

**AMERICAN ARBITRATION ASSOCIATION**  
ARBITRATOR MARY ELLEN SHEA

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In the matter of the arbitration between: \*  
\*  
CITY OF NORTHAMPTON \* 01-17-0007-4067  
-and- \*  
NEW ENGLAND P.B.A., LOCAL 187 \*  
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INTRODUCTION

A demand for arbitration was filed by the New England Police Benevolent Association, Local 187, pursuant to the parties' collective bargaining agreement and in accordance with the rules of the American Arbitration Association. The parties jointly selected Mary Ellen Shea to act as a single neutral arbitrator in the matter. Hearings were conducted on June 14 and August 14, 2018, in Northampton, Massachusetts.

NEPBA, Local 187 (Union) was represented by Attorney Gary Nolan. The Grievant, Detective Lieutenant Alan Borowski, appeared for the Union. Also in attendance were Attorney Peter Perroni; Sergeant Brian Letzeisen, Local President; Sergeant Corey Robinson, Local Representative; and [REDACTED] observer.

The City of Northampton was represented by Attorney [REDACTED]. Appearing for the City were Alfred Donovan, Investigator/Consultant; Jody Kasper, Chief of Police; and John Cartledge, Captain of Operations. Also in attendance were Attorney [REDACTED] and Dorothy Clayton, Captain of Administration.

The parties submitted post-hearing briefs at which time the record was closed.

THE ISSUES

The parties stipulated to the following statement of the issues to be decided:

Was there just cause to suspend the Grievant, Detective Lieutenant Alan Borowski, for two days on October 26, 2017?

If not, what shall be the remedy?

### RELEVANT CONTRACT PROVISIONS

The parties' July 1, 2016 through June 20, 2019, collective bargaining agreement contains the following pertinent provisions:

#### ARTICLE 3 MANAGEMENT RIGHTS

3.01.... Nothing in this Agreement shall limit the City in the exercise of its functions of management and in the direction and supervision of the City's business. This includes, but is not limited to the right to:... establish rules, regulations, job descriptions, policies and procedures...

#### ARTICLE 5 GRIEVANCE AND ARBITRATION PROCEDURE

5.02.... The arbitrator shall have no power to add to, subtract from, or modify the terms of this Agreement.

#### ARTICLE 8 DISCIPLINARY ACTION

8.01. No employees shall be removed, dismissed, discharge, suspended or disciplined except for just cause as provided by Massachusetts General Law, Chapter 31, Section 41, as amended.

#### RULES AND REGULATIONS

##### Rule 5.3 – Submitting Reports

Promptly [REDACTED] complete and submit all reports and forms as required.

##### Rule 6.2 - Conduct Unbecoming an Officer or Employee

Conduct unbecoming an officer or employee shall include that which brings the Department into disrepute or reflects discredit upon the officer or employee as a member of the Department, or that which impairs the operation or efficiency of the Department or officer or employee.

##### 9.0 Accountability and Discipline

An effective and responsive system of personnel accountability and discipline has for its purpose the maintaining of efficient Department performance and the preserving of overall departmental morale. A clearly defined disciplinary policy enables all officers and employees to know what is expected of them and to understand that appropriate discipline will be administered when required. Essential fairness and justice are the foundation of the disciplinary process and it

is the personal responsibility of the Chief to ensure that the standard is equitably maintained.

Rule 9.1

Under the provisions of MGL Chapter 31, officers and employees may be disciplined for just cause.

Route 9.2

Disciplinary actions which may be imposed after statutory and/or contractual procedural requirements are observed, are....

Rule 9.3

Department standards of conduct and performance will be enforced in a uniform and consistent manner and the disciplinary measures taken will be based upon the seriousness of the charges.

## POLICIES AND PROCEDURES

### AOM CHAPTER P-251

#### Citizen Complaints and Internal Investigations

#### III. Complaint Procedures

D. 1. No complaint should be rejected solely because it is anonymous, as anonymous complaints can often be a valuable source of information and should be considered on their individual merits.

2. The ODC shall be responsible for providing the Chief of Police with status reports on the progress of the investigation.

a. The ODC shall be responsible for overseeing and conducting, if necessary, internal affairs investigations, and shall report directly to the Chief of Police.

3. An internal affairs investigation may inquire into a department employee's on duty or off duty conduct if such inquiry is reasonably and directly related to the employee's performance of duty, if such conduct affects the employee's fitness or ability to continue in police service, or if it reflects discredit on the Department.

#### V. Report of Administrative Investigation

A. At the conclusion of any administrative investigation, a full written report shall be prepared by the assigned investigator for submission to the ODC and forwarding to the Chief of Police. This report shall include....

B. Upon receipt of the written report of investigation, the Chief of Police should take appropriate action based on findings in the particular case. The Chief of Police and the ODC shall together determine the appropriate adjudication and disposition based on the findings of fact....

C. The ODC or designee shall inform the employee, in writing, of the conclusion and disposition of the administrative investigation in a timely manner.

D. The ODC shall notify the complainant formally, in writing, of the conclusion and disposition of the investigation, from one of the six previously described classifications.

AOM CHAPTER O-402  
Evidence and Property Handling Procedures

III. Chain of Custody Procedures

C. Turn Items Over to Officer in Charge (OIC): The submitting Officer shall then turn all items over to the OIC, who shall place such items in the appropriate storage/locker area. Officers shall ensure that all items of evidence/property are submitted to the OIC prior to the end of their tour of duty. However, where circumstances occur that evidence cannot be submitted to the OIC at the end of the shift, with approval of the OIC the evidence will be logged and properly secured until such time that it can be processed accordingly.

