

**In the Matter of Arbitration between:**

**Arbitrator: Richard Bales**

**Grievant: CM**

**Union**

**Grievance: June 30, 2020**

**and**

**Hearing: October 19 & 27, 2020**

**Township**

**Brief Exchange: December 24, 2020**

**Award Date: January 11, 2021**

**Award**

**I. Facts**

Township is a Civil Service Township in ----- County, Ohio. The Township Fire Department (“Department”) provides fire and EMS services to the Township. The Department consists of a Fire Chief, a Captain Inspector, three Captains, three Lieutenants, and eight full-time firefighter/medics. Township firefighters other than the Chief are represented by the Union. The Township and the Union are parties to a collective bargaining agreement (CBA) governing the terms and conditions of employment.

Captain CM became a volunteer firefighter with the Department in 1998. In 2000, she was hired as a part-time firefighter; in 2003 she became the first full-time female firefighter in the Department. CM was promoted to Lieutenant in 2008 and to Captain in 2016, then in 2019 was assigned by the Fire Chief to be Captain Inspector. By all accounts, CM’s performance throughout her career has been exemplary. Apart from the events giving rise to this Grievance, she has no disciplinary history.

On April 12, 2020 – Easter Sunday – Township Firefighter JB was found dead at his home from an overdose of fentanyl.

The previous day, JB had worked an overtime shift until 7:00 p.m.; he was scheduled to work again the following day at 7:00 a.m. After leaving the firehouse, JB went to the residence of and used illegal drugs, including cocaine and heroin. At 9:15 p.m., AM called the Nearby Fire Department because JB became unresponsive after the drug use. Nearby medics arrived and immediately administered Narcan (an opioid overdose reversal drug), then transported JB to St. E Medical Center in City.

While JB was receiving treatment at AM’s residence, an off-duty Nearby firefighter who knew both JB and Township Fire Captain CO called CO to tell him of JB’s condition. CO, who was

off-duty, contacted Township Fire Lieutenant JG, who was on-duty at the time. JG then contacted the on-duty Captain, PL, and requested permission to visit JB at the hospital. PL allowed JG to go to the hospital but said JG would need to be available should they receive a call. While at the hospital with JB, JG helped CO get into the hospital to see JB, avoiding the hospital's COVID-19 rules prohibiting visitors. JG then left to respond to a call and CO stayed with JB. JG reported to PL that JB had been hospitalized for a "panic attack". Neither JG nor CO notified Fire Chief AB or anyone else in the Department that JB had been hospitalized for a drug overdose.

CO was discharged from the hospital that night with instructions to have someone stay at his home with him to monitor him for the next 24 hours. CO took JB back to AM's residence to retrieve his belongings and car. CO followed behind JB as he drove home, but they had to stop when JB told CO he was feeling too sick to drive. CO then had CO's wife drive one of the cars to get JB back home safely. When they arrived at JB's home, JB told CO he was going to be sick again. CO went home, leaving JB alone notwithstanding the hospital's discharge instructions.

On Sunday morning, April 12, 2020, JB did not report to work. At approximately 7:30 a.m., the \_\_\_\_ Village Police found JB unresponsive in his home and declared him dead. Chief AB arrived at the scene and was advised by \_\_\_\_ Village Police that JB was dead and had overdosed the previous night.

After learning of JB's death, CM and other members of the Department congregated at the fire station. Because CM was the Department's family liaison, Chief AB asked her to go to JB's mother's home to inform her of JB's death, and to help his family with whatever was needed.

On April 13, 2020, Chief AB asked MW, the President of the Union at the time, if the Union would object to the Township drug testing all firefighters. The Union agreed to the testing. CM cooperated and tested negative. Also on April 13, 2020, CO and JG were placed on administrative leave. No reason was given at that time either publicly or to the Union.

Apparently, at some point either PL or Captain BO (the testimony is conflicting) told Chief AB he was not surprised by JB's death, because there had been a rumor of firefighters trading pills. AB reported what he knew at the time to the Township Board of Trustees, which then requested that the Township Police Department investigate the events surrounding JB's death and drug use in the department. Township Police Captain RB conducted the investigation with the assistance of Detective Sergeant MS and Detective GB.

On April 24, 2020, CM was at the home of JB's family, helping them put his affairs in order. She used JB's iPad to help the family locate information needed to log into a "GoFundMe" account that had been set up in JB's name before his death. In doing so, CM came across text messages between JB and JG from the date of JB's death. One of the messages from

JG to JB stated: “[PL] bought it. You’re good and clear.” CM explained to JB’s ex-wife that she needed to turn the iPad over to the police immediately. JB’s ex-wife was hesitant, but CM persuaded her. Once CM left the family home, she called Chief AB to notify him that JB’s family had an iPad with JB’s text messages, that JG knew more about the circumstances of JB’s death than he had disclosed, and that the texts potentially contained information relevant to the investigation.

After reviewing the contents of the iPad, the details of JB’s death became clearer. The investigators completed and reviewed a full extraction report containing 26,106 pages of information from the iPad. The investigators found hundreds of text exchanges, dating from August 2019 until JB’s death in April 2020, related to the trading of prescription and illegal drugs. Tr. 64-65 (RB). These texts documented JB’s and JG’s daily procurement and consumption of multiple such drugs. *Id.* at 69. The texts present a harrowing account of JG and JB becoming addicted, attempting to become clean, then descending back into addiction. The texts also demonstrated JB and JG trading pills with CO and Lieutenant JC.

