

**Voluntary Labor Arbitration Tribunal  
Direct Appointment  
Tammy Brynie, Esq., Arbitrator**

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In the matter between:

County Corrections Officers  
Association, NEPBA L. 575

- and -

Gr: 22-008

Gr: ~~S. Whalen~~

Norfolk County Sheriff's  
Office

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**Decision and Award**

**For the Employer**

Michael J. Maccaro, Esq.  
Ariana N. Imbrescia, Esq.

**For the Union**

Thomas E. Horgan, Esq.

**Background**

This case was heard on August 23, 2023. The parties submitted the following Stipulated Issue:

Did the Norfolk Sheriff's Office violate the terms of the parties' CBA as alleged in the

Union's November 2, 2022 Grievance<sup>1</sup> when they administratively separated Officer ██████████ from employment on October 29, 2022?

If so, what shall be the remedy?

The Grievant, ██████████, worked for the Norfolk County Sheriff's Office (Employer or NCSO) as a correction officer for over twenty years. The County Corrections Officers Association, NEPBA, Local 575, (Union) is the exclusive collective bargaining representative of certain employees employed the Sheriff's Office, including all non-supervisory correctional officers, including regular part-time non-supervisory correctional officers, as well as certain employees in the Employer's support services bureaus. Joint Exhibit #1, pp.1-2.

A central aspect of a correction officer's role involves the care and custody of inmates detained at the Norfolk County Sheriff's Office and Correctional Center. That custodial responsibility can include, among other tasks, supervising inmate work details within the correctional center facility; conducting

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<sup>1</sup>The grievance asserts a violation of "Article II section 'C' ... as well as all other relevant provisions of the CBA." Joint Exhibit #18.

searches of inmates and areas within the facility for contraband in accordance with established policy and procedures; transporting prisoners to courts, hospital or other institutions while securing their safe and secure custody; and, ensuring and enforcing that the inmate population adhere to the Correctional Center's rules and regulations. Employer Exhibit #2. Within the 'Physical Requirements and Job Characteristics' section of the correction officer position description, it is noted that officers are frequently "dealing with people beyond giving and receiving instructions." Employer Exhibit #2, p.2. The physical requirements for performing correctional officer job functions include (in addition to frequent sitting): walking, standing, crouching/stooping, squatting, lifting, and carrying up to 120 lbs. Employer Exhibit #2, p. 2.

Working as a corrections officer can be physically demanding and taxing. H.R. Director Kevin Durkin, who has been involved with the Employer in a H.R. capacity for about 24 years, testified that in or about 2020, between 7 to 10% of NCSO employees were on workers' compensation. According to Durkin, there seemed little incentive for employees to return to work once they

were on workers' compensation or on other long-term medical leave. Durkin testified that former-Sheriff Michael Harris was familiar with a Suffolk County Sheriff's Office policy initiative that administratively separated all employees that have been on a medical leave for over a year and showed no signs of returning, with the proviso that any individual that was subjected to the administrative separation had the option of being eligible for rehire, so long as they were medically cleared to return to work and were able to meet preemployment qualifications. From the NCSO's perspective, the Suffolk County policy had cost savings benefits (as the Employer continued to pay for employees' health insurance during their absence), it could have a positive effect on the appropriations received from the Commonwealth, and it could improve employee morale by filling positions and improving the staff per inmate numbers.

Superintendent Harris, in correspondence dated May 11, 2020, indicated that the Employer intended to enforce a one-year limit on medical leaves of absence, effective June 8, 2020. Employer Exhibit #1. Due to a

variety of factors, including the on-going Covid pandemic, the policy was not implemented in 2020.

In 2021, Patrick McDermott became Sheriff. According to Durkin, McDermott revived consideration of a one-year limit on employee medical leaves of absence. Again, a cost saving rationale was an aspect of the decision, and Durkin testified that the cost of the current situation was burdensome, and that the Employer had a responsibility to reduce costs. In conjunction with the one-year limit, Durkin testified that employees who became medically able to return "would be welcomed back."

Durkin, by memorandum dated May 5, 2021, provided notice to Union officials. The correspondence, in its entirety, provides:

Consistent with established Commonwealth of Massachusetts practices, as of June 1, 2021, the NCSO intends to enforce a one-year limit on employee medical leaves of absence. Determinations will be made on a case-by-case basis, following an administrative review and at the discretion of the sheriff. This will apply to all employees, including those currently on a medical leave of absence.

