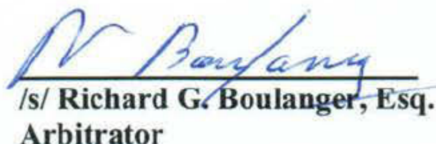
IN THE MATTER OF
GRIEVANCE ARBITRATION
BETWEEN

COUNTY CORRECTIONS OFFICERS ASSOCIATION NEPBA LOCAL 575 **-and-** **NORFOLK COUNTY SHERIFF'S OFFICE**	**CASE NO: 22-002;** [redacted]

AWARD

The Employer did not have just cause to suspend the grievant for fourteen (14) work days without pay on January 4, 2022 because it did not drug test him in compliance with Article XXXX Section 1 as amended by the parties' 2014-2017 Memorandum of Understanding. The grievant's December 22, 2021 drug test is nullified as is his statement on December 22, 2021 that he would test positive, and both the test and the statement are to be expunged from his personnel file. The grievant is not required to participate in drug and alcohol education and treatment, nor shall he be subject to random drug screenings. The grievant shall also be made whole forthwith for his unpaid fourteen (14) work day suspension.

Dated: 3/22/2023



/s/ Richard G. Boulanger, Esq.
Arbitrator

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COUNTY CORRECTIONS OFFICERS ASSOCIATION NEPBA LOCAL 575 **-and-** **NORFOLK COUNTY SHERIFF'S OFFICE**	**CASE NO: 22-002;**

The parties forwarded stipulations of fact as well as joint exhibits to Arbitrator Richard G. Boulanger, Esq. on December 15, 2022.

County Corrections Officers Association NEPBA Local 575 (Union) was represented by Mr. Thomas Horgan, Esq.

Mr. Dan V. Bair, II, Esq. represented the Norfolk County Sheriff's Office (Employer or NSO).

The parties were given full opportunity to present evidence and make arguments.

The parties' stipulated issue is as follows:

> Did the Employer have just cause to suspend the Grievant for fourteen (14) days on January 4, 2022? If not, what shall be the remedy?

I. COLLECTIVE BARGAINING AGREEMENT

A. **ARTICLE V: GRIEVANCE PROCEDURE**

B. **ARTICLE XXIII: MANAGEMENT'S RIGHTS**

C. **ARTICLE XXXX: SUBSTANCE ABUSE SCREENING**

II. SUMMARY OF THE CASE

Correctional Officer (CO) [redacted] (grievant) was ordered to submit to a drug screening test on December 22, 2021. The drug screen test revealed that the grievant was positive for marijuana usage. Based upon the positive drug test, the Employer suspended the grievant for fourteen (14) work days without pay.

The Employer contends that the Union's grievance should be denied because the grievant was properly drug screened pursuant to provisions of Article XXXX, and as a result of his positive drug test result, he was justifiably suspended for fourteen (14) work days without pay.

The Union argues that the Employer did not comply with Article XXXX, as amended by the parties' 2014-2017 Memorandum of Understanding (MOU) dictates when it tested the grievant. Therefore, his positive drug test should be nullified, and consequently there was no just cause to suspend him for fourteen (14) work days without pay.

The arbitrator ruled that the Employer did not have just cause to suspend the grievant for fourteen (14) work days without pay on January 4, 2022 because it did not drug test him in compliance with Article XXXX Section 1 as amended by the parties' 2014-2017 MOU.

III. STIPULATIONS OF FACT

1. The Norfolk Sheriff's Office (Employer or NSO) is a public employer within the meaning of Section 1 of MGL c. 150E.

2. The County Correctional Officers Association, NEPBA Local 575, (the Union or NEPBA Local 575) is an employee organization within the meaning of Section 1 of MGL c. 150E.

3. [redacted] ("Grievant" or [redacted]) is a correctional officer employed by the NSO.

