F E D E R A L M E D I A T I O N & C O N C I L I A T I O N S E R V I C E

In the Matter of Arbitration	)	
	)	
between	)	
	)	
Broward County	)	
Sheriff's Office	)	
	)	FMCS 120229-01727-3
and	)	Termination Grievance of
	)	Sergeant John Goodbread
Broward County Police	)	
Benevolent Association	)	

Before: Robert B. Hoffman, Arbitrator

Appearances:
For BSO: Christine Cardinale-Catuccy, Esq.
For the Grievant and Union: Michael Braverman, Esq

Place of Hearing: Fort Lauderdale, Florida
Date of Hearing: October 3, 2013
Briefs Received/Hearing Closed: December 13, 2013
Date of Award: December 20, 2013

DECISION AND AWARD

I. Introduction

Broward County Sheriff's Office ("BSO)" terminated Sergeant John Goodbread ("the grievant") for violating a State of Florida statute that outlaws withholding information from a medical practitioner, such as a medical doctor. The statute imposes criminal penalties. This violation, also called "doctor shopping," occurs when a person seeks to obtain a prescription for a controlled substance, and that person had received the prescription within the previous 30 days but then seeks a prescription for a controlled substance from another practitioner. BSO further concluded that by violating this statute the grievant engaged in conduct unbecoming an employee of BSO.

The Broward County Police Benevolent Association ("PBA") on behalf of the grievant maintains that BSO based its case entirely on hearsay and as such there is no direct evidence in this record that the grievant violated this statute. It raises several due process issues and maintains that they, too, are sufficient to void this termination. At issue is whether BSO had just cause to terminate the grievant, and if not, what shall be the proper remedy.

II. Facts

1. The Grievant's Back Pain and Medications

The grievant began his employment as a police officer in 1989 for the City of Oakland Park and was promoted in 1999 to Sergeant. In 2000, the Oakland Park Police Department merged into BSO; the grievant retained his rank as a Sergeant. In 2003 or 2004, during a routine physical examination with Dr. Prettelt, the grievant testified that "he had me do one of these exercises as part of the physical, bend over type of thing, touch your toes, see what your range of motion. As I was bending over, I stopped because the lower back just seized up. And he asked me what was wrong. I told him. He prescribed me hydrocodone, pain medicine."

He continued to see Dr. Prettelt or his brother for annual physicals until 2011. Asked about prescriptions for hydrocodone, he testified: "There have been two occasions since 2004 that I was prescribed hydrocodone by the one Prettelt brother that is no longer there. And that's been it. . . . that would have been after one of my first physicals, which I believe was 2004 and after one of my second physicals in 2004, 2005, when he asked me about how my back was doing, and I told him exactly that it was still hurting." After that Dr. Prettelt referred the grievant to a chiropractor, which the grievant tried unsuccessfully. Asked about the last time he received "any prescription for hydrocodone from Dr. Prettelt, either of the brothers," he answered that it was in 2005. He further testified that thereafter there was no discussion with the doctor about continuing with this drug and he never sought to ask for a refill. "I could

have," the grievant further related, "but he suggested I go see a specialist. He said I could still give you this, but this isn't going to help, obviously . . . ." Dr. Prettelt also suggested a pain management specialist.

The grievant did not immediately follow this advice. As he testified: "I should have listened to his advice earlier. In all honesty, I should have gone to see him, the specialist, earlier than 2009 than I did. I waited the two and a half years before I even saw the guy."

The grievant went to Dr. Panzer in April 2009. "Once he reviewed the MRI, when he saw the slits in the disks in my lower back, he had me do some bending . . . " and then on April 10, 2009 he prescribed Oxycodone. This doctor passed away in 2009 or 2010 and the grievant continued with Dr. Small from Panzer's office. Small wrote scripts for Oxycodone on June 3 and July 1, 2009. In November 2009 the grievant went to a pain management group of doctors. On November 16, 2009 a Dr. Erigoyen from this group prescribed Oxycodone and Oxycontin, and again on December 14, 2009, January 11, 2010, March 8, 2010, May 3, 2010, June 1, 2010, and July 7, 2010. Thereafter, Dr. Stein from the same pain management group prescribed Oxycodone and Oxycontin for the grievant on October 18, November 15 and December 13, 2010. The grievant testified that he obtained all of his medications from Schaefer Drugs.

2. BSO Learns of Possible Doctor Shopping Allegations

Several months later, on March 2, 2011, Detective Richard Olsen, assigned to the Organized Crime Division for BSO testified he received a phone call from "a young lady that worked in a doctor's office." He then related that she worked for Dr. Stein in Boca Raton, and she in turn had been contacted by the office manager, Karen, for Dr. Prettelt in Loxahatchee. This "young lady" for Dr. Stein related to Olsen that she was told by Karen with Dr. Prettelt that the grievant and his wife, Heather Goodbread, "may be involved in doctor shopping

crimes." (Quoted from Olsen's subsequent memo to Sergeant Derstine on March 3 regarding this contact.)

According to Olsen both offices provided him with information that the grievant and his wife had been prescribed Hydrocodone in September, October and November 2010 from Dr. Prettelt's office and Oxycodone from Dr. Stein's office during the same period. Olsen requested documentation from the doctors. He received six faxed pages showing internal emails to Dr. Prettelt from a member of his staff and his approvals regarding two re- refills for the grievant of Hydrocodone on September 22 and November 24, 2010, with a notation that the patient called the doctor and wanted it in called into Publix; handwritten notes showing the grievant and his wife were prescribed Hydrocodone (Lorcet) during those months from Dr. Stein; several handwritten prescriptions from Dr. Stein for the grievant, one for Heather for Hydrocodone on October 19, 2010; a copy of a phone message from Heather on August 30, 2010 to refill hydrocodone.