Accordingly, once an employee has been on a medical leave for one year, they may receive notice that they are to return to work, or face

termination. Employees terminated under this provision will be eligible for unemployment benefits, and for re-hire (subject to existing pre-employment requirements such as a satisfactory background check and drug test), should their medical condition allow, at some point in the future.

Employees on a medical leave of absence, who are receiving workers' compensation benefits, will not be terminated unless an administrative judge adopts medical documentation indicating an inability to return to their position.

If you wish to discuss this issue, please contact Kevin Durkin at extension 3321 to arrange a mutually convenient time to do so.

Joint Exhibit #2.

By letters dated June 7, 2021, the Employer notified six correction officers that their employment would be terminated effective July 1, 2021. In each instance, the correspondence stated, in part:

You have been out of work on a medical leave of absence and have been receiving workers' compensation benefits for more than a year. Because you are incapable of returning to your former position, a finding adopted by the DIA<sup>2</sup>, I am compelled to terminate your employment in accordance with Commonwealth of Massachusetts HRD guidelines ...

Joint Exhibit Nos. 19A, 19B, 19C, 19G, 19J and 19K.

The Union responded by correspondence dated June 8, 2021. The letter reflected the Union's "understanding that the NSO intends to terminate a number of our

members effective July 1, 2021 in accordance with [the] revised policy, which was unilaterally implemented on or about May 5, 2021." Joint Exhibit #20. In the correspondence, the Union also "respectfully request[ed] that the NSO extend the July 1<sup>st</sup> deadline and the implementation of the ... policy until the parties have had an opportunity to bargain this subject matter pursuant to MGL c. 150E." Joint Exhibit #20, p. 2.

The Employer issued a June 29, 2021 memorandum to Union officials, indicating that, in recognition of Union requests, Sheriff McDermott had "authorized a delayed date to effectuate the implementation of the administration terminations about which you were notified on May 5, 2021." Joint Exhibit #3. Instead, "a one year limit on employee leaves of absences will be enforced as of September 1, 2021." The correspondence continued: "All employees who exceed the one year limit will be required to return to work or accept an administrative termination." Joint Exhibit #3.

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<sup>2</sup> The Department of Industrial Accidents.

The employees who had received the June 7<sup>th</sup> administrative termination correspondence were advised, by letter dated June 29, 2021, that their employment was being extended through August 31, 2021. As a result, their termination would be effective September 1, 2021. Joint Exhibit Nos. 19A, p.2; 19B, p.2; 19C, p. 2; 19G, p.2; 19J, p.2; 19K, p.2. In addition, by letters dated July 6, 2021, two other correction officers were notified that their employment would be terminated effective September 1, 2021. Apart from the September 1<sup>st</sup> date, the text of the notice was identical to the earlier June 7<sup>th</sup> notices of administrative termination. Joint Exhibit Nos. 19E and 19F. Of the eight employees who received notices, seven were separated from NCSO employment. It appears that one correction officer returned to work. There is no indication that any grievances were filed with respect to the initial administrative terminations.

A grievance, however, was filed concerning  situation. As background, the Grievant suffered an off-duty injury to his left knee. Over time, the Grievant required medical attention, and surgeries, to address the injury. His left knee



remained problematic, requiring further medical and surgical attention. In July 2021, the Grievant began an FMLA leave related to his left knee situation, requiring surgery. The leave paperwork projected a probable duration for the condition as September 13, 2021. Joint Exhibit #4. The Grievant apprised the Employer, on or about August 17, 2021, that he had been approved for Paid Family and Medical Leave (PFML), while also indicating that he hoped to return by mid-September 2021. Joint Exhibit #5. Further FMLA paperwork was submitted, indicating an estimated return to work in late October 2021. Joint Exhibit #6, p. 3. Further communication indicated that the Grievant's absence would be extended until about January 1, 2022. Joint Exhibit Nos. 7, 8 and 9.

