ARBITRATOR'S OPINION AND AWARD

In the matter of Arbitration	*	Opinion and Award
	*	
-between-	*	
	*	
State of Ohio	*	
	*	
-and-	*	Arbitrator Martin R. Fitts
	*	
SEIU District 1199 WV/KY/OH	*	
	*	
	*	
FMCS No. 210819-09341	*	
Grievance No. DRC-2020-00916-12	*	
Grievance: Prohibition from working due to COVID	*	
Grievant: Russell Daubenspeck	*	January 23, 2023
	*	
	*	

****

BACKGROUND

Pursuant to the Collective Bargaining Agreement between the State of Ohio (the Employer) and SEIU District 1199 (the Union), an arbitration hearing was held on October 6, 2022 by Arbitrator Martin R. Fitts. The hearing was at the Union's offices in Columbus, Ohio. Post-Hearing Briefs from both parties were submitted to the Arbitrator by the December 5, 2022 deadline, and subsequently exchanged by the Arbitrator.

APPEARANCES

For the Employer	For the Union:
Victor Dandridge	Josh Norris
Office of Collective Bargaining	Executive Vice President
State of Ohio	SEIU District 1199

APPEARANCES (cont'd)

For the Employer:

Thomas Dunn
Office of Collective Bargaining
State of Ohio

Camille Ali
Office of Collective Bargaining
State of Ohio

Chris Haselberger
Office of Collective Bargaining
State of Ohio

Kristen Rankin
Deputy Director
Office of Collective Bargaining
State of Ohio

For the Union:

Russell Daubenspeck (appeared virtually)
Parole Officer
Grievant

EXHIBITS

Joint Exhibit 1:	Grievance and Grievance Trail
Joint Exhibit 2:	Collective Bargaining Agreement
Joint Exhibit 3:	Governor's Executive Order 2020-01D
Management Exhibit 1:	Ohio Department of Health Director's Order issued 3/14 2020
Management Exhibit 2:	Ohio Department of Health COVID-19 Checklist updated 11/2/2020
Union Exhibit 1:	Grievant's time log from 3/12 2020 to 5/1/2020

STIPULATIONS

The Parties stipulated that the grievance was properly before the Arbitrator and there were no procedural objections. Further, the Parties stipulated that Ohio Governor Mike DeWine declared a State of Emergency due to COVID-19 on March 9, 2020, reflected in Executive Order 2020-01D (see Joint Exhibit 3).

THE ISSUE

The parties stipulated as to the issue: Did the Employer violate the terms of the Parties' Collective Bargaining Agreement when it ordered Mr. Daubenspeck to leave work on Thursday, March 12, 2020 and did not allow him to return to work until Tuesday, March 17, 2020? If so, what shall the remedy be?

DISCUSSION

In response to the COVID-19 pandemic, Governor Mike DeWine issued Executive Order 2020-01D (see Joint Exhibit 3) on March 9, 2020 declaring a State of Emergency. In relevant part the Order reads: *5. State agencies shall develop and implement procedures, including suspending or adopting temporary rules within an agency's authority, consistent with recommendations from the Department of Health designed to prevent or alleviate this public threat.*

The unrebutted testimony of the Grievant was that on Thursday, March 12, 2020 his supervisor observed the Grievant coughing in the workplace. The Grievant stated he told his supervisor that in the previous month he had been seen by his doctor and diagnosed with a sinus infection, or sinusitis. His supervisor nonetheless ordered him to go home and use his leave. The Grievant stated further that he was told not to return to work until his cough was gone. The Grievant chose to take vacation leave instead of sick leave as provided for in Article 13 of the Collective Bargaining Agreement. The instant grievance was filed on the same day, March 12, 2020. The remedy requested was that the Grievant be made whole in every way, including but not limited to approving the Grievant for administrative leave instead of sick leave and replenishing the Grievant's sick leave balance with the sick leave he used since being sent home on March 12, 2020.

