IN THE MATTER OF THE ARBITRATION BETWEEN	)	
	)	FMCS No. 200616-07163
ESCAMBIA COUNTY BOARD OF COMMISIONERS	)	
County,	)	GRIEVANCE: Suspension
and	)	
AMALGAMATED TRANSIT UNION (ATU), LOCAL 1395	)	
Union	)	GRIEVANT: Michael Lowery

FINAL AND BINDING ARBITRATION AWARD

ARBITRATOR: DANIEL R. SALING, ESQ.

AWARD DATE: June 7, 2021

APPEARANCES FOR THE PARTIES

COUNTY: Michael Mattimore, Esq.
ALLEN, NORTON & BLUE, P.A.
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Tallahassee, FL 32303

and

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UNION: Mark Floyd, Esq.
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WITNESSES:

For the County:

Tonya Ellis – ECAT Director of Mass Transit

For the Grievant:

Michael Lowery – Grievant

PROCEDURAL HISTORY

The Escambia County Area Transit is hereinafter referred to as the "ECAT" or the "Department." The County of Escambia is hereinafter referred to as the "County." Mr. Michael Lowery is hereinafter referred to as the "Grievant." The AU, Local 1395 is hereinafter referred to as the "Union." The collective bargaining agreement between the Escambia County Board of Commissioners and the First Transit was entered into on November 13, 2013, and became effective on October 1, 2013. On September 21, 2017, the County entered into an Implementing Agreement with the Union in which the County agreed to employ the members of the bargaining unit for a term of six months under the terms and conditions of the expired collective bargaining agreement with First Transit,

including all Memorandums of Understanding, subject to certain exceptions. (MX 14) The Memorandums of Understanding referred to in the Implementing Agreement, is hereinafter referred to as the "Agreement." The parties further agreed the ECAT Policies and Procedures Manuals would apply to the bargaining unit. Such policies are hereinafter referred to as "Department Policy" or "Department Policies."

Upon the expiration of the Implementing Agreement, effective April 1, 2018, the members of the bargaining unit became public employees of the County. Thereafter, on August 29, 2018, the ATU Local 1395 was certified by the Public Employees Relations Commission (PERC) as the bargaining agent for the ECAT bargaining unit (#1938). Accordingly, the bargaining unit and its agent are subject to the provisions governing public employee labor organizations as set forth in the Florida Public Employees Relations Act (PERA), Chapter 447, Florida Statutes, and as specified in Art. 1 § 6, Florida Constitution.

During the term of the Implementing Agreement, the County and the ATU Local 1395 commenced negotiations and have participated in numerous collective bargaining sessions. To date, the parties have not ratified a collective bargaining agreement and continue operating under the status quo as it relates to wages, hours, and terms and conditions of employment applicable to the public employees within the bargaining unit and in accordance with Florida law.

The dispute that is before the Arbitrator arises out of the Department's suspension of the Grievant from his position as an Escambia County Bus Operator. The charge filed against the Grievant was that on or about February 7, 2020, he violated Department policy and was insubordinate to his Department Director. The Grievant was alleged to have failed to follow a directive to report to work on February 7, 2020, when his request for union leave was denied. Further, the Grievant violated the County Administrator's September 27, 2019, letter regarding union leave.

The Department alleged that the Grievant was insubordinate and did not follow the provision of the Agreement or District Policy. On February 24, 2020, the Department issued the Grievant a Notice of Disciplinary Action (NOSD), which indicated the proposed discipline would be issued a one-day suspension. (MX 2) The one-day suspension took place on February 27, 2020.

On February 27, 2020, the Grievant filed a timely grievance and processed it under the provisions of Article 5, Grievance Procedure, of the Agreement. The charges filed against the Grievant were for insubordination. Following unsuccessful attempts to resolve the grievance, the matter was referred to arbitration in accordance with terms of Article 6, Arbitration Procedure, the Agreement. Using the services of the Federal Mediation and Conciliation Service (FMCS), Daniel R. Saling was appointed as Arbitrator on June 26, 2020.