Although medical information indicated that the Grievant was recovering well from his knee surgery, with a projected return to work in May 2022 (Joint Exhibit #10), that timetable was revised. Instead, a mid-May 2022 medical note indicated that the Grievant required further surgery, with an estimated absence until at least August 1, 2022. Joint Exhibit #11. A further medical note on August 23, 2022 indicated that

the Grievant was undergoing a "left knee revision arthroplasty<sup>3</sup>" with a projection that he would be out of work for 3-4 months post-surgery. Joint Exhibit #12.

By letter dated August 26, 2022, the Grievant was advised that, "effective October 29, 2022, unless you are cleared medically to return to work before then, your employment with the Norfolk County Sheriff's Office (NCSO) will be terminated." Joint Exhibit #13, p.2. Durkin sent a related email, on August 29<sup>th</sup>, that provides, in part:

Please see the attached letter notifying you of your administrative termination. This is administrative only, and is consistent with the action we have taken with other employees on medical leave for over a year. If your health improves and you are medically cleared to perform the essential duties of a Corrections Officer at some point, the department will rehire you, subject to any fiscal/budgetary restraints.

Denise<sup>4</sup> updated me on your current medical status, which has you a few months away from a possible return. The last time we talked, you were still hoping to return at some point, and if that is still the case, this does not preclude that. Denise and I are both available to discuss other options if you come to the conclusion at some point that you're not going to be able, medically, to return ...

Joint Exhibit #13.

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<sup>3</sup> Evidently, the Grievant had a replacement of implants from a prior knee replacement.

The Union responded by letter dated October 18, 2022, with a related medical note. The note, from the Grievant's treating physician stated:

Patient is S/P total knee in September and can return to work January 15<sup>th</sup> full duty with no restrictions. Any questions or comments please feel free to contact my office. Thank you.  
Joint Exhibit #15.

The text of the Union's accompanying correspondence provides, in part:

Attached please find a medical note from Officer [REDACTED] treating physician which specifically indicates that he will be able to return to work without restriction on January 15, 2023. Given that we have a return date, please accept this e-mail as a formal notification/request on behalf of the union and officer [REDACTED] for a reasonable accommodation extending his leave until January 15, 2023. If it is the position of the NSO that his request for an accommodation would somehow cause an undue burden on the operations(s) of the facility please respond in writing indicating the same.

Joint Exhibit #14, p. 3.

As a result of further exchange of correspondence, the Employer received records from the Grievant's physical therapy practice, updated as of October 24, 2022. Joint Exhibit #16. Aspects of the report record that the Grievant "ambulates with cane" and notes "ambulating more without cane at home." Joint Exhibit

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<sup>4</sup> Denise Nelligan was the Employer's Benefits Coordinator.

#16. Functional activity updates were recorded on October 3 and October 4, 2022. The status updates record improvement in capabilities with respect to standing and household ambulation. In addition, the Grievant's limitations were upgraded from "moderate" to "mild" in evaluated areas including sleeping, dressing and sit to stand transfers. Joint Exhibit #16, pp.1-2. In related correspondence, on October 31, 2022 the Union wrote: [W]e're specifically requesting an accommodation under the ADA for an extension of leave based upon the documentation that was provided by Officer ██████ this past Friday. If this request for an extended leave is being denied please advise as soon as possible. We're hopeful this matter can be resolved mutually, Orc. ██████ is working hard to ensure he returns to work as soon as possible." Joint Exhibit #17, p. 1-2.

Durkin responded the next day, as follows:

The requested extension has not been approved and 10/29/22 stands as the termination date. As previously stated, if ██████ is found to be medically able to perform the duties of a Corrections Officer at some point in the future and wishes to return, he will be rehired at that time.

Joint Exhibit #17.

At the time, Durkin provided no information or rationale about either the decision to deny the request for an extension or the determination that October 29, 2022 would stand as the termination date. At arbitration, however, Durkin testified that, in reaching the decision to deny the extension request, he relied upon the information contained within the provided physical therapy report. For example, Durkin testified, he read to the P.T. report (indicating a 12 week goal to "demonstrate ability to maintain SLS<sup>5</sup> on affected LE<sup>6</sup> for greater than 30 seconds with LOB.<sup>7</sup>) as demonstrating that the Grievant continued use a cane and needed continued physical therapy progress to be able to dress safely. As a result, there were no signs of his being close to returning to work. Durkin further testified that, to date, the Employer has not received any indication that the Grievant is capable of returning to work.