D. Responsibility of Evidence/Property Control Officer: The E/P Control Officer shall be responsible for reviewing the Evidence/Property Log and when necessary, removing items from the temporary storage area(s) to the proper permanent secured storage area(s)....

E. Evidence Room Entry Log: Any authorized person entering the Evidence Room will only gain access with the use of their issued key FOB....

F. Record Chain of Custody: Whenever evidence or property is released, exchanged or transferred, such transfer of custody shall be recorded...

G. Members Of the Northampton Police Department who assume custody of evidence or property are full responsibility for ensuring its security, proper storage, maintenance, and for the ready retrieval of such evidence upon demand.

VI. Evidence and Property Room Inspection

A. Responsibility of Evidence/Property Control Supervisor: At least semi-annually, the E/P Control Supervisor shall be responsible for inspecting all property storage areas to determine adherence to procedures....

AOM CHAPTER O-504  
Medicine Disposal Drop Box Unit

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III. Procedures (B) Emptying of the Drop Box Unit

1. The Drop Box Unit will be checked on a b-weekly basis...
2. Once full, two (2) Police Officers, one (1) of which is to be a Supervisor, will remove the contents of the Drop Box Unit.
3. The contents will be placed in a cardboard box...
4. A card is to be entered into the daily log...
5. The box shall then be placed I the Evidence Room.
6. The Hampshire County Sheriff's Department will be the agency that collects...
7. A journal shall also be kept and shall contain the following information:
  - a) the date the Drop Box was emptied
  - b) the names of the personnel emptying the Drop Box Unit
  - c) the property number assigned
  - d) the date of turnover...

## BACKGROUND

Lieutenant Alan Borowski has been employed by the City of Northampton Police Department for 20 years. He was promoted to Detective Lieutenant in 2014 to head the Detective Bureau, a prominent position in the department. The responsibilities of this position include managing seven detectives, five crime scene technicians, the Evidence and Property Room, and the Medicine Disposal Drop Box. Until October 2017, Lieutenant Borowski had a clean discipline record and, according to Police Chief Jody Kasper, a performance record marked by hard work, dedication and excellence. Lieutenant Borowski was suspended in October 2017 for allegedly removing drugs from the lobby drop box and transferring them to the evidence room without filing a complete and accurate report.

In February 2016, a Hatfield resident and friend of Lieutenant Borowski called to ask about disposing of some pills connected to his brother's (also a friend) overdose. Lieutenant Borowski explained the pills could be safely disposed of in the lobby drop box at the Northampton Police station. When the Hatfield resident arrived at the station, however, he asked Lieutenant Borowski to put the pills in the drop box for him, perhaps to avoid being captured on camera. After a conversation with Detective Peter Fappiano of the Drug Task Force, Lieutenant Borowski removed the pills from the drop box and transferred them to the evidence room. Lieutenant Borowski did not make a record of the removal from the drop box and he did not file a complete report about the source of the pills when he logged them into the evidence room.

Eighteen months later (on August 14, 2017), Chief Kasper received an anonymous note:

Since you don't have a freaking clue about what actually goes on inside these 4 walls, here is a hint for you –

Check the camera that eyes the drug drop box around the time that the overdose occurred involving Swazlowski. Why would a supervisor be opening and digging through it and then removing pills from it?? You should ask your

detective head. You may want to piss test him too. He's cycling<sup>1</sup> and has been for years. Time for him to go.

Employer Exhibit #3A

The Operations Division Commander, Captain Cartledge, was filed an Internal Affairs Complaint Report, which triggered a departmental requirement to conduct an internal investigation:

On Monday, August 14, 2017, Chief Kasper received an anonymous letter regarding allegations that pertain to your conduct. It is alleged that you improperly removed pills from the drug drop box in the lobby. It is also alleged that you are using illegal steroids and have been for years.

Employer Exhibit #5

Department policy required that Captain Cartledge (as ODC) conduct the investigations but Chief Kasper decided to hire an outside investigator because she and "both Captains were close to" the Grievant. The Chief had gone to the Academy with Lieutenant Borowski and both she and Captain Cartledge had been friends with him for more than 20 years. "I wanted to assure an unbiased investigation, so I hired a neutral investigator."

By the end of August, the department contracted with Alfred P. Donovan (APD Management) an experienced investigator with prior experience as a police officer, sergeant, deputy chief, and chief. Captain Cartledge was the investigator's lead contact for the Department, and provided him with all the documents needed and made arrangements for the investigator's interviews with department employees.

On September 18, 2017, Captain Cartledge notified Lieutenant Borowski that he was being placed on Administrative Leave pending an internal investigation (Employer Exhibit #4). It is not clear whether Lieutenant Borowski was told about the anonymous allegations or the purpose of the investigation before being interviewed by Mr. Donovan the same day (September

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<sup>1</sup> "Cycling" is a reference to the use of steroids or performance enhancing drugs.

18, 2017). During the interview with the investigator, Lieutenant Borowski had Union representation but was denied a request to see the anonymous letter. During the interview, the Grievant described his duties and responsibilities and told the investigator that he:

- never opened or accessed the drug drop box without another department employee present;
- never took any drugs that had been in the Department's custody for his own use;
- never gave a civilian any drugs that had been in the Department's custody; and
- never used illegal steroids or illegal performance-enhancing drugs

The same day (September 18, 2017), five detectives, including Detective Fappiano whose statements included the following:

- He was with Lieutenant Borowski and observed him remove the pills from the lobby drop box;
- He could interview the Hatfield residents because of his role as a member of the Drug Task Force, but there was no "criminal case";
- He talked to the Hatfield men in an effort to "set them straight";
- Captain Cartledge was present when the Lieutenant displayed the envelope of pills while the two discussed the matter. The Captain then shook his head, put his hands up and said, "I'm outta here."