The Grievant claims that the Department violated the following provisions of the Agreement and Department Policy:

1. Article 24, Section 2 (3)
2. Article 7, Section 1 (B)
3. Article 7, Section (2) (d)
4. Article 1, Sections 1 & 3
5. Article 41, section 7
6. Department Operation Policy - Progressive Discipline

A virtual arbitration hearing was held on April 2, 2021. During the hearing, all parties were afforded a full opportunity for the presentation of evidence, examination, and cross-examination of witnesses and oral argument. Witnesses were duly sworn. The parties stipulated that the grievance was properly before the Arbitrator and all the timelines had either been followed or waived. Further, the parties stipulated that the Arbitrator had final and binding authority in the rendering of the award.

The parties elected to file post-hearing briefs. The Arbitrator received timely postmarked briefs from both parties. The Arbitrator received the last brief on or about May 14, 2021.

PERTINENT PROVISIONS OF THE AGREEMENT:

Article 24 – ATTENDANCE:

...

SECTION 2 -Definitions pertaining to absenteeism:

...

(3) Employees with absences of one day will be considered excused. Employees with absences of two or more days will be considered excused with a doctor's certificate (covering all the days absent). After the completion of the first year of this agreement, the absences shall be permitted for one or two consecutive workday absences and will be considered excused without documentation. Three or more consecutive scheduled workday absences must be supported by an original doctor's certificate (covering all days absent). Doctors' certificates must be signed (no facsimile stamp signatures accepted).

...

GRIEVANCE ISSUES TO BE RESOLVED:

The parties at the commencement of the hearing agreed to the following submission statement:

1. Did the County have just or sufficient cause to suspend the Grievant?
2. If not, what is the appropriate remedy?

FACTUAL BACKGROUND

Set forth in this Background is a summary of undisputed facts and evidence regarding disputed facts sufficient to understand the parties' positions. Other facts and evidence may be noted in the Discussion below to the extent knowledge of either is necessary to understand the Arbitrator's decision.

The facts in this case are largely undisputed and are hereinafter summarized. Where, however, relevant evidence regarding pertinent facts conflicts, the evidence is summarized.

The County on April 10, 1995, hired the Grievant as a transit Bus Operator and he has served in that capacity with the County for approximately 26 years prior to the date of his suspension. The Grievant became the vice-president of the Union in 1998 and the Union President in 1999, a position in which he still serves.

On February 6, 2020, at approximately 5:14 a.m., the Grievant submitted a request for 10 hours of paid union leave for the following day on February 7, 2020, with the purpose for the leave being listed as "Other". The Grievant further specified the "ECAT related activities" would entail work that was required by PERC in completing the required annual forms that authorized the Union to collectively bargain with ECAT. The Forms were required to be finalized and postmarked to the State of Florida on behalf of ATU Local 1395 (Public Sector) ECAT/BOCC representation."

The request for leave was considered by Ms. Tonya Ellis, ECAT Director of Mass Transit, to be untimely and she believed that the leave could impose an undue operational burden on the Department. Ms. Ellis denied the request and indicated that she was denying the Union leave request because the described activities did not constitute direct representation of the bargaining unit for which the County could legally provide paid union leave.

At approximately 4:22 p.m., on February 6, 2020, the Grievant submitted a request for ten hours of unpaid union leave to perform the same alleged ancillary union activities described in the previous request. Ms. Ellis considered and determined that the second leave request was untimely under the terms of the Agreement and the County Administrator's directive regarding union leave and she denied the leave request. (MX 6 & MX 15)

At approximately 4:26 p.m., Ms. Ellis emailed the Grievant and reiterated her previous denial, and stated that she expected the Grievant to report for duty on February 7, 2020,

at his regular starting time of 5:45 a.m. (MX 1 & MX 4). For the remainder of the afternoon and evening of February 6, 2020, Ms. Ellis testified she was attending the Board of County Commissioners' meeting and did not have further correspondence with the Grievant until the following day.

