In the Matter of the Arbitration Between

THE NIAGARA FRONTIER TRANSPIT METRO, INC.,
Employer,

-and-

THE AMALGAMATED TRANSIT UNION, LOCAL 1342,

(Lawrence Williams, Grievant),
Union.

OPINION

AND

AWARD

Before: MICHAEL S. LEWANDOWSKI, Impartial Arbitrator

Appearances:

For the Authority: Wayne R. Gradl, Esq.
Attorney for the Authority

For the Union: Joseph E. O'Donnell, Esq.
Reden & O'Donnell, LLP

Effective February 21, 2014, the Niagara Frontier Transit Metro System, Inc. ("Company") suspended Bus Driver Lawrence Williams for insubordination. Mr. Williams was then terminated on March 7, 2014.

The suspension and termination were grieved by the Amalgamated Transit Union, Local 1342 ("Union") which filed a timely grievance on March 10, 2014. The grievance was processed thru the steps of the parties' grievance procedure as contained in the collective bargaining agreement ("Agreement") between the parties without resolution. Ultimately, a demand for arbitration was

filed. Pursuant to the terms of the Agreement, the undersigned was designated arbitrator.

In accordance with the above designation, a hearing was conducted at the Company's offices on June 19, 2014. The parties were accorded a full and fair hearing including the right to present witnesses for examination and cross-examination, the right to introduce documentary and physical evidence and the right to make arguments in support of their respective positions in this matter.

The parties agreed to submit written closing arguments in support of their positions. The writings were transmitted to me electronically on July 11, 2014.

ISSUE

The parties agreed to submit the following issue to arbitration.

Was the penalty of termination justified under the parties' negotiated Performance Improvement Guidelines and/or Section 11.1 of the parties' collective bargaining agreement?

If not, what shall the remedy be?

BACKGROUND AND SUMMARY OF THE EVIDENCE

Transportation Supervisor Brian Olson testified that on February 18, 2014, the Grievant was informed of a mistake that resulted in his being issued Company paid uniforms and was told he had to return the items. The Grievant at first agreed to return the issue. Olson said that the next day, Williams came in and told him he would not return the uniform issue because the Company was making a mistake in recalling the uniform issue. Williams told Olson that he was qualified for the uniforms (Ironically, the record shows that the Grievant actually was eligible for the uniform issue). Williams asked Olson how his failure to return the uniforms would affect his employment with the Company. Olson said he was "not sure but it would depend on what he did." Olson told Williams he would look into the matter but Williams had to return the uniforms. Olson also said he told Williams that if he did not return the uniforms it could be considered insubordination.

The next day (February 20, 2014) Olson spoke with the Union and asked that they talk to Williams and that they tell Williams if he did not return the uniforms he could be brought up on insubordination charges. Olson said the Union representative agreed to do so.

On February 21, 2014, Olson called Williams and a Union representative into his office and again asked Williams to return the uniforms. Williams again said he would not return the uniforms and he did not care what happens. The Union representative tried to encourage Williams to comply but Williams would not do so. Williams was then suspended.

Olson said that throughout the interactions, Williams never said he felt he was entitled to the uniforms, all he said was since a mistake had been made, he should not be held accountable, someone else should be accountable.

On cross-examination Olson said he spoke with Labor Relations and was told Williams actions constituted insubordination and Williams should be suspended pending termination. Olson repeated that when Williams asked him on February 18th how his refusal to return the uniforms would affect his job, Olson told Williams he was not sure, it depended on what Williams did.

Olson said he did not speak directly to Williams on February 20th, but overheard Williams tell someone else he

would not return the uniforms. He also acknowledged that he prepared the Notice of Discipline ("NOD") prior to the disciplinary hearing. Olson said there was an initial determination that Williams qualified for the uniforms then the Company determined he did not qualify and had to return the uniforms. The Company and the Union are currently disputing the uniform allowance provision but as it turned out, Williams was qualified for the uniforms however Williams never told Olson he felt he was qualified to have the uniforms.

