OPINION AND AWARD

In the Matter of the	)	FMCS No. 231115-01165
Arbitration Between:	)	GR-221108-VTUT (McMahon Insurance)
	)	GR-211129-XUSR (McMahon Docking)
ILLINOIS FRATERNAL ORDER	)	GR-221006-RYEV (McMahon 1-day)
OF POLICE LABOR COUNCIL	)	GR-221006-BBHF (Torres 1-day)
	)	GR-230705-GEMX (McMahon 2-day)
and	)	GR-21118-NHGE (McMahon Comp.)
	)	GR-211202-RDXM (McMahon Comp.)
VILLAGE OF BROADVIEW	)	GR-211206-HWBY (McMahon Comp.)

Before James Q. Brennwald, Arbitrator

Date of Award: February 5, 2024

Award Summary: (1) The Village violated Section 24.5 of the CBA by charging Officer McMahon more than $400 per month in health insurance contributions. Grievance No. GR-221108-VTUT is sustained.

(2) The Village had just cause to impose each of the disciplinary actions at issue: the docking of one day's pay from Officer McMahon's paycheck for his violation of the COVID policy on November 22, 2021 (Grievance No. GR-211129-XUSR); the one-day suspension given to Officer McMahon for his violation of the COVID policy on September 4, 2022 (Grievance No. GR-221006-RYEV); the one-day suspension given to Officer Torres for his violation of the COVID policy on September 22, 2022 (Grievance No. GR-221006-BBHF); and the two-day suspension given to Officer McMahon for his violation of the Body Worn Video Recording Policy on May 8, 2023 (Grievance No. GR-230705-GEMX). Each of those four grievances is denied.

(3) The Village did not violate the CBA by failing to compensate Officer McMahon for time spent testing for COVID-19. Grievance Nos. GR-21118-NHGE, GR-211202-RDXM and GR-211206-HWBY are denied.

Appearances: For the Union: Jeffery Burke
Kimkea Harris
Attorneys

For the Village: Kevin P. Camden
Camden Law Office, LLC
Brian Miller
Del Gado Law Group

I. INTRODUCTION

In accordance with the terms of their collective bargaining agreement ("the CBA"), the Illinois Fraternal Order of Police Labor Council ("the Union") and the Village of Broadview ("the Village") selected the undersigned to decide the captioned disputes involving Village Police Officers Neil McMahon and Mark Torres. A hearing was conducted at the Village's offices on October 19, 2023. At hearing, both parties were granted full opportunity to present evidence and argument in support of their positions. On December 15, 2023, the parties submitted post-hearing briefs in electronic form, the briefs were exchanged by the undersigned via email, and the record was closed.

II. ISSUES

At hearing, the parties stipulated to the following statement of the issues to be decided:

(1) For Grievance Nos. GR-221006-RYEV, GR-230705-GEMX, GR-211129-XUSR and GR-221006-BBHF:

Did the Village have just cause to discipline the Grievant? If not, what shall the remedy be?

(2) For Grievance Nos. GR-21118-NHGE, GR-211202-RDXM and GR-211206-HWBY:

Did the Village violate the CBA by failing to compensate the Grievant for time spent testing for COVID-19? If so, what shall the

remedy be?

(3) For Grievance No. GR-221108-VTUT:

Whether the Village violated the CBA by charging more than the cap that is in the contract? If so, what is the remedy?[1]

III. RELEVANT CBA PROVISIONS[2]

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ARTICLE 12 – EMPLOYEE SECURITY

Section 12.1 Just Cause Standard
No non-probationary Officer covered by this Agreement shall be suspended, relieved from duty, disciplined in any trimmer or separated without just cause.

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ARTICLE 24 INSURANCE

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Section 24.5 Employee Contribution
There will be 24 pay periods per year. Officer contributions shall be deducted on a pre-tax basis and shall be as follows: Officers shall pay 12.5% of the premium effective May 1, 2020; 14% effective May 1, 2021; and 15.0% effective May 1, 2023 for the health and dental plan in which they are enrolled (HMO, PPO etc.): however, the Officer's premium contributions shall be capped at four hundred ($400.00) per month.

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ARTICLE 28 WORK SCHEDULE AND OVERTIME

Section 28.1 Work Period

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[1] Transcript of hearing ("Tr.") at pp. 10-11.

[2] Joint Exhibit ("JX") 2: the parties' May 1, 2020 to April 30, 2024 CBA.

For Officer's assigned to work an eight-hour shift, the normal work period shall be a forty-hour (40) work week. For Officer's assigned to work a twelve-hour shift, the normal work period shall be a forty-two hour (42) workweek. The normal work period shall not consist of more than 84 hours per 14.day (2 week) work cycle. The twelve (12) hour shift system creates an 84 hour work cycle every 14 days (2 weeks). This four hour "overage" every 2 weeks (12 hours in 6 weeks) shall be alleviated in one of two ways: (a) one work day every 14 days (2 weeks) will be converted to an eight (8) hour day, or Kelly day system will be implemented where each officer will be given one twelve-hour (12) day off every 6 weeks to place the officer's hours worked at forty-hour/per week average. Each officer working a twelve (12) hour shift shall be allowed on sixty (60) minute lunch and one thirty (30) minute break. The work breaks are designed to be taken individually and not connected together. Breaks will continue to be assigned at the discretion of the Watch Commander.

<u>Section 28.2 Overtime Pay</u>
Officers assigned to work an eight-hour shift schedule shall be compensated at the rate of one and one-half times their normal hourly rate of pay for all hours worked in excess of forty hours per week. Compensatory time shall count towards the forty hours necessary to receive overtime pay.

Officers assigned to work a twelve-hour (12) shift schedule shall be compensated at the rate of one and one-half times their hourly rate. This compensation shall begin at any hours worked in excess or twelve hours per work day or in excess or eighty-four (84) hours per fourteen-day (two week) work cycle.

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IV. FACTUAL BACKGROUND

<u>The CBA</u>

The parties' CBA covers a bargaining unit of approximately 13 full-time sworn Village police officers below the rank of Sergeant. The CBA previously in effect had a

stated term of May 1, 2019 through April 30, 2020.[3] However, by the terms of Section 33.2, the 2019-2020 CBA remained in full force and effect after the stated April 30, 2020 expiration date, while the parties engaged in bargaining for a successor agreement. In those negotiations for a successor agreement, the parties eventually reached a bargaining impasse on four issues, one of which was the percentage contribution to be paid by officers for group health insurance coverage. In accordance with the requirements of the Illinois Public Labor Relations Act, the parties convened an interest arbitration proceeding to resolve their impasse. A hearing was conducted before Arbitrator Cary Morgen on December 7, 2022. On March 19, 2023, Arbitrator Morgen issued his Opinion and Award resolving all four impasse issues.[4]

After Arbitrator Morgen's award was issued, the parties prepared a final draft of the new CBA. Their final draft incorporated the changes from the previous CBA awarded by Arbitrator Morgen, as well as changes agreed to by the parties at the bargaining table. The new CBA was signed by the Union's representatives on May 23, 2023, and by the Village's on June 26, 2023.[5] That CBA remains in effect, with a stated term of May 1, 2020 to April 30, 2024.

