LAW ENFORCEMENT DISCIPLINARY GRIEVANCE ARBITRATION

BEFORE THE ARBITRATOR

SNOQUALMIE POLICE ASSOCIATION ON BEHALF OF GRIEVANT Grievant, vs. CITY OF SNOQUALMIE, Respondent.	CASE 134880-P-22 **ARBITRATOR'S DECISION** ARBITRATOR PAUL GORDON

Appearances:

Alan E. Harvey, Attorney, Northwest Legal Advocates, for the Snoqualmie Police Association and Grievant.

Robert Sterbank, City Attorney, and Anna Astrakhan, Assistant City Attorney, for the City of Snoqualmie.

ARBITRATION DECISION AND AWARD

The City of Snoqualmie, WA, herein the City or Employer, and the Snoqualmie Police Association, herein the SPA, the Association or Union, are Parties to a collective bargaining agreement, CBA, which calls for the arbitration of certain disputes. The individual Officer involved, herein the Grievant[1], at all material times was or had been a member of the Association and was employed in the Snoqualmie Police Department being in law enforcement personnel under RCW 41.58.070. The Association requested the Public Employment Relations Commission, PERC, to appoint an Arbitrator to resolve a grievance wherein the Association contends that Grievant was disciplined without just cause, and that the City had violated several terms of the Parties' collective bargaining agreement by deducting vacation pay instead of sick leave pay when Grievant left employment with the City. The Association's request was made in reference to the CBA and RCW 41.58.070. After the PERC Appointed this Arbitrator pursuant to RCW 41.58.070(13), the City requested that the PERC withdraw the appointment, contending that the grievance and arbitration request did not involve discipline under RCW 41.58.070 because the Grievant had not been disciplined, the grievance had been settled, Grievant had no independent right to request arbitration, and had left City employment. The PERC declined to withdraw the appointment.

[1] The names of the individual Grievant and witnesses are redacted. Some witnesses are identified by their positions. Other individual are identified by position or initials.

Hearing on the matter of the grievance was held in person on May 12, 2022 in Snoqualmie, WA before a Court Reporter. The Parties agreed that in the event I concluded the Grievant had not been disciplined I would also decide the remaining grievance issues concerning the vacation pay deductions and other CBA matters. At the close of the hearing the Parties agreed to a briefing schedule. They also agreed, with the consent of this Arbitrator, that the evidentiary record be held open for them to find out if there was a date of the election of Association Officers and stipulate to that as part of the record, including any documents for when the election was certified and the for the dates the Officers signed for the purpose of them being the Officers. Thereafter, there was a delay in the Court Reporter producing a transcript of the proceedings and a new briefing schedule was set, and later extended. The Parities did not produce a stipulation or documentation as to the specific reason the evidentiary record had been held open. The Parties filed written briefs and reply briefs. When the City filed its brief and reply brief the Association questioned several other types of documents the City had appended to its briefing concerning subjects other than the election of Association Officers, and done in response to arguments raised by the Association. After providing for additional comments concerning the Association's questioning, I issued a written Ruling wherein I put no weight on the appendices proffered with the City briefing and declined to take Arbitral Notice of the contends and matters in those Appendices. With that Ruling the Record was closed on August 20, 2022.

ISSUES

The Parties did not stipulate to a Statement of the Issues but agreed that I would ultimately state the Issues. The Association states the Issues as:

1. Did the employer have just cause to implement discipline when placing Officer Grievant on administrative leave?

2. If any discipline was merited, was the imposition appropriate and if not, what is the appropriate remedy?

3. In the event the arbiter finds that the actions were not disciplinary, were the actions by the City in violation of the CBA?

The City raises several Issus, which can be stated as:

1. Is the grievance arbitrable concerning authorization by the Association or by timeliness?

2. Is the grievance arbitrable because it was settled?

3. If the grievance is arbitrable, was the City decision to code hours that Grievant did not work as vacation time administrative, not disciplinary?

4. Was the City decision to debit 50 hours of vacation reasonable and justified under the CBA?

5. If the City debit decision was discipline, did the City have just cause?

The record best supports a statement of the Issues as:

1. Whether Grievant was disciplined?

2. If Grievant was not disciplined, whether the grievance is arbitrable?

3. If Grievant was disciplined and the grievance is arbitrable, was there just cause for the discipline? If discipline imposed is not supported by just cause, what is the remedy?

4. If Grievant was not disciplined, did the City otherwise violate the collective bargaining agreement by coding his pay stub with 50 hours of administrative leave, then later recoding this by debiting 50 hours of vacation time?

RELEVANT CONTRACT PROVISIONS

ARTICLE IX VACATIONS

* * *

9.2 Vacations shall be scheduled at the employee's request, subject to the needs of the Department. In the event scheduling conflicts occur, the employee with most rank and then seniority shall be given preference in the selection of vacation time; provided the request is submitted and received by the Employer prior to March 1st of each year. After March 1st of each year, vacation shall be approved on a first come first served basis.

* * *

9.4 Upon termination of employment, employees shall be paid for all accrued vacation at their regular straight time rate of pay.

ARTICLE X SICK LEAVE

* * *

10.4 Usage. Such sick leave shall be granted upon application before or within a reasonable time after the absence, depending on the circumstances of each case. Each employee shall use sick leave solely for the purpose of bona fide illness or injury and utilization of sick leave for any other purpose shall be cause for disciplinary action. The Employer may require that the employee, after three (3) days of concurrent illness, furnish a physician's proof of illness. Physical illness or injury of the employee or an employee's

immediate dependents, doctor, dental appointments as well as forced quarantine of the employee in accordance with the State or Community Health Regulations shall be approved grounds for sick leave.

* * *

ARTICLE XIV DISCIPLINE

* * *

14.1 The Employer shall not discipline a permanent employee without just cause.

14.2 A written warning shall be given prior to discipline being imposed for performance of conduct issues the employer determines to be minor. Such written warning letter shall state the nature of the performance or conduct improvement required and the time period in which improvement is expected to occur. After one year, the employee may make a written request for removal of the written warning from his personnel file, and the employer shall remove the written warning if the required improvement has been achieved and the employee has not received any additional written warnings or other discipline related to the original written warning within such one year period.

ARTICLE XV GRIEVANCE PROCEDURE

15.1 A grievance is defined as a dispute involving the interpretation or application of the express provisions of this Agreement that arise during the term of this Agreement. It is the intent of the parties that the following procedure is the exclusive remedy for resolving disputes as defined herein. The employee shall have the right to Association representation in all steps of grievance procedure. When the term "days" is used, it shall refer to calendar days. The employee, the Association of the Employer can file a grievance.

* * *

15.2 Step One- The employee of Associating, as the case may be, shall first reduce to writing a statement of the grievance containing the following: a) the facts on which the grievance is based; b) a reference to the provision in this agreement; c) the remedy sought. The grievant shall submit the written statement of grievance to the Police Chief within fifteen (15) days. In the event the grievant does not present such grievance within fifteen (15) days of its occurrence or reasonable knowledge of the occurrence, the grievance shall be invalid and subject to no further processing. The Chief or designee shall have fifteen (15) days from submission of the written statement of the grievance to resolve the matter or deny the grievance. If resolved, the disposition shall be indicated on the written statement and signed by the Chief or designee and the Association.

15.3 Step Two- If the grievance is denied at Sept 1, a written statement of grievance shall be submitted within fifteen (15) days of the date of the denial to the City Administrator. The

City Administrator, or designee, shall have thirty (30) days from the submission of the written statement to resolve or deny the grievance. If any agreeable disposition is made, the City Administrator or designee and the Association shall sign it.

15.4 Step Three- If the grievance is denied at Step 2, the Association may request arbitration within twenty (20) days of the denial. Arbitration is the exclusive right and remedy of the Association, which in its sole discretion to determine which matters will be moved forward to Arbitration. This request must be submitted in writing. Representatives from the Employer and the Association shall consult within seven (7) days of the date written request for arbitration is submitted to attempt to agree on an arbitrator. If the parties cannot agree within three (3) days, the parties shall jointly request the Public Employment Relations Commission (PERC) to provide a list of nine (9) arbitrators. The Employer and the Association shall alternatively strike one name from the list until only one name remains. The order of striking shall be determined by the toss of the coin, the loser striking the first name. The one name remaining shall be the arbitrator.

15.5 The arbitrator shall hold a hearing at which the parties may submit their case concerning the grievance. The arbitrator shall have not power to render a decision that shall add to, subtract from, alter, change or modify the terms of this agreement. The arbitrator's power shall be limited to interpretation and application of the express terms of this Agreement. The decision of the arbitrator shall be final and binding on the Association, the Employer and the employees involved.

* * *

15.8 The arbitrator shall have no right to amend, modify, nullify, add to, or subtract from the terms and conditions of this Agreement. The arbitrator shall consider and decide only the specific issue(s) submitted in writing by the Employer and the Association, and shall have no authority to make a decision on any other issue no (sic) so submitted.

15.9 The arbitrator shall be without power to make decisions contrary to, or inconsistent with or modifying or varying in any way the application of laws, rules or regulations having the force and effect of law. The arbitrator's decision shall be submitted in writing within thirty (30) days following close of the hearing or the submission of briefs by the parties, whichever is later, unless the parties agree to an extension. The decision shall be binding on both the Employer and Association and shall be based solely on the arbitrator's interpretation or application of the express terms of the Agreement and to the facts of the grievance presented.