Joint Exhibit #1A

According to Mr. Donovan, some of the statements prompted more questions for Lieutenant Borowski and asked the Chief to handle. On September 20, 2017, the Chief wrote to the Grievant, listing 17 questions for him to answer in writing:

As a result of the preliminary interviews conducted by investigator Alfred Donovan... [t]here are several items which need clarification and further investigation. Therefore, I am ordering you to complete a detailed report in regards to the questions listed below.

Employer Exhibit 3F

Lieutenant Borowski submitted written responses on September 21, 2017 (Employer Exhibit #3G). The written questions along with Lieutenant Borowski's written responses follow:

1. How long have you known Sean Szawlowski and what is the nature of your relationship?

- A. I have known Sean for approximately 30 or so years. We have been friends for many of those years; however, we have not maintained any type of friendship since approximately July of this year.
2. How long have you known Chris Szawlowski and what is the nature of your relationship?
  - A. I have known Chris for approximately 30 years. We have also been friends for many years. Since July of this year we have not maintained any type of friendship.
3. When did you first become aware that Sean Szawlowski had overdosed on pills?
  - A. Approximately late January or early February 2016.
4. In your report dated 2/10/16 you indicated that someone provided you with 11 blue pills that you tagged to be held for safekeeping. Who provided the pills to you and how long have you known the person who provided you with the pills?
  - A. Chris Szawlowski, who I have known for some 30 years.
5. Does the person who provided you with the pills have a nickname and if so what is it?
  - A. I do not believe so, I've always called him Chris. If you are referencing Christopher Stanislawski he goes by the nickname "Topher" however he did not hand the pills over to me.
6. At the time of his overdose, what was your relationship with Sean Szawlowski?
  - A. We were friends.
7. Why did you take the 11 blue pills and what did you intend to do with the pills when you first took possession of them?
  - A. I had spoken with Chris at some point and he informed me that he came into possession of them. To the best of my recollection, I believe that Sean's wife, Kristi, had given them to him to get them out of the house. I did not ask if they were pills that had been prescribed to Sean (I believe he did have a legal prescription). I told Chris that we had a drug disposal box in the lobby of our Police Department and he could dispose of them there. My intent was to have the drugs destroyed so no one could abuse them, and I believe that Hatfield PD, where they all lived, did not have such a box.
8. Did you place the pills in question in the drug drop box in the police station lobby?
  - A. Yes.
9. When did you place the pills in the drug drop box in the police station lobby and why did you place them in the drug drop box?
  - A. I don't remember the specific date and time, but it was right around the time I received them, and some time on the day shift. I believe it was several days after Detective Fappiano had interviewed Sean and Christopher. Not believing they were evidence of any nature, I put them in the box for destruction.
10. Was anyone with you when you took that action?



- A. I can't recall. I may have walked with Chris to the box on his way out of the PD, or I may have been alone. No other Police employee was with me as far as I recall.
11. Did you tell anyone that you were going to put the pills into the drug drop box prior to taking that action?
- A. I don't recall.
12. Information has been received that you took the pills in question out of the drug drop box in the lobby of the station. If that happened, when and what time did you take that action and why?
- A. I spoke with Detective Peter Fappiano and advised him that Chris Szawlowski had brought the pills into the station for destruction and then I put them in the lobby drug destruction box. It was my belief through our prior conversations that all of his interviews were done, and he would not and could not charge anyone in this case so there was no need to maintain possession.
13. If you remove the pills from the drug drop box in the police lobby, was there anyone with you at the time you took that action?
- A. No there was not.
14. If you took the pills in question out of the drug drop box in the police lobby, why did you enter them as "held for safekeeping" as opposed to evidence?
- A. To the best of my recollection, Detective Fappiano had informed me that he would not be charging Christopher Stanislawski, or anyone in this case. He was speaking to them to try and get them to straighten out their lives that were spiraling out of control. Without anyone being charged, I did not feel that it warranted an evidence tag, and they were not be sent out to be analyzed.
15. Why were the pills (one day later) marked for destruction and placed in the destruction box?
- A. It was my belief through conversations with Detective Fappiano that no charges were going to be filed in this case, either now or in the future. Therefore as with other drugs that will not be needed, they were marked for destruction. To my knowledge the drugs still remain secured in our evidence room. I vaguely remember talking to Detective L. Caputo and telling her what I did but it's been so long I can't be certain.
16. Your report indicates that the pills were involved in an investigation conducted by the drug task force, who initiated that investigation and why?
- A. Since all involved parties lived in Hatfield, I spoke with Detective Fappiano and advised him of everything going on with Sean, whom he also knew very well. I didn't feel comfortable dealing with Sean due to our relationship and thought he would listen more if Detective Fappiano spoke to him, due to the Detective's extensive knowledge in this area. Detective Fappiano agreed to bring him in, as well as Christopher Stanislawski (who I believe was brought in by Sgt. Trushaw). Detective Fappiano spoke with both of them with the hopes of straightening them

out, although I believe he did obtain a small amount of intelligence from Stanislawski.

17. What is the outcome of the drug task force investigation?
  - A. To the best of my recollection I don't believe a formal investigation was ever done. I believe it was strictly to bring Sean Szawlowski and Christopher Stanislawski in to let them know of the deadly path that they were going on and get them help. I believe that both checked into rehab facilities after Detective Fappiano's conversations with them. That was the extent of all of this.