<u>The Village's COVID Policy</u>

The COVID-19 pandemic reached the level of a national health emergency in the United States in March of 2020. In a cover memo to Village staff from Village

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[3] JX 1.

[4] JX 19.

[5] JX 2.

Administrator LeTisa Jones dated October 11, 2021, the Village announced a mandatory COVID-19 vaccination policy.[6] Accompanying the memo were a five-page policy, and a three-page "Frequently Asked Questions" document.[7] The policy included a statement that "Employees must attest to their vaccination status by October 29th and provide proof of vaccination to Human Resources by submitting their CDC COVID-19 Vaccination Record Card."[8] Part XIII of the policy put employees on notice that compliance with the policy was a condition of employment, and that failure to follow its terms could subject employees to discipline up to termination of employment.[9]

In her cover memo, Ms. Jones stated that employees and others working on Village premises "must comply with one of the following: Copy of vaccination card [or] Accommodation letter (as it relates to medical and/or religion)." The memo further notified employees: "If you are not vaccinated and/or your accommodation letter is not approved, weekly testing is mandatory." The memo concluded with the instruction: "If anyone has questions concerning this important matter, contact LeTisa Jones, Village Adminstrator." Ms. Jones' telephone number was provided in the memo.

On October 12, 2021, Union Field Representative Bruce Wisniewski sent an email to an attorney for the Village, Julie Diemer, regarding ongoing negotiations for a successor CBA. He also wrote in his email that the Union would be sending the Village a demand to bargain over the COVID policy, and proposed several October dates for a meeting. Within a half hour, Ms. Diemer replied that she would be handling the effects

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[6] JX 11, p. 3.

[7] JX 11, pp. 4-11.

[8] JX 11, p. 6.

[9] JX 11, p. 7.

bargaining for the Village.[10] On October 15, Mr. Wisniewski sent to Village Mayor Katrina Thompson the Union's formal demand to bargain over the impact of the COVID policy.[11] On October 19, Mr. Wisniewski sent a follow-up email to Ms. Diemer seeking to schedule a bargaining session regarding the COVID policy. He sent her another email on October 27 stating that the Village had not responded to the Union's request to bargain, and demanding that the Village not implement the policy until negotiations were concluded.[12]

On November 2, 2021, Ms. Jones issued a follow-up memo stating that, in light of a ruling of the Circuit Court of Cook County in a case involving the City of Chicago, the Village had decided to delay enforcement of the vaccination requirement until December 31, 2021.[13] However, the memo stated the following regarding the weekly testing requirement:

> Despite the delayed enforcement of the vaccination policy, the Village is requiring all non-vaccinated employees to provide proof of a negative COVID-19 test once a week. Non-vaccinated employees must submit to a test at least 15 minutes before the start of his or her shift. If an employee fails to submit a negative test result or submit to an on-site test at least 15 minutes before the start of the employee's shift, the employee will be sent home and not allowed to work.
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> Weekly testing is mandatory for all non-vaccinated employees. Failure to comply with this directive and the Village's Policy may result in disciplinary action up to and including termination.

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[10] Union Exhibit ("UX") 13.

[11] JX 12.

[12] UX 13.

[13] JX 11, p. 1.

The memo provided a list of three testing facilities in the area, with addresses and hours of operation, noting that the list was provided only for employees' convenience, and that their testing options were not limited to those facilities. As she did in her October 11, 2021 memo, Ms. Jones concluded the November 2 memo with an instruction to contact her "[i]f anyone has questions concerning this important matter."

On November 5, 2021, Mr. Wisniewski emailed Ms. Diemer again, referencing his prior communications and Ms. Jones' November 2 memo, and requesting that she provide dates when the Village would be able to meet regarding the COVID policy.[14] Mr. Wisniewski testified that he never heard from Ms. Diemer regarding the COVID policy after her October 12 email reply.[15]

On November 10, 2021, Police Department Deputy Chief Pierre Smith sent an email to staff, with the subject line "Covid-19 testing," stating that the Department "will not pay overtime" for employees to be tested, and that "all unvaccinated employees will be tested once a week 15 minutes prior to the start of your shift on your own time."[16] The email went on to state:

> Moving forward, any employee that is unvaccinated must provide proof of a negative Covid-19 test prior to their shift or they will be sent home in a no pay status. The memo dated November 2, 2021 provided several locations and times to get tested. It is the unvaccinated employees responsibility to do just that prior to the start of their shift. The trailer located at the Broadview FD is a courtesy for your convenience.

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[14] UX 13.

[15] Tr. 31.

[16] JX 16.

The Six COVID Policy-Related Grievances

1. The Five Grievances Filed on Behalf of Officer McMahon

Officer Neil McMahon has been a police officer for the Village for ten years. He also served as a member of the Union's bargaining team during negotiations for both the current and the previous CBA. Six of the eight grievances at issue pertained to the Village's implementation of its COVID policy, and five of those grievances were filed by the Union on behalf of Officer McMahon. On November 15, 2021, the Union submitted Grievance No. GR-21118-NHGE, claiming Officer McMahon was improperly denied pay owed to him for time spent outside his regular working hours that day complying with the weekly COVID testing requirement.[17] In Grievance No. GR-211202-RDXM, the same claim was made for Officer McMahon's testing time on November 22, 2021.[18] Also on November 22, 2021, Officer McMahon was not allowed to work his scheduled tour of duty because he did not have his negative COVD test result in hand prior to the beginning of his shift. After learning that he would not be paid for the missed shift, the Union challenged the Village's action by filing Grievance No. GR-211129-XUSR on November 29, 2021.[19]

On December 1, 2021, the Union filed Grievance No. GR-211206-HWBY, claiming pay for Officer McMahon for his COVID testing time on that day.[20] Ten months later, on October 6, 2022, Officer McMahon was given a one-day suspension

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[17] JX 4.

[18] JX 5.

[19] JX 3.

[20] JX 6.

for violating the COVID policy by failing to submit a negative COVID test prior to his September 4, 2022 shift.[21] The Union challenged the suspension by filing Grievance No. GR-221006-RYEV on October 6, 2022.[22]

2. The Grievance on Behalf of Officer Torres

Mark Torres was an officer for the Village from October 2012 until April 17, 2023. On October 4, 2022, Officer Torres received a one-day suspension for failing to submit a negative COVID test prior to his September 22, 2022 shift.[23] The Union challenged the suspension by filing Grievance No. GR-221006-BBHF on October 6, 2022.[24]

The Health Insurance Contribution Grievance

A completely different issue was raised by Grievance No. GR-221108-VTUT, filed by the Union on Officer McMahon's behalf on November 9, 2022.[25] In that grievance, the Union alleged that the Village violated the CBA by requiring Officer McMahon to pay health insurance premium contribution amounts that exceeded the $400 per month cap specified in Section 24.5.

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[21] Village Exhibit ("VX") N.

[22] JX 8.

[23] VX K and M.

[24] JX 7.

[25] JX 9.