When these texts came to light, the Township placed JC on administrative leave. As described above, JG and CO already had been placed on leave.

The extraction report revealed that CM participated or was mentioned in three of JB’s text exchanges related to this Grievance. The first was an exchange between CM and JB on November 4, 2019. It read:

JB: Got any Smurf berries burning a hole in your pocket? I’m running low on Xannies.  
CM: Lol. I will see what I have here.  
JB: [Unidentified emoji]

The second was an exchange between CM and JB on December 17, 2019:

CM: I must be really fucked up then because I thought it was kind of funny. And I was seriously going to put it in Joy’s window.  
JB: It is hilarious. He has his high and mighty moments.  
CM: And whatever you do, Jesus, don’t tell him I texted  
JB: Of course  
CM: Maybe I should give him some Smurf berries. Lighten the mood a little.  
JB: Sometimes he becomes a dad and needs brought back down to earth  
CM: Oye

The third was an exchange between JB and JG on March 4, 2020:

JB: If we get out, I have a fresh haul of Xannies to pickup  
JG: Oh thank god!!!  
JB: 4-5 of them have your name on them.

JG: Roadhouse  
JB: I'm going to see if CM has any smurfberries too

As part of the ongoing Township Police Department investigation, Captain RB interviewed CM on May 1, 2020. Though Captain RB believed at the time that the text messages described above could lead to disciplinary action against CM, he did not inform her of this before or during the interview.

During the interview, CM said she had a prescription for the anti-anxiety medication Klonopin (a brand name for clonazepam). She also explained that she often referred to Klonopin as "smurf berries" because the pills looked like a cereal she ate as a child. She stated during her interview – and many firefighters testified at the arbitration hearing – that many if not most firefighters were prescribed anti-anxiety medication because of the stress of the job, and that one common form of stress release was that they frequently joked with each other about their medication.

Also during the interview, Captain RB asked CM about the November 4, 2019 text exchange described above. CM explained that when she received JB's text, she did not interpret it as a literal request for her prescription medication. Instead, she explained, she interpreted it as a joke – both because such jokes were common among the firefighters, and because JB often referred to his prolific use of recreational drugs in his younger days. RB did not ask CM any questions about whether she had violated specific Township policies, her alleged failure to report her prescription medication to Chief AB or the Township, whether her prescription medication inhibited her work performance, or if she had a doctor's note for the medication. A summary of the interview prepared by RB concluded, regarding CM:

CM was asked to clarify the "smurf berries" comments in the text messages. CM vaguely remembers the text messages about "smurf berries" but denied ever sharing or receiving medication with another fireperson. There are only three text messages regarding CM and her specific medication and no indicator it was shared.

Joint Ex. 26 at JT398.

On May 1, 2020 – the same day RB interviewed CM– attorney RL emailed Township Law Director CP to inform her his office would be "representing Local 2075 in regard to the pending investigation involving Captain CO, Lt. JC and Lt. JG." Nothing in the record indicates RL, the Union, or CM knew or had any reason to believe at that time that CM was a subject of the investigation. RB did not tell CM she was a subject of the investigation during his interview of her.

At the conclusion of the investigation, the investigation team drafted an Investigative Report. This Report contained an Investigative Summary Report, which summarized the investigation, its findings, and supporting documents. Joint Ex. 1. The Summary Report

described in detail a series of texts among JB, JG, CO, and JC that demonstrated rampant use and trading of a wide variety of both illegal and prescription drugs. Its key finding was that:

[t]he facts set forth in detail in the Investigation Report and its attachments show that firefighter JB, Lieutenant JG, Lieutenant JC, and Captain CO repeatedly violated the Policies of the Township Fire Department and the laws of the state of Ohio.

Joint Ex. 1 at JT024.

The Summary Report reproduced the three text exchanges involving CM described above. Its findings regarding CM were consistent with RB's summary of his interview with CM, quoted above. Nothing in the Summary Report indicated that CM had participated in the use or trading of illegal or prescription drugs, or that she was aware that other firefighters were doing so.

On May 13, 2020, the Township presented disciplinary charges against JG, CO, and JC. The Township simultaneously demoted each of them one rank. Township Ex. 8. Within a week, JG and JC resigned, and CO retired.

On May 21, 2020, the Township demoted CM one rank (from Captain Inspector to Captain). The written notice gave no reason for the demotion. Joint Ex. 45. This demotion is the subject of Grievance No. \_\_\_\_\_ and is not before the Arbitrator in this case.

On May 26, 2020, the Township placed CM on administrative leave and issued eight disciplinary charges against her. Joint Ex. 46. This document also gave notice of intent to demote her a second rank (from Captain to firefighter), impose a five-day unpaid suspension, and make her ineligible for promotion for two years. The eight formal charges can be summarized into three main allegations: (1) Failing to report pill trading in the Department [Charges 1, 5, 6, and 8], (2) participating in pill trading in the Department [Charges 2, 4, and 7], and (3) failing to report her Klonopin prescription to the Township [Charge 3].