4. The Grievant's birthday falls on October 22.

5. The Grievant was on an authorized leave of absence from December 10 to December 19, 2021.

6. December 20, 2021 and December 21, 2021, were the Grievant's regularly scheduled days off.

7. The first scheduled day of work after the Grievant' s authorized leave of absence was December 22, 2021. The Grievant returned to work on December 22, 2021.

8. On December 22, 2021, the Grievant was ordered to report for a drug screening test at Milton Hospital.

9. Grievant told [redacted] prior to reporting to Milton Hospital on December 22, 2021, that he was going to fail his drug test.

10. Grievant complied with the order and reported to Milton Hospital for a drug screening test which was administered the same day, December 22, 2021.

11. On or about December 31, 2021, the NSO received the results of the drug screening test.

12. The Grievant tested positive for marijuana according to the drug screening test of December 22, 2021.

13. The Grievant did not request a confirmatory test pursuant to Article XXXX of the collective bargaining agreement.

14. On January 4, 2022, the NSO issued the Grievant a fourteen (14) day suspension without pay pursuant to Article XXXX of the collective bargaining

agreement.

15. On January 15, 2022, the NEPBA filed a grievance at step one of the grievance/arbitration procedure set for in Article V of the collective bargaining agreement on behalf of the Grievant.

16. On or about January 24, 2022 the Employer denied the NEPBA's step one grievance of January 15, 2022.

17. On or about January 28, 2022, the NEPBA filed a step two grievance pursuant to the grievance/arbitration procedure set forth in Article V of the collective bargaining agreement.

18. On or about January 31, 2022, the NSO denied the step two grievance.

19. On February 7, 2022, the NEPBA filed for arbitration pursuant to the grievance/arbitration procedure set forth in Article V of the collective bargaining agreement.

IV. SUMMARIES OF THE PARTIES' ARGUMENTS

A. EMPLOYER:

The Employer argues that it complied with the terms of Article XXXX when it ordered the grievant to submit to a drug screening test upon his return to work after an authorized leave of absence. The grievant was properly tested on December 22, 2021, his first work day after his authorized leave of absence which began on December 12, 2021 and expired on December 19, 2021, followed by his regular days off on December 20 and 21, 2021. Prior to reporting to Milton Hospital for his drug test, the grievant admitted to [redacted] that he was going to fail the drug test. The grievant tested positive on December 22, 2021. Consequently, there was just cause to suspend the grievant for fourteen (14) work days without pay pursuant to the Article XXXX disciplinary mandates.

The Union's argument that the grievant's drug test was defective because it occurred on the sixty-first (61st) day after his October 22nd birthday should be rejected. The 2014-2017 MOU is unclear as to what portion of Section 1 was modified. Section 1 should be interpreted as allowing the Employer to test an employee who returns to work after an authorized leave of absence although the test itself may be outside the one hundred twenty-one (121) day period. To interpret Section 1 as eliminating certain terms of Article XXXX will produce absurd results, and must be avoided. Moreover, Arbitrator Gary Altman's prior arbitration decision (*International Brotherhood of Correctional Officers and Norfolk Sheriff's Department* American Arbitration Association, Case No. 11-390-00096-07 ([redacted]) supports the Employer's view of Section 1, and should guide the arbitrator in his evaluation of Section 1 in the instant case. The arbitrator should also consider public policy which mandates that law enforcement personnel not be under the influence of illegal drugs while in their employment setting.

Consequently, for all of the reasons specified above, the Union's grievance should be denied, and the grievant's fourteen (14) day suspension should be upheld.

B. UNION:

The Union contends that the Employer did not have just cause to suspend the grievant for fourteen (14) work days without pay. Based on the terms of Article XXXX as amended by the parties' 2014-2017 MOU, the Employer subjected the grievant to a drug test outside of the contractual testing window. Therefore, the fourteen (14) day suspension was without just cause.