Olsen concluded in his March 3 memo that a person obtaining therapeutic use medication from two different doctors within a 30 day period violated Florida law, Sec. 893.13(7)(a)8. Olsen recommended in light of the alleged criminal offense occurring in Palm Beach County that the investigation should be handled by there.[1]

3. Palm Beach County Investigates and Proceeds to Criminal Charges

Detective Rocky Zavattaro handled the investigation. After reviewing Olsen's memo and the documentation attached to it, he described in a nutshell what he did that led to criminal charges against the grievant and his wife, as follows:

[1] Throughout Olsen's testimony and earlier during the admission of exhibits, PBA objected on the basis of hearsay for medical and other exhibits that could not be verified, and testimony where the information came from a party who would not be called as a witness. As these objections occurred at the outset of the hearing the arbitrator ruled: "I will make that determination on hearsay using the standard of reliability after I've examined the entire record." He allowed for a continuing objection based on hearsay where applicable.

> Based on that, I started off at the pharmacies where the alleged prescriptions were filled. It's two pharmacies, Publix and Schaeffer's pharmacy. They were about a mile -- within a mile of one another. At these pharmacies, I obtained the pharmacy profiles for John and Heather Goodbread. Based on that, I -- well, I took those, put them in a spreadsheet, compared to which ones overlapped from different doctors, meaning he had his -- one doctor, Prettelt, I think his name was, and then the pain management doctors. So I was lenient on it. I didn't -- like, within 15 to 20 days, if they overlapped, then I put -- those charges that I was going to have. After I determined how many alleged incidences I would have, I would then write a search warrant for their medical records from both doctors' offices. Then I would compare what was prescribed there to what was filled at the pharmacies. I got statements from the doctors saying that they did not know the other doctor was prescribing the same type of medication. And then based on that, I had my charges.

The Detective also obtained receipts or logs from each pharmacy showing that prescriptions were signed for and received. He testified that the signatures were much the same.

> Q. Were there different signatures on those sheets, if you recall?
> A. We weren't allowed to -- we're not handwriting specialists, but yeah, they were similar, put it that way. They were similar.
> Q. So when John had a prescription, was there a particular signature, and when Heather had a prescription, was there a different signature, same signature?
> A. No, same signature, I believe.

Detective Zavattaro presented a photo line-up to the pharmacist at Schaefer Drugs, who, according to the Detective identified both the grievant and Heather Goodbread as the individuals who had received the medications. The pharmacist at Publix could not identify the grievant in a photo line-up.

As many of the dates of refills between the Primary Care and Pain Management offices came within 30 days of one another, the grievant was charged with trafficking Oxycodone and 24 counts of withholding information from a practitioner. An arrest warrant was issued for the grievant on April 8, 2011. On or about August 23, 2011, the indictment against the grievant was dropped and a new indictment filed, without the trafficking count, for one count alleging a violation of Fl. Stat. 893.13(7)(a)(8) for withholding information from a practitioner. The grievant then entered into a pre-trial diversion program for first-offenders

that takes the matter out of the criminal court system and into some form of rehabilitation.[2] According to Court records that program started in January 2013.[3]

Palm Beach County also brought charges against the grievant's wife, Heather. At this arbitration she testified she was arrested on April 8, 2010 for "calling in prescriptions under my husband's name." Asked if she did so, she answered "I did." She described a scheme whereby unbeknownst to him she would have her husband's Hydrocodone prescription re-filled over the phone with Dr. Prettelt, where she was also a patient and had accompanied him to all of his physicals, and then have the doctor's office call in the re-fill to Publix. She was the only one who picked-up those prescriptions for Hydrocortisone at Publix. At the pain management office, she would accompany the grievant where they both were patients. They had prescriptions from those doctors filled at Schaefer's Drugs. Asked how she resolved her criminal case, she testified that she pleaded guilty: "I opted out for probation. I got three years, off in two years, for good conduct . . . . And I'll be done in six months."[4] The grievant testified he first became aware of her scheme when they were both arrested in April 2011.

4. BSO Investigates and Decides to Terminate the Grievant

On April 8, 2011, the day of his arrest, BSO suspended him without pay. Sergeant Greene, who also had been assigned in March 2011 to this matter, kept in contact with Palm

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[2] "The Misdemeanor Diversion Program (M.D.P.) is a diversion program that affords first time offenders an opportunity to immediately accept responsibility for their actions, seek rehabilitation, and divert their cases from the criminal court system. M.D.P. is administered and supervised by Broward Sheriff's Office Probation for this judicial circuit.." OFFICE OF THE STATE ATTORNEY, 17TH JUDICIAL CIRCUIT MISDEMEANOR DIVERSION PROGRAM, BROWARD SENIOR INTERVENTION AND EDUCATION PROGRAM (Revised 12/1/2010). The grievant's diversion settlement is not in evidence. Colonel Dole testified as to whether the agreement included an admission he took drugs: "There's no recognition of it in this document."

[3] Colonel Dole testified the settlement included the "defendant pleads no contest to the crime charged. Employer notification, substance abuse evaluation, recommend treatment, 50 hours of community service, max 12 months, early termination at six months," all in reference to the one count for withholding information.