After reviewing the full transcript of the arbitration hearing, it is unclear to me who or what drove the Township's decision to discipline CM. The Union believes the Township scapegoated CM to help deflect negative reports in the press about the circumstances surrounding JB's death, and there was conflicting testimony at the arbitration hearing about what information the Township released to the press about CM, and whether the Township did so voluntarily or only in response to freedom-of-information-act (or similar) requests.

One might expect that an initial recommendation for discipline would come from Chief AB, since he was CM's immediate supervisor, had worked with her for more than twenty years, and was the head of the Department. However, that does not seem to have happened here. Instead, AB initially believed CM's explanations of the texts: that (1) CM had interpreted JB's November 2019 text asking for smurf berries as a joke and had not given him any, (2) CM's

December 2019 text about giving smurf berries to a high-strung colleague was intended as sarcasm and did not indicate a literal intent to do so, and (3) that the March 2020 text in which JB tells JG he will ask CM for smurfberries did not indicate CM was providing them to him. See generally Tr. 202-16 (AB). But after the Township “administration” (his word) determined that the texts indicated CM knew JB and others were trading pills, he changed his mind about the November 2019 texts and came to believe they indicated CM knew to some extent about the pill trading. Tr. 204-05.

Township Trustee DS sheds a little more light on the Township’s decision-making process. He described several meetings – both formal and informal – among the Board, Chief AB, Township Administrator MW, and Township Law Director CP. Tr. 223-28. DS seems to indicate that the decision to discipline was a collective one, and that it was based not on a conclusion that CM had participated in pill trading, but rather that she had known of the trading by others but failed to report it. Tr. 228; but compare Tr. 234 (indicating that, unlike AB, DS concluded from the November text exchange that CM was herself involved in trading pills). The formal charges, however, squarely accused CM of trading pills.

Notwithstanding DS’s testimony that the decision-making was collective, Chief AB testified repeatedly and unequivocally that although he participated in the discussions leading up to the decision to discipline, the decision itself was made by “administration”. Tr. 203-04. Township Administrator MW testified at the arbitration hearing, but not on this topic. Township Law Director CP served at the arbitration hearing as advocate for the Township, and thus did not testify.

On June 15, 2020, the Township held a pre-disciplinary hearing. The hearing was held before a “neutral fire administrator” in accordance with Article 14, Section 2 of the parties’ CBA. Fire Chief DT of NF Joint Fire District was selected by the Township to serve as the “neutral fire administrator.” On June 24, 2020, Chief DT issued a written decision, finding “merit” in each of the charges, and specifying the evidence that supported each charge. Joint Ex. 50. The next day, the Township Board of Trustees met and voted to demote CM to the rank of firefighter and to make her ineligible for promotion for two years. Joint Ex. 51. On June 30, 2020, CM filed Grievance 03-2020 challenging her demotion from Captain to firefighter.

## **II. Posture**

Grievance 03-2020 specified that it was “filed at Step 3 of the Grievance Procedure” pursuant to Article 14, Section 4. The Township, however, issued a Step 1 response from the Fire Chief on July 1, 2020. The Union did not object and advanced the Grievance to the Board of Trustees (Step 2). A Step 2 hearing was held on July 15, 2020. On July 23, 2020, the Township issued its Step 2 denial of the grievance. That same day, the Union notified the Township it was advancing the Grievance to Step 3 (arbitration). On July 29, 2020, the parties notified the undersigned Arbitrator of his selection. On August 4, 2020, the parties participated in a Zoom videoconference with the Arbitrator to discuss the proceedings. During the conference, the

Township raised a substantive arbitrability argument.<sup>1</sup> The parties agreed the Township would submit its arbitrability claim through a letter brief to the Arbitrator, and that the Union would respond. The Township filed its brief on August 18, 2020, and Union filed its brief on August 21, 2020.

On August 25, 2020, I issued an Arbitrability Decision, ruling:

... that Articles 14 and 17 of the CBA permit the Union to arbitrate Ms. CM's demotion. That arbitration will be limited to the issues of whether the Township had just cause to order the demotion, and if not what the remedy should be. The arbitration will not consider whether, if just cause existed, the discipline imposed by the Township was excessive.

This Arbitrability Decision is incorporated by reference into this Award.

The parties held a final hearing on the merits October 19 and 27, 2020, and exchanged briefs on December 24, 2020.

### **III. Issue**

Did the Township have just cause pursuant to the CBA Article 14 Section 2 to demote CM from Captain to firefighter? If not, what should the remedy be?

### **IV. Relevant CBA Provisions**

#### **ARTICLE 14 CORRECTIVE ACTION – DISCIPLINE**

**Section 1.** No employee shall be disciplined, reduced in pay or position, suspended, or removed except for just cause.

**Section 2.**

A. Discipline will be applied in a corrective, progressive, and uniform manner.

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<sup>1</sup> The Union correctly points out that substantive arbitrability issues such as the ones raised by the Township generally are to be resolved by courts rather than arbitrators. Union's Arbitrability Brief at fn. 1. However, the parties to this Grievance agreed that the arbitrability issue raised by the Township would be determined by the Arbitrator.