The Grievance Regarding Officer McMahon's Two-Day Suspension

Finally, on July 6, 2023, the Union filed Grievance No. GR-230705-GEMX, challenging a two-day suspension that was given to Officer McMahon on June 29, 2023 for violating the Police Department's Body Worn Video Recording Policy on May 8, 2023.[26]

The parties were unable to resolve the eight grievances through the grievance procedure, and agreed to combine them for hearing and decision through this proceeding.

V. THE PARTIES' ARGUMENTS

The Union

The Union takes the position that all eight of its grievances should be sustained, and Officers McMahon and Torres made whole. First, under the plain language of Section 24.5 of the CBA, an officer cannot be required to contribute more than $400 per month in insurance premium contributions. Even though the Union had filed a grievance challenging the Village's practice of charging officers more than $400 per month, the Village did not propose raising the cap prior to the December 7, 2022 interest arbitration hearing, and the Arbitrator therefore did not award any change to the cap in his March 19, 2023 award. The Village has clearly violated Section 24.5 by continuing to charge bargaining unit employees more than $400 per month.

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[26] JX 10; VX R.

Second, all of the discipline grievances should be sustained because they arose out of alleged violations of the Village's COVID policy, and the Village failed and refused to bargain with the Union over the policy. The Village's unilateral implementation of the policy was a violation of the Union's right to bargain. The October 11, 2021 policy and cover memo were inconsistent and confusing, and raised more questions than they answered. Citing a 2023 Recommended Decision and Order by an Administrative Law Judge for the Illinois Labor Relations Board pertaining to a City of Chicago COVID policy, the Union maintains that a make whole order is the proper remedy for employees who were adversely affected by the Village's refusal to bargain over its COVID policy.

Specific to Officer Torres, the Union further argues that his one-day suspension was without just cause because he reasonably relied on the representation of his supervisor, Sergeant Grzymkowska, that he did not need to provide a negative COVID test before he reported to work on the day in question. Sergeant Grzymkowska acknowledged her mistake, and it was the only time the Grievant had ever reported to work without providing a required negative test. The discipline was wholly unwarranted.

The Union contends that, although the Village may not refer to it as a disciplinary suspension, that was the effect of its decision to send Officer McMahon home from work without pay on November 22, 2021 because he had not yet received his result from the COVID testing station. He lost a day's pay for an alleged violation of the Village's unlawful COVID policy. The Village failed to meet its burden of proving that it had just cause for the suspension. Officer McMahon was not allowed to return to work after he received the test result. Bargaining unit members had no control over when their results would be provided to them. Delays in getting test results were routine, and could arise from unpredictable variables such as test facility staffing shortages or a significant number of individuals getting tested at the same time. The Village elected not to negotiate

with the Union over such issues, and instead simply doled out suspensions.

Officer McMahon's October 2022 one-day suspension was also unsupported by just cause because it was unwarranted and unduly harsh. He made the mistake of being off by one day in calculating the due date of his next COVID test, at a time when the Village was about to rescind the policy. As was the case with Officer Torres, his miscalculation by one day did not result in any identifiable harm to the Village. At a minimum, the suspension should have been reduced during the grievance procedure, after the rescission of the policy, when there was no longer any reason to enforce vigilance in complying with the policy. Regarding Officer McMahon's unrelated July 2023 two-day suspension, the Union argues that, although Officer McMahon acknowledges that he failed to activate his BWC, the penalty was unduly harsh. His oversight was a minor one, and the two-day suspension was based on the previous one-day which was issued without just cause. No suspension at all was warranted for this first offense minor infraction.

Regarding the final three grievances, the Union argues that, had the Village complied with its legal obligation to bargain with the Union over its implementation of the COVID policy, there would have been clearer direction to employees with respect to, among other things, who was required to submit to testing, when testing was to be done, and whether employees would be compensated for time spent getting tested outside of working hours. The actual time Officer McMahon spent getting tested was far greater than the fifteen-minute blocks he requested for each of the three dates at issue: November 15 and 22 and December 1, 2021. When the COVID policy was implemented, Officer McMahon rightly believed that he should be compensated for the pre-shift time he was going to spend testing for COVID. There is no question that an employer must pay employees for time they spend in its service. Under the CBA, employees are to be paid

an hourly rate, including overtime for hours worked in excess of their schedule. Although Officer McMahon In addition, Officer McMahon informed the Department in writing, on February 11, 2021, that he had received a first dose of the vaccine, and he received his second vaccination shot in early March of 2021, by November of 2021, the effectiveness of his vaccination had waned to the extent that it was reasonable for him to follow the Village's policy as an unvaccinated employee. The tests were consistent with the Village policy and to the Village's benefit. The Village violated the CBA when it refused to compensate Officer McMahon for the three days he requested.

The Village

It is the Village's position that it had just cause to deny each of the eight grievances. Its COVID policy was validly enacted by the Village Board, in accordance with its express managerial rights under Article 5 of the CBA, for the purpose of protecting the health and safety of Village employee, and in response to a nationwide emergency. Similar vaccination mandates in other municipalities have been upheld. The Union has never contested the Village's COVID policy, either by challenging it through the grievance procedure or by filing an unfair labor practice charge with the ILRB. The Union's failure to properly challenge the policy means that its enforcement by the Village was valid and just,

Addressing Officer McMahon's grievances, five of which pertained to the weekly testing requirement under the COVID policy, the Village first states that he repeatedly deceived the Department regarding his vaccination status. On direct examination, the Grievant testified that he was not vaccinated at the time, but on cross-examination he testified that he was. Therefore, he knew that the COVID policy did not apply to him, and his testing and overtime grievances were deceptively brought. Whether or not he had

a justifiable objection based on privacy or health concerns, the Village justly enforced its policy and Officer McMahon violated it. By his own admission, Officer McMahon intentionally misled the Village and the Department so they would believe he was unvaccinated, and then attempted to capitalize on his deceit by submitting requests for overtime for time he spent unnecessarily completing weekly COVID tests. Those requests were properly denied because they had no foundation in any Village or Department policy. The Village was also justified in disciplining him for his failure to comply with the policy as an individual who the Department reasonably believed to be unvaccinated. Officer McMahon admitted that he was aware of and failed to comply with the policy. Even if the Village's denials of his grievances were unjust, those denials must be upheld because they were founded in deceit.

Officer McMahon repeatedly violated the COVID policy, the Village asserts. He admitted multiple times in his testimony that he failed to test properly and that he knew he would not be compensated for the overtime spent testing. Even after he changed his testimony and argued that the Village knew of his vaccination status, he admitted that he failed to provide proof of his status. He also admitted that he did not seek an accommodation based upon his beliefs about the policy. Under the COVID policy, employees were required to attest to their vaccination status and provide proof.

With respect to Officer Torres's grievance, the Village states that the evidence established that, despite the requirement that he submit a test result weekly, Officer Torres's September 23, 2022 test result was obtained and submitted on the eighth day after his previous test result. He was an experienced officer who had complied with the weekly testing requirement for nearly a year at that point. He clearly knew what was required. Although he attempted to deflect blame to Sergeant Grzymkowska for his non-compliance with the policy on the day in question, he admitted that, if he had any

questions about the policy, he was to contact Village administrator Letisa Jones, and he did not do so.