Olson said at the time he issued the NOD he did not know Williams was indeed eligible for the uniform issue.

Olson also said he has had to issue NODs in the past and except for this instance, he has always had another manager present when the NODs were issued. Williams was given another opportunity to return the uniforms at the disciplinary meeting but Williams would not return them. After he was suspended, Williams finally said he would return the uniforms.

Olson also said he had a good relationship with the Union President but did not call him to ask for his help in

getting Williams to comply.

Director of Public Transit Thomas George testified that he oversees all operations in the entire Metro Division. He was involved in the decision to terminate Williams. Mr. George said he reviewed Williams work record and the recommendation from Mr. Olson. George determined Williams was insubordinate and it was therefore appropriate to terminate him. Mr. George knew that there was a claim that Williams was entitled to the uniforms but in the end that had had no bearing on his decision to terminate because Williams refused to comply. George said he saw no mitigating circumstances that would affect the determination to terminate.

On cross-examination, George said the whole matter involved about $125 but that is not why Williams lost his job. Williams lost his job because he failed to follow his supervisor's directive. Mr. George said he did not talk to the Grievant or to the Union to get their side of the story but instead relied solely on the reports of the supervisor and the advise of Labor Relations.

The Union called Transportation Support Specialist Sharon Weber who testified that Williams was originally deemed eligible for the uniforms. Her office published a list of eligible employees and sent it to station supervisors. Weber was later informed by the Payroll department that certain bus operators including Williams were not eligible for the issue. Several weeks later, Weber was deemed eligible.

Union President and Business Agent Vincent Crehan testified that he first learned that Williams was to be suspended then terminated on the day of the suspension. He spoke with Olson who told Crehan that "downtown" directed him to suspend/terminate Williams. Crehan said he asked Olson why he was not called earlier, this could have been worked out. Crehan said Olson was "regretful" saying he did not have a reason for failing to call except "I just screwed up." Crehan said the Union attempts to prevent things from escalating but because he did not know of this situation he could not try to defuse it.

Mr. Crehan said he later found out the Company made a determination not to allow employees to borrow days in order to qualify for the benefit and that had caused a

determination that certain drivers were not eligible for the uniform issue. The Union and the Company are currently processing a dispute on this issue because the Union asserts the Company agreed to permit drivers to borrow days in order to get the benefit. (The record here shows that Williams qualified for the benefit without borrowing). Crehan spoke with Labor Relations and was told that "it was up to Olson" as to whether Williams would be fired. Crehan had been told by Olson it was not up to him. Labor Relations also said the Company could have garnished Williams wages instead of firing him but the termination would stand. Labor Relations then sent an email proposing a 30-day suspension as way to resolve the matter but that was rejected.

Crehan said he had never heard of any employee ever having to return a uniform.

Union representative and Executive Board member Muhammed Ali testified that he first learned there was a problem involving Williams on Wednesday, February 19th. Mr. Ali said Mr. Olson told him Williams did not qualify for the uniform allowance and Olson asked Ali to ask Williams to return the uniforms. Ali said he did so. Ali and

Williams spoke about the possible penalty for not returning the uniforms but neither knew what that penalty might be. Ali said he did not know the penalty because he asked Olson what the penalty might be and Olson said he did not know. Ali said he never thought the matter would rise to the level of termination.

Mr. Ali also said that when he spoke with the Grievant about the matter, he did not use the word "insubordination" because Olson did not use that word when he spoke to Ali. Despite what Olson wrote in his notes, the word "insubordination" never came up when Ali and Olson spoke. Also, despite Olson's notes, Olson never told the Grievant to take the uniforms back.

Ali said that when he finished his bus run on the 21st, he found out Williams had been suspended. He then asked Olson if he was serious and would Olson actually go thru with the suspension/termination to which Olson replied in the affirmative. Ali was aware of another employee who was charged with failing to move a table at a Christmas party when told to do so but all that happened to that employee is that he was sent home for the day; a one-day suspension. He said he was aware of another employee who was charged

with refusing to follow a directive and that employee also got a one-day suspension.