[4] As to her current ability to testify: "Q. And you completed treatment? A. Yes. Q. And you're doing much better now? A. Yes. Q. You're not taking any prescription medication at this time? A. Only what's prescribed to me by my doctor. Q. Are you okay today sitting here, Heather? Do you understand what we're doing and -- A. Yes. Q. -- what you're saying to the arbitrator? A. I'm lucid. I understand.

Beach County during the investigation and after the grievant's arrest. On October 25, 2011 Internal Affairs notified him that he was under investigation for allegations regarding withholding information from a practitioner and conduct unbecoming an employee. Greene completed an Internal Affairs Investigative Report two days later that set forth Detective Olsen's initial "internal memo" of March 3, 2011, and all of the subsequent contacts Greene made, including Palm Beach County Detective Zavattaro and a short "synopsis" from his report, with a description of his search warrant results; Sergeant Postin from PBC who was in charge of the case; several State Attorney's handling the case.[5]

On September 29, 2011 Internal Affairs sent an "invite letter" to the grievant to appear before it and provide a "voluntary sworn statement" prior to the presentation of the investigative report to the Professional Standards Committee. The grievant did not respond and further opted not to attend the scheduled preliminary hearing. Greene reported that the grievant's criminal case was set for trial on January 10, 2012 and that a "plea deal" was offered to the grievant. The grievant eventually accepted a pre-trial a diversion program for misdemeanors and avoided the January 10 trial. He was terminated one day later by BSO. The PBA filed a grievance on January 19, 2012.

C. Discussion and Decision

Certainly on the face of the documentation, i.e., the Probable Cause Affidavit prepared by Palm Beach County, and relied on by BSO in full to support its decision to terminate, it could be reasonable to conclude that the grievant was doctor shopping. After all, with his name appearing on prescriptions and pharmacy records for Hydrocodone (all from Dr.

[5] As to the completeness of her report: "Q So in reviewing all the documentation, what evidence did your investigation uncover to support the charges against -- the administrative charges against the Grievant? A The filing from the State Attorney's Office supports the two charges -- or the one charge for the conformity to laws. Conduct unbecoming, it fits, if you read the description of the policy, for him committing – allegedly committing a criminal allegation or crime."

Prettelt), and Oxycodone and Oxycontin (from three other doctors in succession not as a group) they appear to qualify as violations of Fl. Stat. 893.13(7)(a)(8). And that is a controlled substance prescription received within 30 days of a prescription for a controlled substance from another doctor.[6]

But should an affidavit be enough to establish just cause? BSO readily admits it did nothing more than rely on that affidavit for this termination. It made no other effort to investigate this case, other than present a synopsis of the PBC investigation in the Internal Affairs report sent to the PC for a decision. And then at arbitration BSO offered no direct testimony from witnesses identified in the Zavattaro affidavit from PBSO.

The answer to whether this affidavit is enough to establish just cause is "no." This is not a proceeding to establish probable cause for an arrest, as this affidavit was used for in Palm Beach County. "Probable cause" for an arrest under Fl. Stat. Sec. 901.15 carries with it a lower standard for law enforcement to make an arrest without a warrant. [7] As such it does not measure up to any of the three standards for burdens of proof – beyond a reasonable doubt, clear and convincing or preponderance of the evidence. The probable cause affidavit then is basically a "reasonable ground *to suspect* that a person has committed a crime." *Black's Law Dictionary* at 1219 (7th Ed. 1999).

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[6] *Six days* - April 10 (O) and April 16 (H); *14 days* – June 3 (O) and June 17 (H); *14 days* – Nov. 16 (O) and Nov. 30 (H); *two days* – Jan. 11, 2010 (O and O) and Jan. 13 (H); *.four days* – March 2, 2010(H) and March 8 (O and O); *25 days* – May 3, 2010 (O and O) and May 28 (H); *three days* – June 1, 2010 O and O) and June 4 (H); *seven days* – July 19, 2010 (H) and July 26 (O and O); 1 day – Oct. 18 (O and O(and Oct. 19 (H); 14 days – Nov. 15 (O and O) and Nov. 29 (H). This same Affidavit shows that the grievant's refills of Oxycodone and Oxycontin on five occasions where filled within 29 days. However, these O and O refills are with the same doctor or physician group and would not be a violation of Fl. Stat. 893.13(7)(a)(8).

[7] Moreover, 901.15 (2) refers to a "felony has been committed and he or she reasonably believes that the person committed it." And the charge checked off on the affidavit is for a "felony." Trafficking in Oxycodone, Sec. 893.135 is a felony and some 20 counts were included in this affidavit. However, those charges were subsequently dropped leaving the misdemeanor charge relating to withholding information. Thus, the weight of this affidavit is substantially reduced .

This arbitration does not rely on suspected behavior. It is a contractually based proceeding that relies on two major contractual prongs. First, a standard for discharge that requires just cause with proof, either by a preponderance of the evidence or clear and convincing evidence, depending on the severity of allegations. That burden in cases where criminal implications or stigma result, require clear and convincing proof. "[I]n cases involving criminal conduct or stigmatizing behavior, many arbitrators apply a higher standard of proof, typically a 'clear and convincing evidence' standard . . . ." Elkouri & Elkouri, *How Arbitration Works*, 6th Ed. at 950-951 (2003). As this arbitrator held in *Miami-Dade County*, 131 LA 287 (2013): "As a general rule 'clear and convincing' means the evidence is 'so clear, direct and weighty and convincing as to enable [the fact finder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.' *Slomowitz v. Walker*, 429 So.2d 797, 800 (Fla.4th DCA 1983)." Evidence based on suspension, even if it's "reasonable suspicion," fails to be clear and convincing.