After receiving Ms. Ellis's denial, the Grievant at approximately 4:10 a.m. the following morning, telephoned dispatch and reported to the on-duty supervisor that he was calling out for today to do union business. (MX 1), Supervisor Incident Report; MX-5. On February 7th, Mr. Lowery testified that he tended to the very same activities for which he had requested and was denied union leave. The Department alleges that the Grievant did not "call out" on the morning of February 7, 2020, because of illness, a personal emergency, or other unforeseen circumstances, but called out to do union business.

The Department alleges that the Grievant willfully disregarded Ms. Ellis's denial of his request for union leave and refused to report for duty. After "calling out," the Grievant communicated with Ms. Ellis via email and requested a meeting at 2:00 p.m. to discuss the denial of his request for union leave.

COUNTY'S POSITION

The County believes that it has properly disciplined the Grievant for job-related misconduct. The alleged misconduct included violation of County and/or Department rules, regulations, policies, and/or procedures.

The County contends that the preponderance of the evidence shows that the Grievant violated County Policy. The Grievant failed to report to duty to conduct ancillary union business and such conduct constituted insubordination in direct defiance of the Transit Director that directed him to report to work.

Since the County entered into the Implementing Agreement with the Union, the President of the Union has contractually been allowed to take time off to conduct union business. The Grievant held the position of Union President and had held that position since 1999. The Grievant was fully aware of the provisions of the Agreement and Department Policy that governed the right to union leave.

On February 4, 2020, the Grievant was granted union leave for February 5 & 6, 2020. At approximately 5:45 a.m. on February 6, 2020, the Grievant requested union leave for Friday, February 7, 2020, a day when he was scheduled to work. The Grievant requested union leave for the purpose of completing a PERC required form. The Department determined that the request for union leave was untimely and was for an activity that was not a direct representation of the union membership and therefore the Department could not grant the request for union leave under Florida law.

At approximately 4:22 p.m. on the afternoon of February 6, 2020, the Grievant requested a non-paid union leave to perform the same ancillary union activities described in the initial request for paid union leave. Again, the Department determined that the request for non-paid union leave was untimely under the provisions of the Agreement and the County Administrator's directive regarding union leave. (MX 6 & MX 5)

At 4:26 p.m. on the afternoon of February 6, 2020, Ms. Ellis emailed the Grievant and denied his request for non-paid union leave. Further, Ms. Ellis informed the Grievant that she expected him to report to work for duty on the morning of February 7, 2020. (MX 1 & MX 4)

At approximately 4:10 a.m. on the morning of February 7, 2020, the Grievant telephoned dispatch and reported to the on-duty supervisor that he was "calling out" for the day. The Grievant stated that he was "calling out" because he had not heard back from the ECAT Director regarding his request for non-paid union leave. (MX 5) The Grievant did not call out because of illness, a personal emergency, or any other unforeseen circumstance. The Grievant blatantly disregarded Ms. Ellis's directive to report for duty and instead "called out" for the very same reason that that resulted in his two early requests for leave being denied.

Under Department Policy, insubordination is grounds for immediate suspension or termination without the use of progressive discipline. The Department could have issued a more severe penalty but instead a more measured progressive discipline action was taken.

The Department contends that it has the right and authority to deny the Grievant's leave request on legitimate grounds. It is the Department's opinion that the Grievant should have reported to work on February 7, 2020, and if he believed that his contractual rights had been violated, then he could have filed a grievance and sought an appropriate remedy. The Department believes that the Grievant's failure to report to work on February 7, 2020, as directed by Ms. Ellis was insubordination.

The Union believes that it has the right to conduct union business and that management may only decline the request for union leave if the union business is ancillary to the direct representation of the union membership. The Department contends that the Union's position is a misrepresentation of the status quo period relating to union release time and the right of the County to management under Section 447.209 of the Florida Statutes to deny paid union leave during the status quo period.

Under Florida law, it is an unfair labor practice for an employer to provide any form of contribution or financial support to a public employee labor organization. The public employer may grant paid union release time, but such paid release time must be for direct representation such as negotiation or grievance processing. Paid release time may not be given for ancillary union work.