* * *

ARTICLE XVI MANAGEMENT RIGHTS AND RESPONSIBILITIES

16.1 The Union recognizes any and all rights, powers and authorities, which are not modified by this agreement, as being retained by the Employer. These rights include but are not limited to the following:

To maintain efficiency and to make, alter, and enforce reasonable policies and procedures to be observed by the employees. This shall include, but not be limited to, the following topics:

To direct, hire, evaluate, promote and lay off employees as covered by the Civil Service promotional and layoff processes, transfer, and for just cause, suspend, discipline or dismiss employees. Probationary employees may not use the grievance procedure to contest any disciplinary/discharge decision of the Employer.

To evaluate jobs and positions, classify positions, establish performance standards, qualification requirements of employees and specify the employee's duties and work hours.

* * *

BACKGROUND AND FACTS

Grievant was a Police Officer for the City of Snoqualmie and a member of the Snoqualmie Police Association, which holds a non-profit corporation status. Grievant started with the City in late 2018 and voluntarily left City employment on December 13, 2021. The Chief of Police described his performance generally as one of the best Officers we have. On July 15, 2021Grievant was Covid positive and medically not able to receive a vaccine for 90 days.

Starting on February 29, 2020, the Governor of the State of Washington issued several proclamations and orders, declaring a state of emergency related to the spread of the Covid-19 virus, star at home orders, and reopening orders. On March 6, 2020 the City issued an Emergency Proclamation within the City related to the Covid-19 virus.

As noted, Grievant was Covid positive on July 15, 2021. He did not specifically inform the City Administrator of this until October 18, 2021. He did have some sick time deducted for some time off in July, and went through Washington Labor and Industries Department processes concerning those hours. The City Human Recourses department had some involvement with this, but those matters are handled for the City by an outside representative. Grievant's time cards then would have indicated Covid.

On August 9, 2021 the Governor issued a State Vaccination Proclamation requiring state employees and healthcare workers to be fully vaccinated against Covid -19 by October 18, 2021 as a condition of employment. Various entities of local government quickly followed suit. The Governor's Proclamation was later expanded to include all employees working in K-12 education, most child care facilities, and higher education. A statewide mask mandate was re-imposed.

On August 20, 2021 the City issued a Directive requiring all employees to be fully vaccinated by October 18, 2021. High Covid related sick leave usage among City employees, including the police department, and significant financial and staffing burdens from backfilling

and overtime pay contributed to the City decision to issue the Directive. The Mayor's Directive contained a summary:

> **Summary**
>
> I order to protect employees, residents, and visitors of the City of Snoqualmie and the community at large from the risks of the Covid-19 virus, I am issuing these directives requiring all City of Snoqualmie employees to receive a Covid-19 vaccine by the deadline specified below, and to wear masks indoors in City facilities. Employees not in compliance with this directive will no longer be able to maintain employment with the City.

An employee would be fully vaccinated 14 days after receiving either both doses of Pfizer or Moderna vaccines by October 3, 2021 and a third booster shot within 30 days of their eligibility for a booster, or a single dose of Johnson & Johnson vaccine by October 3, 2021 and a second boost shot within 30 days of their eligibility for the booster. Employees with a sincerely held religious belief or medical condition were allowed to apply for an exemption from the vaccine mandate.

The Directive contained a section of frequently asked questions, which stated at 5:

> **5. What happens if an employee refuses to comply with the vaccination requirement, or an exempt employee refuses to comply with testing requirement?**
>
> Employees who refuse to fully comply with the vaccination requirement by October 18, 2021, and employees who are exempt from the vaccination requirement because of a reasonable accommodation for medical or sincerely held religious belief accommodation and who refuse to comply with the testing requirement or other conditions of the applicable exemption, will no longer be able to work for the City.

Grievant applied for a religious exemption on September 2, 2021. On October 13, 2021 the City notified him that the exemption was denied because the City was unable to accommodate the exemption. No member of the Police Department who submitted a religious exemption request was granted an exemption and accommodation No people working for the City of Snoqualmie were granted a religious or accommodation. Grievant was not going to make a decision on getting vaccinated until his religious exemption was either approved or denied. Grievant was then vaccinated on October 15, 2021. On October 17th Grievant provided his vaccination card to the City. Neither Grievant nor the Association grieved the denial of the religious exemption application.

In the meantime, on October 15, 2021the City and the Association had reached a tentative Memorandum of Understanding regarding the City vaccination Directive. The MOU would provide 5 days of paid administrative leave to Association members who, like Grievant, did not get timely vaccinated and therefore were not fully vaccinated by the Directive deadline. – allowing

them to get paid while waiting to become fully vaccinated before returning to work. Among other things, it also included an extension of the vaccination deadline for those who applied for an exemption or accommodation, and 10 hours of holiday pay to all Association members who were fully vaccinated.

The City Council ratified the MOU on October 19, 2021. On October 25, 2021 the Association voted to reject the MOU. The MOU provisions did not go into effect.

In the meantime, in expectation that the Association would approve the MOU, and in response to Grievant not having been fully vaccinated by October 18, 2021, the Interim or Acting City Administrator, herein the City Administrator, by email of October 18th informed Grievant that he would not be able to work from 1700 hours October 18th through October 29. The email informed Grievant of the tentative MOU and that it included paid administrative leave to cover some of this time away, and suggested he contact his Labor Leadership. From this, Grievant assumed he would be getting administrative pay for the 50 hours he would not be working.

Grievant responded to the above email on October 18th, and therein mentioned that he had tested positive for Covid on July 15th, and that October 15th was the earliest he could have received the shot. He asked if that changed anything. The City Administrator responded that he had heard Grievant had had Covid, but did not know the details. Any information in City records concerning the July sick leave and the Labor and Industries proceeding would not have contained information that Grievant had been vaccinated on October 15, 2021. The City Administrator quickly responded, indicating to Grievant he would do some research and get back to him. On October 19th the City Administrator emailed Grievant, stating:

> …please submit a medical exemption request form - its in the packet attached. Once we have it we can respond with an accommodation (like wearing an N95 until Oct 29 vs regular mask when working around other staff). It would be helpful if you can submit a doctors note indicating your situation – usually you can do this over the phone.
>
> When are your working next? Once we have this we can turn it around pretty quick and get you back to work.

Grievant responded by email on October 21st wherein he sent the signed medical exemption back and stated he did not contact a doctor about this situation.

The next day the City Administrator responded that he will need a note from the MD to process the request, he needed to follow a specific process, and that they can send it either to you or they can send it direct to (the City Administrator). Grievant did not produce a Doctor's note.

At the hearing Grievant testified about not providing a Doctor's note with his medical accommodation request:

By Mr. Sterbank:

Q: Okay. And so the sum of that is that there – there was not a medical exemption then approved that would have allowed you to report back to work sooner than the time period previously covered in Exhibit A?

A: No. The – I didn't have a medical exemption to fill out. Or there's no medical – there's nothing medically wrong with me.

Q: There was no medical exemption approved?

A: I'm sorry. I may have misunderstood your question. I – it wasn't approved. I signed it. I didn't go to the doctor with it because I was confused on what it was for because I didn't have a medical exemption.

I already – I already got the vaccine. This was six days after I got the vaccine. So I was confused on why I would need a medical exemption. So that's I didn't email back even after -.

(TR. Pp. 393, 394)

By Mr. Harvey:

Q: Why didn't you just go get a doctor's note?

A: Because I didn't have a reason to get a medical exemption.

(Tr. P. 399)

By Mr. Harvey:

Q: You were sent an application. Do you believe you could fill it out and get a medical exemption in any way based on the requirements of the form?

A: No. I had nothing medically wrong with me.

Q: Okay. So your chose not to – to – to submit anything to try to get back to work that would be untrue, correct?

A: Correct.

(Tr. Pp. 401, 402)

The City had been working with a local medical doctor to see if there might be a way to accommodate employees, such as Grievant, who had some sort of proof that they had some protection against Covid -19, so that they might be able to do some type of work. But this would be dependent on what the employee's doctor's note had said at that point. The City, through its health care provider, approved at least one medical accommodation request for a different employee who already had Covid and who went through the application procedure with a doctor's note. The accommodation granted to that employee was to wear an N95 mask.

Pursuant to the City Directive and the City Administrator's October 18th email, Grievant did not work the 5 work shifts at 10 hours per shift because he was not fully vaccinated by October 18, 2021 and had not received a religious exemption or a medical accommodation.

The City Administrator instructed City payroll staff how to process and code the 50 hours that Grievant did not work. This was in the time frame where the tentative MOU had been reached but the City had not yet ratified it and the Association had not yet voted on it. This was also at the time that City payroll needed to be executed. Therefore, the City administration had payroll move forward with using paid administrative leave under an assumption that the MOU was going to pass or be ratified by the Association.

Pursuant to the instructions to the payroll department, Grievant was paid by the City for the 50 hours he did not work. Grievant's pay stub for the period 10/1/2021 – 10/31/2021 coded the 50 hours as Administrative Leave at the rate of 41.14040, for a total on that line of $2,057.02.