A November 2, 2022 grievance was filed challenging the termination of the Grievant's employment. Joint Exhibit #18. The grievance was processed through the

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<sup>5</sup> SLS - Single Leg Stance.

<sup>6</sup> LE - Lower Extremity, here the left leg.

<sup>7</sup> LOB - Loss of Balance to improve ability to dress safely.

contractual grievance procedure, without resolution, to arbitration. At the conclusion of the arbitration, both parties filed post-hearing written submissions.

### **Contract Provisions**

#### Article II Union Representation

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C. Discipline and Discharge:

1. It is agreed that the Sheriff will have the right to discipline or discharge an employee for just cause.

\* \* \*

#### Article IV Non-Discrimination

A. The Employer shall not discharge or discriminate against any person with respect to promotion, assignment or any other matter because of race, color, religion, sex, age, sexual orientation, physical or mental handicap (if otherwise qualified with reasonable accommodation afforded by the Employer)...

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#### Article XXIII Management's Rights

Except to the extent that it is contained in this Agreement, all of the authority, power, right, jurisdiction and responsibility of the Employer are retained by and reserved exclusively to the Employer. Said rights to manage include but are not limited to the following: rights to direct, control the operations of assigned work to employees, determine the methods, means, processes and personnel by which the House of Correction and Jail is to be operated, determine the

size of and direct the activities of the day to day working force ... For just cause, transfer, discipline, suspend, demote or discharge employees... The foregoing enumeration of management rights shall not be deemed to exclude other rights of management not specifically restricted by this Agreement.

Joint Exhibit #1

### **Contentions of the Parties**

The Employer asserts that it had just cause to terminate Officer ~~Whalen's~~ employment pursuant to its Medical Leave Administrative Separation Policy (Policy). In order to improve morale and reduce costs, the NCSO established the policy. The NCSO determined that there were not enough funds to pay for individuals on extended medical leaves and individuals would be administratively separated from employment once their medical leave had extended beyond one year and there were no signs of the individual returning to work imminently. As the Grievant had been on medical leave for more than a year, without signs of an imminent return to work, just cause existed to terminate Officer ~~Whalen's~~ employment.

The Grievant was unable to perform the duties required of him as a correction officer. He failed to

provide documentation that demonstrated that he was medically able to return to work and perform his job duties and responsibilities. The available evidence established that, at the time of his termination, he was unable to perform his duties, he would need to be out of work and there was no indication that he would be returning to work any time soon. Therefore, there was just cause to terminate his employment on October 29, 2022.

The Union's assertion that the NCSO failed to engage in the interactive process, as required by the ADA, when it refused to extend Officer [REDACTED] medical leave until January 15, 2023 is false and untrue. Throughout his entire leave, the NCSO worked with Officer [REDACTED] to provide him with reasonable accommodations. There is no requirement, however, to provide open-ended or indefinite leave. After numerous extensions of his medical leave, the Grievant was requested to provide documentation of when he was able to return to work. The provided documentation (Joint Exhibit #16, Physical Therapy material) indicated that he was not reasonably close to returning to work. The NCSO then made the decision that it could no longer



reasonably accommodate Officer Whalen's leave extension requests and he was administratively separated.

Undisputed evidence indicates that after a long interactive engagement with Officer Whalen NCSO could no longer reasonably accommodate his absence and, with just cause, he was administratively separated from employment. The Union has failed to provide contradictory evidence. As a result, no contract violation has occurred, and the grievance should be denied.

\* \* \*

The Union contends that the issue at hand is whether or not the Employer's decision to deny Officer Whalen's request for an accommodation to extend his leave through January 15, 2023 violated the terms of the collective bargaining agreement. Article 4, the Non-Discrimination provision of the parties' collective bargaining agreement, protects against the discharge and/or discrimination of an employee based upon the employee's physical injury.

The Americans with Disabilities Act (ADA), the Massachusetts Fair Employment Practices Act, and the Massachusetts Equal Right Act provide employees who suffer from disabilities with the right to request reasonable accommodations and/or request medical leaves so long as the request is reasonable and does not result in an undue hardship for the employer. An extended medical leave can be a reasonable accommodation under the law.