The second prong is the arbitration proceeding itself. It is essentially an adversarial proceeding where notions of due process prevail. This means that contractually, the parties have agreed to a process that involves certain fairness to both sides; it is especially the case where the arbitrator must determine if just cause exists for the discharge. And one of the elements of that due process fairness is the ability of the employee to confront and cross-examine the accuser, if available, at the hearing. Cross-examining this witness enables the dismissed employee to test accusations for reliability, e.g., first-hand-knowledge, memory, self-interest, biasness, inconsistencies, waffling, defensive answers, leaving out key facts in direct examination, perceptions and opinions distinguished from facts. And such examination affords the arbitrator an opportunity to judge demeanor of the witness. See *South Penn Oil*

Co., 29 LA 720 (Duff, 1957); *UGL Services*, 2011 WL 6005178 (Hoffman, 2011). None of these components of reliability can be made from a bare affidavit.

Thus, a major concern here is the virtual reliance on hearsay to carry BSO's burden of proof. A few basic principles are worth repeating inasmuch as so much here depends on evaluating non-first hand evidence.

- The use of hearsay in arbitration. Contrary to some popular belief that hearsay is acceptable in arbitration, or that the rules of evidence never apply, arbitrators say otherwise as does the leading treatise on labor arbitration: "Arbitrators for the most part do not automatically exclude hearsay, but instead will evaluate its reliability and only where questionable exclude it. Elkouri & Elkouri, *How Arbitration Works*, 6th Ed. (2003) at 366." In *Miami-Dade County & Dade County PBA*, 2013 WL 5231579 (Hoffman, 2013): "Although acknowledging that arbitrators have much flexibility in evidentiary matters, it is exercised with the object of producing reliable and trustworthy evidence."

- Witness statements made during an internal investigation. *City of Pompano Beach, Fl & IAFF*, 10-2 ARB ¶5124 (Hoffman, 2010). "No opportunity was given to the Union to cross-examine them in the presence of the arbitrator, or for the arbitrator to judge their demeanor and make credibility determinations." But see *Miami-Dade County & AFSCME*, 40 LAIS 82 (Hoffman, 2011), where despite the absence of the complaining persons alleging the grievant's misconduct, "an abundance of reliable proof" existed from direct testimony of others who could "pinpoint" him as responsible for misconduct.

- Complete reliance on hearsay for discipline. ". . . it is exceedingly unlikely that an arbitrator will render a decision supported by hearsay evidence alone." Elkouri 7th at 8-35. *In Barton Center*, 121 LA 249 (Kravit 2005), the arbitrator conducted an "extensive review" in one industry to determine the validity of whether arbitrators refuse to rely solely on hearsay. "In the great majority of those cases arbitrators have refused to sustain discharges based *solely* upon hearsay evidence. "

- Failure to have direct evidence at the hearing from an available witness could cause a negative inference to be drawn. In *Auto Truck Transport/IAM*, 2012 WL 2428594 (Hoffman, 2012), where witnesses were not called to testify about complaints concerning a grievant, ". . . the arbitrator is left with the conclusion that these failures . . . in the face of opportunities to do so . . . at this hearing, means that they are both undenied." Also see *Southern Calif. Permanente Medical Group*, 92 LA 41 (Richman, 1989).

- Business records exception to hearsay. *Florida Stat.* Sec. 90.803 (6): This exception requires that the record(s) be "made at or near the time" of the incidents, "kept in the course of a regularly conducted business activity" by "a person with knowledge" and "all as shown by the testimony of the custodian or other qualified witness" or a certificate of compliance with the statute making the record available "in advance" to afford a challenge. The exception can be lost in Florida if "the sources of information or other circumstances show lack of trustworthiness." 90.803 (6).

Foremost is the concern as to whether BSO established by clear and convincing proof that the grievant violated the criminal provision in the Florida statues concerning notification to practitioners. And as noted, in judging this concern is the overshadowing hearsay issue, i.e., whether the documentation and testimony of Sergeant Zavattaro is hearsay, and if so whether the are sufficient reliable factors in this record so that this testimony can given sufficient weight to establish clear and convincing evidence of just cause for termination.

There is no question but that BSO did not present any witness at this hearing who had direct and personal knowledge of the facts that establish a violation of 893.13 (7a)8. To violate this law there must be evidence that 1) the grievant withheld information from Drs. Erigoyen, Small, Panzer and Stein that he was receiving a prescription for a controlled substance of like therapeutic use from Dr. Prettelt; 2) or the opposite, that he withheld information from Dr. Prettelt regarding his prescriptions of a controlled substance from the aforementioned doctors; 3) he withheld this information from them while within the previous 30 days receiving this prescription; 4) the evidence *reliably shows* he sought a prescription for a controlled substance from Dr. Prettelt or the other doctors during this 30 day period.

First, none of the doctors testified. Their statements taken in Palm Beach County were not placed in evidence in this hearing. And while they served as part of the basis for the Probable Cause Affidavit, by not having them in this record, the arbitrator can make no informed decision as to weight, probative value or reliability of whatever they told to Sergeant Zavattaro in Palm Beach County. But even if they were included, simply accepting the Sergeant's testimony and report that neither of them knew about the alleged dual prescriptions, causes many unanswered questions that may have been reliably answered by their sworn testimony at this hearing.