After the Association voted down the MOU, the City gave additional instructions to City payroll on how to code the 50 hours that Grievant did not work. The City recoded the pay record to deduct the 50 hours of administrative leave and put those hours onto Grievant's vacation category to make the City whole. The City understood it could not give away City fund to someone who did not work the hours, and had to account for those funds somehow. The City did not think it could use sick leave for that type of purpose. Grievant had not notified the City he was sick. There was no other applicable provision for administrative leave. There was no pending investigation or administrative proceeding going on under the City Personnel Policies that concerned Grievant. Therefore, the City used vacation time. This is reflected in Grievant's pay stub for the month of November, 2021.[2] The City Administrator and Chief of Police, who also approved the change, discussed this when it was done. City department directors, including the Chief of Police, sometimes detect and correct coding of pay for employees. There have been many times when employee's time sheets have been turned in and the finance department came back needing them changed.

The City did not inform Grievant before it made the coding change to his administrative leave and vacation time. No one from the City communicated with Grievant about this change until after he gave his two week notice that he was leaving City employment.

[2] Grievant had taken an additional 10 hours of vacation time.

By November 23, 2021 Grievant had sought and obtained a conditional offer of employment from a Police Department in a different Washington City, and started working there on or about December 16, 2021.

Grievant gave his two week notice on December 1, 2021 to the Police department and to the City payroll department. In an email that day to the City payroll department he informed them of this, and that his last work day would be the 13th of the month. He also wanted to be sure everything was squared away to get paid out for 137.26 hours of vacation as of the time of his departure. On December 2, 2021 the payroll department responded by email that his current vacation accrue is 87.26 because of using 60 hour last month, and that he'd get whatever December's was too. Grievant quickly asked for a copy of what payroll saw for the end of November, and that he hadn't seen his paystub yet. He also stated he didn't recall taking 6 days off. Payroll quickly emailed back on December 2, 2021 that their report shows what was taken off like he'll see on his paystub. Payroll asked if he received 5 days paid administrative leave in October: if so (payroll) was instructed to use other available vacation or comp time in place of the 50 hours. Grievant responded that day by email: "Okay. Thanks for the info".

At no time after the City Directive was issued did Grievant notify the City that he was sick or apply for use of sick leave. In the grievance filed herein on December 8, 2021 he did request as part of the remedy to deducting "50 hours of sick leave opposed to the vacation time that was deducted." After the City Directive and before leaving employment with the City, he did not request time off related to preventive medical care. He did not further vaccinations after October 15th and October 29, 2021.

No one from the City suggested to Grievant that he was being disciplined for not being fully vaccinated by the October 18th deadline. The Chief of Police has the authority to impose discipline on members of the department. The Chief of Police testified that there was no discipline imposed on Grievant as a result of the timing of his vaccine and the work shifts involved .Grievant was never told by the Chief of Police that he was being disciplined. The City follows the principles in the CBA when it applies disciplinary action to an employee. In this case, there was never an investigation into Grievant's conduct. He did not receive any oral or written reprimands concerning vaccination issues or the 50 hours. There was no hearing or disciplinary meeting with Grievant having to do with those issues, or any other issues before the 50 hour coding was changed. From the perspective of the City, there was no discipline issued or imposed on Grievant concerning the 50 hours.

On December 8, 2021 Grievant and an Executive Board Officer as his Association Representative signed and filed a grievance over the 50 hours. The name of the Grievant was listed as the Grievant. The Article and Section numbers of contract violation was: 9.2 Vacations, 14.1 Discipline. The statement of the grievance in summary contained some of the basic facts similar to those set out above, with some apparent confusion or mistakes as to the name of the Grievant. It also contained the statement:

> On 11/29/2021, On 11/30/21 Officer Grievant received his November pay stub in his personal mailbox. Officer Grievant noticed 50 hours of "administrative leave" deducted and 50 hours of vacation deducted.

> Office Grievant was never notified that he was charged vacation hours. This occurred without his permission, knowledge, or consent.

The Remedy requested was:

1) Restoration of all 50 hours of vacation time.
2) Deducting 50 hours of sick leave opposed the vacation time that was deducted.

During the same time there was also a grievance from the Association and another Officer which was identical or very similar to that of Grievant herein as to administrative leave having been coded originally, then changed after the MOU was not ratified by the Association.

On December 23, 2021 the grievance herein was denied. After a recitation of background facts, the denial reasoned:

> …. In the absence of an MOU, there is no contractual or other basis to provide "administrative" leave. Administrative leave under Section 7.2.2 of the Personnel Policies is inapplicable, since it is used, at the City's discretion, "during a pendency of an investigation or other administrative proceeding." There is likewise no basis for the use of sick leave, since Ofc. Grievant was not sick during the days he did not work (nor does he assert that he was). In the absence of other options to account for the time Ofc. Grievant was assigned to but did not work in October 2021, the City's designation of that time as "vacation" was proper and fully complies with the CBA and the Personnel Policies.

Grievant and the Association advanced the Grievance to Step 2 on December 31, 2021. The grievance was identical to Step 1, and was denied by the City for the same reasoning on January 28, 2022.

In early February, 2022, the City Administrator and the FOP- Association Representative for Grievant and the other employee with the similar grievance discussed settlement. That Representative had been meeting with the City on behalf of the Association for contract negotiations and other labor related issues on an ongoing basis. The Representative told the City Administrator that he had authority to settle the two grievances. The City Administrator understood this to mean the Representative was acting on behalf of the Association. Attorney Harvey was representing the Association on other matters with the City at that time as well, but was not involved in this particular proposed settlement.

The Association President, who was the Interim President at the time, testified that he did not provide authority to that Association Representative to combine or offer a combination settlement deal with respect to those two grieving employees.

On February 10, 2022 the City Administrator emailed the Representative informing him of the Mayor's approval of the Representative's suggested settlement of the two grievances, whereby the City would remove 50 hours of Sick Leave from the other grieving employee's sick bank and move it to his vacation bank, and Grievant's grievance is dropped. The next day the Representative emailed back that the other grieving employee and the unit had approve the settlement agreement. The City Administrator replied that he would communicate that fix to get it addressed in the next pay check. The City did then credit back the 50 hours of vacation time to the other grieving Officer to perform its part of the settlement agreement.

By email of February 15, 2022 the Association Representative emailed the City Administrator that he had finally spoken to Grievant letting him know the FOP and Association were not moving forward with his grievance; that he may be moving on it forward on his own but that was not clear.

By email of February 16, 2022 Attorney Alan Harvey notified the City that he has been designated the point of contact for the SPA in the Step 3 Grievance Response for Grievant. The email was to preserve a timely notice the Association was moving forward pursuant to CBA article 15.4 and was now requesting the matter move forward to Arbitration. Among other things the email stated that the SPA has provided [him] with the authority to move forward with arbitration and indicated [he is] the sole point of contact for the SPA in this matter.

From sometime after October 18, 2021 until several months into 2022, there were vacancies on the five member Executive Board for the Association. March 28, 2022 was the first meeting of a newly elected full Executive Board. For several months prior to that date, the previously mentioned Interim Association President was the only Executive Board member

A few months prior to the hearing in this matter, the City and the Association discussed a sick leave hours transfer from some Association members to this other Officer, which was later done.

An Arbitration Request in this matter dated March 1, 2022 was signed and filed with PERC by Attorney Alan Harvey identifying the Union as Snoqualmie Police Association. The Details stated:

> The grievant is the SPA (pursued on behalf of employee/ Officer Grievant) This is an arbitration relating to the an disciplinary sanction as to SPD Officer Grievant on the issue of multiple violations of provisions of the CBA. There are a number of issues relating to the violation of the CBA. The City failed to meet a timing provision at CBA article 14.1 and CBA section 15.2. Further, the issues also related to violations of just cause per the CBA. (This is a application by joint application by operation CBA and RCW 41.58.070)

It was marked as a joint request. The Type of Request was marked for: Assign an arbitrator from the Law Enforcement Roster (only for law enforcement disciplinary grievance arbitration).

No one for the City signed the Arbitration Request. Instead, the City objected to PERC appointing an arbitrator from the Law Enforcement Roster because the City contended the Grievant was never disciplined, that the grievance had already been settled, that the Grievant individually did not have the CBA right to request arbitration, and because he had already left City employment. The PERC declined the City request to have the Arbitrator Appointment withdrawn.

This arbitration followed. Other facts are in the Discussion.

POSITIONS OF THE PARTIES

Association Brief

In summary, the Association argues that it has established that an order to not come to work, placing Grievant on leave, for failing to follow the vaccine directive was a disciplinary act. On October 18th he was ordered to stay home from his assigned workdays, it being unclear what would occur regarding his leave status or how or if he would be paid. He was put on paid administrative leave and then the City, without notice, took 50 hours from his vacation bank. This was a monetary loss to him. He was placed on leave due to a failure to follow a directive. He was not provided notice or an opportunity to be heard before the vacation bank conversion occurred. Taking the 50 hours was in effect a disciplinary act.

The Association argues it had established violations as to just cause and to factual and procedural issues regarding substantive and procedural Due Process violations. The Association contend that the seven tests of just cause, the Daugherty tests, apply. A "no" answer to any one of the seven questions would result in a lack of just cause, and the burden of proof by a preponderance lies with the employer, citing Enterprise Wire, 46 LA 359 (Daughery, 1066); Whirlpool Corporation, 58 LA 421 (Daugherty, 1972); Grief Brothers, 42 LA 555; Koven and Smith, Just Cause: The Seven Tests, 217-219, 293 (1985); Elkouri and Elkouri, How Arbitration Works, 4th Ed., 661 (1988). Due Process requires that an employee be informed promptly and in detail what offense he is being alleged to have committed and given the chance to tell his side of the story. Management must have substantial evidence the employee committed the allegations charged. In this case five of the seven tests clearly have "no" answers.