The grievant was ordered to take a drug test on December 22, 2021, the day after his contractual eligibility period, based on his October 22nd birthday. Pursuant to the 2014-2017 MOU, a return from Workers Compensation leave and involvement in a motor vehicle collision with an NSO vehicle, are the only exceptions for drug testing outside of the one hundred twenty-one (121) day window. Those exceptions do not apply in the instant case because in December, 2021 the grievant was on an authorized leave of absence consisting of compensatory leave and vacation leave. Therefore, he could not validly be tested outside of the one hundred twenty-one (121) day period. Based on the one hundred twenty-one (121) day window, December 21, 2021 was the last day that the grievant could be tested. Therefore, requiring him to be drug tested on December 22, 2021 was a violation of Article XXXX Section 1 as amended by the 2014-2017 MOU. In the instant case, the arbitrator should follow the lead of Arbitrator Altman and vacate the grievant's discipline for a positive drug test which test was ordered outside of the contractual drug testing window. The positive drug test should be nullified, and the grievant made whole for the unpaid fourteen (14) work day suspension for all of the reasons delineated above.

V. FINDINGS AND OPINION

A. CONTRACTUAL STANDARDS

1. JUST CAUSE

Application of the just cause standard to the grievant's fourteen (14) day suspension is required by the parties' stipulated issue as well as the following provisions of Article XXIII (**MANAGEMENT'S RIGHTS**):

> "Said rights to manage include but are not limited to the following... For just cause, transfer, discipline, suspend, demote or discharge employees." (See Joint Exhibit #1.)

In Article XXXX, Section 2, the parties agreed as follows regarding discipline for a positive, drug test:

> Discipline for a positive test of an illegal drug will be as follows:
>
> 1st offense: Fourteen (14) day unpaid suspension, mandatory drug and alcohol education and treatment at a certified program which is approved by the Sheriff. The employee may have a choice of a certified approved program where choice is allowed for the purpose of insurance coverage. Random urine testing for eighteen (18) months. (See Joint Exhibit #1.)

The just cause standard requires the Employer to prove by a preponderance of the evidence that the charges against the grievant are borne out by the evidence. If the Employer satisfies its threshold burden, then it must demonstrate just cause for the level of discipline imposed. However, here, the parties agreed that an unpaid, fourteen (14) work day suspension would be imposed on a bargaining unit employee for his/her failure of a drug test on a first offense basis. (See Joint Exhibit #1.)

It is clear from the Employer's disciplinary notice that the grievant was suspended for fourteen (14) work days on January 4, 2022 as a result of his December 22, 2021 drug test which showed that the grievant was positive for marijuana. (See Joint Exhibit #4.) Consequently, the

Employer must show that not only did the grievant fail his drug test, but that the drug test was administered in a manner compliant with Article XXXX Section 1 as modified by the parties' 2014-2017 MOU. The evidence reveals that the grievant was ordered to submit to a drug test outside of the drug testing window as specified in the 2014-2017 MOU amending Article XXXX Section 1. The grievant was tested on December 22, 2021, on the 61st day after his October 22nd birthday while the drug testing period for the grievant expired on December 21, 2022, based on the contractual sixty (60) day period after his October 22nd birthday.

2. ARTICLE XXXX (SUBSTANCE ABUSE SCREENING) AND 2014-2017 MOU

Article XXXX Section 1 includes the following terms and conditions:

> Section 1: Effective July 1, 2002, the Parties hereby agree to the implementation of a Substance Abuse Screening Program. Every employee will be tested annually. After July 1, 2004 and after the first round of annual testing is complete, the testing date shall be within the sixty-one (61) day period beginning thirty (30) days prior the employees' birthday and ending thirty (30) days after the employees' birthday. If an employee is out on worker's comp or an authorized leave when their testing date comes up and expires, then the employee will be tested upon returning to work unless their birthday is within six (6) months of the date returning. No employee will be tested twice until the entire list of all eligible employees has been tested. Employees missed in the first round of testing shall be considered to have been tested and to have had a negative result. (Joint Exhibit 1)

In their 2014-2017 MOU, the parties modified Section 1 by negotiating the following terms and conditions:

> ARTICLE XXXX: Substance Abuse Screening Section 1: Delete sentences 1 and 2. Modify Article starting with sentence 3 to "Effective July 1, 2014, the testing date shall be within the period beginning sixty (60) days prior to the employee's birthday and ending sixty (60) days after the employee's birthday. All employees will be tested once a year. If an employee is involved in a motor vehicle accident in an NSO vehicle, he or she will be subjected to another test. If an employee is out on worker's compensation, he or she may be ordered to be tested upon his or her return to work." (Joint Exhibit 1)

Consequently, the original provisions of Article XXXX Section 1 must be reconciled with the

terms negotiated by the parties, and memorialized in their 2014-2017 MOU. Reading the terms of Article XXXX Section 1 together with the 2014-2017 MOU provisions reveals that while all employees must be tested once a year, it must be done sixty (60) days before or sixty (60) days after an employee's birthday, unless an employee is involved in a motor vehicle collision while using an NSO vehicle, or when returning to duty from a Workers Compensation leave.

The terms of the 2014-2017 MOU, amending Article XXXX Section 1, are clear and unambiguous. The parties intended in the MOU to eliminate the first two (2) sentences of Section 1. Following that 2014-2017 MOU provision deleting the first two (2) sentences of Article XXXX Section 1, the next MOU provision indicates as follows: "Modify Article starting with sentence 3…" By that second MOU term, the parties clearly manifested their intent to revise Article XXXX Section 1 in its entirety by the manner in which they did so in the 2014-2017 MOU. By the parties' 2014-2017 MOU terms, there is no indication that they intended to save any of Article XXXX Section 1 terms as *originally* included in Article XXXX Section 1 provisions unless they expressly did so in the MOU itself.

As to the terms specifying sentence 3 of Article XXXX Section 1in their 2014-2017 MOU, the parties codified their intent to expand the testing period from sixty-one (61) days to one hundred twenty-one (121) days effective July 1, 2014. The parties agreed to begin the screening period "sixty (60) days prior to the employee's birthday and ending sixty (60) days after the employee's birthday" for a drug screening period of one hundred twenty-one (121) days. Significantly, testing by the Employer within the contractual window as specified in the 2014-2017 MOU is mandatory as the parties used the following words, "the testing date *shall be within the period beginning…*" in the 2014-2017 MOU. (Emphasis added.) Prior to the 2014-2017 MOU, Article XXXX Section 1 also required drug tests to be administered by the

Employer in the then sixty-one (61) day testing period. "...*the testing date shall be within the sixty-one (61) day period beginning*..." (Emphasis added.)

The Employer contends that per Article XXXX Section 1, it had the right to order the grievant to a December 22, 2021 drug test because his leave of absence expired on December 19, 2021. The Employer also argues that because December 20 and December 21 were days off for the grievant, December 22, 2021 was the first day that he could be tested upon his return to work from his authorized leave of absence. Per the 2014-2017 MOU, the only exceptions to the one hundred twenty-one (121) testing period are if an employee is involved in a motor vehicle accident in an NSO vehicle, or if an employee returns to work from a Worker's Compensation leave. In such cases, he or she may be screened outside of the one hundred twenty-one (121) day testing window. (See Joint Exhibit #1.) Significantly, for the resolution of the instant case, in their 2014-2017 MOU, the parties codified their intent to eliminate the Employer's right to test an employee outside of the testing period if s/he was on an authorized leave during that testing period. In their 2014-2017 MOU, the parties retained Workers Compensation leave and added involvement in a motor vehicle collision with an NSO vehicle as exceptions to testing within the one hundred twenty-one (121) day window. Therefore, the only exceptions to the one hundred twenty-one (121) testing period is a return to work from a Workers Compensation's leave, or if the employee is in a motor vehicle collision in an NSO vehicle. The parties are entitled to the benefit of their bargain. Therefore, the Union could and does insist that employees be tested only within the sixty (60) day time period before and after the employee's birthday unless that employee is involved in a motor vehicle collision involving an NSO vehicle, or is returning from a Workers Compensation leave and unable to be tested during the window period.