Questions such as, when was the grievant last examined by Dr. Prettelt? How often was he seen? Was he examined prior to each re-fill? Is there a legal requirement to do so? Was the grievant complaining to him in 2009-2010 about his back? Did Dr. Prettelt know the grievant was seeing other doctors while Dr. Prettelt prescribed Hydrocodone? Did his wife speak to Dr. Prettelt about the grievant's Hydrocodone prescriptions? What if anything did Drs. Stein, Erigoyen, Small and Panzer know about the grievant's history at Dr. Prettelt? Did they get the grievant's records from Dr. Prettelt? And the questions would not end here. But reliability would certainly be helped.

Secondly, none of the persons on the staffs of these doctors testified. In particular the person or persons in Dr. Prettelt's office who on multiple occasions called in to Publix a prescription in the grievant's name for Hydrocodone. Should the arbitrator simply accept the PC Affidavit that the grievant sought those many prescriptions that came within the 30 day period of his receiving prescriptions from the other doctors for a controlled substance? What evidence is there that the grievant called Dr. Prettelt's office, identified himself as the grievant and requested the Hydrocodone refills? There is none in the PC Affidavit, other than Sergeant Zavattaro's conclusion that he did so supposedly based on the two internal office emails in Dr. Prettelt's office. There are no statements from any staff persons for any of the doctors. Questions for them if called as witnesses would relate to establishing Dr. Prettelt's policy on calling in for re-fills, and explaining whether the patient needs to be examined before a re-fill or not; who requested them from Dr. Prettelt and how was he request made; how many times the grievant called in; how many times his wife called; can a spouse call in for her spouse and have a position re-filled? Relying on Sergeant Zavattaro's hearsay account is not only unreliable but fails to answer any of the questions just posed.

Thirdly, none of the records Zavattaro obtained through his search warrant are in this record. Simply naming them in his Affidavit is not enough. And those few records that are in evidence came from BSO Sergeant Olsen. His initial inquiry in March 2010 shows two internal emails in Dr. Prettelt's office, not from then grievant, but back and forth between his staff and himself. According to the emails from a staff person to the doctor, the patient (the grievant) requested re-fills of Hydrocodone; there is also a copy of a phone message that the grievant's wife requested Hydrocodone. Her message does not relate to any of the dates in the PC Affidavit, and neither do the emails. As such, they raise an issue as to the practice in Dr. Prettelt's office as to whether only the patient can request re-fills or if a spouse can do so, who is also a patient, and as will be seen the caregiver for the grievant. This evidence is anything but clear and convincing that the grievant requested Hydrocodone re-fills.

Fourth, given these evidentiary lapses, and considering the grievant's defense that he did not request Hydrocodone from Dr. Prettelt and had no knowledge that his wife was actually making the requests and picking up the medicine from Publix, it was incumbent on BSO at this hearing to provide the pharmacy records, and just as important to have live testimony from a Publix pharmacist who could identify the person picking up the prescription. The arbitrator realizes that picking up the medication alone is not a defense if someone other than the grievant did so, but given the multiple times that the Publix scripts for Hydrocodone were called in, if the grievant also picked them up at any time it would dispel sworn testimony that he never did so and his wife's testimony that she was responsible for the prescription and obtaining the medicine.

Sergeant Zavattaro's investigation on this point is critical, for it shows that the Publix pharmacist could not identify the grievant as the recipient of the medication from that store. Moreover, the handwritten signatures on the prescription receipts from Publix according to

Zavattaro appeared to be the same handwriting both for the grievant and his wife. There is no evidence that a handwriting expert determined who signed them. But at the least, when considered with the lack of identification of the grievant, it suggests that Heather, as she so testified, was picking up the Hydrocodone and not the grievant.

BSO had an opportunity to rebut the grievant's defense. To do so it needed to call at the least someone from Dr. Prettelt's office with personal knowledge of these transactions. If such a person was no longer with Dr. Prettelt, then Dr. Prettelt could have been subpoenaed to tell the arbitrator his practice regarding re-filling controlled substance scripts and whatever knowledge he had of the grievant and his wife. Without any further evidence, the arbitrator is left with a record where BSO has not reliably shown that the grievant requested the Hydrocodone prescriptions from Dr. Prettelt, which makes his controlled scripts from the other doctors within the 30 day period proper.

BSO maintains that the grievant's wife testimony is suspect. She testified she and the grievant had no physical interaction with Dr. Prettelt's office after the first couple of annual visits in 04 and 05; thereafter she called-in for re-fills. BSO questions whether this procedure is logical; why wouldn't Prettelt's office want to know his physical status before prescribing a controlled substance? The arbitrator agrees that this procedure seems at odds with prescribing Hydrocodone, but that is one of the concerns discussed above regarding the absence of a witness from this doctor's staff or the doctor himself. It's part of BSO's burden, or by way of rebuttal to explain this refill process.