Ali also said he could have worked this matter out if he was aware of it before it reached the disciplinary stage.

On cross-examination, Mr. Ali said he did advise Williams to return the uniforms and that Williams replied that he did not think he should have to do so.

Union Steward William Preston testified that he attended the February 21, 2014 meeting between Olson and Williams. Prior to the meeting, Preston was aware that there was an issue regarding Williams' uniform allowance. At the beginning of the meeting, Olson told Williams the meeting was concerning Williams being recommended for suspension pending termination. Olson tried to show Williams what he sent "downtown" but Williams said he did not need to see it.

At the meeting, Williams was very animated and kept asking how this would affect his job and Olson kept telling him he did not know, the matter was being referred

downtown. Williams was given the opportunity to look at what was written about him but he declined to look at it. Despite the foregoing, Mr. Preston first said he did not know if Williams was given the opportunity to reconsider his refusal to comply with the uniform directive and then Preston said "I want to say, no, Williams was not given an opportunity to reconsider." He then said Olson did not tell Williams now that you know how it will affect your job, will you reconsider.

Preston said he never told Williams this would be considered insubordination and refusing to comply could result in termination. Preston testified that Williams said he was never told he would be disciplined. Olson replied "I told you I did not know how this would go down."

Mr. Preston then told Williams that since he is being sent home for the day, Williams may as well go get the uniforms and being them in. Preston said he and Olson were expecting Williams to bring the uniforms back to work and Williams did not. What they later found out is that Williams took the uniforms back to the uniform company and had a receipt showing the uniforms were turned in before 1:00 p.m. that day.

On cross-examination Mr. Preston acknowledged that other bus operators were told to return their uniforms but there were no other problems that he was aware of.

Lawrence Williams testified that he believed he was eligible for $325 worth of uniforms. There was a posting saying he could go to the uniform store and spend that amount. He then went and got the uniforms. Union exhibit 1 shows Williams picked up $125 worth of uniforms.

Williams said he was later (2/18/14) told to stop by Olson's office after a bus run. When he got there, he was not eligible for the uniforms. Williams said he told Olson he was eligible for the uniforms, my name is on the list. Olson said Williams did not have the 220 days necessary. Williams said he told Olson he did have the proper number of days and he could not borrow days to qualify.

Williams testified that Olson then told him he has to return the uniforms. Williams agreed to do so however the next day Williams went to Olson and said he wore some of the items and did not know if the uniform company would take those items back. Williams said he then told Olson

that he did not make the mistake so he did not think he should have to pay. Williams said he asked Olson if his job was in jeopardy and asked if he would be disciplined for no returning the uniforms. Olson replied that he was not sure Williams could lose his job over something like this. Williams said he left Olson under the impression Olson would find out the answer to his question and get back to him. Williams said he expected Olson to get back to him and tell him if he could keep the uniforms and if there would be any discipline for his failure to return them.

Williams said he did not see Olson the next day even though he went looking for him. He saw Mr. Ali who yelled to him asking if he had returned the uniforms. Williams said he thought Ali was joking because he yelled that across the room at him. When Williams approached Ali to ask him what this was about Ali told Williams he needed to return the uniforms. Williams asked Ali if Olson told him Williams would be in trouble if he did not return the uniforms. Ali did not have an answer to that question. Williams said he again went looking for Olson but did not find him. He needed to leave on his run so he left to do so.

At the end of the day, Olson had not called him so Williams figured if there was any severity to the situation, Olson would have called him into his office as he did the prior day. Olson had not used the word "insubordination."

On Friday the 21st, Williams was told to go see Mr. Olson. Williams immediately went to Olson's office and when he got there, Mr. Preston was there to accompany him into the meeting. As they walked in he was handed a piece of paper. Williams said he asked what it was and was just told to read it. Williams said, no, tell me what this is about. He knew it was not a good thing. Williams was then told he was suspended pending termination.