The investigator also told the Chief about the allegation that Captain Cartledge knew about Lieutenant Borowski's handling of the pills. The Chief decided she would ask the Captain about it privately. The Chief testified that Captain Cartledge had no recollection of the matter but conceded, "it could have been true." The Chief testified that she verbally reprimanded the Captain because she determined he had "made a joke about it and left the room." The Chief did not record or make notes of the interview and only told the investigator that the Captain "did not recall" the incident.

On September 27, 2017, Mr. Donovan conducted a second interview with Detective Fappiano to clarify some of his previous answers in light of the Grievant's written answers. The same day, the investigator interviewed another two detectives, a police officer and three civilians (Employer Exhibit #3I).

A short time later, Detective Fappiano was summoned to meet with Chief Kasper, Captain Cartledge and Captain Clayton. According to the Chief, Detective Fappiano was complaining to department employees that the investigation was not being handled properly and the Grievant would not be disciplined. Chief Kasper testified that "We have a policy of addressing rumors right away..." and said, "we wanted to hear what he had to say and why he was so bothered." Months later (March 2018), Detective Fappiano submitted a ten-page

statement that included a description of the late September 2017 meeting with the Chief and the two captains:

I expressed frustration because the truth was not leading to a just result where individuals were held accountable when they break important rules meant to protect the department, other officers, and the public. I repeated the history of events under investigation that I had told two other times to [the investigator].

I advised Captain Cartledge that if he would have done his job as a Captain while in Lieutenant Borowski's office that day that he showed both of us the pills that I wouldn't be sitting in the chair right now. Captain Cartledge stated that he didn't remember.

I expressed frustration because if they were to conclude that the matter was unsubstantiated, then they all must believe that I wrote the letter and that I was lying. I reiterated that I did not write the letter and that I had told the truth. After this the Chief began asking me more questions about Lieutenant Borowski, probing for more information and evidence ostensibly to use against Lieutenant Borowski because the formal investigation conclusion had not been permanently and formally declared....

[Later] I met Captain Clayton...and she stopped me. Captain Clayton said, "Thank you Peter" I said for what. Captain Clayton said that up until now "they" could not wrap their heads around why I was so mad...I repeated the history of events to her and she said that she believed me and thanked me for telling the truth.....Shortly after I heard the investigation was taking a turn and that Captain Clayton was performing a full blown investigation into Lt. Borowski.

Union Exhibit #10

The meeting with Detective Fappiano was not recorded and no notes were made. Chief Kasper testified the meeting "helped us better understand the facts." The Chief acknowledged that Detective Fappiano was a "percipient witness" in the ongoing investigation but Mr. Donovan was never told about the meeting. A couple days later, Captain Cartledge filed another Internal Affairs Complaint Report about Lieutenant Borowski:

While conducting an internal investigation into allegations of improper evidence handling procedures and illegal steroid use, the Administration received concerning information related to Lt. Borowski's performance and responsibilities as a supervisor in the Northampton Police Department, specifically his ability to supervise within the Detective Bureau. These allegations are detailed below:

1. ...allegedly engaged in "bullying" behaviors to his staff...
2. ...allegedly drove his assigned unmarked police cruiser off-duty...with a civilian in it...

3. ...leaves the Department for extended periods of time...[allegedly] attending PT appointments...
4. ...allegedly made comments “bashing” the Northampton Police Department Community Policing efforts...
5. Allegedly solicited employees to make inappropriate comments about Captain Cartledge on previous climate surveys...
6. ...allegedly called out sick when he was not sick...
7. ...worked a detail...and allegedly left the detail one hour early...

Union Exhibit #16

The Complaint Form did not name any witness or complainant. On this point, the Chief testified that the complaints had come from various detectives. The Complaint Form did not specify a “Date of Incident.” On this point, the Chief testified that specific dates may have been omitted because the complaints covered “a broad period of time.” The filing of the complaint report triggered the department requirement to conduct an internal investigation. The Chief decided did not to use an outside consultant this time and assigned the second investigation to Captain Clayton instead.

The next day (October 3), Mr. Donovan emailed a “Draft [Investigative] Report for review by Chief Kasper” (Union Exhibit #12). According to Captain Cartledge, the only suggested changes were “minor edits.” Mr. Donovan testified he had agreed “to add something about the chain of command stuff” to the draft. Captain Cartledge received the final investigative report (Employer Exhibit #3) on October 10, 2017, and on October 16, 2017, he notified Lieutenant Borowski of his decision:

On or about February 10, 2016 you intentionally disposed of illegal drugs (blue non-prescription pills) and place them into the lobby drop box. These pills were obtained by you from your friend’s brother who had overdosed. You had specific knowledge that there were other overdoses occurring in the area, with these types of manufactured blue pills and that the Drug Task Force was actively investigating these types of cases. You also intentionally wrote a very vague and obscure OF report (16-342-OF) which did not properly document the intake of the pills that you came into possession of and which also indicated that you knew that these pills were illegally obtained by your friend. Lastly, you failed to

properly document your entry into the lobby drop box when you retrieved these pills.

The actions are in violation of:

AOM P100 – Rules and Regulations

Rule 5.3 Promptly and accurately complete and submit all reports and forms as required.

Rule 6.2 Conduct unbecoming an officer...

AOM O504

Medicine Disposal Drop Box Unit

III. Procedures (B)

AOM O402

Evidence and Property Handling Procedures

III. Chain of Custody Procedures

A. Complete Incident Narrative:

B. Complete Entries in Evidence/Property Segment of Offense Report  
Joint Exhibit #2

The same day, (October 16, 2017), Captain Cartledge, notified Lieutenant Borowski he would be suspended for two days:

Based upon a thorough review of all evidence presented to me relative to this matter, it has been determined that you did violate the policies and rules that are listed above.