The Union may bargain union release time and such release time will survive the expiration of an agreement to the extent that the union leave is for the direct representation of the bargaining unit members. During the status quo period, the County is not required to authorize union leave to perform ancillary union duties.

The County was not contractually or legally obligated to grant the Grievant a paid union leave for February 7, 2020, because the leave was not being requested for the purpose of direct representation. Therefore, the Grievant's request for paid union leave on February 6, 2020, was properly denied. Also, the Grievant's request for a non-paid leave was not timely and therefore that request was properly denied.

The Grievant may argue that he was not given timely notice that he was under

investigation, and this denied him due process, but that argument is without merit. The Grievant was given notice by Mr. Barnes on February 14, 2020, that he was under investigation. (UX 5) Also, Mr. Edgerton, provided the Grievant with an Absence Occurrence for his absence on February 7, 2020, which was further notice. (UX 4) The Grievant was timely notified of his investigation and he was not denied any due process rights.

The County knows that it has the burden of proof to show that the Grievant was provided with a just cause review and his guilt was determined by the preponderance of the evidence. The County believes that the evidence supports a clear finding that the Grievant committed the charges filed against him and that the discipline administered was appropriate.

The County believes that the Arbitrator should defer to its decision to suspend the Grievant because it has met its burden of proof and the Grievant was suspended for just cause. The County's decision to suspend the Grievant was not arbitrary or capricious and the Grievant's actions were serious and warranted a severe penalty.

The County requests that the Arbitrator find that the Grievant's suspension was appropriate and that it was based on just cause. The County asks that the Grievance be denied, and the suspension be upheld.

GRIEVANT'S POSITION

The Union contends that the County did not follow "just cause" in disciplining the Grievant. The County has the burden of proof to determine by the preponderance of the evidence that the Grievant was disciplined for just cause. To sustain the filed charges against the Grievant, the County is required to base its decision to discipline the Grievant on credible evidence.

The County and the Union entered into an Implementing Agreement whereby the County agreed to honor the collective bargaining agreement entered into between the Union and the County's predecessor, First Transit, until such time as a new collective bargaining

agreement could be negotiated and ratified. (MX 14) The Implementation Agreement, entered into on October 17, 2017, was to remain in effect for six months while the County established a non -profit organization to assume the duties that had been performed by First Transit. The County did not establish a non-profit but instead assumed the responsibilities for rapid transit system as a County provided program. The collective bargaining agreement remains in full force and effect at all times relevant to this arbitration proceeding.

On February 7, 2020, the Grievant was working as a County Bus Operator, a position he had held since April of 1995. Additionally, the Grievant was serving as the elected Union President and Business Agent, a position he had held since 1999.

The dispute that is the basis of this arbitration arises out of the County's suspension of the Grievant from his position as a Bus Operator. The charge filed against the Grievant was that on or about February 7, 2020, he violated Department policy and was insubordinate to his Department Director. The Grievant was alleged to have failed to follow a directive to report to work on February 7, 2020, when his request for union leave was denied. Further, the Grievant was alleged to have violated the County Administrator's September 27, 2019, letter regarding union leave. On February 24, 2020, the Grievant was issued a ten (10) hour suspension. (MX 2)

Prior to the ten (10) hour suspension issued to the Grievant on February 24, 2020, the Grievant had no disciplinary history during his tenure with the County. Following the issuance of the ten (10) hour suspension that is the subject of this proceeding, the Grievant was given a three-day suspension and then, subsequently terminated by the County. The discipline administered related to the three-day suspension and the Grievant's termination is not at issue in this proceeding.

Article 7, Section 1, of the Agreement expressly provides for Union Business Leave (UBL) Article 7, Section 1(B) states that the President/Business Agent of the Union "will" be permitted off from their regular work assignment to conduct Union business if the request is made in writing and submitted 24 hours in advance of the requested leave. (MX 15) Article 7 does provide for exceptions to the required 24-hour advanced notice

under certain extenuating circumstances. Additionally, the Agreement also provides for non-paid Union leave.