The Village maintains that it properly denied the health insurance grievance because there is no $400 cap on employee contributions in the current CBA. The Village's final offer did not include a $400 cap, and nothing in the interest arbitration award mentions a $400 cap. The arbitrator examined the issue and adopted the Village's proposal to increase employee contributions.

Finally, the Village argues that it had just cause to suspend Officer McMahon for his violation of the Department's BWC policy. He admitted at hearing that his camera was in his car in the charging station as he was responding to a call for service involving a juvenile who repeatedly threatened to kill a pregnant woman and her unborn child. He also admitted that he knew that he was required to ensure that his BWC was fully charged and operational at the beginning of his tour of duty, and that he failed to do so. Chief Thomas Mills reviewed the discipline and agreed to reduce it from a three-day suspension to a two-day suspension, based on the Grievant's prior disciplinary history and the seriousness of the offense. A two-day suspension was justified under principles of progressive discipline, given Officer McMahon's multiple violations of the BWC policy, and his disciplinary history.

VI. ANALYSIS AND OPINION

As reflected in their stipulated statement of the issues raised by the eight grievances before me, the parties have presented multiple questions for decision. Following the approach taken by the Union in its brief, I will first address the health insurance contribution grievance. I will then turn to the six COVID policy-related grievances. The final issue addressed will be the question raised by the eighth and final grievance: whether the Village had just cause to suspend Officer McMahon for two days for violating the Police Department's body worn camera policy.

A. The $400 Health Insurance Contribution Cap

As the parties stipulated, the question raised by Grievance No. GR-221108-VTUT is whether the Village violated the CBA by charging more than the cap on employee contributions specified in the CBA. The Union argues that, by the plain terms of Section 24.5, employees cannot be required to pay more than $400 per month in contributions toward health care premiums. The evidence established that the Village violated Section 24.5 by requiring Officer McMahon to pay more than $400 per month. Therefore, the grievance should be granted, and Officer McMahon should be made whole.

The Union is correct. Section 24.5 plainly states four agreements by the parties. The first is that there will be 24 pay periods per year, and the second is that employee contributions toward the premiums paid by the Village for group health insurance are to be deducted on a pre-tax basis. The third agreement stated in Section 24.5 is that the amount of the contribution each officer is required to make is a designated percentage of the premium paid by the Village for the plan in which the officer has enrolled. The

parties' fourth agreement is that the officer's premium contributions "shall be capped" at $400 per month. Officer McMahon's unrebutted testimony established that, at the time the Union's grievance was filed, on November 9, 2022, the Village was deducting a total of $403.36 per month from his two monthly paychecks, based on the 12.5% contribution rate then in effect under the terms of the prior CBA.[27] Further unrebutted testimony by the Grievant established that, since May 1, 2023, the Village has been deducting more than $410 per month from his paychecks for health insurance contributions.[28] Those amounts plainly exceed the agreed $400 monthly cap.

The Village argues that there is no $400 cap in the current CBA, citing the absence of any reference to a cap in Arbitrator Morgen's March 19, 2023 interest award. It is true that Arbitrator Morgen did not address the monthly contribution cap in his award. That is because the parties did not ask him to. The evidence established that the only health insurance issue presented to Arbitrator Morgen was the Village's proposal to increase the employee contribution percentages from 12.5% to 14% in 2021 and 2022, and to 15% in 2023. Those proposals were adopted by Arbitrator Morgen. There is no evidence that either party ever made any proposal to change the monthly contribution cap, or to revise any other language in Section 24.5. Accordingly, the only change from the 2019-2020 CBA reflected in Section 24.5 of the current CBA is the increase in percentage contributions proposed by the Village and awarded by Arbitrator Morgen. All of the other language in the current Section 24.5 – pertaining to 24 pay periods, pre-tax deductions, and the $400 cap – is the same language found in the 2019-2020 contract.

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[27] Tr. 96-99 and 107-110; JX 20.

[28] Tr. 104.

As counsel for the Village pointed out at hearing, it is the language found in the CBA, and not what occurred during the interest arbitration, that controls.[29] The language of the current CBA, including Section 24.5, was drafted and reviewed by both parties, and their representatives signed off on that language in May and June of 2023. As confirmed when Section 24.5 of the current CBA was read into the record at hearing, the language agreed to by the parties quite plainly stated a $400 monthly cap on employee contributions.[30] The evidence established that the Village deducted more than $400 per month in premium contributions from Officer McMahon's pay, in violation of Section 24.5. Accordingly, Officer McMahon is entitled to be made whole for his losses. In light of the seven-day time limit for filing grievances specified in Section 10.1 of the CBA, the make whole period will begin with paychecks Officer McMahon received on or after November 2, 2022, the date seven calendar days prior to the Union's November 9, 2022 grievance.

B. The COVID Policy Issues

1. The Union's Duty to Bargain Argument

Of the remaining seven grievances, six arose out of the Village's implementation of the COVID policy in October and November of 2021: three claims by Officer McMahon that he was entitled to pay for time getting tested for COVID, and three disciplines issued for violating the policy – two to Officer McMahon, and one to Officer Torres. The Union argues that it had a right to bargain over the implementation and effects of the COVID policy, the Village refused to do so, and that the Village's refusal

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[29] Tr. 113-115.

[30] Tr. 115-116.

to bargain is an independent basis for granting each of the six grievances. The Village responds by arguing that the policy was a proper response by the Village to a national public health emergency, that it acted within its managerial authority under the CBA in implementing the policy, and that the Union never challenged the policy or its implementation through the grievance procedure or by filing an unfair labor practice charge with the ILRB.

As the Union alleges, the record reflects that, in fact, the Village never responded to the Union's demand to bargain over the impact of the Village's decision to implement the COVID policy, despite Mr. Wisniewski's several follow-up communications with the Village. The problem with the Union's argument is that it asks me to find that the Village had a duty to bargain with the Union over both the decision to issue the policy and its impact, and that the Village's failure to do so constituted an illegal refusal to bargain under the Illinois Public Labor Relations Act ("IPLRA").[31]

Interpretation and enforcement of the IPLRA is beyond the scope of my authority in this proceeding. The parties expressly agreed in Section 10.4, paragraph 3 of the CBA that an arbitrator's decision "shall be based upon the Arbitrator's interpretation of the meaning or application of the terms of this Agreement to the facts of the grievance presented." They also agreed that "[t]he Arbitrator shall only consider and make a decision with respect to the specific issue or issues presented to the Arbitrator and shall have no authority to make a decision on any other issues not so submitted." The Union does not cite to any language in the CBA that imposed on the Village a contractual obligation to bargain with the Union, or even a duty to meet and discuss the matter with the Union, before it implemented the COVID policy. Nor did the parties' stipulated

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[31] 5 ILCS 315/1, *et seq.*

statement of the issues grant me authority to interpret and apply the relevant provisions of the IPLRA. Instead, consistent with the restriction on an arbitrator's authority stated in Section 10.4, the parties specifically asked me to determine only whether there have been any violations of the CBA, including the "just cause" provision. I further note that, as a general matter, arbitrators consider refusal to bargain allegations to be outside the scope of their authority.[32]

If the Union wanted a finding that the Village committed an unfair labor practice in its implementation of the policy, and a remedy for the Village's alleged violation of the IPLRA by refusing to bargain, it was incumbent upon the Union to seek such a ruling by filing an unfair labor practice charge with the Illinois Labor Relations Board, the state agency responsible for administering and enforcing the IPLRA. By the clear terms of the parties' agreements, both in the CBA and at hearing, my function in this proceeding is limited to interpreting and applying the relevant provisions of the CBA. I will therefore not make any determinations as to whether, by implementing the COVID policy without first bargaining with the Union, the Village violated the IPLRA.