- B. Progressive discipline shall take into account the nature of the violation, the employee's record of discipline, and the employee's record of performance and conduct.
- C. Whenever the Employer and/or his designee determines that there may be cause for an employee to be disciplined (suspended, reduced, or discharged), a predisciplinary hearing will be scheduled to give the employee the opportunity to offer and explanation of the misconduct. The predisciplinary hearing will be scheduled within fifteen (15) calendar days of the alleged misconduct. In the event the Employer cannot schedule said hearing in the time limits set in this paragraph, the Employer shall notify Union and request the additional time needed. Said request for additional time shall not be unreasonably denied by Union. The predisciplinary hearing procedure shall be as follows:
1. The employee shall be provided with a written notice advising him of the charges and the specifications of the charges against him. In addition, the notice will list the date, time, and location of the hearing. Such notice shall be given to the employee and Union at least five (5) days before the hearing. The employee, with Union's approval shall be allowed representation of his choice, the cost of which shall be borne by the employee. Time limits may be waived by mutual consent of the parties.
  2. The hearing shall be conducted before a "neutral" fire administrator selected by the Employer, a fire administrator who is not involved in any of the events giving rise to the offense. During the course of the hearing, the employee may offer verbal or written statements from other persons pertaining to the charges.
  3. Within ten (10) calendar days after the hearing, the neutral hearing officer shall provide the employee, Union, and the Employer with a written statement affirming or disaffirming the charges, based on the evidence given at the hearing by the parties. The document will also give the reasons for the decision.

\* \* \*

**Section 5.** The Employer agrees all disciplinary procedures shall be carried out in private and in a businesslike manner.

## **ARTICLE 17 GRIEVANCE PROCEDURE**

**Section 4.** The written grievance shall state on the grievance form the specific article and paragraph of this agreement alleged to have been violated, an explanation of the facts, and the relief requested.

\* \* \*

**Section 6.** Each grievance shall be processed in the following manner.

\* \* \*

**Step 3 - Arbitration:** If the grievance is not adjusted at Step 2, Union may appeal the grievance in the following manner:

\* \* \*

The arbitrator shall hold the arbitration promptly and issue his decision within the time limits established by FMCS. The arbitrator shall limit his decision strictly to the interpretation, application or enforcement of those specific articles and/or sections of this agreement in question. The arbitrator's decision shall be consistent with applicable law.

The arbitrator shall not have the authority to add to, subtract from, modify, change or alter any provision of this agreement, nor add to, subtract from or modify the language therein in arriving at his determination on any issue presented that it proper within the limitations expressed herein.

The arbitrator shall expressly confine himself to the precise issues submitted for arbitration and shall have no authority to determine any other issues so submitted to him or to submit observation or declarations of opinion which are not directly essential in reaching a decision on the issue in question.

### **Appendix C Drug and Alcohol Testing Policy**

#### **I. STATEMENT OF POLICY**

Township, Ohio, (hereinafter referred to as the "Company") will not condone and will not tolerate any of the following workplace related behaviors by its employees:

- a. The use of illegal drugs;
- b. The use of alcohol;
- c. The sale, purchase manufacture, transfer, use or possession of any illicit drugs or prescription drugs obtained without a prescription; or
- d. The employee's presence at work under the influence of any drug (legal or illegal) or alcohol to the extent that job performance or safety may be affected.

The purpose of this policy is to promote safety. Any employee or applicant whose position requires testing for specific drugs or alcohol, based on established thresholds, under any law, regulation, or policy that violates this Drug Free Safety Policy (hereinafter referred to as the "Policy") may be subject to discipline, up to and including termination of employment. The implementation of discipline or of sanctions shall be at the sole discretion of the Company in compliance with applicable discipline policy, collective bargaining agreement or law.

\* \* \*

All employees are responsible for obtaining and providing a 'Fitness for Duty' release to the Company [sic] if they are placed on any medication that may impair their normal or motor functioning, prior to performing their regular job duties.

**V. Other Relevant Policies and Procedures**

TOWNSHIP FIRE DEPARTMENT  
POLICY 1016  
Drug- and Alcohol-Free Workplace

1016.4 MEMBER RESPONSIBILITIES

Members shall come to work in an appropriate mental and physical condition. Members are prohibited from purchasing, manufacturing, distributing, dispensing, possessing or using controlled substances or alcohol on department premises or on department time (41 USC §8103). The lawful possession or use of prescribed medications or over-the-counter remedies is excluded from this prohibition.

Members shall notify a supervisor immediately if they observe behavior or other evidence they believe demonstrates that a fellow member poses a risk to the health and safety of the member or others due to drug or alcohol use.

1005.6 CONFORMANCE TO LAWS

Members shall obey all laws of the United States and of any state and local jurisdiction in which the member is present.

1016.3.1 USE OF PRESCRIBED MEDICATIONS

Members should avoid taking any medications that will impair their ability to safely and completely perform their duties. Any member who is medically required or has a need to take any such medication shall report that need to his/her immediate supervisor prior to commencing any on-duty status.

**VI. Analysis**

Union argues the burden of proof should be on the Township to show misconduct "beyond a reasonable doubt", or at least by "clear and convincing" evidence, because of the seriousness of the alleged misconduct. The Township argues the correct standard should be "preponderance of the evidence" because this is a discipline case. I find no need to resolve the issue because the outcome would be the same regardless of the legal standard.