It is the Union's position that if the County has no discretion as to whether or not a request for UBL will be granted so long as the request is for the purpose of Union business and the request is made 24 hours in advance of the requested leave, except in cases of an emergency. Unless the request for UBL is not for union business or if the request is deemed unlawful, the County must honor the terms for the Agreement.

The Union believes that the Grievant's request for paid leave for February 7, 2020, was improperly denied. The Grievant's request was timely made and was for the purpose of conducting union business, as provided for in Article 7 of the Agreement. The County claims that it had unilaterally altered the provisions of Article 7 of the Agreement as outlined in County Administrator Janice Gilley's September 27, 2019, correspondence. (MX 6) While the Union has used the forms attached to the September 27th correspondence, the Union has not agreed to the modifications proposed in paragraphs three of four of the correspondence nor has the County implemented the proposed changes.

When the Grievant was improperly denied paid union leave, he immediately requested that he be allowed to take unpaid union leave. The County once again denied the unpaid leave request as being untimely filed. The Grievant was not given a written denial of his unpaid union leave from his supervisor and believed his request was still being considered.

On the morning of February 7, 2020, the Grievant had not received a response from his supervisor regarding his request for non-paid union leave and therefore decided to exercise his right to "call out" for leave on February 7, 2020, as provided for by Article 24, Section 4, of the Agreement. (UX 3; MX 15, p. 34) The purpose of the "call out" leave was given as union business. The Count contends that the "call out" leave was not made due to illness, a personal emergency, or any other unforeseen circumstance and that therefore when the Grievant exercised his rights under Article 23, that he was insubordinate. There is no prohibition under the expressed provisions of Article 24 that

the leave can not be made for personal or professional reasons but must be made only for illness, a personal emergency, or any other unforeseen circumstance.

The Union believes that the Grievant was not provided with due process and that his alleged misconduct was not thoroughly investigated. The Grievant was not made aware of what he was being charged with that would possibly result in some form of discipline. The Grievant was not given an opportunity to provide a written statement to assist the County in determining if he had been insubordinate and/or had violated established County Policies. Further, the County did not follow progressive discipline before determining that the Grievant's alleged misconduct warranted a ten (10) hour suspension.

While the County alleges that the Grievant was insubordinate because he did not report to work on February 7, 2020, Ms. Ellis testified that she did not order or direct the Grievant to report to work on February 7, 2020, and she had only denied the request of the UBL.

The issue in this proceeding is not the provision related to UBL, be it paid or non-paid leave, but the issue is whether the County had just or sufficient cause to suspend the Grievant for ten (10) hours? The County did not have just cause to suspend the Grievant. The County denied the Grievant due process. Further, the County failed to obtain substantial evidence that the Grievant was insubordinate and did not provide the Grievant with his rights under Article 24 of the Agreement.

The Union requests that the Arbitrator sustain the Grievance and that the Grievant be compensated for lost wages, and/or other benefits resulting from his wrongful suspension for his alleged misconduct on February 7, 2020.

DISCUSSION

The Grievant who is the subject of this arbitration has been employed by the County for approximately 26 years as a Bus Operator. Prior to the discipline that is being addressed in this award, the Grievant had no discipline history with the Department.

On October 1, 2017, the County assumed responsibility for the management and operation of the ECAT, which has since that date functioned as the Transit Department of Escambia County. Prior to October 21, 2017, the County transit system was operated by private contractors. The last private contractor, prior to the County assuming responsibility for its transit system, was First Transit. First Transit employed the employees that operated the transit system, and these employees were represented by the Amalgamated Transit Union, (ATU) Local 1395, which was certified by the National Labor Relations Board (NLEB). First Transit and ATU had entered into a collective bargaining agreement that covered the employees' wages, hours and working conditions.

When the County assumed responsibility for its transit system and the former employees of First Transit became County employees, the provisions of the collective bargaining agreement continued until a new agreement could be bargained and ratified by the County and the Union. The County and the Union have bargained over the past several years, but a new agreement has not been reached. The Agreement that continued after the County assumed the responsibility of its transit system continues in full force and effect and has been honored by both the County and the Union.