On Monday, March 16 the Grievant stated that he contacted his supervisor around 10:40am and was instructed to return to work. The Grievant testified that in response he told the supervisor that he would take the remainder of the day as vacation leave. Further, the Grievant testified that when he returned to work on the morning of Tuesday, March 17 he still had a cough, and that despite the cough was not sent home. He stated that he subsequently worked in the

office until March 19, at which time every employee was told to work from home.

As noted, the Grievant's testimony above was unrebutted by any testimony or evidence offered by the Employer, and is thus considered by this Arbitrator to be a factual account of the interactions between the Grievant and his supervisor during the period March 12, 2020 through March 17, 2020. In addition, the Grievant's time log (Union Exhibit 1) showed that he did, in fact, use 4.30 hours of vacation leave on March 12, 6.40 hours of vacation leave on March 13, and 7.30 hours of vacation leave on March 16, and that he returned to work in the workplace on March 17.

The Employer asserted that it is contractually obligated to provide its employees with a safe and healthful workplace, and cited Article 32 – Health and Safety Procedures of the Collective Bargaining Agreement (Joint Exhibit 2), which reads on page 110 in relevant part: *The Employer shall provide a safe and healthful place of employment for each employee and comply with all local state and federal health and safety laws and regulations.* Article 32 does not specifically state that the Employer must ensure that infectious diseases and viruses are kept out if the workplace. But just as with all provisions of any collective bargaining agreement, it must be interpreted in a reasonable manner that avoids nonsensical results. By March 12, 2020 COVID-19 was well-publicized as a highly infectious virus that had resulted in many deaths throughout the world. It had also been confirmed to exist within the boundaries of the State of Ohio (as stated in the Governor's Executive Order 2020-01D declaring a State of Emergency due to COVID-19). It seems clear that the State would be duty-bound by Article 32 to take reasonable measures keep its employees safe from this virus in their respective workplaces. In fact, the Union acknowledged in its Post-hearing Brief that the "claim that they must send employees home to provide a safe and healthful workplace may be accurate…" (see Union's Post Arbitration Brief at p.15.)

Having established that the Employer has the authority and duty under the provisions of Article 32 of the Collective Bargaining Agreement to take action, the important question in the instant matter then becomes: was it a reasonable action for the Grievant's supervisor to send the Grievant home from the workplace on March 12, 2020 due to his cough? The supervisor's rational for sending the Grievant home on that date is unknown, as he did not testify at the hearing, nor did the Employer offer any written documentation contemporaneously prepared by the supervisor that memorialized his decision to send the Grievant home. It is, however, more

than reasonable to assume that the supervisor based his decision on three factors: the well-publicized existence and lethality of COVID-19 and its symptoms (which had been widely reported in the news media for weeks); the Governor's Executive Order found in Joint Exhibit 3; and the Grievant's cough. Notably, the Grievant himself testified that he was sent home because he was coughing in the workplace, which was a known symptom of COVID-19 at that time. In addition, the supervisor's action took place only three days after the Governor issued Executive Order 2020-01D (see Joint Exhibit 3) which would have reasonably highlighted for the supervisor both the seriousness of the virus as well as the ease of spreading the virus in the workplace. While there is no certainty to this conclusion, it is most reasonable to conclude that the existence of the COVID-19 virus and Governor's Executive Order raised the supervisor's awareness of the potential seriousness of the spread of such a virus throughout the workplace, and that upon observing the Grievant coughing in the workplace on March 12, he felt it necessary to send the Grievant home as a protective measure for the other employees.