2. The Village's Right to Implement the Policy Under the CBA

The right to establish and enforce reasonable work rules is a fundamental component of an employer's managerial authority.[33] I have little trouble finding that the

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[32] See Elkouri and Elkouri, *How Arbitration Works* (BNA, 8th ed. 2016) Ch. 10.3.A.v.a, p. 10-45:

> Particularly concerning allegations of refusal to bargain, many arbitrators have taken the view that their function is to interpret and apply the agreement rather than enforce affirmative duties under the statute, and they have refused to decide whether the statutory duty to bargain had been violated.

[33] That employees are expected to obey reasonable work rules is "[p]art of the fundamental understanding between every employee and employer." Theodore J. St. Antoine, Editor, *The Common*

Village had a legitimate and compelling interest in attempting to minimize both the spread and the impact of a highly contagious and deadly virus in its workplaces, and that the Village's decision to require either proof of COVID-19 vaccination or weekly testing for infection was rationally related to that objective.[34] By the end of 2021, approximately 818,625 deaths in the United States were attributable to COVID, and it had become the third leading cause of death in the United States, behind only heart disease and cancer.[35] According to one estimate based on a later study, the administration of COVID vaccines between December 2020 and November 2022 "prevented more than 18.5 million additional hospitalizations and 3.2 million additional deaths," and also reduced the overall number of COVID infections by "nearly 120 million."[36] I find that the Village was also reasonable in its determination that regularly testing unvaccinated employees, and not allowing them to work unless they provided a weekly negative test result, was likely to reduce the risk of virus transmission in its workplaces.

I find no provision in the CBA that in any way restricted the Village's authority to issue the COVID policy, and the Union does not argue that the Village's doing so was

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Law of the Workplace (2nd ed. 2005) §6.5, comment "a," pp. 177-178.

[34] See Brand and Biren, Editors, *Discipline and Discharge in Arbitration* (2nd ed. 2008) Ch. 2.IV.A, p. 85: "Arbitrators uniformly agree that an employer has the right to establish and enforce work rules, subject to the requirement that the rule must be reasonable and rationally related to a legitimate business objective."

[35] See the November 10, 2022 report from the Peterson-Kaiser Family Foundation Health System Tracker:
https://www.healthsystemtracker.org/brief/covid-19-leading-cause-of-death-ranking/#Total%20deaths%20in%20the%20United%20States%20from%20COVID-19%20and%20other%20leading%20causes,%202020-2022.

[36] The Commonwealth Fund, December 13, 2022 blog post:
https://www.commonwealthfund.org/blog/2022/two-years-covid-vaccines-prevented-millions-deaths-hospitalizations.

itself a violation of the CBA. I also note that, in the "Safety Issues" provision of Article XVI of the CBA, the parties specifically agreed that the Village "shall take all reasonable steps to protect employees during work hours in the performance of their duties." In short, I find that the Village's decision to require vaccination or weekly testing was, on its face, an entirely reasonable exercise of its managerial authority, and its responsibility, to maintain a safe and healthy workplace. The Union does not contend otherwise.

3. Officer McMahon's COVID Policy-Related Grievances

(a) Officer McMahon's Failure to Disclose His Fully Vaccinated Status

COVID vaccines became available to emergency first responders in early 2021. The record reflects that, on February 5, 2021, Commander Thomas Kostka sent to Village Police Department staff an email stating that he was trying to keep track of who had been successful in receiving the first dose of the vaccine, because "I don't want anyone who wants the vaccination to fall through the cracks."[37] Six days later, on February 11, Officer McMahon sent a reply to Commander Kostka, stating that he had "received the first shot" on February 7.[38] Five or six weeks after that, Officer McMahon received the second dose of the vaccine.[39] However, Officer McMahon never informed the Village that he was fully vaccinated, even after the Village issued its COVID policy ten months later, and even though he understood that the policy specifically required employees to attest to their vaccination status and provide proof of vaccination, or be

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[37] UX 23.

[38] *Id*.

[39] Tr. 166.

subject to discipline.[40] Officer McMahon simply decided not to comply with the requirement that he provide proof of his vaccination status, and to instead submit to the weekly testing required of non-vaccinated employees.

Officer McMahon's deliberate concealment of the fact that he was fully vaccinated continued through his direct examination, under oath, at the hearing in this proceeding. When shown the Village's October 11, 2021 policy and asked if he was non-vaccinated at the time, and if he therefore fell under the policy's requirements for non-vaccinated employees, Officer McMahon answered "correct" to both questions.[41] It was not until cross-examination by the Village, and in follow-up testimony after being recalled by the Union on rebuttal, that Officer McMahon acknowledged that he was in fact fully vaccinated at the time the Village issued its COVID policy. On cross-examination during his testimony on rebuttal, Officer McMahon cited his concerns related to the privacy of his personal health information, and stated that he consciously chose not to comply with the requirement that he disclose his fully vaccinated status, because "I felt at that time that I should have been able to – it was my choice to let the Village know whether I was vaccinated or not."[42]

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[40] Tr. 77-82 and 167-169.

[41] Tr. 42.

[42] Tr. 169-170. In its post-hearing brief, the Union argues that, given the waning effectiveness of the COVID vaccines over time, for all practical purposes Officer McMahon was no longer vaccinated as of November of 2021, and was therefore justified in submitting to weekly testing as a non-vaccinated employee. I am not persuaded by that argument, for two reasons. First, once he acknowledged at hearing that he was fully vaccinated in the spring of 2021, Officer McMahon did not at any point thereafter in his testimony give any indication that he considered himself to be "non-vaccinated" by November of 2021. Second, there was nothing in the Village's policy that gave fully vaccinated employees any reason to believe that there would be any sort of "expiration" of their fully vaccinated status, much less that they had the right to make their own determinations as to whether and when they could declare themselves no longer vaccinated.

There is no question before me as to whether discipline would be warranted for Officer McMahon's deliberate concealment of the fact that he was fully vaccinated. I therefore will not address that question. However, I agree with the Village that Officer McMahon's concealment of that fact is a circumstance to be taken into account in weighing the merits of his claims for compensation for time he spent getting tested.