Though the Township based its discipline of CM on eight charges, I agree with the Union they can be grouped into three main allegations: (1) CM traded prescription and illegal drugs with other firefighters; (2) CM knew or should have known, yet failed to report, that other firefighters were using and trading such drugs among themselves; and (3) CM failed to report her own prescription drug use to the Fire Department. I will further group (1) and (2) because the evidence regarding them overlaps.

## **A. Alleged Pill Trading; Knowledge of Pill Trading by Other Firefighters**

### **1. The November 2019 Text Exchange**

As part of the investigation into JB's death, more than 26,000 pages of texts were extracted from his iPhone/iPad account. Hundreds of these text exchanges, dating from August 2019 until JB's death in April 2020, related to the daily trading of at least five different types of prescription and illegal drugs. Tr. 64-65, 69 (RB). Three text exchanges involved or referred to CM.

The first is by far the most important, because it serves as the predicate for the third and because the second was more obviously intended as a joke. The first text exchange, from November 2019, is:

JB: Got any Smurf berries burning a hole in your pocket? I'm running low on Xannies.  
CM: Lol. I will see what I have here.  
JB: [Unidentified emoji]

As described above, the Township interprets this exchange as JB explicitly asking CM for her prescription medication and CM responding she was willing to supply it. CM says she did not interpret JB's text as a literal request for her prescription medication, but instead as a joke – both because such jokes were common among the firefighters, and because JB often referred to his prolific use of recreational drugs in his younger days.

The Township's first counterargument to this is that JB's request for CM's prescription medication could not have been a joke because he gave a reason for the request – in effect, "please give me your Klonopin because I am out of my Xanax." But that is not necessarily true: jokes are more humorous when they verge on plausibility, so JB could have been intending to make his joke funnier by making it appear almost-as-if he was actually asking for CM's Klonopin.

More importantly, though, it is not JB's intent that matters for this Grievance – it is CM's intent. In November 2019, JB was deeply addicted to painkillers and was willing to take a wide variety of them to satisfy his addiction. With 20/20 hindsight, knowing this, it's quite likely JB was hoping CM would give him some of her Klonopin, but couched his request as a joke so if she called him out, he could plausibly deny that was his intent. In retrospect, and in a perfect

world, CM would have recognized that and called him out and reported him to Chief AB. But nothing in the record indicates CM knew then that JB was addicted to or was trading pills. Given the frequent joking among nearly all the firefighters about their prescription medication, and JB's frequent joking about his prior drug abuse, it was reasonable for CM to assume this text exchange was just another instance of that. And, again in retrospect, although it's likely that JB's frequent joking about his prior drug abuse was a red flag on his current addiction, none of the firefighters, including Chief AB, saw it.

The Township's second counterargument to CM's characterization of JB's text as a joke is that even if it were a joke, CM had a duty to report it. I agree with the Township that:

"[a] person in authority cannot simply dismiss problematic behavior as a joke – whether it is racist or sexist comments or requests to illegally share medication. As a supervisor, CM had an obligation to report violations of Township policy such as a request to provide prescription medication to the Fire Chief."

Township Brief at 7. The problem is that in the Township Fire Department in 2019-20, such jokes were pervasive, and no one took them seriously. Several firefighters testified or alluded at the arbitration hearing about not only jokes related to medication, but also jokes that were sexist and misogynistic and almost certainly violated a wide variety of Township policies – and this Arbitrator is relatively confident that the jokes described at the hearing were not the worst of it. But the Township apparently tolerated it. If the Township had held a drug-safety workshop and announced that "joking" about drug abuse is a symptom of drug abuse and that such jokes would henceforth be treated accordingly, that would be different. Here, however, CM's dismissal of problematic behavior as a joke was consistent with established practice of the Fire Department from the top down. Under these circumstances, it would be unfair to single out CM for discipline.

## **2. The December 2019 Text Exchange**

The second text exchange involving smurf berries, from November 2019, is:

CM: I must be really fucked up then because I thought it was kind of funny.  
And I was seriously going to put it in J's window.  
JB: It is hilarious. He has his high and mighty moments.  
CM: And whatever you do, Jesus, don't tell him I texted  
JB: Of course  
CM: Maybe I should give him some Smurf berries. Lighten the mood a little.  
JB: Sometimes he becomes a dad and needs brought back down to earth  
CM: Oye

Not a single witness at the arbitration hearing testified to interpreting this text exchange as indicating that CM did or intended to give her Klonopin to the person described here as "a

dad” (a person identified as CO by the testimony of both RB and CM). Instead, all witnesses testifying about this text exchange believed the exchange referred to a practical joke that several firefighters were thinking about playing on J, who was Chief AB’s administrative assistant. Apparently, the plan had been to put a dead mouse on her window. CO did not find this humorous and became upset with his fellow firefighters. His reaction prompted the text from CM to JB that perhaps she should have given CO one of her “smurf berries” to calm him down.

CM testified she intended this text as sarcasm. Nothing in the testimony indicates it was anything but sarcasm; nothing indicates CM ever intended to or did give CO any of her Klonopin. Chief AB testified he believes this was a joke, but also (perhaps inconsistently, and without providing any basis for his conclusion) testified that he concluded from this that “smurf berries were being given around to people.” Tr. 166.