In arguing against the reasonableness of the supervisor's action, the Union maintained that nothing had changed on Monday, March 16 when the Grievant was ordered to return to work. It argued that the Employer did no due diligence as the Grievant was never ordered to get a COVID test, and that the supervisor is not a trained medical professional and would have no way to have known if the Grievant was COVID-free or not. Again, absent any testimony from the supervisor, or any contemporaneously kept record of the supervisor's actions, it is impossible to know for sure on what the supervisor based his decision to send the Grievant home on March 12, as well as his decision to have the Grievant return to work on March 16. However, the issue before this Arbitrator is the only the supervisor's decision to send the Grievant home on March 12, as the instant grievance was filed on that date. Just as the Union properly argued that the Employer's two exhibits (see Management Exhibits 1 & 2) are irrelevant as they are dated after the supervisor's March 12 action and after the March 12 filing of the grievance, so too must the supervisor's March 16 decision to allow the Grievant back into the workplace be irrelevant as it occurred after the supervisor's March 12 action and could not possibly have been part of his decision on March 12. Indeed, even the fact that the State told all the employees to work from home beginning March 19 is irrelevant to the instant grievance as it occurred after the March 12 action and the filing of the instant grievance.

The Union also argued that by sending the Grievant home and forcing him to use sick leave, the Employer violated the Grievant's due process rights. It claimed that the Employer had an obligation to determine if, in fact, the Grievant was contagious prior to removing his property,

i.e. his sick leave. It is true that the Employer did not order the Grievant to get a COVID test to determine if, in fact, he was infected and therefore a threat to his co-workers' health. However, it is common knowledge that in the early days of COVID, testing was not readily available on demand, nor were test results instantly available. It is highly likely that, if the supervisor had given such an order to the Grievant, he still would have reasonably been held out of the workplace for the same length of time as he was, or even longer, even with a negative test, and the instant grievance would have been filed just the same. It is noteworthy as well that the Union did not offer any evidence of the Grievant having taken a COVID test following his removal from the workplace on March 12, 2020, let alone evidence of a negative test.

Further eroding the Union's argument that due process obligated the Employer to conduct an investigation similar to the requirement under just cause for a disciplinary issue is the Parties' own Collective Bargaining Agreement, which in its Article 8 – Discipline, outlines the requirement that an employee "shall be afforded and opportunity to be confronted with the charges against him/her and to offer his/her side of the story". No such due process or just cause provision exists in Article 32 that would require the Employer to follow when taking actions under it. Nor are there any such due process or just cause requirements found in Article 13's sick leave provisions.

Additionally, while the Grievant testified that he told his supervisor the he had been to his doctor in February 2020 and received a diagnosis of sinusitis, there was no evidence that he offered the Employer any proof of that prior to March 12, 2020, or at any subsequent date. Nor did the Union or the Grievant offer any proof of that at the Arbitration hearing. Even if evidence of a February medical diagnosis been offered, it would not provide conclusive proof that Grievant did not have COVID on March 12.

The Union also argued that, by sending the Grievant home and forcing him to use his sick leave (or vacation option) it had taken something of the Grievant's away without any due process. However, as in all matters arising out of the Collective Bargaining Agreement, the due process that must be followed is what is found within the four corners of the Agreement itself. For example, this Agreement's Article 8 – Discipline provides that disciplinary action "may be imposed upon an employee only for just cause" (see Article 8, Section 8.01 of the CBA found in Joint Exhibit 2), with "just cause" commonly interpreted by arbitrators as needing to satisfy the so-called Daugherty seven tests (see, for instance, *Discipline and Discharge in Arbitration*

(Brand, BNA Books 1998 at p.31ff) which have been utilized for decades. As noted above, no such just cause or due process clause appears in Article 32 of the instant Agreement.

Additionally, the Union implied that the Grievant's due process rights were violated when, by choosing to skip the Step 2 hearing provided for in the grievance procedure, it did not afford the Grievant an ability to provide evidence of his sinusitis diagnosis. However, the Union acknowledged in its Post-hearing Brief that the State was within its right to skip the hearing and proceed to the next step. And while the Union argued that the Employer made no effort to validate Grievant's claim that he had been diagnosed with sinusitis, there was no evidence offered by the Union that the Grievant made any attempt to provide documentation of sinusitis diagnosis to the Employer prior to or on March 12, or for that matter at any subsequent time. It is again noted here by the Arbitrator that no evidence of a sinusitis diagnosis from the Grievant's doctor was offered at the arbitration hearing either.