Heather Goodbread's gave details in her unrebutted testimony how she called into Dr. Prettelt's office and had them re-fill a Hydrocodone script at her request for the grievant:

> We would go to the doctor. He -- I would sign him in to the doctor. He's deathly afraid of doctors. . . . I have to physically go to the doctors with him, bring either a -- well, at that time [around April 2009], like a Gameboy or a cell phone, a game for him to play, something to keep him occupied. I sign him in. I, at the time, give over the insurance

> information, fill out all the paperwork for him, like a mother would a child, and present it to the person at the front desk. Fill out the complaint of what's wrong with him. And any follow-up appointments, I do the same thing. That's how I would handle it. Then the doctor calls him, or the medical assistant calls him to go in, I walk him in as if he's a child, because he is afraid of the doctors. He's been like that ever since he was a child. If he needed a follow-up appointment, I was usually paying the bill, making the next appointment and gathering his prescriptions, and he was already high-tailing -- or excuse me, leaving to the truck. I handled everything. . . he did not know about the ones [prescriptions] that I had, nor did he know about the ones that I would call in and left voicemails for, for refills . . . .

It is unrefuted then that Heather Goodbread took the grievant's physical prescription after the annual visit to the Publix pharmacy. She thereafter called-in to Dr. Prettelt's office for re-fills on that prescription without the grievant's knowledge. And having Hydrocodone refilled without a prescription is lawful.[8] In the meantime the grievant was being medicated from his other doctors with Oxycodone and Oxycontin. Heather kept the prescriptions of Hydrocodone for her own use. Her pleading guilty to trafficking in Palm Beach County suggests that she unlawfully obtained these prescriptions in the manner she described in her testimony at this hearing.[9]

Her testimony that she would not have any "physical interaction" with the doctor's office after first obtaining a prescription referred to her re-filling the prescription after the visit. She did not testify that this occurred in 2005 only. Her answer to no "physical interaction" related to the re-fills in the April 2009 time period; she did not testify that the grievant never went back to the office again. And she clarified his office visits in her later testimony that he had annual visits. Most importantly, unless rebutted by Dr. Prettelt or his

[8] Schedule III drugs are easier to prescribe and ultimately easier to get as evidenced here. A doctor is permitted to phone in a Schedule III prescription refill to a pharmacy. Schedule III drugs include Hydrocodone and anabolic steroids. Recently the FDA has proposed moving Hydrocodone to Schedule II that would require an actual prescription to refill. *nytimes.com* and *cnn.com* (Oct. 24, 2013); *fda.gov* (Oct. 24, 2013) *"Statement on Hydrocodone Proposed Reclassification."*

[9] Ac seen, Heather Goodbread testified that she was arrested for "calling in prescriptions under my husband's name." Asked if she did so, she answered "I did." The public record of the "Booking Blotter" from the Palm Beach County Clerk's website, *mypalmbeachclerk.com*, shows she was charged with trafficking drugs and "fraud- concealing information to obtain prescription." She testified she pleaded guilty and "that's why I'm on probation."

staff, her testimony explains how she was able to call-in on her husband's behalf for a refill. And as seen, her testimony stands unrebutted.

BSO maintains that the few pieces of documentation from Dr. Prettelt's office show that the grievant and not Heather called in for the re-fills. However, only documents on two dates reflect any type of call-in to Dr. Prettlet's office. Both of them are questionable. An email dated November 24, 2010 from CM [Candice Mayer] to Dr. Prettelt that "PT called in for re-fill on Hydrocodone . . . and wants it called in to Publix." Prettelt emails back "ok." On September 22, 2010, again virtually the same email appears. Neither email has some correlation by date to any of the prescriptions set forth in the PC Affidavit. There are no prescriptions from any of the doctors for the months of September and October 2010 to match the Sept. 22 email. Moreover, the November 24, 2010 emails have no corresponding date in the PC Affidavit. The closest date is November 29, 2010. And not having the pharmacy records from Publix further makes both emails questionable.

But more importantly, the emails are hearsay that clearly needed the testimony of the sender to determine the truth.[10] And it is not certain from these two emails whether the sender actually spoke to the "PT" or whether someone else in that office did so. And, it is more likely that she called on behalf of the grievant, especially given Heather Goodbread's unrefuted testimony that she acted as a surrogate mother for him in dealing with doctors. Candice Mayer, who supposedly took these calls for Dr. Prettelt was not called as a witness by BSO. She then could not be examined to verify that she actually spoke to the grievant, if someone else in her office did so, whether it was Heather who called for her husband or to even dispel

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[10] The notion that these emails constitute a business record exception to hearsay is misplaced. There is no evidence that such emails are kept in the regular course of that business as a means of confirming a re-fill. And given the unrefuted testimony that the grievant never called for re-fills, and his wife did so without his knowledge that has not been unproven, the trustworthiness of those documents is an issue that falls within the statutory exception in Florida.

testimony that Heather acted for her husband in dealing with prescriptions. It is found that the grievant's wife had to deal with this office on his behalf, and as such it reasonably follows that it would not be out of place for her to tell Dr. Prettelt office she is calling for her husband.

The other concern about the internal emails on these two dates is that no other emails were produced for this record to determine if the emails were a practice used for refills or some other method was utilized. Detective Zavattaro makes no reference to other interoffice emails at Dr. Prettelt's office, or any other manner as to how the re-fills were received and then approved by Dr. Prettelt. Yet Publix supposedly has records of multiple Hydrocodone re-fills. Where then are the approvals from Dr. Prettelt for these call-ins? Do they show that the "PT called in" or that his wife called in? Or were no other records kept?

The upshot is that based on this record the arbitrator cannot find that Heather Goodbread's testimony is unworthy of belief. So, too, that she would also risk lying under oath when she is completing her probation appears both risky and foolhardy.