As to the first just cause question, the Association argues the City did not give Grievant forewarning or foreknowledge of the possible or probable disciplinary consequences. Grievant was provided with a directive and offered options to apply for a religious or medical exemption. Nowhere in the Directive was there notice of what the City would do if it failed to process Grievant;s application in a timely fashion. Grievant was informed he would not get an accommodation 5 days before the deadline. He compromised his religious beliefs to maintain being employed. The City Directive provided no notice that in those circumstances employees would be summarily sent home without pay and any form of payment would be taken from vacation banks. The answer to the first question of just cause is "no."

The Association argues, as to just cause question 3, the City did not make an effort before administering discipline to discover whether he did in fact violate or disobey a rule or order of

management. Grievant complied as soon as practicable. He waited 43 days for the religious exemption answer, then took only 2 days to be vaccinated. He was not the cause of the delay on the part of the City, and there was no violation in any meaningful way on his part. The answer to question 3 is "no."

As to just cause question 4, the Association argues that prior to taking the 50 hours from the vacation bank there was no investigation of any kind and, therefore, no fair and objective investigation. The answer is "no."

The Association argues that the answer to just cause question 5 is "no" because, there being no investigation, there was no substantial evidence or proof that Grievant committed misconduct.

The Association argues that the degree of discipline is not reasonable related to the seriousness of the offence, and there was no consideration given to Grievant's record or service with the City. Therefore, the answer to question 7 is "no."

The Association further argues that in general fairness the City should have held a subsequent hearing to allow Grievant to respond to the allegations as to his failure to comply with the vaccine directive.

The Association argues that it is clear the "no" answer to multiple prongs of the just cause tests has been demonstrated. The appropriate remedy is to pay Grievant his 50 hours at his departing rate of pay pursuant to Article 9.4 of the CBA.

The Association also argues that in the event the arbiter finds the City actions were not disciplinary, in the alternative the failure to allow the use of sick time was a violation of the articles of the CBA and the statutory law on sick time usage. On October 18th the City Administrator ordered Grievant to stay home after Grievant was vaccinated. October 15 was when he was vaccinated and the earliest he could do so as he had been Covid positive in July and was medically not able to receive a vaccine for 90 days. He became vaccinated due to a condition of employment as a result of the August 19th City Directive. By operation of law all of those individuals who receive vaccinations and were put on leave on October 18th were entitled to use sick time while they had to wait to become fully vaccinated. This applies to Grievant as his religious exemption request took 43 days to process and he had to make a last minute decision to compromise his religious beliefs and receive the Covid-19 vaccine. And, even if the exemption had been processed more rapidly, he still had to wait until October 15th for vaccination due to his testing positive for Covid on or about July 15th.

The Association cites RCW 49.46.210(1)(b)(i):

> (1) Beginning January 1, 2018, except as provided in RCW 49.46.180, every employer shall provide each of its employees paid sick leave as follows:
>
> (b) An employee is authorized to use paid sick leave for the following reasons:

> (i) An absence resulting from an employee's mental or physical illness, injury, or health condition; to accommodate the employee's need for medical diagnosis, care, or treatment of a mental or physical illness, injury, or health condition; or an employee's need for preventive medical care;

In the statute, the Association emphasizes "an employee's need for preventative medical care."

The Association also cites CBA Article 10.4 usage of sick leave:

> Such sick leave shall be granted upon application before or within a reasonable time after the absence, depending on the circumstances of each case. Each employee shall use sick leave solely for the purpose of bona fide illness or injury and utilization of sick leave for any other purpose shall be cause for disciplinary action. The Employer may require that the employee, after three (3) days of concurrent illness, furnish a physician's proof of illness. Physical illness or injury of the employee or an employee's immediate dependents, doctor, dental appointments as well as forced quarantine of the employee in accordance with the State or Community Health Regulations shall be approved grounds for sick leave.

In Article 10.4 the Association emphasizes "as well as forced quarantine of the employee in accordance with the State or Community Health Regulations shall be approved grounds for sick leave."

The Association argues that the directive and the results of the order to stay at home on the 18th of October 2021 were effectively a forced quarantine on the part of the employer. The City took the position at the hearing that the Covid 19 vaccine was not "preventive care" but rather "preventive treatment." There is no statutory definition in RCW 49.46 to assist on this arcane issue. The CDC recognizes the Covid-19 vaccine as "preventative care." The Association also cites 15 USC 9001 and Public Law 134-367 at section 3203:

> (b) DEFINITIONS.—For purposes of this section:
>
> (1) QUALIFYING CORONAVIRUS PREVENTIVE SERVICE.—
>
> The term ''qualifying coronavirus preventive service'' means an item, service, or immunization that is intended to prevent or mitigate coronavirus disease 2019 and that is;
>
> (A) an evidence-based item or service that has in effect a rating of ''A'' or ''B'' in the current recommendations of the United States Preventive Services Task Force; or an immunization that has in effect a recommendation from the Advisory Committee on Immunization

> Practices of the Centers for Disease Control (CDC) and Prevention with respect to the individual involved.

And the Association further notes that the Public Health Services Act (PHS Act) 42 USC chapter 6A sect 2713(a) defined the term "qualifying coronavirus preventive service" means an item, service, or immunization that is intended to prevent or mitigate coronavirus disease 2019 (COVID-19) and that is, with respect to the individual involved.

The Association argues that considering the fact that CDC and supporting legislation has defined the Covid Vaccine as "preventative" care, it is a ridiculous conclusion that Grievant was not entitle to use sick leave pursuant to RCW 49.46.210(1)(b)(i) and CBA Article 10. And, it is uncontested from the City that there is no legal mechanism in the CBA or policy that actually allowed the City to take vacation time from a leave bank to satisfy time paid while on administrative leave.

The Association concludes that the actions taken on October 18 but not discovered by Grievant until early December, 2021 were disciplinary. That the City didn't provide notice or follow contractual requirements doesn't alter the nature of those actions. This violated just cause. The remedy is to reimburse Grievant with the monetary value of the 50 hours of vacation time that was taken from his leave bank. Alternatively, if the actions were not disciplinary, the Parties have agreed to allow the Arbitrator to decide if there were CBA violations. Here the CBA and applicable law regarding sick leave were violated. There was no authority for the City to take from Grievant's sick bank the time he was required to not come to work. There was authority to use that time from his sick bank under RCW 49.46.210 and CBA Article 10.4. It was a violation to not allow for use of sick time for the time Grievant was ordered not to work. As he no longer works for the City, he is open to having the reimbursement of 50 hours of vacation time cashed out.

City Brief

In summary, the City argues that the Arbitration Request is not arbitrable because it was not authorized by the Snoqualmie Police Association, the only party with authority under the Collective Bargaining Agreement to demand arbitration. The grievance and arbitration demand expressly or impliedly claimed to be authorized by the Association, but the Association had failed to maintain a duly-elected or appointed board of directors in compliance with the governing nonprofit corporation statute, citing RCW 24.06. Under Washington law a nonprofit corporation acts through its board of directors, and a failure to maintain a board of directors as required by applicable law and its governing articles of incorporation or bylaws renders the actions purportedly taken on the corporation's behalf invalid.

The City argues that the Snoqualmie Police Association is a Washington non-profit corporation incorporated under Ch. 24.06 RCW.[3] The Association President testified that the

[3] As noted in the introduction to this Decision and Award, I place no weight on and take no arbitral notice of matters contained in the attachments to the City briefing which were not admitted into evidence at the hearing. Some slight reference might be made to such matters in the Position of the City to acknowledge the City made such arguments. They have no bearing on any part of this Arbitration Decision and Award.

Association does have bylaws, which identify a 5-member executive board, comprised of the president, 1st vice president, 2nd vice president, secretary and legislative chair. Due to resignations and terminations, the Association Executive Board was reduced to a single person.

For nonprofit corporations, "[t]he board of directors of a Washington nonprofit corporation is responsible for managing its affairs." Diaz. 165 Wn.App. at 77, citing RCW 24.03.095. For entities incorporated under Ch. 24.06 RCW, "the number of directors of a [nonprofit] corporation shall be not less than three and shall be fixed by the bylaws. RCW 24.06.130. RCW 24.06.140 provides that "A majority of the number of directors fixed by the bylaws, or in the absence of a bylaw fixing the number of directors, then of the number stated in the articles of incorporation, shall constitute a quorum for the transaction of business…." If the minimum number of directors necessary for a quorum remains, state statue allows the board to fill a vacancy. "Any vacancy occurring in the board of directors and any directorship to be filled by reason of an increase in the number of directors may be filled by the board of directors unless the articles of incorporation or the bylaws provide that a vacancy or directorship so created shall be filled in some other manner." RCW 24.06.135. And the president of a nonprofit corporation may call a special meeting of the corporation members, for the purpose of electing a new board of directors. Nonprofit corporations must also maintain their books and records.