You are hereby notified, under the authority of Chief Jody D. Kasper, that you are being suspended from duty, without pay for a period of TWO (2) days. The dates of the suspension will be determined at a later date....

...In closing, your actions related to these events were unprofessional, display a lack of sound judgment, and calling to question your integrity. Any further violations will result in disciplinary action up to and including termination. This letter serves as your notice of suspension.

Employer Exhibit #4

The grievance was denied at Step 1 by Captain Clayton (date not known) and at Step 2 by the HR Director on November 27, 2017;<sup>2</sup>

I received your email initiating a Step 2 grievance on Wednesday, November 8, 2017. I also received a hard copy of your request on November 17, 2017...

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<sup>2</sup> Employer Exhibit #2 identified as the "Grievance Trail" is not complete and contains some unrelated documents. The first page is a grievance complaint dated November 20, 2017 regarding a different suspension (for five days). And the third page is a 12/6/17 demand for arbitration, without specifying which grievance it pertains to.

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The Police Department conducted a thorough investigation and found multiple violations of the AOM P100 – Rules and Regulations. These violations were significant and there is just cause for the two day unpaid suspension.

Employer Exhibit #2

Thereafter, the parties were unable to resolve the matter which was subsequently submitted to arbitration.

### POSITIONS OF THE PARTIES

#### THE CITY

The City argues there was ample just cause to issue a two-day suspension to Lieutenant Borowski for rules violations in October 2017. There is no question that, as head of the detective bureau with oversight responsibility for the Evidence and Property Room and the Medicine Disposal Drop Box, Lieutenant Borowski knew of and understood well the rules he was found to have violated.

These rules, in addition to being well known to Lieutenant Borowski, are critically important to the orderly, efficient and safe operation of the City's Police Department. The Chain of Custody Procedures are of the utmost importance, "to minimize the possibilities of adverse claims against the Department and to enhance its credibility when used in Court as evidence...Chain of custody must be able to account for the handling, examination and storage of evidence by everyone involved" (AOM Chapter O-402).

Administration of the Drug Drop Box Policy is similarly important to maintain public confidence in the utilization of the drop box. The drop box exists for family members and friends to have a safe place to dispose of medication to avoid potential abuse by their loved ones. It is true that the drop box policy does not contain a specific rule requiring an officer to document the removal of a singular item from the drug drop box. Silence in the policy about the removal of

some items cannot be construed as allowing an officer unfettered discretion to remove items from the drop box. The policy is silent on this because there are no reasonable circumstances contemplated where a police officer should retrieve a medication or narcotic that has been placed into the drop box for disposal. If it were allowed, common sense says that the chain of custody would require the removal be documented.

By his own admission, Lieutenant Borowski obtained the pills from a personal friend and disposed of them in the drop box on his behalf but later opened the box, retrieved the pills and entered them into evidence. He filed only a bare bones report that failed to identify the friend he received the pills from or the fact that Lieutenant Borowski had deposited and then retrieved the pills from the drop box. Later, Lieutenant Borowski revised the report by marking the evidence for destruction. The City rejects the Grievant's explanation that the report was not detailed because he did not "believe [there was] a formal investigation." The City contends the Grievant's report misrepresented the facts, concealed a conflict of interest due to his personal relationship, violated departmental rules and disrupted the chain of custody.

The collective bargaining agreement as well as the department's Rules and Regulations put Lieutenant Borowski on notice that his conduct could have disciplinary consequences. Specifically, the AOM Chapter P-250 states that discipline may be imposed for any "violation of any written, verbal, departmental or City Rule, Policy, procedure, regulations or order."

The City argues that the investigation was fair and sufficient establishing substantial evidence that Lieutenant Borowski violated several departmental Rules and Regulations. In an abundance of caution, the Chief hired an outside investigator since both she and the ODC had been friends with the Grievant for at least twenty years. The impartial, neutral investigator independently concluded that:

Detective Lieutenant Borowski put himself in a position where he was directly involved in an ongoing investigation concerning close personal friends and acquaintances and his failure to follow clearly written directives allows for speculation and may have provided the appearance of preferential treatment. Furthermore, had criminal proceedings resulted from the investigation a credible challenge to the chain of custody...may have been presented which could have prevented their admission as evidence.

Employer Exhibit #3

The City asserts the two-day suspension was appropriate given the seriousness of the violation. The City also contends the two-day suspension was fair and that Lieutenant Borowski was treated no more harshly than other employees similarly situated. The Chief testified about a similar discipline case in which she issued a two-day suspension when a Court Administrator prematurely destroyed evidence in a case against a relative in violation of the same evidence and property handling procedures the Chief found the Grievant to have violated.

The City rejects any assertion that the investigation was tainted by the meeting between Detective Fappiano, Chief Kasper, Captain Cartledge, and Captain Clayton. During that meeting Detective Fappiano reiterated what he already told the investigator and no new information was obtained. The City also rejects any claim that the investigator's release of a "draft" report for the Chief's review proves the final report was influenced by the Chief. Chief Kasper testified that the report was simply reviewed for proofreading and double-checked for accuracy.

The City dismisses Detective Fappiano's allegation that Captain Cartledge was aware of and condoned the Grievant's misconduct. Captain Cartledge testified he had no recollection of the alleged incident. Even if Captain Cartledge had been present, he credibly testified that simply possessing a bag of pills was not out of the ordinary in the bureau and did not necessarily indicate wrongdoing.