The Grievant's knee injury falls within the governing definition of a disability, as it is a physical impairment that substantially limits one or more of his major life activities. At the time of his proposed separation, the Grievant had submitted medical documentation noting an anticipated full duty return date of January 15, 2023. A request for an accommodation, to extend the Grievant's medical leave until that time, was made. In response to the Employer's request for additional medical documentation, notes relating to the Grievant's physical therapy progress were provided. Then, a second request to extend the Grievant's leave was made.

On November 1, 2022, the Employer, without explanation, denied the Grievant's requests for a leave extension and notified him that his employment was terminated as of October 29, 2022. Joint Exhibit #17. The Employer engaged in no interactive process/discussion with respect to the request for leave extension until January 15<sup>th</sup>; nor was any response concerning why the requests would otherwise cause an undue burden on the NSCO's operations provided. The Employer had an obligation to both engage in an interactive process with the Grievant regarding whether his pending leave extension accommodation request was reasonable and to inform him as to why his extension request was either unreasonable or would cause an undue burden. The Employer has violated the collective bargaining agreement.

As remedy, the October 2022 termination should be rescinded; the Grievant should be awarded out of pocket costs, including but not limited to the reimbursement of health insurance costs; and the Grievant should be made whole. Finally, the Union requests that any and all other remedies deemed appropriate be awarded.

## Opinion

My review, and the resulting determination, is limited to deciding whether or not the Employer's decisions to both deny the Grievant's request to extend his medical leave through January 15, 2023 and to terminate his employment with an effective date of October 29, 2022 violated the collective bargaining agreement. I am purposefully side-stepping other issues that the parties have raised, or alluded to, including: Whether, at the time of the challenged discharge, the Employer had an established practice of administratively separating employees who had been on medical leave for greater than one (1) year and were not cleared to return to work as determined by the individual's own medical submissions and/or an independent medical exam (Employer's Brief, pp. 3-4); whether the Union has acquiesced to such a practice (Joint Exhibit# 14; Employer Brief p. 13, "The first grievance the Union filed regarding the Policy was the grievance at issue in this case; after eleven (11) administrative separations have already occurred."); and whether Article 4, the Anti-Disrimination provision within the parties' collective bargaining, in

effect, incorporates ADA and Massachusetts disability protections into the collective bargaining agreement, rendering asserted violations subject to review and remedy through the grievance procedure. (Union's Brief, pp. 5-8). Those matters are more appropriately addressed if, and after, they have been fully explored at arbitration - including a fully developed arbitral record and corresponding detailed arguments.

Instead, I adopt the Employer's framing of the argument as delineated in its brief - namely that, at its essence, this is a just cause matter. It is clear that, unlike most 'just cause' disputes, this is not a disciplinary situation. Yet, the parties' collective bargaining agreement establishes a 'just cause' standard for an employee's discharge.<sup>8</sup>

The essence of a 'just cause' standard -- a concept requiring fundamental fairness, including due process considerations - is clearly applicable here. Core just cause considerations -- including notice of an intent to discharge an employee; communicating the basis or

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<sup>8</sup> My review of the governing collective bargaining agreement did not reveal a different standard for an "administrative separation,"

rationale for the contemplated action; and an providing an opportunity for the individual to address, or be heard with respect to, the articulated reasons for the discharge - are all applicable to the termination decision here.

First, the instant grievance challenges the first termination of employment of a NCSO correction officer who was out on an extended medical leave, and not covered by workers' compensation. All previous 'administrative separations' involved employees on workers' compensation who had been found to have been incapable of returning to their former positions by the Department of Industrial Accidents. Side-stepping practice/acquiesce considerations, the Grievant's circumstances are markedly different from other administrative separations. The earlier matters had been reviewed by an external agency, the Department of Industrial Accidents, and findings had been made that the individuals were incapable of returning to work. Joint Exhibit Nos. 19A, 19B, 19C, 19G, 19J and 19K. The Grievant's leave, recuperation and return to work

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nor did either party point to any such negotiated, mutually agreed-upon standard.

circumstances, in contrast, were reviewed only by Employer personnel.

The record demonstrates that the Grievant and the Employer had long been in communication about the Grievant's leave status and medical progress. Between July 2021 and September 2022, the Grievant had a number of major surgical procedures involving his left knee. In sum, it appears that knee repair and replacement surgeries resulted in infections, requiring further surgeries, culminating in a "left knee revision arthroplasty" on September 6, 2022. Joint Exhibit Nos. 4-12. An August 23, 2022 note from the Grievant's surgeon, indicating that it was anticipated that he would be out of work for 3-4 months following that surgery, was submitted. Joint Exhibit #12.

