of certainty than occurred in this case. Violating Departmental rules, which clearly happened in this case, was handled with other Deputies by giving them a written warning. Clearly Grievant's conduct was worse than that because he did not have a prescription and thus serious discipline is warranted.

The Employer acknowledged in its Brief and as witnesses and I observed at the hearing, Grievant is a fairly likeable individual and there is no reason to believe that he could not function in the Department if reinstated. There is some evidence in the Grievant's own statement (Employer Ex. 12) in paragraph 11 that he has come to grips with his conduct "I will accept any punishment the PD deems appropriate. All I ask is my employment is spared. I feel I have a lot of good to offer the Department and would hate to see my career cut short by these means. Also at this very difficult time in my life this job, along with my daughter, is one of the few bright spots for me. I would gladly submit to weekly drug tests and attend any treatment the Department deems necessary." The Grievant has obviously indicated some remorse and a willingness to work effectively within the Department. On the other hand I note and will include in the remedy remedial action that the Grievant must take with respect to the e-mail which he sent to Deputy B. in which Grievant, while frustrated, was crude.

AWARD

The grievance is granted in part. As a result of the foregoing, Grievant is reinstated at the beginning of the next pay period. The time from his discharge until reinstatement will be considered a disciplinary suspension. Grievant will be subject to drug testing in accordance with the Department's policy, for up to 18 months and for as many times as the Department deems appropriate. Grievant's reinstatement is conditioned upon an appropriate apology by letter to Deputy B. that must be approved by the Lieutenant before mailing with a copy, when sent, to the Lieutenant.

This experience should have allowed Grievant sufficient time to think about his conduct and hopefully, in his words, allow him to become a productive member of the Department. I hope he makes the most of this second chance since any significant misdeed in the future will surely end his career. Finally, I trust the Grievant will have the good judgment not to brag about getting his job back when his position is precarious after an imposed almost 8 month suspension without pay and the other above related conditions for his reinstatement.

Dated: _____

Thomas J. Barnes, Arbitrator