Finally, the City argues that an officer must be held responsible for properly documenting and accounting for items they enter into evidence even if the items are never relied upon in an



investigation or criminal case. That said, the City respectfully submits the Grievant only received a two-day suspension and not a more severe suspension because his misconduct thankfully did not actually impact the result of an investigation.

For these reasons, the City urges the arbitrator uphold the discipline and deny the grievance in its entirety.

#### THE UNION

The Union argues that the City has failed to prove that it had just cause to suspend Lieutenant Borowski and, for this reason, the discipline cannot stand.

The medicine drop box policy is meant to provide a high degree of anonymity to people looking to dispose of unwanted medications. There is no evidence that any officer has ever been provided training on the policy, which only describes a procedure for emptying the box when it is full. Lieutenant Borowski was never forewarned that he could be disciplined for conduct that is not mentioned in the policy. More significantly, evidence indicates that Captain Cartledge was present and aware of the circumstances involving the pills and his failure to act amounted to tacit approval of the Grievant's actions.

The pills in question were never evidence of any crime, were not involved in any investigation, were meant to be disposed of anonymously, and anyone involved in a related overdose had immunity protections under the Good Samaritan law. For these reasons, the evidence procedures did not apply when Lieutenant Borowski transferred the pills from the drop box to the evidence room. Moreover, Lieutenant Borowski's report was found to be complete and approved in writing by a supervisor. No item of evidentiary value is missing, no party has been prejudiced, no case was ever commenced, and no investigation was ever compromised.

The Union contends the City did not conduct a fair and objective investigation. The decision to hire an outside investigator violated the Internal Affairs policy. The City claimed it did so to ensure independence and an unbiased result but when the investigator learned that Captain Cartledge was allegedly involved, the Captain was not removed, he did not recuse himself and he continued to participate in the investigation. Rather than the investigator, the Chief questioned Captain Cartledge about his involvement. The interview was not recorded, and no notes were made, which also violated the Internal Affairs policy.

When the Chief and Captain Cartledge interviewed Detective Fappiano, he was a major witness in the ongoing investigation. That interview was not recorded, and no notes were made. Despite the active investigation, the investigator was not told about the interview with Detective Fappiano. These off-the-record interviews (Cartledge and Fappiano) were never made part of the internal affairs report as required nor was notice about them given to the Grievant. The Union contends that any appearance of fairness had given way to undue influence.

Finally, the Union argues the discipline imposed was neither fair nor consistent with discipline imposed in similar cases. There is no dispute that Lieutenant Borowski had no prior discipline of any kind, yet the City ignored its well-defined progressive discipline policy by skipping over several lesser levels of discipline to impose the two-day suspension.

The Union concludes the City did not have just cause to suspend Lieutenant Borowski for two days in October 2017. The Union asks that the arbitrator uphold the grievance and make the Grievant whole for all wages and benefits lost; all demonstrable overtime and detail pay likely to have been earned while on administrative leave and suspension; all demonstrable economic damages incurred due to removal from his position as Detective Lieutenant; and interest on all such losses from the date of filing of the instant grievance.

### DISCUSSION

The question is whether the City had just cause to suspend Detective Lieutenant Borowski for two days on October 26, 2017. I find that it did not. There is no question that Lieutenant Borowski demonstrated poor judgment when he removed pills from the drug box without documenting their removal and that he filed an incomplete report when he transferred the pills to the evidence room. There is not sufficient evidence, however, to support the various assertions that Lieutenant Borowski took these actions for improper, personal, or nefarious reasons. The City's charge that the actions were "intentional" may be true. That said, the evidence suggests he intended to balance the department's commitment to citizen anonymity when using the drop box with the procedures for documenting items placed in the evidence and property room. The evidence does not establish an intent to conceal information for personal reasons.

In a discipline case, the employer has the burden of proof. The City established that it hired a professional outside consultant to investigate charges made in an anonymous letter that alleged Lieutenant Borowski had engaged in serious misconduct and suggested moral turpitude and possibly criminal conduct. Chief Kasper testified she and the two Captains who were authorized to conduct an internal investigation all had known Lieutenant Borowski for many years and she wanted to avoid the appearance of preferential treatment. The Chief had attended the Academy with Lieutenant Borowski and both she and Captain Cartledge had known him for more than 20 years. "I wanted to assure an unbiased investigation, so I hired a neutral investigator."

Given the close relationships between the Grievant and the three superiors and the nature of the allegations against him, the City's decision to hire an outside investigator was reasonable.

Using an outside investigator may not be an option in the department's internal investigation policy, but it was a reasonable choice to achieve the Chief's goal of assuring "an unbiased investigation" and is consistent with the policy's commitment to "an internal system where objectivity, fairness, and justice are assured by proper and impartial investigation and review."

Certain department policies require strict compliance with the established procedures and others allow for discretion. There was no dispute that strict compliance was required by AOM Chapter P-251, the procedures the department must follow when conducting internal investigations. Some of the procedures that required strict compliance include:

...all appropriate investigative techniques and methods should be employed, consistent with legal requirements and all necessary concern for the individual rights of the accused employee.

An internal investigation should be conducted with the same degree of professional competence as is devoted to a criminal investigation.

The [investigative] report shall include the following:

- The original complaints report;
- Any additional statements taken from the complainant or statements obtained from witnesses...
- A statement of any mitigating circumstances...

Employer Exhibit #3C

It may be possible to conduct a fair investigation and produce a fair result even if the established procedures are not followed. The problem here is not any particular technical failure to comply with the procedures but the failure to employ appropriate investigative techniques with "all necessary concern for the individual rights of the accused employee."