The City argues that when a nonprofit corporation's board of directors, or a committee thereof, attempts to take action on behalf of the corporation but without following the legal requirements applicable to the board of directors or committee, any such actions are invalid and void. Hartstene Point Maint. Assoc. v. Diehl, 95 Wn.App. 339, 345 (Div. II 1999). The Association's failure to maintain a functioning Board of Directors rendered the Association's attempted grievance invalid. In order for an act to constitute an action of the Snoqualmie Police Association, the act was required to be approved by majority vote at a meeting which at least 3 board members (a majority of 5 directors) were present. New Board members were not seated until March 28, 2022. When the Step I and Step 2 grievances were filed, as well as the Arbitrator Request, they alleged they were acting on behalf of the Association. But there was only one Executive Board member at that time. A single board member's action is not an authorized action of the Association, and Washington courts clearly hold otherwise, citing Parker Estates Homeowners Assoc. v. Pattison, 198 Wn.App. 16, 27 (Div. II 2016). The Interim Association President's sole action purporting to authorize the filing of a grievance, or purporting to authorize Mr. Harvey to move the grievance to arbitration were insufficient as a matter of law to constitute an action by the nonprofit corporation known as the Snoqualmie Police Association. The Association's Counsel's acknowledged and agreed with the arbitrator -- on the record -- that he had no proof that a single member of the SPA Executive Board had authority to move a grievance forward on his own.

The Interim President sat on his hands and took no action to call a special meeting to elect new directors, although authorized to do so by law under RCW 24.06.100. Instead, the Interim President -- first with Grievant, and then alone after Grievant's resignation -- purported to act on behalf of the Association. Their actions were void and invalid as a matter of law, per Diehl, because there was no duly-constituted Association board of directors, nor a majority vote of a quorum thereof.

The City also argues that the lack of timely, valid grievances or Arbitration Demand requires dismissal. Lack of a valid, authorized grievance cannot be saved by a months-late, post-hoc "ratification," either at the March 28 meeting or otherwise. That is because the Collective Bargaining Agreement imposed deadlines for submission of grievances and a demand for arbitration, and any post-hoc attempted ratification on March 28, 2022 was much too late to save the Step 1 or Step 2 grievances or the demand for arbitration. Section 15.2 of the CBA provides that "In the event the grievant does not present such grievance within fifteen (15) days of its occurrence or reasonable knowledge of the occurrence, the grievance shall be invalid and subject to no further processing." Here, the Step 1 grievance was signed by the Interim President, but was not an authorized act of the Association. Diehl, 95 Wn.App. at 345. Given this, the entire grievance "shall be invalid and subject to no further processing," and cannot be saved by a post-hoc "ratification." The Step 2 grievance and demand for arbitration were likewise untimely.

The express language of the CBA itself demonstrates the Association's anticipated argument that the case law and RCW 24.06 do not apply is meritless. Section 15.6, 15.8 and 15.9 of the 2019 CBA, and Section 15.11 of the 2022-23 CBA, require the Arbitrator to apply "applicable law" and "laws, rules or regulations having the force and effect of law." "Applicable law" includes both Ch. 24.06 RCW and Diehl, Northwest Defenders, and other appellate precedent cited above.

The City further argues that the Arbitration Request is not arbitrable because the underlying grievance was settled and resolved by FOP Representative L. P., an officer with bona fide authority to act on behalf of the Association. L.P., with whom the City Administrator had been negotiating a successor City-Association collective bargaining agreement over the course of several months, approached him to discuss the potential settlement of two related grievances. Both concerned vacation, sick leave and administrative leave time in relation to their vaccination status. From the outset, the resolution of the two grievances was discussed as a package deal. . L.P. represented to the City Administrator that he was acting on behalf of the Association and had authority to settle both grievances, affirmed by L.P's role as representative of the Association in contemporaneously-held CBA negotiations.

At L.P.'s request the City Administrator and he met and reached an agreement to allow the other grieving Officer to use sick leave, rather than vacation hours, for some of the time missed when he was not "fully vaccinated," in exchange for the Association agreeing to not proceed with Grievant's grievance. This was reduced to writing as seen in their emails. And L.P. emailed that the other grievant and the unit approved the settlement agreement, and later that he had let Grievant know that the Association was not moving forward with his grievance.

The Association assertion that L.P. was not authorized to settle grievances on behalf of the Association is inconsistent with his undisputed role as the Association representative in contemporaneous CBA negotiations then-ongoing, and is contrary to the Association position with the respect to the settlement of the other Officer's grievance. If, as the Association suggests, L.P. did not have authority to settle grievances on behalf of the Association, then his proposal for the settlement of the other Officer's grievance has no force or effect, the City is not bound the agreement to credit back 50 hours of vacation leave to that Officer in return for debiting 50 hours of sick leave. The Association, however, has not contested the proper settlement of the other

Officer's grievance, nor indicated that the City's settlement obligations vis-à-vis that Officer do not apply.

The City also argues that the settlement agreement between the City and the Association is an Accord and Satisfaction of Grievant's grievance that invalidates subsequent attempts to revive the grievance. By entering into the agreement, the Association released its right to any claims in Grievant's grievance. The City Administrator and L.P. confirmed the agreement in writing via e-mail exchange. The agreement was that the City would charge 50 hours to the other Officer's s sick leave, and restore 50 hours to his accrued vacation bank; in exchange, the Association would not pursue the Grievant's grievance to arbitration. Under Section 15.3 of the CBA, Grievant's grievance was resolved, and is not arbitrable.

Accord and satisfaction requires the parties have a bona fide dispute, an agreement to settle that dispute, and performance of the agreement. Paopao v. State, Dept. of Social and Health Services, 145 Wash. App. 40, 46 (Wash. App. Div. 1, 2008), citing David K. DeWolf & Keller W. Allen & Darlene Barrier Caruso: Washington Practice: Contract Law and Practice § 16:2 (2d ed.2007). "An accord and satisfaction is a new contract - a contract complete in itself. Its enforceability does not depend on the antecedent agreement." Id. at 46. "Each party's promise in the new agreement is supported by an entirely new consideration - the return promise of the other. And so the accord is enforceable as a contractual agreement in its own right. It cuts off all defenses and arguments based on the underlying contract." Oregon Mut. Ins. Co. v. Barton, 109 Wash. App. 405, 414 (Wash. App. Div. 3, 2001). Washington courts readily dismiss claims – including those arising out of union employer dispute -- after parties reach accord and satisfaction. See e.g. Pugh v. Evergreen Hosp. Medical Center, 177 Wash. App. 348 (Wash. App. Div. 1, 2013) (union members' acceptance of settlement checks from settlement agreement between union and employer and release of claims resulted in "accord and satisfaction.").

The City performed on the agreement by making the agreed-upon adjustment to vacation hours, and the Association performed on the agreement by accepting the agreed-upon adjustment and by withdrawing the other Officer's grievance. "When an accord is fully performed, the previously existing claim is discharged and all defenses and arguments based on the underlying contract are extinguished. A strong presumption attaches that the parties have considered and settled every existing difference." Paopao, 145 Wash. App. at 46. The settlement agreement between the City and the Association is an accord and satisfaction that has discharged the claims made in Grievant's grievance.

The City argues that the doctrine of partial performance requires enforcement of the settlement agreement negotiated by L.P. and the City Administrator. Even "[u]nwritten or unsigned agreements are saved under the doctrine of part performance when (1) the contract is proven by clear, cogent, and convincing evidence and (2) the acts constituting part performance "unmistakably point to the existence of the claimed agreement." Shelcon Const. Group, LLC v. Haymond, 351 P.3d 895, 904, 187 Wash.App. 878, 895 (Wash. App. Div. 2,2015). Partial performance is an adequate consideration. The City Administrator testified that the City's decision to settle the other Officer's grievance was contingent upon the Association not pursuing Grievant's grievance, and that in the absence of an agreement on the Grievant's grievance, the

City Administrator would not have recommended an agreement on the other Officer's grievance. Under the doctrine of partial performance, the settlement agreement must be enforced.

The City moreover argues that the Arbitration Demand on behalf of Grievant is barred by Equitable Estoppel. "Equitable estoppel prevents a party from taking a position inconsistent with a previous one where inequitable consequences would result to a party who had justifiably and in good faith relied." Silverstreak, Inc. v. Washington State Dept. of Labor and Industries, 159 Wash.2d 868, 887 (Wash., 2007). The elements of estoppel are: "(1) a party's admission, statement or act inconsistent with its later claim; (2) action by another party in reliance on the first party's act, statement or admission; and 3) injury that would result to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission." Kramarevcky v. Dep't of Soc. & Health Servs., 122 Wash.2d 738, 743, (1993). L.P. proposed to the City in a negotiation on February 9, 2022 that it would not pursue Grievant's grievance to arbitration. The City relied on the Association's representation when it entered into a written settlement agreement and credited back 50 hours of vacation time to the other Officer. Allowing the Association to repudiate the settlement agreement by arbitrating this grievance after the Association explicitly agreed to not proceed with arbitration is "self-evidently unfair," as it places the City in the position of bearing the cost of 50 hours of vacation time credited back to the other Officer, while facing the financial burden and risk of an arbitration and its outcome.