(b) Officer McMahon's Claims for Compensation

Officer McMahon submitted requests to be paid 15 minutes of overtime as compensation for time spent taking COVID tests on three different dates: November 15, November 22 and December 1, 2021. It is undisputed that he submitted those requests despite the fact that he was fully vaccinated, and therefore not required to undergo weekly COVID testing at all. It is also undisputed that he purposefully concealed that fact from the Village. Given those circumstances, I cannot agree with the Union's argument that the off-shift time spent by Officer McMahon undergoing COVID testing constituted "hours worked" under the Overtime Pay provisions of Section 28.2 of the CBA. As Officer McMahon well knew, because he was fully vaccinated, he was not required by the Village to submit to weekly COVID testing. Nor could the Village be deemed to have in any sense knowingly suffered or permitted Officer McMahon's weekly off-duty testing for its benefit, since the Village was operating under the false impression, deliberately created by Officer McMahon, that the testing was necessary because he was not fully vaccinated.

In a contract interpretation case, it is the union that bears the burden of proving, by a preponderance of the evidence, its claim that the employer violated the collective

bargaining agreement.[43] I find that there is no reasonable interpretation of the term "hours worked" that would encompass any of the time spent by Officer McMahon undergoing COVID testing that was not only not required by the Village, but also undertaken with the specific intent of deceiving the Village regarding his vaccination status. I therefore find that the Union was unable to meet its burden of proving that the Village violated Section 28.2 by failing to compensate Officer McMahon for time spent testing for COVID-19.[44] Grievance Nos. GR-21118-NHGE, GR-211202-RDXM and GR-211206-HWBY are denied.

(c) Officer McMahon's Violations of the Testing Requirement

Officer McMahon was twice the subject of disciplinary actions by the Village for failing to comply with the weekly COVID testing requirement. In Section 12.1 of the CBA, the Village agreed that it will discipline officers only for just cause. Accordingly, the parties have agreed that the question to be answered with respect to both of the disciplines is whether the Village's action was supported by just cause. In each case, it is the Village's burden to prove that it had just cause to take that disciplinary action. In order to meet its burden, the Village must establish both that Officer McMahon committed the infraction alleged, and that the penalty assessed was appropriate.[45] For the following reasons, I find that the Village met its burden in both cases.

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[43] *The Common Law of the Workplace* §1.93, pp. 54-55.

[44] Given that ruling, I find it unnecessary to determine whether Officer McMahon would have been entitled to compensation for his testing time under Section 28.2 had he not been fully vaccinated.

[45] *The Common Law of the Workplace* §6.9; *How Arbitration Works* Ch. 15.3.D, p. 15-25.

Officer McMahon testified that he understood that, under the Village's COVID policy, on a weekly basis, non-vaccinated personnel were required to either provide a negative COVID test result, or submit to a test at least 15 minutes prior to the start of their shift. He also understood that an employee's failure to do so would result in the employee being sent home and not allowed to work, or otherwise being subject to discipline.[46] The record reflects that, having decided to misrepresent to the Village that he was non-vaccinated, Officer McMahon routinely complied with the weekly testing requirement. He acknowledged on cross-examination that, from the time the requirement went into effect on November 2, 2021, and until September of 2022, the only times he failed to comply with the testing requirement were on November 22, 2021 and September 4, 2022.[47] Given that testimony by the Grievant, I cannot accept the Union's argument that the COVID policy was lacking in clarity, and that the Grievant's confusion on the two dates at issue was therefore justified. The Grievant acknowledged at hearing that he understood the requirements of the policy, and that, except only for the two days at issue, he was able to abide by those requirements without incident every week for over nine months.

Officer McMahon stated that, on November 22, 2021, he arrived at work 15 minutes early "expecting to be tested from someone from the command level staff or my sergeant," but "nobody was there."[48] He proceeded to walk to a COVID testing trailer that had been set up in the Fire Department parking lot, and had a test administered. He then returned to the Police Department to report to work and encountered Deputy Chief Smith, who asked him if he had a negative test, and told Deputy Chief Smith he would

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[46] Tr. 60-61, 64-67; JX 11.

[47] Tr. 66.

[48] Tr. 43-44.

have to check his email for the result. Deputy Chief Smith told him that, since he did not have a negative test result, he would not be allowed to work.[49] It was not until Officer McMahon was already on his way home, a little after his 11:00 a.m. shift start time, that he received an email notification that his COVID test was negative.[50]

On cross-examination, Officer McMahon acknowledged that he did not have a test result in hand 15 minutes prior to the beginning of his shift as required by the policy.[51] Though the Union is correct in arguing that Officer McMahon had no control over when he would receive his test result, he certainly had control over when he went to a testing station to take a test. Given his testimony that he did not walk to the testing trailer in the Fire Department parking lot until after he arrived at the Police Department 15 minutes prior to the start of his shift, it is apparent that Officer McMahon took the test less than 15 minutes before his shift started, in violation of the policy. Therefore, regardless of how quickly and efficiently the test may have been administered and the result generated, Officer McMahon obviously would have been unable to provide his test result to the Department until after the 15-minute pre-shift window had closed.

Officer McMahon testified that he expected to be tested by command staff that day because Police Department personnel had received an email stating that the Department was going to be administering COVID tests at roll call, which is conducted seven minutes before the start of his shift.[52] Officer McMahon did not produce any such

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[49] Tr. 44.

[50] Tr. 45.

[51] Tr. 69-70.

[52] Tr. 46.

email at hearing, and he acknowledged that no roll call testing was ever implemented.[53] Without the email in evidence, it is impossible to determine exactly what may have been communicated to the officers regarding COVID testing by the Department, or when it was communicated. The record evidence therefore falls well short of establishing that, on the day in question, Officer McMahon had a reasonable expectation that, notwithstanding the clear requirement stated in the policy, he would be allowed to report to work without a COVID test result, and take a test at roll call less than 15 minutes before the start of his shift.[54]

To summarize, Officer McMahon's testimony established that, on November 22, 2021, he failed to submit to a COVID test at least 15 minutes prior to the start of his shift, even though he knew both that he was required to do so by the terms of the COVID policy, and that his failure to test meant that he would not be allowed to work his shift, and that he would be subject to discipline. I therefore find that the Village met its burden of proving that Officer McMahon violated the testing requirement of the COVID policy as charged, and that the Village had just cause to discipline him for that violation.

Officer McMahon's second violation of the testing requirement occurred over nine months later. In a September 6, 2022 memorandum to the Police Department, Officer McMahon admitted that he was due to turn in a weekly COVID test result on September 4, 2022, and that he failed to do so because he "got his days mixed up," thinking his test was not due until the following day.[55] There being no dispute that Officer McMahon failed to comply with the testing requirement on September 4, 2022,

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[53] Tr. 46 and 68.

[54] Tr. 46 and 68.

[55] VX O. Also see Tr 53-54 and 63-64.

I find that the Village met its burden of proving that it had just cause to issue appropriate discipline for that infraction, as well.

