**OCB AWARD NUMBER: 2712**

SUBJECT: Arb Summary # 2712

TO: All Advocates

FROM: Tom Dunn

OCB GRIEVANCE NUMBER: DRC-2020-00916-12 (FMCS No. 210819-09341)
DEPARTMENT: Ohio Department of Rehabilitation and Correction

UNION: SEIU District 1199

ARBITRATOR: Martin R. Fitts

GRIEVANTS NAMES: Russell Daubenspeck

MANAGEMENT ADVOCATE: Victor Dandridge

UNION ADVOCATE: Joshua D. Norris

OCB REPRESENTATIVE: Tom Dunn

ARBITRATION DATE: October 6, 2022

DECISION DATE: January 23, 2023

DECISION: DENIED

CONTRACT SECTIONS 13, 13.06, 32

OCB/BNA RESEARCH CODES:

KEYWORD SEARCH TERMS: COVID, Health and Safety, Screenings, Sick Leave, Administrative Leave

**HOLDING:** The Employer did not violate the terms of the CBA. Grievance is denied.

**Facts:** 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.* On Thursday, March 12, 2020 Grievant’s

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. 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.

**The Union argued:** 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. 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. The Union argued that the Employer made no effort to validate Grievant’s claim that he had been diagnosed with sinusitis.

**The Employer argued:** 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.* 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. Article 13 sick leave was the appropriate leave to be used in this circumstance. Neither the Grievant nor the Union provided evidence of the sinusitis diagnosis.

**The Arbitrator found:** 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. 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. 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. 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. 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. Therefore, the grievance was **DENIED.**