The Union was selected by the Escambia County transit workers to be the exclusive bargaining agent for the purpose of representing the members of the recognized bargaining unit in all labor relation matters with the County. To maintain its status as the exclusive bargaining agent, which allowed it to bargain and to file grievances with the County, the Union was required by PERC to annually complete certain representation forms. Without completing the required forms, the Union would lose its right to collectively bargain on behalf of the members of the exclusive bargaining unit.

There is a nexus or direct link between the Union's duty and obligation to complete the required annual PERC forms that allows it to continue to represent the members of the exclusive bargaining unit in negotiation and in defending the rights of the members by the filing of grievances. The County relied upon PERC case, Allen v. Miami-Dade College Bd. of Trustees, 43 FPER ¶ 6 (2016), to claim that the Union's request to have union leave was not a direct representation but was an ancillary union duty and therefore

the County under Section 447.501(1)(e), Florida Statutes was expressly prohibited from using tax collections to fund a public-sector union.

A direct duty or obligation mandates that it be performed and the failure to complete the required task results in some form of penalty or loss. An ancillary duty is a duty or task that is not required or essential to the performance of the required duty or task and generally there is not any form of penalty or loss associated with failure to perform such duty or task. A direct duty is essential and is absolutely necessary and as such must be performed because it is considered to be indispensable.

The example of ancillary duties listed in the Allen v. Miami-Dade College Bd. of Trustees (supra) listed duties or activities such as lobbying for political issues, going to community events and charities, communicating Union positions, attending conventions and alumni affairs, coordinating with other unions, and advocating for academic and education issues or other non-representative activities. Each of the listed ancillary duties has no nexus with the right and the duty of the Union to perform its duties as the exclusive bargaining agent to negotiate and police the collective bargaining agreement.

The discussion of the right of the Union to seek union leave to complete the required PERC form to allow it to perform its exclusive bargaining duty for direct representation is interesting and has not been fully developed in PERC case law. The examples given as what is considered direct representation versus ancillary union duty is not fully developed. There is no discussion to establish if the development of contract proposals is to be considered a direct representation or an ancillary union duty. The examples of what has been determined to be ancillary union duties list activities that have no direct connection to bargaining or grievance processing.

The work required of the Union to fairly represent its members requires it to perform all necessary tasks to preserve its rights to represent its member. The surveying of the Union membership, the completion of all necessary forms to allow the Union to maintain its exclusive bargaining status, the development of negotiations proposals, the bargaining

sessions, the investigation of contractual violations or unfair labor practices, and the filing, processing, and arbitrations of member grievances are all directly related to representation.

The issue that must be addressed in this award is whether or not the County had just cause to discipline the Grievant when after being rightfully or wrongfully denied either paid or non-paid union leave the Grievant was determined to be insubordinate when he exercised his alleged rights to call out under the provisions of Article 24.

CONCLUSION

A standard of proof determines the amount of evidence the Employer needs to provide for the trier of fact to reach a particular determination. In arbitration cases, the burden of persuasion that applies is called "a preponderance of the evidence " standard. This standard requires the trier of fact to return a judgment in favor of the employer if the employer can show that a particular fact or event was more likely than not to have occurred. Some scholars define the preponderance of the evidence standard as requiring a finding that at least 51 percent of the evidence favors the Employer's position.

The issues that were presented in this hearing centered on two key issues. The first issue was to determine if the County had just cause to suspend the Grievant. The second issue is if it is determined the Grievant was disciplined for just cause, was the discipline issued appropriate? The Arbitrator will address both issues.

JUST CAUSE

"Just cause" consists of several substantive and procedural elements. Primary among its substantive elements is the existence of sufficient proof that the employee engaged in the conduct for which he or she was discharged or disciplined. Other elements include a requirement that an employee knows or reasonably be expected to know ahead of time that engaging in a particular type of behavior will likely result in discipline or discharge, the existence of a reasonable relationship between an employee's misconduct and the punishment imposed and a requirement that discipline be administered even-handedly,

that is, that similarly situated employees be treated similarly and disparate treatment be avoided. Another element of just cause is to determine if the charges against the employee have been investigated and whether the investigation was conducted fairly and objectively.