Nonetheless, the Grievant received correspondence stating that unless he was medically cleared to return to work before October 29, 2022, his employment would be terminated. Joint Exhibit #11. In response, a further medical note from the surgeon, with a projected return to full duty work date of January 15, 2023, was submitted, as well as a request for an extension of

medical leave, as an accommodation, to that date. Joint Exhibit #14.

The Employer then appears to have requested further information and, in response, received documentation from the Grievant's physical therapy providers. Joint Exhibit #16. The physical therapy notes document some recuperative and activity progress, thereby advancing the Grievant's functional status from "moderate" to "mild" impairment in certain areas. There were also notations indicating that the Grievant sometimes ambulated with cane. Durkin testified to the effect that, based on the Grievant's use of a cane as well as self-dressing limitations, there were signs that the Grievant was not close to returning to work. As a result, the decision was made to terminate the Grievant's employment.

The Employer breached its contractual just cause requirement - to provide due process, fundamental fairness and a pre-termination opportunity to respond - when it decided to terminate the Grievant's employment, without seeking either further information to reconcile the perceived discrepancy between the



surgeon's January 15<sup>th</sup> return to work date and the late October 2022 physical therapy assessment or otherwise providing the Grievant with an opportunity to respond. The arbitral record indicates that Durkin relied on his own examination and review of the physical therapy materials and determined, using his years of human resources experience and his knowledge of the nature of work performed by correctional officers, to decide that the Grievant "was not close to returning to work."

My key concern is that is that the ultimate decision to terminate the Grievant's employment was made without follow-up or engagement with the Grievant and/or treating medical professionals about the perceived discrepancy between the treating surgeon's return to work date and the assessments contained within the physical therapy documentation. The 'process due' prior to making the termination decision is necessarily informed by prevailing external law. Specifically, the ADA's "interactive dialogue" requirement provides a relevant framework when evaluating whether the Employer's administrative separation action was just and fair.

The Union (on the Grievant's behalf) requested an extension of medical leave until January 15, 2023 - the Grievant's surgeon's projected return to full duty date. Here, a leave of a specific duration was sought, and the January 15, 2023 date was supported by medical documentation. Before relying on its interpretation of related physical therapy material to reach a contrary conclusion, the Employer, in keeping with due process and fundamental fairness considerations, should have articulated its concerns about whether the Grievant's rehabilitation process was consistent with a January 15, 2023 return to full duty. Just cause considerations required the Employer to articulate its concerns and provide an opportunity a meaningful opportunity for the Grievant/Union and medical providers to respond before it terminated the Grievant's employment.

I determine that the Employer's decision to terminate the Grievant's employment as of October 29, 2022 was not supported by just cause. As a result, the Grievant is entitled to a remedy. The scope of that remedy, however, is necessarily affected by the Grievant's ultimate inability to return to work. As a result, an

appropriate remedy is to grant a further medical leave extension until January 15, 2023, with the restoration of the Grievant's related benefits. The record reflects, however, that the Grievant was not able to return to work on January 15, 2023. As a result, the Grievant's return to employment status will be restored, including benefits, for only the period between October 29, 2022 and January 15, 2023. The Grievant shall be reimbursed for the out-of-pocket expenses (including health insurance costs) incurred as a result of the termination of his employment prior to January 15, 2023. Finally, I will retain jurisdiction for a period of 60 days, renewable by either party upon request, to resolve remedial disputes, if any.

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**AWARD**

The Norfolk Sheriff's Office violated the terms of the parties' CBA as alleged in the Union's November 2, 2022 grievance when they administratively separated Officer ~~Shawn Whalen~~ from employment on October 29, 2022.

As remedy, the Employer shall:

- Restore the Grievant's employment status and benefits from October 29, 2022 through January 15, 2023.
- Reimburse the Grievant for out-of-pocket expenses, including health insurance costs, incurred as a result of the termination of his employment prior to January 15, 2023.
- I will retain jurisdiction for a period of 60 days, renewable by either party upon request, to resolve remedial disputes, if any.

/s/ Tammy Brynie

Tammy Brynie

Arbitrator

April 8, 2024