Early in the investigation, Mr. Donovan realized that there was no evidence to support the anonymous suggestion that Lieutenant Borowski had engaged in potentially criminal conduct. Lieutenant Borowski was cleared of the charge of steroid use. He was cleared of the anonymous suggestion that he removed medications from the drop box for improper or personal reasons. The

investigator then focused on Lieutenant Borowski's decision to remove the pills from the drop box and place them in the evidence room.

When the investigator determined he needed Lieutenant Borowski to clarify some of his initial statements (that were not consistent with Detective Fappiano's<sup>3</sup>), Mr. Donovan did not interview the Grievant personally but developed a list of questions and asked the Chief to handle them. There was no explanation for why the investigator did not interview Lieutenant Borowski or why he did not present the written questions directly to him. Instead, Chief Kasper issued a memo ordering the Grievant to answer the questions in writing saying, "there are several items which need clarification" without giving any details.

Written questions requiring written answers may be a less effective investigative technique than a personal interview but, when used fairly, there is nothing inherently wrong with it. When clarification was needed from Detective Fappiano, however, the investigator used a different approach. There was no explanation why the investigator used a different investigative technique with Detective Fappiano than he had used with the Grievant for the same purpose: to clarify statements made during their initial interviews. There should be no question that a personal, direct interview (which allows for follow-up and clarifying questions) is a more thorough investigative technique than asking for written answers to a fixed list of questions. For example, during the second interview with Detective Fappiano, the investigator was able to ask follow-up questions about particular events, such as:

- And the purpose of that meeting was what?
- And the pills were from what? Your understanding?
- What was your understanding as to why...?

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<sup>3</sup> It must be noted that Detective Fappiano was issued a subpoena to appear at hearing. The City did not compel his attendance and relied on transcripts of his interviews with the investigator and a written statement by him, which do not constitute direct evidence.

Also, the Grievant was only told that “several items needed clarification” when he was presented with a series of questions, which is a reasonable approach if applied fairly. When Detective Fappiano was re-interviewed, however, the investigator explained how his statements conflicted with the Grievant’s before asking for clarification. For example:

- Um, he’s, his, his explanation of it is he was there alone? A. Absolutely not.
- OK. Alright. He testified that he did it alone and by himself and um, so that’s, just wanted clarification from you. A. That’s not accurate.
- My big clarification was that I wanted to talk to you today cuz I’m gonna uh, continue this is, was, were you there because he’s telling us that you weren’t, so. A. I was there.

There are other concerns about the investigation. The evidence indicates a failure to investigate properly the assertion that Captain Cartledge knew about and failed to address Detective Borowski’s handling of the pills, an allegation that suggests the Captain may have tacitly approved Lieutenant Borowski’s actions. According to the transcript of his interview, Detective Fappiano told the investigator:

I came into the Bureau one day and Captain Cartledge was standing near the window talking to [the Grievant]. I went in...to let the boss know what’s going on...So, in conversation the pills come up and he reached over to his desk in his papers he pulls out a little envelope, he opens up the envelope...there were small blue pills... and Captain put his hands up and uh...he just kind of shakes his head and says I don’t see nothing and I’m outta here....

Joint Exhibit #1A

When Mr. Donovan told the Chief about the allegation, she questioned the Captain rather than the impartial investigator. The private conversation was not recorded, and no notes were taken. According to the Chief, Captain Cartledge “could not recall” the alleged incident with Lieutenant Borowski and Detective Fappiano but conceded “it could have been true.” The Chief verbally reprimanded Captain Cartledge because he had “made a joke about it and left the room,” an indication she believed the Captain did have some knowledge of the incident. This is evidence of a potentially mitigating circumstance that was not relayed to Mr. Donovan. The investigator

was told only that Captain Cartledge “could not recall” the alleged incident. As a result, the evidence of “any mitigating circumstance” was not included in the investigative report as required.

The investigator explained he was been concerned about questioning Captain Cartledge himself because he was the lead contact for the department. The Chief did not explain why she decided the interview Captain Cartledge herself even though she had known him for 20+ years, a decision that contradicts the Chief’s goal of hiring an outside investigator to avoid the appearance of preferential treatment or a conflict of interest. More troubling, however, is the absence of any record of the Chief’s interview with Captain Cartledge and the failure to give the investigator all the information gleaned from the interview.

While Mr. Donovan was still investigating the anonymous charges against Lieutenant Borowski, Detective Fappiano was summoned for a separate meeting with Chief Kasper, Captain Cartledge and Captain Clayton. During the meeting, he reiterated his allegation about the Captain:

I advised Captain Cartledge that if he would have done his job as a Captain while in Lieutenant Borowski’s office that day that he showed both of us the pills that I wouldn’t be sitting in the chair right now.

Union Exhibit #10

While Mr. Donovan was still investigating the anonymous allegations against Lieutenant Borowski, other detectives were being interviewed about other complaints regarding Lieutenant Borowski. The Chief and Captain Cartledge conducted interviews with numerous officers in the detective bureau. On October 2, 2017, Captain Cartledge filed the second Internal Affairs Complaint Report, listing a series of allegations including:

Lieutenant Borowski allegedly solicited employees to make inappropriate comments about Captain Cartledge on previous climate surveys and continuously

makes comments about him to subordinates (AOM P100, Rule 6.2-Conduct Unbecoming of an Officer or Employee, Rule 6.6 Discourtesy).

Union Exhibit #16

At this point and as a result of his interviews with Detective Fappiano and other bureau detectives, Captain Cartledge knew of several allegations relating to him personally and professionally. Mr. Donovan was not told about these other interviews or the allegations about Lieutenant Borowski that related to Captain Cartledge. This decision does not determine whether the City was required to tell the outside investigator about the additional interviews with Fappiano and other detectives or about the second internal affairs investigation. Captain Cartledge continued to manage the investigation and made disciplinary decisions despite evidence he had multiple potential conflicts of interest (at a minimum, the appearance of conflicts of interest).