Given the context, I see nothing untoward about this text exchange. CM testified she intended it sarcastically. That testimony is supported by every witness who testified on the subject at the arbitration hearing. At worst, this text exchange demonstrates JB’s familiarity with CM’s prescription for Klonopin. If there had been no reason to suspect JB knew CM was taking Klonopin, this text could indicate such knowledge, from which it *might* be inferred they were trading each others’ pills. However, several firefighters testified that CM made no secret of her Klonopin prescription, and that she often called her pills “smurf berries” in casual conversation. Given that, there is no reason to infer anything inappropriate either from CM’s use of the phrase “smurf berries” here or with JB’s familiarity with what she meant by it.

### **3. The March 2020 Text Exchange**

The third text exchange involving smurf berries, from March 2020, is:

JB:            If we get out, I have a fresh haul of Xannies to pickup  
JG:            Oh thank god!!!  
JB:            4-5 of them have your name on them.  
JG:            Roadhouse  
JB:            I’m going to see if CM has any smurfberries too

The Township interprets the last line of this text exchange as JB indicating CM had given him Klonopin after the November 2019 text exchange. If she had not previously given him Klonopin, the Township reasons, JB would have no reason here to ask her for more.

This is one plausible interpretation of the third text exchange. But another interpretation is at least equally plausible: that CM had never previously given JB any of her

Klonopin, that JB and JG both knew from previous casual conversations with CM that she had a prescription for Klonopin and frequently referred to the pills as “smurf berries”, and that JB was merely joking to JG, the subtext of which was that JB wanted drugs regardless of the source. The problem for the Township is that no one can testify to what JG and JB intended by this text exchange. CM wasn’t a party to the conversation. JB is dead. JG may be under indictment, and even if not, he can hardly testify to this text exchange without implicating himself in having received Xanax from JB.

#### 4. The Text Exchanges Collectively

Even if no one text exchange demonstrates CM was trading pills, or that she knew but failed to report that other firefighters were doing so, the Township argues that collectively the three exchanges are strong circumstantial evidence against her. Trustee DS, for example, testified that the three exchanges, all of which use a “code name” for CM’s Klonopin prescription (JG and JB used code names for various drugs they were buying and trading), “indicate CM’s familiarity with drugs and drug activity that is not simply banter among coworkers.” Tr. 243-44. I agree that, taken alone, these exchanges might lead a reasonable person to suspect CM was trading pills or at least was aware of JB and JG doing so.

Other circumstantial evidence, which I find even stronger, indicates the opposite. First, CM was the person who discovered the text messages among JB, JG, and CO that triggered the entire investigation and that eventually implicated her. Far from ignoring or burying what she had found, she immediately called Chief AB and urged him to investigate further, and encouraged and ultimately persuaded JB’s family to voluntarily turn over the iPad and permit a search. It is certainly possible all the texts would have come to light eventually regardless of CM’s actions. Nonetheless, it is extremely unlikely she would have done what she did if she thought she had something to hide. See RB, Tr. at 99 (describing CM’s role in discovering the texts and making them available to police investigators; AB, Tr. at 168 (“[S]he gave us the iPad. I didn’t think she would implicate herself if, you know, she knew everything that was going on. I don’t think she knew everything that was going on...”). The Township has offered no explanation – even a conjectural explanation – for why CM would have reported the iPad if she had previously exchanged incriminating texts with JB.

Second, several witnesses at the arbitration hearing described an earlier incident in which a firefighter from another department asked CM for medication she had been prescribed post-surgery; she reported him through the proper chain of command. Though this does not *prove* she would have reported JB if she had known of his drug use, it indicates at least a propensity in that direction.

Third, there is nothing in any of the three text exchanges described above indicating JB or JG or any other firefighter ever *received* any pills from CM. Compare this to the literally hundreds of text exchanges between JB and JG, and a lesser number involving CO and JC, in which it is crystal clear precisely where they were obtaining their drugs. RB, Tr. at 106. The two

texts in which CM participated do not fit this pattern; the third text (between JB and JG) says explicitly that JB obtained Xanax from a source not involving CM.

The Township argues the absence of a “thanks for the drugs” text can be explained by CM and JB being in the same fire station when the texts were exchanged. But if true, that proves too much – if they were in the same fire station, and JB both intended to ask CM for her Klonopin and had reason to believe she would give it to him, it is unlikely he would have put his request in a text. It would have been just as easy – and much safer – to ask her in person. The absence of a “thanks for the drugs” text is, I believe, more likely to be circumstantial evidence that JB was joking or fishing, than it is to be circumstantial evidence that JB and CM were trading drugs.

Fourth, the Investigative Summary Report prepared by the Township Police Department found “no indicator” from the evidence that CM shared her medication. “There are only three text messages regarding CM and her specific medication and no indicator it was shared.” Joint Ex. 26 at JT398. Similarly, the Report did not conclude CM knew there was pill trading going on in the Department, and did not find CM violated any Department policies or any laws by failing to report a pill trading scheme in the Department.