I find nothing unreasonable about the penalty imposed by the Village for either of Officer McMahon's COVID policy violations. The Village's November 2, 2021 memo clearly put employees on notice that they would be "sent home and not allowed to work" if they failed to submit to an on-site test or provide a negative test result at least 15 minutes prior to the start of their shift. That is exactly what happened when Officer McMahon failed to test at least 15 minutes prior to his November 22, 2021 shift, and Officer McMahon admitted at hearing that he knew that being sent home would be the consequence of failing to provide a timely negative test result. Because he did not work that shift, the Village had every right to dock his pay accordingly. I therefore find that the Village met its burden of proving that it had just cause to dock Officer McMahon's pay for his missed shift on November 22, 2021. Grievance No. GR-211129-XUSR is denied.

The Union argues that the one-day suspension Officer McMahon was given for his September 4, 2022 violation was unduly harsh, because his only offense was miscalculating by one day the due date of his COVID test, and that mistake resulted in no identifiable harm to the Village. In addition, the fact that the Village stopped enforcing the testing requirement only a short time later means that, by the time of the violation, the need for weekly testing had clearly waned.

There is no question that, as the Union emphasizes, Officer McMahon's September 4, 2022 offense was simply a mistake. However, the point of the testing requirement was to reduce the risk of spreading the COVID virus in the workplace by ensuring that employees who may have become infected were identified and isolated as

soon as possible. In furtherance of that objective, the Village chose to draw a bright line with a strict weekly testing schedule, and there is nothing in the record to indicate that the Village was anything but consistent in its enforcement of the weekly testing requirement. Officer McMahon's inadvertent missed test day had the effect of compromising workplace safety, and thereby undermining the purpose of the policy, and the need for consistent enforcement, to the same extent it would have had his missed test been intentional.

Police Chief Mills testified without contradiction that "approximately five or six" officers were given one-day suspensions for violating the policy, and there is no evidence in the record that any employee who missed a scheduled test day ever received less than a one-day suspension.[56] Though the testing policy was terminated shortly after Officer McMahon's violation, the fact remains that the policy was in full force and effect at the time the violation was committed. Under all of the circumstances presented, I cannot say that the Village's decision to suspend Officer McMahon for one day for his September 4, 2022 violation of the weekly testing requirement was lacking in reason or fundamental fairness. I therefore find that the Department met its burden of proving that it had just cause to impose that penalty.[57] Grievance No. GR-221006-RYEV is denied.

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[56] Tr. 136.

[57] It is generally understood that an arbitrator should not second-guess an employer's judgment regarding the appropriate level of discipline, unless the evidence demonstrates that the employer's decision was "arbitrary, capricious, discriminatory or otherwise violative of fundamental notions of reasonableness, fairness and/or due process." *Discipline and Discharge in Arbitration* Ch. 2.IV.C, p. 103, quoting from *Rural Metro Ambulance Co.,* 123 LA 604, 613 (Sergent, 2007).

4. The One-Day Suspension of Officer Torres

For similar reasons, I find that the Village satisfied its burden of proving that it had just cause to suspend Officer Torres for one day for failing to submit a scheduled weekly COVID test result on September 22, 2022.[58] Officer Torres testified that, prior to his September 22 shift, he asked his supervisor, Sergeant Grzymkowska, if he was due for a COVID test, and she told him that he was not.[59] When asked on direct examination why he had asked that question of Sergeant Grzymkowska, Officer Torres responded that it was because she was his supervisor, and, as a supervisor, she had access to a spreadsheet used to track officers' COVID tests.[60] When then asked why he wanted to know when he was due for a test, Officer Torres answered that he just wanted to find out "if I was good to work my regular shift." He did not recall if Sergeant Grzymkowska told him the date his next test would be due.[61] Officer Torres proceeded to work his September 22 shift, and later learned that he was being suspended for one day because, contrary to what Sergeant Grzymkowska had told him, he had been due to submit his weekly COVID test that day.[62] Officer Torres acknowledged on cross-examination that, every week for the previous ten months the COVID policy had been in effect, he submitted a timely COVID test on the day it was due.[63]

In a September 26, 2022 memo to Deputy Chief Smith, Officer Torres stated that

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[58] VX K.

[59] Tr. 119.

[60] Tr. 119-120.

[61] Tr. 120.

[62] Tr. 120-121.

[63] Tr. 127-129.

his previous COVID test had been taken on September 15, 2022. Therefore, it was his understanding that he was "good" for the next seven days, through September 22, which, he wrote, "I am inclined to believe is considered a 'week.'"[64] Officer Torres went on in his memo to request clarification of "what is considered to be a 'full week'" for purposes of the weekly testing requirement. He also wrote that Sergeant Grzymkowska had told him that he was "clear to work," and that his most recent negative test result was still valid as of September 22.

Sergeant Grzymkowska also provided a memo to Deputy Chief Smith on September 26, 2022. In her memo, Sergeant Grzymkowska wrote that Sergeant Torres had asked her on September 20 when he was due for his next COVID test.[65] She also stated that, in response to a question she asked him, Officer Torres told her that he "sent the test results" on September 16. Therefore, Sergeant Grzymkowska wrote, she was under the mistaken impression that he had taken his last COVID test on September 16, rather than his actual test date of September 15, and that is why she told him he was not due to take a test on September 22.

As reflected in Officer Torres's memo, there is no dispute that his previous COVID test had been taken on September 15. It is also clear from his memo that he understood seven days to constitute a week. At hearing, Officer Torres never offered an explanation for why he nevertheless felt the need to ask someone the due date for his next test. The only indication in the record as to why he did so is the policy interpretation he offered in his memo: that test results are "good for" a full seven days after the date of the test, meaning his next due date would have been September 23, the eighth day

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[64] VX L.

[65] JX 17.

after his September 15 test. The reference to that interpretation suggests that he was seeking confirmation from Sergeant Grzymkowska that his interpretation was correct.

I do not find Officer Torres's rationale convincing, for two reasons. First, under his interpretation of the policy, officers would have been allowed to go an entire week – seven calendar days – without testing. I find that interpretation difficult to square with a "weekly testing" requirement, as it would seem to be obvious that such a requirement contemplates testing once within a period of seven calendar days. Second, it is undisputed that, for the previous 10 months, Officer Torres had submitted weekly tests – at least 40 in total, it would be fair to assume – on the correct due date, meaning he had never once acted on the interpretation floated in his September 26, 2022 memo.

I also find Officer Torres's reliance on Sergeant Grzymkowska's memo misplaced. While there is no dispute that she told Officer Torres that he was not due for a COVID test on September 22, Sergeant Grzymkowska's memo also stated that she told him that only because he told her that his last test result had been submitted on September 16, so she assumed that September 16 was also the date he took the test. If in fact Officer Torres had disclosed to Sergeant Grzymkowska in their conversation that his last test had been taken on September 15 and not September 16, he had every opportunity to provide that clarification at hearing. He did not do so. It is therefore apparent that Sergeant Grzymkowska's advisement to Sergeant Torres that he did not have a test due on September 22 was based on incomplete information provided to her by Officer Torres. If Officer Torres never made it clear to Sergeant Grzymkowska that his last test date was September 15, and not September 16, then he had no reason to understand that she was confirming his apparently new-found theory: that the policy allowed him to work on a day that was his seventh consecutive day without getting tested for COVID.