Here, the grievant's birthday was on October 22. He was tested on December 22, 2021,

one (1) day outside of the contractual testing window. The parties stipulated that the grievant was on an authorized leave of absence from December 10 to December 19, 2021, and his regular days off were December 20 and 21, 2021. (See Joint Exhibit #2.) His personnel record indicates that the grievant's leave consisted of personal leave, vacation leave, and compensatory leave. (See Joint Exhibit #2.) As the grievant was not on Workers Compensation leave immediately prior to his return to duty on December 22, 2021, nor was he involved in a motor vehicle collision in an NSO vehicle, it is clear from the terms of the parties' 2014-2017 MOU that the Employer was not authorized to test the grievant on December 22, 2021 because it was outside of the drug screening period. (See Joint Exhibit #1.)

The results of the drug test are the best evidence of a positive or negative screen. A prediction by a test taker, as the grievant here, that he would test positive is not conclusive, and cannot be relied on by the Employer to discipline the grievant. In the instant case, the drug test was untimely per the terms of the 2014-2017 MOU, and could not be utilized to justify discipline against the grievant. Similarly, the grievant's prediction that he would test positive cannot be used to establish just cause for the grievant's suspension for the reasons identified above, and because it was in reaction to the untimely, and thus invalid test.

It is noteworthy that in their negotiations for the 2014-2017 MOU, the parties nearly doubled the length of the Article XXXX Section 1 drug testing period from sixty-one (61) days to one hundred twenty-one (121) days. It is not as if the Employer's only opportunity to test the grievant was on December 22, 2021. The evidence reveals that the Employer had opportunities to drug test the grievant on at least five (5) days in December, 2021 alone, prior to December 22, 2021 when the grievant returned to duty following his December 10 to December 20 leave of absence. In the instant case, the Employer's inability to test the grievant outside of the one hundred twenty-one (121) day

drug screening window was not on a collision course with the annual testing requirement.

B. ARBITRATOR'S AUTHORITY

The Employer and the Union cite the decision by Arbitrator Altman in the *Winston* case. **Supra.** In that decision, Arbitrator Altman concluded:

> "...the Department violated the provisions of Article XXXX when it directed Officer Winston to submit to the annual drug and alcohol testing process on June 28, a date outside of the contractual window period for such testing." **Id.** @10.

While the facts of Arbitrator Altman's case differed somewhat from those of the instant case, he applied the 2007 provisions of Article XXXX Section 1 to the facts of his case in ruling that the Employer tested the grievant outside of the testing window. Article XXXX Section 1 as modified by the parties in their 2014-2017 MOU must be applied to the facts of the instant case, and I reach the same result as did Arbitrator Altman in his case. Failure by me to enforce the parties' contract provisions is expressly prohibited in Article V **Grievance Procedure**) as follows:

> "The parties are in agreement that the Arbitrator's decision shall be final and binding, and the arbitrator shall have no power to add to or subtract from or modify in any way the terms of the agreement."

Ruling that the Employer had the right to order the grievant to be drug tested on December 22, 2021 would require me to impermissibly ignore the sixty (60) day post birthday drug testing window agreed to by the parties in the 2014-2017 MOU.

C. CONCLUSION

The Employer did not have just cause to suspend the grievant for fourteen (14) work days without pay on January 4, 2022 because it did not drug test him in compliance with Article XXXX Section 1 as amended by the parties' 2014-2017 MOU. The grievant's December 22, 2021 drug test is nullified as is his statement on December 22, 2021 that he would test positive, and both the test and the statement are to be expunged from his personnel file. The grievant is

not required to participate in drug and alcohol education and treatment, nor shall he be subject to random drug screenings. The grievant shall also be made whole forthwith for his unpaid fourteen (14) work day suspension.