BSO also attacks the grievant's testimony. It calls his testimony "self-serving" that he and his wife would testify she was responsible and he did not know what she was doing. But there is no evidence showing that he did know, which is the burden of BSO to establish under this criminal statute. As already found there is no proof that he went to Publix to pick up those prescriptions. There is no direct, first-hand evidence that he called-in the Hydrocodone prescriptions to Dr. Prettelt. And as seen, the sworn testimony is undenied that his wife acted as a surrogate mother for him with Dr. Prettelt, such as making appointments, staying with him in the exams, dealing with the office for him, taking the prescriptions and calling in re-fills for him and then not disclosing them to her husband. And the two documents relied on by

BSO to show he called, as seen, are replete with questionable concerns that go to their reliability.

BSO further argues that the grievant's testimony is unbelievable. It bases that conclusion mostly on the period from 2005 to 2009 as being unexplainable. BSO asserts that the grievant testified he was allowed to refill Hydrocodone prescriptions without a doctor's visit in that period. But this conclusion is misplaced. There is no documentary evidence that the grievant received such prescriptions during that period and the grievant testified that he did not. Asked about the last time he received "any prescription for hydrocodone from Dr. Prettelt, either of the brothers," he answered in 2005. His testimony is that he could have done so but Dr. Prettelt suggested a specialist.

BSO then maintains that his testimony is suspect, i.e., when he did visit Dr. Prettelt's office in 2009 and 2010 no one there asked how the Hydrocodone was working for his back, despite refills for the medication on a monthly basis. BSO is correct the grievant testified that from 2005 through 2011 no one from Dr. Prettelt's office asked him to have an office visit if he wanted a prescription for Hydrocodone, or was it ever mentioned in any of his annual physicals exams. But it is undisputed that other doctors were treating the grievant's back at this time. At the same time there is no evidence from Dr. Prettelt's records that he approved prescriptions for Hydrocodone from annual exams, except for the two questionable internal emails that are further unclear as to if they followed an office visit or an annual visit. And without Dr. Prettelt's testimony, or anyone from his staff, it cannot be shown that the grievant was aware of any prescriptions written for him regarding Hydrocodone during this period. If he was not on other pain medication, it would be more plausible that he did know of the prescription from Prettelt. However, he was being treated elsewhere and on heavy doses of two other pain medications also labeled as controlled substances.

There is little need to address other due process concerns raised by the PBA. Suffice to say that the BSO investigation left stand many holes in the PC Affidavit prepared by another agency. The BSO investigation consisted of updates obtained by Sergeant Greene of the grievant's criminal case, the several documents initially obtained by Sergeant Olsen and some undocumented interviews. The well-established principle is that "when a third party makes a finding regarding an employee's conduct, whether that third party is a judicial officer, an insurance carrier or other person, the employer must still conduct an impartial, thorough investigation and make its own disciplinary determination based on the evidence from its probe." Brand, *Discipline and Discharge in Arbitration*, at 46. It's a due process violation that is most serious here. An independent investigation by BSO of the facts needed to reliably connect the grievant to this criminal statute, not just the procedural updates, which could have answered the many questions posed above and thus satisfied due process.

Finally, with respect to the charge that the grievant violated this criminal statute, the evidence as shown above fails to establish a violation on the merits. The proof offered by BSO lacks the weight of evidence needed to reach the clear and convincing level. BSO did not prove through reliable evidence that is clear and convincing the grievant violated Fl. Stat. 893.13(7)(a)(8) for withholding information from a practitioner.

As to the conduct unbecoming charge, BSO charges that evidence of violating the statute is unbecoming conduct, which as seen has not been proven. After the hearing it added three more grounds for unbecoming conduct. First, "actions taken by grievant regarding the medication that grievant admits to receiving, which he calls legitimate prescriptions, support that BSO has just cause to terminate Grievant for his unbecoming conduct." It is unclear what BSO means by "actions" the grievant took regarding those medications. There is nothing in

the record establishing that his receiving those prescriptions was improper or unlawful, or that he received some sort of treatment.

Secondly, BSO asserts that not providing information to the prosecutor or PBSO about his wife making the calls for his prescriptions, is sufficient to warrant his removal as a Sergeant. But there is no evidence that the grievant withheld information from the prosecution about his wife. No prosecutor testified. The grievant made no such admission. And there is no documentation suggesting that he did so. Nothing about his wife appears in his Diversion agreement. Colonel Dole who had the agreement in front of him, testified that it did not reveal anything about what the grievant stated or did not state about the allegations, or anything about his wife's role. That settlement is also not in evidence. Of course whatever prompted that arrangement is inadmissible as part of a settlement.

Thirdly, BSO claims that receiving a pre-trial diversion alone is enough for unbecoming conduct. BSO does not go so far as maintaining that the program is in effect an admission of guilt, but suggest that some sort of taint exists from participating in it that does not become a police officer. The arbitrator agrees that entering into this program could create at the least a poor image of a BSO sergeant. "'Unbecoming' can mean 'creating an unfavorable impression or detracting from one's character.'" *City of St. Petersburg, Florida and PBA*, 2001 WL 1013742 (Hoffman, 2001) quoting the definition of "unbecoming" from *Random House New College Dictionary.*