Captain RB explained that the part of the report pertaining to CM merely described the evidence rather than reaching conclusions; the Report left conclusion-making to Township administrators. But that wasn’t true for JB, JG, JC, and CO. For them, the Report found:

Messages between John JB and his contacts documented trading, sharing, and purchasing of prescription drugs and illegal drugs among members of the Township Fire Department including JB, Lieutenant JG, Captain CO, and Lieutenant JC. The texts also revealed that JB was trading and selling narcotics with other members outside of the fire department including a police officer in another jurisdiction.

Joint Ex. 1 at JT012. The Report further found:

The facts set forth in detail in the Investigation Report and its attachments show that firefighter JB, Lieutenant JG, Lieutenant JC, and Captain CO repeatedly violated the Policies of the Township Fire Department and the laws of the state of Ohio.

Joint Ex. 1 at JT024.

Given these explicit findings of wrongdoing by four firefighters, the absence of such findings against CM might reasonably be interpreted as a finding of no wrongdoing. At the least, it indicates the evidence against her was weaker than the evidence against the other firefighters.

Fifth, I give significant weight to Chief AB's initial assessment of CM's intent behind the email exchanges described above. It was apparent from both the words and the intensity of his testimony at the arbitration hearing that he has tremendous respect for CM, her dedication to the Department, her work ethic, her character, and her rapport with fellow firefighters. As described above, his testimony interpreting the text exchanges might be described as equivocal. He testified that initially – and no doubt influenced by more than twenty years of working closely with her<sup>2</sup> – he believed CM neither traded pills nor knew her fellow firefighters were doing so. It was only over after a series of meetings with Township administration – over the course of about six months – that he changed his mind and came to believe CM may have known there was some level of pill trading going on. Tr. 204-05. He continues to believe she was not herself trading pills. *Id.*

When the texts at issue in this Grievance came to light, no one was in a better position to judge CM's credibility or character than AB. He had worked with her on a day-to-day basis, in close quarters, for more than twenty years. He had supervised her directly, and was doing so at that time. He had promoted her into a position requiring substantial responsibility and judgment, and had given her more responsibilities in that position than her predecessor.

As described above, the record in this Arbitration does not indicate precisely who made the decision to discipline CM, or on what basis. It does indicate the decision was made by Township administrators, based primarily on a police investigation in which CM was at most a peripheral subject, and on an interview of her that did not ask her about or give her an opportunity to explain the facts that form the basis of some of the charges against her.

I'm not suggesting Township administrators inappropriately pressured Chief AB to change his mind. As described above, based on the raw text exchanges and the limited information in the Report about CM, there was some circumstantial evidence from which one might come to believe CM had at least known of pill trading by other firefighters. It would hardly be surprising if AB's perspective evolved over time to match the conclusions that had been reached by the Township administrators and Board members to whom he reports.

The point here is not to ascribe wrongdoing to the Township or Chief AB. Instead, my point is that it is unclear who or on what basis the Township made the decision to discipline CM. The one person in the best position to judge her character and credibility did not participate in that decision, and initially believed no discipline was warranted. Only later – after several months and many meetings with decisionmakers who relied on incomplete information and who had far less experience with CM than AB did – did he become persuaded that perhaps discipline was warranted. Under these circumstances, I am inclined to give at least as much weight to AB's initial assessment as I am to his later conclusion.

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<sup>2</sup> Chief AB testified he began his career at the Department in approximately 1996. CM testified she became a volunteer at the Department in 1998 and became permanent in 2000.

## B. Failed to Report Own Prescription Medication

Charge 3 against CM is that she failed to report her own prescription drug use to the Fire Department. Joint Ex. 48 at JT550. This charge states:

CM admits she was using Klonopin, a drug that can cause severe drowsiness and may impair thinking and reactions. However, she did not notify the Fire Department that she was taking the medication while working, **as required by policy**. (emphasis added)

The charge does not specify where this “policy” purportedly comes from, perhaps because the relevant policies, transparently, do not support the charge against CM.

The CBA, Appendix C, is a Drug and Alcohol Testing Policy. Joint Ex. 33 p. JT484 et seq. The Township’s original charges against CM and its post-hearing brief repeatedly invoke this Policy as justification for disciplining CM for trading pills and failing to report the pill-trading by other firefighters. However, neither the original charges nor the post-hearing brief ever cite to the specific provision requiring firefighters to report prescribed medication. That provision is found in Part II, paragraph 2, on page JT486:

All employees are responsible for obtaining and providing a ‘Fitness for Duty’ release to the Company [sic] if they are placed on any medication that may impair their normal or motor functioning, prior to performing their regular job duties.

The Township presented no competent medical evidence that CM’s prescription for Klonopin is a “medication that may impair [a firefighter’s] normal or motor functioning”. Moreover, Chief AB – who directly supervised CM and had worked with her for more than twenty years – testified he had no reason to believe her functioning was inhibited in any way by her prescription. Tr. 212-13. Finally, during the Grievance process, CM presented a letter from her doctor clearing her to work while taking her prescription medication. Given the Township’s complete lack of any contrary evidence, the Township should at that point have either presented evidence that Klonopin can impair a firefighter’s normal or motoring function, or it should have withdrawn the charge. The Township did neither.