The County charged the Grievant with insubordination because he used his contractual rights under Article 24, to "call out" and to take time off. The evidence established that the Grievant made a timely notification to the County and claimed time off under Article 21, Section 2(1) which defines an excused absence as, "Any absence approved by the Company, provided by the Labor Agreement or mandated by law."

The Union was required to complete required forms for PERC which allowed the Union the right to directly represent the members of the exclusive bargaining unit. The starting point of direct representation is to obtain authorization from the state agency that allows the Union to maintain its exclusive bargaining unit status. Without completing the required forms, the Union would not be allowed to directly represent its membership and therefore the completing of the required representation forms is an activity that is a direct representation and should not be considered an ancillary union duty.

The County and the Union agree that it is unlawful for the County to directly contribute to the Union for activities that are not related to the direct representation of the exclusive bargaining unit membership. The parties differ as to what can be considered a union activity that is for direct representation and what union activity is to be considered ancillary. While the County may provide release time to the Union for direct representation activities, such release time cannot be granted for ancillary union activities.

In the case at bar, the Grievant timely requested paid union leave to allow him to complete required PERC forms that allowed the Union to maintain its status as the exclusive bargaining agent and allow it to directly represent its members. The County incorrectly assumed that the required representation forms were an ancillary union duty and wrongfully denied the Grievant union leave. After the request for paid union leave was wrongfully denied, the Grievant requested unpaid union leave, and that request was

denied as being untimely filed. After the Grievant had been denied both paid and unpaid union leave, he timely requested a "call out" leave under Article 24, of the Agreement.

The County filed charges that the Grievant was insubordinate because he did not report to work on February 7, 2020. Ms. Ellis testified that she did not order or direct the Grievant to report to work on February 7, 2020. There was no evidence presented by the County that established that the Grievant was insubordinate and failed to follow an order or directive.

The primary element in just cause is to determine that the accused engaged in the conduct for which they were discharged or disciplined. In reviewing the evidence and the testimony, I have determined that the Grievant did not violate any provision of Article 24, when he called out on February 7, 2020. Further, there was no credible evidence to establish that the Grievant was insubordinate.

In the workplace, insubordination is defined as a constant or continuing intentional refusal by an employee to obey a direct or implied order, reasonable in nature, and given by and with proper authority. Three elements must be present to constitute insubordination. First, the supervisor or employer gave a direct order to the employee. Second, the employee understood the order. Third, the employee blatantly refused to follow the order whether through action, words, or both.

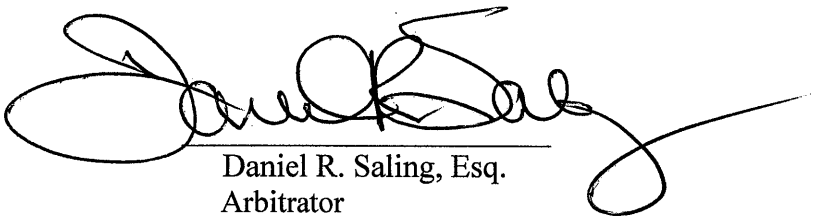
There was no evidence or testimony presented that established that the Grievant had been given an order to report to work on February 7, 2020, and that he understood the order, and refused to follow the order. There was no evidence presented that established that the Grievant was guilty of insubordination.

Having reviewed the testimony and evidence presented at the hearing, and after reading the advocates' post-Hearing briefs, I believe the Grievance must be sustained.

AWARD

For the reasons hereto stated, I, Daniel R. Saling, the duly appointed impartial Arbitrator in this matter, issue the following final and binding decision:

1. The Grievance is sustained.
2. The Grievant is to be made whole.



Daniel R. Saling, Esq.
Arbitrator

June 7, 2021
Date