The investigation was incomplete because the allegation that Captain Cartledge had some involvement or knowledge of the Grievant's handling of the pills was not pursued with "appropriate investigative techniques" or "with the same degree of professional competence as is devoted to a criminal investigation." The Chief interviewed the Captain despite a 20+ year relationship, she did not record or document the interview, or include it in the investigative report as required. The Chief's testimony about her decision to discipline Captain Cartledge was evidence of a "mitigating circumstance," information also required by departmental policy, but not included in the investigative report.

The evidence did not support other allegations that Lieutenant Borowski 1) "knew that the pills were illegally obtained" (Joint Exhibit #2); 2) "had specific knowledge...that the Drug Task Force was actively investigating" (Joint Exhibit #2); or 3) had marked the pills for destruction "a day later" (Chief's testimony and Employer Exhibit #3F). First, when he logged the pills into the



evidence room, Lieutenant Borowski filed a report which clearly states, “no crime involved” (Employer Exhibit #3H), which is consistent with his written statement (Employer Exhibit #3G) and Detective Fappiano’s repeated statements that this was “not a criminal case” (Joint Exhibit #1A). Second, Detective Fappiano told Mr. Donovan that, because he was on the Drug Task Force, he could talk to the men involved. He “knew the family” and tried “to talk some sense” into them. The City offered no evidence of any related investigation by the Drug Task Force.<sup>4</sup> Finally, the evidence does not support the claim that Lieutenant Borowski filed an initial report and then changed it “a day later.” When he logged the pills into the evidence room, the system generated and recorded the dates and times Lieutenant Borowski filed and then modified his report. These entries were not explained at hearing, but it appears that Lieutenant Borowski filed the initial report on February 10, 2016 at 1:04 p.m. and modified it one minute later at 1:05 p.m., not a day later.

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Approved: 02/10/2016 1847

Employer Exhibit #3H

By his own admission, Lieutenant Borowski did not comply with the established procedures for Evidence and Property Handling and he did not record the removal of pills from the drop box. The Lieutenant’s decision to transfer the pills from the drop box to the Evidence and Property Room revealed contradictions between the applicable policies. For example, the Evidence and Property Handling Procedures (Joint Exhibit #3K) require a report detailing how the department came into possession of the evidence or property and where it was stored from the time it was received to document the chain of custody. Lieutenant Borowski’s report

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<sup>4</sup> In the second interview, Detective Fappiano made a statement that he “was investigating” the same type of pills, but reiterated that it was “not a criminal case” (Joint Exhibit #1D).

(Employer Exhibit #3H) did not include complete information about the pills from the time they came into his possession, since he did not include the name of the friend from whom he first received the pills. On the other hand, the Medicine Disposal Drop Box Unit policy (Employer Exhibit #3B<sup>5</sup>) was meant to provide anonymity for citizens – like the Grievant's friend - who wanted to safely dispose of drugs.

The City has established that Lieutenant Borowski filed an incomplete report about drugs removed from the drop box and that he demonstrated poor judgment when he did not document the removal. The City may have had grounds to impose some corrective action or discipline if the investigation had been fair and complete, including statements from all the witnesses and any mitigating circumstances. The investigation was not fair to the Grievant because Captain Cartledge's involvement was not handled with a comparable "degree of professional competence" and because the Grievant was subjected to different investigative techniques than others were. Taken altogether, the investigative process did not demonstrate "all necessary concern for the individual rights of the accused employee." For these reasons, the City did not have just cause to suspend Detective Lieutenant Alan Borowski for two days on October 26, 2017.

#### REMEDY

The City is hereby ordered to immediately rescind the October 26, 2017, two-day suspension, remove all references to the discipline from the file, and make Detective Lieutenant Alan Borowski whole for all wages, overtime and any benefits lost as a result of the two-day suspension.

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<sup>5</sup> It is noted that the Medicine Disposal Drop Box Unit Policy entered into evidence was revised in August 2017 and is not the policy that was in effect in February 2016.

The Union's request that the remedy also include overtime opportunities the Grievant may have lost while on administrative leave is denied. The stipulated issue before me is whether the City had just cause to suspend the Grievant for two days in October 2017. The parties' stipulation limits the scope of the arbitrator's remedial authority to that question.

For similar reasons, the Union's request for "economic damages incurred due to removal from his position as Detective Lieutenant" is denied. The parties' signed stipulated agreement refers to the Grievant as "Detective Lieutenant." No evidence was offered at hearing indicating the Grievant had been removed from the Detective Lieutenant position on or before the October 26, 2017 suspension. None of the three Certificates of Service indicate that Lieutenant Borowski was to be removed from the Detective Lieutenant position. In fact, all three certificates are addressed to "Detective Lieutenant Alan Borowski" (Joint Exhibit #2, second page; and Employer Exhibit #4, second and last pages). Finally, the Union has not offered a rationale for its request for the payment of interest on the remedy and is denied.

AWARD

The grievance is sustained.

The City did not have just cause to suspend Detective Lieutenant Alan Borowski for two days on October 26, 2017.

The City is ordered to immediately rescind the October 26, 2017, two-day suspension, to remove all references to the discipline from Lieutenant Borowski's file, and to make him whole for all wages, overtime and any benefits lost as a result of the two-day suspension.

The arbitrator will retain jurisdiction for 90 days for the sole purpose of resolving disputes about the calculation of the remedy.



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Mary Ellen Shea, Arbitrator  
November 23, 2018