The City argues that even if the Arbitration Request is arbitrable, the City's decision to code the hours that Grievant did not work as vacation time was administrative, not disciplinary. The Arbitration Request does not specify the manor or reason that Grievant was sanctioned. In fact Grievant was fully paid for all hours worked and for all vacation hours, and suffered no disciplinary or pecuniary impact. City personnel policies define "Disciplinary Action" as "imposition of certain personnel actions (e.g. reprimand, warning, suspension, dismissal, demotion) as a result of poor performance or conduct detrimental to the City." City of Snoqualmie Personnel Policies, Section 1.4.14. The Police Chief testified that he personally approves or authorizes all discipline imposed on Snoqualmie police officers, and that Grievant was not subject to any discipline of any kind in connection with the timing of his vaccination or otherwise, nor was there cause to discipline him for any reason. And, Grievant clearly did not exhibit either "poor performance," or, given his vaccination before the Directive deadline, any "conduct detrimental to the City" that would result in a "Disciplinary Action" under the personnel policies. The Chief of Police also testified that he was not aware of Grievant's application for a religious exemption and accommodation. Grievant therefore could not have been, and was not, disciplined because he had applied for an exemption and accommodation. The City never conducted any investigation, never issued oral or written reprimands, never held a disciplinary hearing, and never issued any disciplinary decision. No one at the City ever indicated to Grievant that he was being disciplined. His pay stubs show that he was paid in full for all hours worked and that he was paid in full for all vacation hours. He was paid his full salary, and the hours he took were later debited from his vacation bank. He did not work for 50 hours, these hours were charged against his vacation time, he was paid in full for this vacation time, and he was paid in full for his remaining vacation hours when he left the City. The allegation of "disciplinary sanction" has no merit.

The City further argues that the City's administrative decision to debit 50 hours from Grievant's vacation bank for the time he did not work is reasonable and justified under the CBA.

The City action was administrative, and not disciplinary, and therefore was not subject to the CBA's "just cause" requirement. The City's accounting was reasonable and justified under the CBA. The Directive was clear: employees had to be "fully vaccinated" by October 18, 2021; those who were not, would "no longer be able to work for the City." The Directive defined "full vaccination" as either 14 days after a second dose of the Pfizer or Moderna vaccines, or 14 days after a single dose of the Johnson & Johnson vaccine. Grievant chose to not get vaccinated until October 15, 2021, which did not give him enough time to be "fully vaccinated" by the Directive deadline. Based on the Directive, Grievant was informed that he could not work for the City until he was fully vaccinated. The Association has explicitly declined to challenge the validity of the Directive. At the hearing the Arbitrator accepted that the Directive was valid. The City Administrator had authority under the Directive to enforce the Directive's requirements by instructing Grievant not to work until fully vaccinated.

Secondly, any challenge to the City Administrator's direction that Grievant not work between October 18 and October 29 was untimely under Section 15.2 of the CBA, which requires that a grievance be presented "within 15 days of its occurrence or reasonable knowledge of its occurrence." The email instructing Grievant not to work was on October 18, 2021. Grieving that instruction within 15 days would be November 2, 2021. The Step 1 grievance was submitted December 8, 2021. To the extent Grievant challenges the City Administrator's instructions, the grievance is untimely per Section 15.2 of the CBA.

Once the MOU was rejected, however, paid administrative leave was no longer an option, because under the City's personnel policies, paid administrative leave is available only "during the pendency of an investigation or other administrative proceeding, as determined by the City Administrator." Grievant was neither under an investigation, nor a party to an administrative proceeding arising out of the timing of his vaccination. Paid administrative leave in Grievant's circumstances was not available to him.

Third, Grievant was also not eligible to use sick leave because he was not, in fact, sick. He did not testify that he was sick or unable to work, and while he was out he did not request sick leave or provide a doctor's note. Under the City's Personnel Policies, an employee may take sick leave for one of several reasons. Personnel Policies, Section 6.3.1. Grievant has never alleged nor testified that any of these categories applied to him. He has not claimed a bona fide illness or injury.

The Association attempt to bring up RCW 49.46.210(1)(b), which provides that an employee is authorized to use paid sick leave for . . . an employee's need for preventive medical care" is a red herring. Regardless of whether getting vaccinated qualifies as preventive medical care, there is no dispute that Grievant did not get vaccinated during the time he did not work. Instead, he got vaccinated on October 15, 2021, 3 days before he was told to stop working. Neither the Association nor Grievant offered any evidence that he received any type of medical care – preventative or otherwise – during the time he did not work between October 18 and October 29.

The City also argues that even assuming the City's decision to debit 50 hours from Grievant's vacation bank could be characterized as "discipline," the City had just cause, regardless whether the City's action is evaluated under the 7-factor Daugherty test or the more abbreviated

two-factor test. Grievant was well aware that the Directive required full vaccination by October 18, 2021 as a qualification of employment or he would be terminated. The Directive was a reasonable health and safety measure. Grievant received his vaccination only on October 15, 2021. In anticipation of a vote on a tentatively-agreed MOU, the City granted 50 hours of paid administrative leave to Grievant and other police department employees who had timely submitted exemption and accommodation requests but were not fully vaccinated by October 18, 2021. The City Administrator informed Grievant of the MOU and this possibility, and he admitted to being aware of it. The same payroll adjustment applied to Grievant as to other police department employees who, like Grievant, had been placed on paid administrative leave in anticipation of the MOU's ratification. He was made aware of the payroll adjustment on December 2, 2021 by the City's payroll officer, who informed him that 50 hours would be charged against his vacation, and he did not protest or in any way inform her that he believed the City could not do so. The City's decision to debit 50 hours from Grievant's and other police department employees' vacation time was fair, because under the City's Personnel Policies, Grievant did not qualify for administrative leave, and he could not use sick leave because he was not sick, and he does not argue otherwise. He was paid in full for the 50 hours he did not work, so he was not injured or adversely effected.

The City concludes that dislike of the Directive is no substitute for the requirement to have a good faith basis for a grievance. In this case, the Association's opposition and grievance is particularly meritless. The matter is not arbitrable. Alternatively, on the merits it should be denied.

Association Reply

In summary, the Association points out that, after the grievance was filed, there is no record of a concern regarding the authority of the Association's ability to move and grieve the matter. There was no issue raised as to timeliness raised by the City in its response filed on the 23rd of December 2021. And there is no record, or reference set out within the Step 2 denial or the transmittal email that the City questioned the timeliness or the Association's authority to move forward. There is no record, or reference set out within the Step 2 denial or the transmittal email that the City questioned the authority or the Association's authority to move forward.

As to Association Representative L.P.'s settlement discussions with the City, the Association President was not copied in on the emails. The Association President testified that L.P. did not have authority to resolve Grievant's grievance. There is no evidence that L.P. was provided the authority to act on behalf of the Association regarding Grievant. Nor is there any evidence that L.P. had the authority to act on behalf of the Association regarding resolving this grievance. And, there is no documentary evidence of any transfer of any vacation time to the other grieving Officer before the 16th of February 2022. It is also clear that for the sake of argument regarding the existence of an agreement, that a meeting between the other Officer and the City Administrator was a condition required as a part of any potential agreement. There was no such meeting prior to the 16th of February 2022.

Nineteen days after the Step 2 denial, on the 16th of February 2022, Alan Harvey provided timely notice to the City Administrator that pursuant to CBA article 15.4 the Grievant matter would be moving forward to Step 3, Arbitration.

The Association argues that there are no sections in the CBA which indicate that there are requirements for the Snoqualmie Police Association to comport with any set rules for their organization. In summary if the City wished to bargain for such issues the City should have done so in relation to the CBA for 2019 to 2021. The City's analysis in their opening brief at sections II A 1- A4 (page. 17-page.26 of the City's Opening brief) are entirely misplaced and are supported by no known relevant case that has been applied to a labor organization in the State of Washington with respect to attacking the labor entity's authority to protect members. The first CBA Article cited by the City is Article 15.6, which is a cost provision relating to the expenses of the Arbitration and has no application to position referenced by the City as to analysis related to RCW 24.06. The City referenced Article 15.8, which actually limits the authority of the arbitrator to address issues raised by the parties and has no reference to RCW 24.06. Third, the City referenced Article 15.9 which actually provides the arbitrator an accurate statement of the state of the law, as the arbitrator can't violate existing law. Again, there is nothing relating to the scope of addressing substantive issues outside of the legal issues outside of the CBA. Specifically, there are no specific references in the language which allow for the Arbitrator to address issues relating to RCW 24.06. There are no references to RCW 24.06 in any Article in the CBA.

Not one Court case cited by the City relates to an application or reference to an arbitrator's authority to apply any section of RCW Chapter 24.06 in the scope of an arbitration decision. Not a single one of those cases could be located as having had been cited in any Washington PERC decision. There was not a single reference to RCW 24.06 located in any Washington PERC decisions.

The Association argues that RCW 41.58.070 applied here. RCW 41.58.070(1)(c) provides as follows in whole:

> "Disciplinary grievance" means a dispute or disagreement regarding any disciplinary action, discharge, or termination decision arising under a collective bargaining agreement covering law enforcement personnel.

RCW 41.58.070 (1)(d) provides in whole as follows:

> (d) "Grievance arbitration" means binding arbitration of a disciplinary grievance under the grievance procedures established in a collective bargaining agreement covering law enforcement personnel.

RCW 41.58.070 (2)(c) provides in whole as follows:

> (c) This section does not require any party to a collective bargaining agreement in existence on July 25, 2021, to reopen negotiations of the agreement or to apply any of the rights and responsibilities under chapter 13, Laws of 2021 unless and until the existing agreement is reopened or renegotiated by the parties or expires.

It appears that RCW 41.58.070 does apply to this matter. The CBA was opened for negations in the late summer of 2021. By operation of RCW 41.58.070 (2) this allows for application of RCW 41.58.070 procedures as to selection of arbitrators. However, RCW 41.58.070 provides no references to, or application of, RCW 24.06.There is no indication the parties intended to apply RCW 24.06 in relation to addressing issues of authority anywhere in the CBA. Further, the City has failed to demonstrate in any meaningful way how the Arbitrator has the authority pursuant to the CBA to incorporate or apply RCW 24.06.