But is an unfavorable image enough here to warrant termination? In those cases where terminations result for violating this rule, the conduct is usually considered outrageous, extreme, or offensive in damaging the image of a public employer. For example, in *Broward County Sheriff's Office & FPE*, 110 LRP 46038 (Hoffman 2010), where "in addition to hurling the knife, the grievant made continued efforts to block her [his girlfriend] from

moving, at one point hitting her car. Her 14 minute sojourn with him, as vividly demonstrated on the 911 tape, is more than sufficient evidence to establish that grievant engaged in aggravated stalking. . . .” This arbitrator upheld the termination for “there can be no doubt that when a law enforcement officer engages in such a multitude of unlawful conduct his actions are clearly unbecoming an employee of BSO. For a police officer to partake in any of these offenses does not become what a law enforcement officer stands for, albeit one whose sworn duty is to protect citizens from exactly what he did to this citizen. The grievant thus violated the BSO policy of engaging in conduct unbecoming an employee of this agency.”[11]

That he participated in this program should not be judged *per se* as something outrageous or offensive that deserves termination. The diversion program is meant only for charged misdemeanors, as the program is so named, “Misdemeanor Diversion Program,” which suggests a much less serious charge than what his wife admitted to. So, too, this program is meant for the charged persons “to seek rehabilitation, and divert their cases from the criminal court system.” These objectives appear on their face as positive and helpful to BSO, the person charged and the citizens of this County, as Colonel Dole pointed out. Furthermore, there is no evidence from this program that the grievant needed rehabilitation for any drug use, as Colonel Dole also revealed in his testimony: “There's no recognition of it in this document.”

These considerations lead to the conclusion that while there may be an impression of unbecoming conduct, that alone is insufficient for termination. Lesser discipline could result if the record did not contain serious due process concerns about how BSO asserted this

[11] Termination for unbecoming conduct of police officers, also see: *City of St. Petersburg, Florida and PBA*, 2001 WL 1013742 (Hoffman) (continually belittling the Chief in front of a group); *City of Cooper City and PBA*, 118 LA 842 (Hoffman, 2003) (sleeping); *State of Florida and AFSCME*, 10-1 ARB 4874(Hoffman, 2009) (veiled threat of violence to supervisor);
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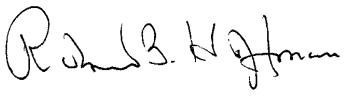
position on unbecoming conduct. Its argument that the diversion program itself is unbecoming conduct is found nowhere in this record. Neither Sergeant Greene's report to the Professional Standards Committee nor her testimony reveals any link between the grievant's participation in this program and charging him with unbecoming conduct. Her only basis of that charge, she testified, stemmed from "him committing, allegedly committing a criminal allegation or a crime." Further, there is no evidence that the Committee expanded this charge to include this new three-pronged basis for unbecoming conduct. And counsel for BSO in her opening statement at this hearing made no such connection. She simply stated: "And he was also charged with conduct unbecoming an employee."

To make known the basis for this charge for the first time after the hearing causes obvious fairness concerns. There is no way at this point the grievant can offer a defense or any type of argument; the Union's brief is void of any position regarding this broadened concept of unbecoming conduct. And none of the evidence relied on by BSO for its position is newly discovered during the hearing. BSO referred to the diversion program in its opening statement at the hearing, but did not connect it to unbecoming conduct. "The right to be informed of the charges includes the right to be informed at the time the discipline is imposed, not at some later date." Brand and Biren, *Discipline and Discharge in Arbitration*, 2nd Ed. (2008) at 39-40, 48, citing this arbitrator's decision in *School Board of Broward County*, 117 LA 129, 137 (Hoffman, 2002). At the time of discharge here it appears the diversion program was agreed to (see pgs. 6-8). "The employer's failure to provide a precise statement of charges may establish a contractual violation or a due process violation." Brand at 48. As such, to impose any discipline for unbecoming conduct as asserted by BSO in its brief would be improper in light of this due process violation that deprived the grievant of asserting any defense. The unbecoming charges are all rejected.

Award

Based on the above and the entire record the grievance is sustained as to both charges. Accordingly, the grievant shall be reinstated to his former position and made whole within the conditions set forth in the footnote below, starting with the date of his Notice of Suspension without Pay on April 8. 2011.[12] The arbitrator shall retain jurisdiction for a period of 90 days after this award in the event any dispute arises as to the administration of this remedy.



Robert B. Hoffman
arbitrator

[12] The parties stipulated prior to the hearing that back pay is waived from August 7, 2012 until the date of the arbitration hearing, October 3, 2013, and it is SO ORDERED as part of the make whole remedy. Back pay included in the make whole remedy is ORDERED to resume from the date of this Award until reinstatement, if the grievant so qualifies.

As for reinstatement, Lieutenant Greene testified she had no problem with the grievant returning to work. "I personally worked with Sergeant Goodbread in the Dania Beach District. I did not have any problem with Sergeant Goodbread at that time," but she would not want someone working for her who may be "under the influence." When the grievant was asked at the hearing if there was anything that would prevent the arbitrator from reinstating him, he answered: "I'm probably healthier now than I was, *except for my back*, when I was 20 years old." [Emphasis added].

Inasmuch as it is the grievant's back that caused him to take controlled substances for pain, the record is unclear whether that medication continues, and the extent to which his back problem would interfere with his job or whether light duty is more appropriate if available; those answers must come from the grievant completing a fitness for duty examination and it is SO ORDERED. Such examination shall be independently conducted and shall take place no later than seven days after this Award, unless the parties otherwise agree. A fitness determination, which may or may not include a drug test at the option of BSO, shall be made within seven days after the exam.