Similarly, the Township Fire Department Policy 1016, Drug- and Alcohol-Free Workplace, provides:

### 1016.3.1 USE OF PRESCRIBED MEDICATIONS

Members should avoid taking any medications *that will impair their ability to safely and completely perform their duties*. Any member who is medically required or has a need to take any *such* medication shall report that need to his/her immediate supervisor prior to commencing any on-duty status.

(Emphasis added.)

The Township's post-hearing brief specifically cites to this provision to justify its discipline of CM. However, the Township's brief quotes *only the second sentence*. It does not quote, and makes no reference to, the first sentence. The word "such" in the second sentence demonstrates that the reporting requirement imposed by that sentence applies only to the medications described in the first sentence – i.e., to medications "that will impair [a firefighter's] ability to safely and completely perform [her or his] duties." As described above, the Township presented no competent evidence that CM's prescription for Klonopin impaired her ability to perform her duties. Her direct supervisor and 20-year superior officer testified he saw no evidence of such impairment. Her doctor provided a written letter saying there was no impairment. Again, the Township showed questionable judgment in pressing this charge without evidence, and in not withdrawing it upon ascertaining the charge lacked any factual basis.

Worse, however, is the Township's decision to obscure the weakness of its argument by quoting the second sentence of 1016.3.1 but ignoring the first sentence, upon which the second sentence is predicated. Even notice pleading under Federal Rules of Civil Procedure Rules 8 and 11 require a good-faith basis for the alleged facts and relied-upon law. A much higher standard is expected in labor grievances, where an employee's livelihood and professional reputation are at stake, and where the orderly and efficient resolution of labor disputes depends on mutual trust. Mis-representing an applicable legal standard undermines a party's and an advocate's general credibility and damages prospects for future bargaining and grievance resolution. It is not effective advocacy.

### **C. Due Process and Related Issues**

Other aspects of the Township's handling of this Grievance are concerning. First, CM was demoted two ranks. JG, CO, and JC, who by the Township's admission were guilty of far worse and more obvious misconduct (see DS, Tr. 222-23), would have been demoted only one rank (Twp. Ex. 8), until their resignations or retirements resulted in no discipline at all. The harsher punishment for a less-significant and less-provable offense raises red flags. But the Union did not raise this issue, so perhaps I am missing something.

Second, the Township's investigation of CM left much to be desired. Captain RB did not ask CM about many of the issues that later became the basis of the charges against her. This by itself is no surprise, since CM was at most a peripheral subject of RB's investigation. But before bringing charges against CM, one would expect the Township to conduct at least a brief investigation into these issues, and to give CM an opportunity to explain and respond.

Third and most concerning, the Township appeared to go out of its way to hide from both CM and Union the fact that CM was a subject of the Police Department investigation into the circumstances of JB's death. By all accounts, they learned nothing of this until after the investigation was complete and charges had been drawn up – well after Union notified the

Township it had obtained legal representation for the firefighters it knew to be the subject of the investigation.

I have purposefully declined to rule on these issues, however, because I am aware that persons unfamiliar with the process for resolving grievances often describe arbitral decisions based on violations of industrial due process as “technicalities” unrelated to the merits. My decision in this Award rests squarely on the merits: I find the Township lacked sufficient evidence to demonstrate just cause for demoting CM from Captain to firefighter.

#### **D. The Union’s Request for a Public Apology**

The Union presented evidence that the Township leaked to the press information related to the investigation into JB’s death that was embarrassing or damaging to CM, including information such as her prescribed medication. The Township presented evidence it gave the press only information it was legally required to provide under applicable laws. The Union argues CM’s professional reputation has been damaged both by the leaks and by publicity surrounding CM’s demotions, and that her reputation can be restored only by requiring the Township to issue a public apology.

In support of its request for a public apology, the Union cites an unpublished Award issued by this Arbitrator in an unrelated case. That case involved a school district’s unwarranted discipline of a teacher. The district had sent the original disciplinary notice to fourteen individuals across the district who were unrelated to the case. As part of the remedy, I required the district to send notice of a retraction of the discipline to each of those fourteen individuals.

The remedy requested in this Grievance is different. In the other case, I required the district to send the retraction to its own employees. In this Grievance, Union asks me to require a public apology. I am confident in my authority under the CBA to order a *workplace* remedy, and a bit less confident of my authority to order a remedy that goes beyond the workplace. Regardless, I am dubious of the value of a forced apology, which invariably takes the form of “I am apologizing because my mother made me, and I am sorry for any offense you may have taken from my completely righteous action.”

### **VII. Award**

For the reasons described above, the Grievance is sustained. I find this Grievance arbitrable under the CBA. I further find that Township lacked sufficient evidence to demonstrate just cause for demoting CM from Captain to firefighter. I therefore order that Township:

1. Reinstatement CM to the rank and position of Captain effective back to the date of demotion;
2. make CM whole for all lost wages and benefits resulting from the demotion;

3. rescind all charges of wrongdoing against CM related to this Grievance, and note such in her employment records;
4. issue a full retraction of the charges against CM; and
5. be responsible for all arbitration fees consistent with the “loser pay” language established in Article 17, Section 6, Step 3 of the CBA.

I retain jurisdiction for the limited purpose of resolving any disputes the parties may have about calculating damages, or otherwise applying or interpreting this Award.



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January 11, 2021