The Association also argues that he City's argument regarding timely filing here is wholly without merit. The association has met every timeline set out in the CBA through to Step 3.

The Association further argues that there was no settlement of Grievant's matter and the facts of the matter do not support arguments at to Partial Performance or Equitable Estoppel. Regarding the cases cited by the City, in the instant case there are no applicable relevant facts to support partial performance due to the fact that there was no evidence of any performance. Further, there was no completed negotiation. There was a clear need for a meeting between the other grieving Officer and the City Administrator that did not occur. Further, there is zero evidence in the record that the City did anything between the 7th of February and the 15th of February to provide that other Officer with any vacation time in line with the open negotiations that appeared to be continuing in the matter. The offer and pre condition of a meeting with the other Officer was not yet complete. It doesn't event appear there was a meeting of the minds yet due to no meeting occurring between that other Officer and the City Administrator.

No meeting of the minds could occur as it was clear that L.P. had no actual authority to engage in negotiations with the City Administrator regarding Grievant's matter, and the City Administrator had no evidence to reasonably relay on negotiations where the Interim Association President had never been involved up to that point.

The Association argues that accord and satisfaction would fail as well under the above analysis.

Concerning equitable estoppel, the Association sets out the elements and argues that in the instant case again there is no reliance on or act in reliance by the City. There was a pre-condition of meeting with the other grieving Officer. And there is also a "good faith" component to equitable estoppel. Equitable estoppel prevents a party from taking a position inconsistent with a previous one where inequitable consequences would result to a party who had justifiably and in good faith relied." Silverstreak, Inc. v. Washington State Dept. of Labor and Industries, 159 Wash.2d 868, 887 (Wash., 2007). In the instant case this is questionable in the least as the City Administrator had not been informed by the Association that L.P. had actual authority to negotiate as to Grievant's matters. The City's arguments regarding a settlement of Grievant's matter are without merit.

The Association respectfully requests that the Arbitrator find that the grievance should be granted and the above requested remedies be granted.

City Reply

In summary, the City replies and argues that the grievance should be dismissed because the Arbitration Request was never authorized, and because the Association previously settled it. The City's full argument on these two issues is contained in its Post-Hearing Brief. The Association's glaring omission of any response to these two dispositive issues confirms the simple fact that the grievance, made by an unauthorized party, and previously settled in writing, is not arbitrable and must be dismissed. The Association's failure to even address these issues, let alone provide any counterargument, must be treated as a concession of their validity.

The City also argues that the City's decision was administrative, not disciplinary. The evidence admitted during the hearing conclusively established that the City's decision was administrative, and not disciplinary. The Association's Brief admits that there was neither an investigation of any misconduct by Grievant, nor any proof or evidence of any misconduct. That is because there was no reason to discipline Grievant, described as one of the best officers we have. Grievant testified that he was never told by anyone at the City that he was being disciplined. Grievant was never subject to any discipline. The Association's conclusory statement that "[t]he act of taking the vacation bank hours was in effect a disciplinary act") does not make it so, and neither the Association Brief, nor the hearing testimony provide any evidence of either an act or omission by Grievant that required discipline, or of any disciplinary process undertaken, or that he was disciplined, or of any actual discipline imposed. After Grievant emailed that he had tested positive for Covid on July 15, 2021, in reply, the City Administrator sent him a medical exemption form to fill out that, once fully completed, would qualify Grievant for a medical exemption and accommodation, enabling him to continue working. If Grievant was being disciplined for misconduct, the City would not have gone to such lengths to get him back to work.

In reply to the Association contention that Grievant was suspended, the City argues that per City Personnel Police 7.2.21(C)(1), "a suspension is time off without pay for disciplinary reasons." Here, Grievant was paid for the 50 hours he did not work. And the personnel policy indicates that a suspension is "the most severe form of discipline. . . short of termination," that is "administered as a result of a severe infraction of rules, standards, or after an employee has received a written warning and has made no progress towards improved performance." This clearly did not happen to Grievant.

The City also argues that the Association argument that the time off should be coded as sick leave is based on two mischaracterizations. First, while time needed for an employee to go and receive a COVID-19 vaccine itself would qualify as "preventative medical care," Grievant's 5 days off were not. He testified to zero medical care received during the 5 days off, let alone preventative care. The time was needed in order for him to qualify as "fully vaccinated." Second, his time off was also not "forced quarantine." Quarantine is defined as a period during which an individual who was exposed to a disease needs to stay away from others. Neither Grievant nor the Union have alleged in the grievance, or otherwise, that Grievant was "exposed to a disease" or that he was instructed to stay home because of his exposure to COVID-19. The reason he was told not to work October 18th was because of Grievant's late vaccination that did not allow 14 days for him to become "fully vaccinated" by the Directive deadline.

The City had initially coded Grievant's leave as "administrative" leave based on the tentatively-agreed MOU. The City administratively changed the leave coding to "vacation" only after Association members voted to reject the MOU. This was clearly an administrative decision, not a disciplinary one. Grievant is not now (nor was he) entitled to claim sick leave for his 5 days off.

The City argues the grievance is not timely. The Association also argues that Interim City Administrator's direction that Grievant stay home from work because he was not fully vaccinated was "disciplinary." But if the Association is grieving the direction to stay home from work, the grievance is too late. Grievant was directed to stay home on October 18, 2021. He did not submit his Step 1 grievance until December 8, 2021, well after the CBA's 10-day deadline for submitting a Step 1 grievance.

The City also argues that the administrative decision to change the pay coding of the 50 hours from "administrative" to "vacation," and to debit corresponding hours from Grievant's vacation bank, was authorized, reasonable and justified. Snoqualmie operates as a "noncharter code city, utilizing the "mayor / council" form of government provided by Chapter 35A.12 of the Revised Code of Washington. The Mayor had the authority to direct City subordinate payroll staff as to the appropriate coding of leave accruals to be used to pay a City employee like Grievant, including particularly the initial coding of the 50 hours as "administrative" subsequent to the City Council's approval of the Memorandum of Understanding. The same statute that empowers the Mayor also empowered the City Administrator. His duties include approving timesheets and leave usage. And the City Administrator has express legal authority to recover prior overpayments to employees by making deductions (debits) from subsequent wage payments. See RCW 49.48.200. That is exactly what occurred here. The above-cited statutes and City Council approval of the tentatively-agreed MOU provided the interim City Administrator ample legal authority to direct Grievant not to work until he became "fully vaccinated," and to both authorize the initial 50 hours' payment via administrative leave as well as to direct the change in pay coding to "vacation" and debit his vacation accrual.

The City further argues that the change of pay coding from "administrative" to "vacation" was reasonable and justified. The Association fails to mention that while Grievant claimed to have tested positive for Covid on July 15, he refused to provide the City any proof of this positive test when asked to do so as part of a medical exemption/accommodation request. And he never provided a doctor's note to prove that he had been infected with Covid on July 15th, when he was informed this was required. The City bent over backwards to treat employees fairly. It negotiated an MOU in good faith. The City paid Grievant those 5 days in good faith, based on the tentatively-agreed MOU and following City Council approval of it, because it was the end of the month and payroll decisions had to be made in advance in order to timely pay employees. The Association chose to "look a gift horse in the mouth" and rejected the MOU. In the absence of any other qualifying leave, there is no basis for awarding Grievant payment via sick leave.

The City argues that even if the just cause standard were to apply, there was just cause for the City's decision. As to notice of consequences; a) The Vaccination Directive clearly stated that individuals who failed to get fully vaccinated by the Directive deadline, and who were not granted a religious or medical exemption, "will no longer be able to work for the City".

c) When Grievant was instructed on October 18 that he would not be able to work until October 29 because he was not fully vaccinated, he was informed in the same email that the Association and the City had reached a tentative MOU on the impacts of the directive, including paid administrative leave, and he was encouraged to contact his Union leadership with questions. d) On October 25, 2021, the Union submitted the MOU to a vote of the general membership, which at the time included Grievant, and it was voted down. e) On December 2, 2021, after the Association failed to ratify the MOU, Grievant was informed by the City's payroll officer that 50 hours that had been coded as administrative leave, would be coded as vacation leave. Grievant was well-apprised that the 5 days of administrative leave would be available only as a result of the MOU, so he was also on notice that, if the MOU were not approved, the 5 days of paid administrative leave would not be available. Any claim of lack of sufficient notice by the City to Grievant is meritless.

Further, the Association's meritless "lack of notice" argument obscures the fact that the reason the City re-coded 50 hours of Grievant's administrative leave into 50 hours of vacation leave was that the Association general membership voted down a tentatively agreed MOU that would have given Grievant and other union members. The resultant need to recode administrative leave as vacation leave resulted solely from the Association and its members – including Grievant – and not the City. At no time material herein did he apply for sick leave under Article 10.04 of the CBA.

The City request that the grievance be dismissed as not arbitrable. If the merits are reached, it should be denied.

DISCUSSION

The nature of this grievance arbitration was discussed on the record by the Parties at the hearing. They disagreed whether this case involved discipline under RWC 41.58.070. They did agree that if I found this case is not disciplinary then I would consider the remaining issues as to the provisions of the CBA as payroll. I will first address this foundational issue of whether Grievant was disciplined.