The Union's requested remedy is for the Grievant to have his vacation time restored and for him to have the leave classified as administrative leave and to be so compensated. Significantly, Article 13.06 of the Agreement does provide in its part A that: *The appointing Authority shall approve sick leave usage by employees for the following reason. . . . 2. Exposure of an employee to a contagious disease which could be communicated to and jeopardize the health of other employees.* Clearly the Parties contemplated that there may be instances where a serious and contagious virus could jeopardize the workforce, and that the usage of sick leave would be appropriate to keep an employee out of the workplace for the safety of other workers. Also, the Parties placed no provision in this Section that vests the determination of whether or not an employee's condition could jeopardize others solely to the employee and not the employer. In concert with the provisions of Article 32 (when reasonably applied as it was in this matter) it is clear that, under the provisions of Articles 13 and 32, sick leave was the appropriate compensation in the instant situation.

Further, the Union argued that the Employer violated the provisions of Section 10.03 of the CBA, which states that "vacation leave shall be taken only at times mutually agreed to by the appointing authority and the employee." In this case, the Grievant testified that he chose to take the vacation time rather than the lesser-paying sick leave for his time off, which is clearly allowed under the provisions of Article 13. In fact, the lesser-paying sick leave provided for in Article 13 represents what the Parties' themselves have agreed to be proper payment for sick leave, and thus cannot not be construed as some kind of economic harm to the Grievant. As the Parties agreed

in the Collective Bargaining Agreement that sick leave would be paid at 70% of regular pay with an employee option to take vacation leave, this cannot be considered by this Arbitrator to be a penalty for the instant grievant. The Parties also provided in CBA that employee could choose to take vacation time in lieu of sick leave, which is a voluntary choice of the employee, and which was the option chosen by the Grievant.

As for the argument that administrative leave should have been granted to the Grievant in lieu of using sick leave, the Collective Bargaining Agreement clearly does not provide for that in this instant circumstance, but rather (as indicated by Articles 13 and 32) that sick leave or the optional vacation leave is the appropriate compensation.

In summary, it is reasonable to conclude that the Parties gave the Employer authority in Article 32 to send someone home who could jeopardize the health and safety of other employees. It is also reasonable to conclude that, prior to agreeing to Article 32, the Parties had discussions around how the provisions of Article 32 would work and had the opportunity to put any parameters, guidelines or restrictions in the Article to limit the Employer's authority. They did not do so, meaning that other than the normal requirement that management's actions must meet the arbitral standard of reasonableness, it had the authority under Article 32 to send the Grievant home on March 12, 2020 to protect the health and safety of the other employees.

AWARD

In consideration of the testimony and evidence offered at the hearing, the Arbitrator finds and rules as follows:

1) The Employer has the duty under Article 32 of the Collective Bargaining Agreement to provide a safe and healthful workplace, and in this unusual circumstance, that duty extended to protection of the employees in the workplace from potential spread of the COVID-19 virus; and

2) Given what was generally known of the symptoms and transmission of COVID-19 on March, 12, 2020 and the Grievant's admission that he had a cough on that day, it was reasonable for the Grievant's supervisor to take action to

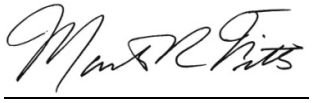
protect the other employees under his direction from possible exposure to the virus from the Grievant's cough; and

3) Sending the Grievant home and telling him to take sick leave (or in this case the optional vacation time) was proper, as the Collective Bargaining Agreement did not provide for the use of administrative leave but does, however, strongly suggest in Article 13 that sick leave was appropriate under the circumstances; and

4) The Grievant voluntarily chose vacation leave over sick leave, as provided for in the Collective Bargaining Agreement, and cannot claim economic harm from his decision; and

5) Therefore, the grievance is denied in its entirety.

The above represents in total my ruling in this matter.



Martin R. Fitts
Labor Arbitrator
January 23, 2023