For all of those reasons, I find that the Village met its burden of proving that Officer Torres violated the Village's COVID policy by working on September 22, 2022 without providing the required weekly COVID test result, and that it therefore had just cause to issue appropriate discipline. I further find that the Village also satisfied its burden of proving that it had just cause to issue a one-day suspension for Officer Torres's infraction, for the same reasons I found that the Village met its burden with respect to Officer McMahon's one-day suspension. The Village reasonably drew a bright line standard requiring weekly testing, the record reflects that the standard was consistently and strictly enforced, and Officer Torres's own consistent compliance with the policy over the first 10 months of its existence demonstrated that he well understood exactly what was required. Although the COVID policy would expire soon, there is no dispute that it was still in full force and effect on September 22, 2022, the date of his violation. The evidence also established that a one-day suspension was the penalty consistently imposed by the Village for violations of the testing requirement, and there is no evidence that any officer similarly situated to Officer Torres received a lesser penalty for violating the COVID policy. In short, I am unable to find in the record any basis for concluding that the one-day suspension assessed to Officer Torres was unreasonable. I therefore find that the Department met its burden of proving that it had just cause to suspend Officer Torres for one day for his violation of the COVID policy on September 22, 2022. Grievance No. GR-221006-BBHF is denied.

C. Officer McMahon's Two-Day Suspension

On June 29, 2023, Officer McMahon was given a two-day suspension for responding to a call for service on May 8, 2023 without using his body worn camera, in

violation of the Village's Body Worn Video Recording Policy.[66] The policy states that the use of body worn video recorders ("BWVs") "provides persuasive documentary evidence and helps defend against civil litigation and allegations of officer misconduct." Accordingly, the policy puts officers on notice that they "shall adhere to the operational objectives and protocols" outlined in the policy, "so as to maximize the effectiveness and utility of the BWV and the integrity of evidence and related video documentation."[67] Among the protocols outlined in the policy are the requirements that officers wear their BMVs "at all times" while on duty and in uniform, that cameras be "turned on at all times when the officer is in uniform and is responding to calls of service or engaged in any law enforcement-related encounter or activity that occurs while the officer is on duty," and that "[o]fficers shall activate body cameras when receiving a call for service and prior to arrival at the scene."[68] Part 100.4.G of the policy states as follows:

> It shall be the responsibility of each individual officer to test the BMV equipment at the beginning of each tour of duty. Officers equipped with the BMV will ensure that the batteries are fully charged prior to the beginning of their shift or special event. In the event that the equipment is found to be functioning improperly, the officer shall report the problem immediately to their immediate supervisor so that the information can be documented, and arrangements made for repair.

Officer McMahon does not deny the allegation that he violated the BMV policy on May 8, 2023. He testified that he responded to a call for service without wearing his body worn camera because the camera battery was low, and he therefore left the camera in the battery charging dock in his police vehicle. During the course of the call, he exited

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[66] VX R.

[67] VX B, part 100.2.

[68] VX B, parts 100.4.I, C and J.

his vehicle without taking his camera out of the charging dock. A short time after exiting his vehicle, Officer McMahon found himself confronting a subject who "had some weapons in his hands," and took the subject into custody.[69] Officer McMahon clearly failed in his responsibility under the BWV policy to ensure that he had a fully charged and functional body camera at the beginning of his shift, which failure resulted in his subsequent failure to record his response to a call for service that involved an encounter with an armed subject.

In its brief, the Union does not contest the Village's right to discipline Officer McMahon for his violation of the BWV policy. Instead, the Union characterizes his offense as a minor, first-time infraction, and argues that any suspension at all would have been unduly harsh. The Union also notes that the two-day suspension penalty imposed was based in part on Officer McMahon's prior one-day suspension for violating the COVID policy, which suspension the Union also argues was improper.

I cannot agree with the Union that Officer McMahon's BWV policy violation was so insignificant as to preclude the imposition of a suspension, even though it was the first time he was found to have violated that policy. The policy is an important one. Both the public and the officers benefit from ensuring that there are accurate audio and video recordings of police encounters. The availability of such evidence is not only invaluable in the prosecution of criminal behavior, it also tends to deter officers from interacting with the public in a manner that is inconsistent with their training, and also protects officers from unfounded accusations of misconduct. Officer McMahon's violation on May 8, 2023 meant that the Village had no video or audio recording of his encounter with an armed subject. There is no indication in the record of the level of discipline that

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[69] Tr. 56-58.

has been given to other officers who have violated the BWV policy, so I have no basis for concluding that a one-day suspension for a first-time violation would constitute disparate treatment.

Importantly, Officer McMahon did not have a clean disciplinary record at the time of his BWV policy violation. As I have found, the Village also had just cause for two prior disciplines issued to Officer McMahon: the docking of his pay after being sent home for failing to comply with the COVID testing policy on November 22, 2021, and the one-day suspension he received for failing to comply with the testing policy on September 4, 2022. The discipline file reflects that Officer McMahon had also previously been given a counseling for "poor performance during the month of March 2023."[70] Following his May 8, 2023 BWV violation, the Department initially recommended a three-day suspension. Officer McMahon requested a meeting with Police Chief Mills, who then agreed to reduce the penalty to the two-day suspension that was assessed.[71] Under all of the circumstances presented, I find no basis for concluding that the Village's imposition of a two-day suspension was fundamentally unfair or unreasonable. I therefore find that Village had just cause to suspend Officer McMahon for two days for his violation of the BWV policy on May 8, 2023. Grievance No. GR-230705-GEMX is denied.

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[70] VX Q.

[71] Tr. 137-139; VX G.

For all of the reasons discussed in this decision, and based on my careful review of the record evidence, the terms of the CBA, and the parties' arguments, I enter the following:

VII. AWARD

A. The Village violated Section 24.5 of the CBA by charging Officer McMahon more than $400 per month in health insurance contributions. Grievance No. GR-221108-VTUT is sustained. As the remedy, I direct the Village to make Officer McMahon whole by reimbursing him for all Section 24.5 health insurance contribution amounts deducted from his paychecks that exceeded $400 in any calendar month, beginning with paychecks Officer McMahon received on or after November 2, 2022, the date seven calendar days prior to the Union's November 9, 2022 grievance.

B. The Village had just cause to impose each of the disciplinary actions at issue: (1) the docking of one day's pay from Officer McMahon's paycheck for his violation of the COVID policy on November 22, 2021 (Grievance No. GR-211129-XUSR); (2) the one-day suspension given to Officer McMahon for his violation of the COVID policy on September 4, 2022 (Grievance No. GR-221006-RYEV); (3) the one-day suspension given to Officer Torres for his violation of the COVID policy on September 22, 2022 (Grievance No. GR-221006-BBHF); and (4) the two-day suspension given to Officer McMahon for his violation of the Body Worn Video Recording Policy on May 8, 2023 (Grievance No. GR-230705-GEMX). Each of those four grievances is denied.

C. The Village did not violate the CBA by failing to compensate Officer McMahon for time spent testing for COVID-19. Grievance Nos. GR-21118-NHGE, GR-211202-RDXM and GR-211206-HWBY are denied.

James Q. Brennwald, Arbitrator

February 5, 2024
Chicago, Illinois