A disciplinary grievance under RCW 41.58.070(1)(c) is defined as:

> "Disciplinary grievance" means a dispute or disagreement regarding any disciplinary action, discharge, or termination decision arising under a collective bargaining agreement covering law enforcement personnel.

RCW 41.58.070 (1)(d) provides:

> "Grievance arbitration" means binding arbitration of a disciplinary grievance under the grievance procedures established in a collective bargaining agreement covering law enforcement personnel.

The dispute or disagreement about discipline here it twofold. First, it is disputed whether there was discipline at all. Secondly, it is disputed if any such discipline was for just cause under the Parties' CBA.[4] The CBA contains just cause for discipline provisions in Article 14.1 and Article 16.1.

The basic facts are that On October 18, 2021 the City directed Grievant not to work until October 29, 2021, and originally coded 50 hours as administrative leave, because he was not yet fully vaccinated by October 18th. Grievant was paid for the 50 hours but had not worked during that time. When the MOU between the Parties was not ratified by the Association, the City recoded his time to eliminate the administrative leave while debiting his vacation leave 50 hours. The Association argues that the order not to come to work and placing Grievant on leave for failing to follow the vaccine directive was a disciplinary act, as was debiting 50 hours from his vacation leave. The City maintains this was an administrative payroll matter, not disciplinary.

I am persuaded that this was not a disciplinary action by the City and that Grievant was not disciplined by the directive not to work until October 29th or by recoding the 50 hours to debit his vacation time.

The reason Grievant was ordered not to work was because he had not been fully vaccinated by the October 18th deadline set by the City Directive. He had been vaccinated October 15th, and was still in the period after that to become fully vaccinated. Having had Covid on July 15, 2021, he could not be vaccinated for 90 days after that. Being fully vaccinated under the City Directive was required to maintain employment with the City. Grievant did not received either a religious or medical exemption or accommodation. He was not ordered to not work due to any other action as a Law Enforcement Officer for the City. There were no alleged actions of misconduct on his part. No misconduct on his part is in the record for the City to have a disciplinary interest.

There were no disciplinary allegations or actions taken against Grievant. Neither the Chief of Police nor anyone else charged him with any disciplinary offense. No investigation was made into as to any disciplinary interest the City may have had with his conduct. It had no disciplinary interest in any of his conduct. There was no meeting or hearing for Grievant to present his position on any disciplinary matter. No formal or informal discipline document was produced. He received no verbal or written warnings, and there was no plan of improvement. He was not suspended, dismissed or demoted. He was not put on administrative leave under City Policy 7.2.2 because there was no investigation or administrative proceeding underway. The only reason his paystub had been coded originally with administrative leave was on the City Assumption that the Association would agree to the MOU which provided for that leave. His record as a City Officer, one of the best Officers the City had, was not considered in either the original or in the recoding of the 50 hours, nor in the City Administrator's directive that he not work until October 29th. No one from the City ever indicated to Grievant that he was being disciplined for anything. He was paid for the hours he did not work, although the Parities disagree on how that was later accounted for.

[4] Assuming the grievance is otherwise arbitrable.

No hallmark or characteristic of discipline appear in this case. There are disputes about vacation and sick leave, but those types of disputes are common and most often do not involve discipline - particularly here.

Contrary to the Association argument that Grievant was ordered to stay home, he was not. He was only ordered not to work. Similarly, he was not quarantined. And, he actually did not receive preventative medical care between October 18th and October 29th in that he had already been vaccinated on October 15th. He did not get vaccinated after that. Even if merely waiting out the time after receiving the vaccination and being fully vaccinated could be considered preventive care for sick leave[5], this still does not indicate there is anything disciplinary about it. The City Directive of August 19, 2021 for the vaccination directive was clear that as a qualification of employment, all City employees are required to be fully vaccinated by October 18, 2021. He did not apply for sick leave or produce a doctor's note in seeking a medical accommodation under the City Directive – which the City suggested he apply for after he informed the City he had been vaccinated on October 15th.

Because there was no discipline in this case it is not necessary to analyze whether there was just cause for discipline.

There remains the issue of whether the City actions regarding debiting the 50 hours as vacation time was a violation of the CBA. However, there are issues of arbitrability that must be answered first.

The City maintains that the grievance is not arbitrable because it was settled and because there was no authority for the Association to file the grievance or Arbitrator Request.

The City maintains that this grievance was settled when the City and Association Representative L.P. agreed that the City would recode sick leave hours to vacation hours for another grieving Officer who had a similar grievance to that here. In exchange the Representative agreed to drop the grievance of Grievant herein. The City argues that the settlement is in writing from the emails and is further supported by the principles of accord and satisfaction, partial performance, and equitable estoppel.

By email of February 10, 2021 the City informed the Representative that it agreed with the Representative's suggested settlement for the two grievances by removing 50 hours of sick leave from the other Officer's bank and moving it to his vacation bank, and acknowledge the Grievant's grievance is dropped. This settlement was after Grievant had left employment with the City, was no longer in the Association, and had begun working in a different City. On February 11, 2021 the Representative emailed the City Administrator that the other Officer and the unit have approved this settlement agreement. The City Administrator responded to the effect that this is resolved, and would have this fix addressed in the next paycheck. On February 15, 2021 the Representative emailed the City Administrator that he had talked to Grievant to let him know the FOP and Association would not be moving forward on is grievance, and that Grievant may be moving it forward on his own but that was not clear. On March 1, 2021 the Arbitrator Request was filed concerning Grievant.

[5] I do not decide this CBA issue at this juncture.

In the February 11th emails between Association Representative L.P. and the City Administrator, the Representative noted that the other Officer requested 10 minutes of the City Administrator's time, and the City Administrator responded that he would reach out to him. By the morning of February 15th they had still not connected.

On February 16, 2021 Attorney Alan Harvey emailed the City Administrator that he had been designated the point of contact in the Grievant's matter, and gave notice that the Association was moving forward to Arbitration, among other things.

The Association argues that Representative L.P. was not authorized to settle Grievant's grievance, and that the Interim Association President had not authorized it. Therefore, there was no settlement of this grievance and the arbitration should proceed to the merits.

I am persuaded that there was a valid settlement of this grievance as set out in the February emails between Association Representative L.P. and the City Administrator, and that Association Representative L.P. had authority to make the settlement. Despite the Association's claims that Representative L.P. did not have authority to settle this grievance, he had been representing the Association on collective bargaining and other labor matters during that time. He had been discussing this and the companion grievance with the City Administrator. There is nothing in the CBA which requires the Association to inform the City that Association Representatives do or do not have authority act, including settlement of grievances, on labor matters. There is no suggestion that in each and every labor matter an Association Representative must divulge to the employer the scope and nature of their authority. Such a requirement would quickly become untenable were it to exist.

It is also significant that, although the Interim Association President, who was apparently the only Executive Board member at the time, testified that he did not give L.P. the authority to settle the Grievant's grievance, the unit did approve it. Nothing in the record undermines that. This would also indicate authorization for the settlement, and the Association's agreement to the settlement of both grievances on their respective terms.

Another factor supporting the validity of the settlement and Representative L.P.'s authority to enter into it is the fact the Association does not challenge the resolution of the other grieving Officers settlement terms. It does not ask that the other Officer's time coding be changed back. If Representative L.P. did not have authority, and if the unit approval did not support the settlement agreement, then the other grievance was not settled. The terms of the other grievance were met by the City, as the payroll changers were to be made at the next check, and there is no evidence that this was not done. The other Officer's grievance has not been pursued or advanced on this record. There is no indication that the Association wanted to undo or avoid the settlement as to the other Officer. The settlement of the other Officer's grievance was clearly predicated and attached to the dropping of Grievant's grievance. The Association's acceptance of the settlement of the other Officer's grievance is an indication that the instant grievance was also settled at that time.

It is not persuasive that there was some type of condition on the settlement concerning the other Officer communicating with the City Administrator. That was not made a condition of the settlement, and the reason the other Officer had to communicate with the City Administrator is not in the record. If it were a condition of settlement, it might be expected the Association would have presented some evidence of that. It did not.

It is also not persuasive that, as claimed by Association, there were additional sick leave bank transfers from other Association members to the other Officer's sick leave bank that were part of the settlement but not yet performed. This would show there was no completed settlement. But such transfers from others was not part of the exchange between the City Administrator and Representative L.P. or what the unit had approved. The discussion of leave transfers from others came up some time, if not some months, later and there is nothing in the record which ties that to the settlement. And, under Article 11.9 of the CBA, sick leave transfers are by City resolution. Thus, there is a contractual vehicle other than a grievance settlement for the other Officer and the Association to attempt to obtain that type of transfer.

Only the Association can advance a grievance to arbitration under Article 15.4 of the CBA. Once this grievance was settled, whether Grievant wanted to arbitrate it or not, he cannot advance it to arbitration. Even if he did not agree with it, the Association settled his grievance. It cannot now advance it to arbitration on the merits. The grievance is not arbitrable on the merits.

Having found the grievance was settled and is not arbitrable on the merits, the other arguments of the City as to arbitrability need not be addressed.

Accordingly, based on the facts and arguments of the Parties, I issue my

DECISION AND AWARD

1. The Grievant was not disciplined and the grievance is not arbitrable on the merits.

2. The grievance is denied and dismissed.

Dated this 19th day of October, 2022 in Fuquay Varina, North Carolina.

/S/ Paul Gordon
Paul Gordon, Arbitrator