Williams said he asked for his Union representative and was told Mr. Preston was his representative. Williams said Mr. Preston is not his representative, Mr. Ali is. He was then told he was suspended. Williams said he reminded Olson he asked if he could get in trouble but Olson did not say he could. Williams asked Olson where this was coming from and Olson told him it did not matter; he was suspended.

Williams said Olson then asked him: "If I asked you to return the uniforms now, would you?" Williams said he responded; "Absolutely." They then talked about how he would return the uniforms. Williams then left the office, went home and took the uniforms to the uniform store. Union exhibit 2 is the receipt for the returned uniforms.

Williams said he likes his job and if Olson had told him the consequences of failing to return the uniforms he would have done so immediately. He said he would never say something like "I don't care what the Company does." He denied he was told his behavior was considered insubordination and could result in termination. He said if Olson had told him that the matter would have ended right there but all Olson said was he did not know if Williams could get in trouble if he did not return the uniforms.

On cross-examination Williams said he is not sure if he ever saw a copy of the Rules for Bus Transportation and Maintenance Employees (Company exhibit 3). He later said he did see the Rules during training. Williams also acknowledged that under the Job Performance Improvement

Guidelines (Joint exhibit 2) insubordination is listed as an immediate termination offense. He also acknowledged saying at first that he would return the uniforms and then saying he would not. He also said that at one point during the meeting of the 21st Mr. Olson asked him to return the uniforms but that was after he was told he was suspended. He disagrees with Mr. Olson's testimony that he was asked to return the uniforms before he was told he was suspended. Williams said if he knew it was important, he would have complied.

Williams acknowledged he has been written up by the Company but said that was for failure to comply with a sign out procedure and he had worked out an arrangement where he felt he did not have to sign out due to his circumstances. He did not grieve those write-ups and two suspensions even though he felt he had clearance not to sign out. He has been complying with the sign-out procedures ever since the suspensions. His last suspension NOD said he would be terminated for his next offense so he changed the way he handled the sign out.

Manager of Labor Relations Louis Giardina testified that he never told Mr. Crehan that Olson makes the

disciplinary decision in this matter; Mr. George would do that. He also said when he spoke to Mr. Crehan, Crehan never explained that Williams was not insubordinate, Crehan only said Williams had his 220 days and was entitled to the uniforms.

On cross-examination, Giardina said the Company did change the way it handled the uniform allowance. Mr. Giardina was not aware that in prior years employees were being allowed to borrow day in order to qualify for the benefit. Giardina later found out Williams was eligible for the uniform allowance but that had no bearing on the discipline because Williams was insubordinate. It is critical that employees know they must comply with an order or be terminated.

Mr. Giardina acknowledged that an employee should be told that if he/she does not comply with the order, he/she would be subject to termination. That notice is critical. If an employee is not given that notice, he should not be terminated. Here there is no written order. There is no order that shows the consequences. Good management practice is to have two managers present and that did not happen here.

Mr. Giardina stated further that he might have told Mr. Crehan to speak with Olson but he again said he did not say Olson has the authority to decide this matter. He did not recall Mr. Crehan raising Section 4.5, Failure to Follow Instruction (not insubordination) of the Performance Improvement Guidelines or that that section of the Guidelines was used when the employee who failed to move the table was disciplined. He acknowledged offering to resolve this matter with a 30-day suspension.

POSITION OF THE PARTIES

The Company asserts it had justification under the disciplinary procedure contained in the Agreement and under the provisions of the Performance Improvement Guidelines to suspend then terminate the Grievant.

This matter, unfortunately, mushroomed into a showdown on whether ATU-represented personnel need to respect the authority of their supervisors and/or can act insubordinately without concern about significant discipline. The Performance Improvement Guidelines that governed the Grievant's employment as an operator

specifically provide that insubordination could lead to immediate termination of employment. **See** Jnt. Ex. 2, Rule 1.7. In addition, the Rules for Bus Transportation Employees and Maintenance Employees which the Grievant admitted having familiarity expressly counsels:

> Employees must obey orders of officials, including Controllers and Supervisors, having authority over them. Refusing to obey such orders will be considered insubordination.

See Co. Ex. 3, Rule 1.3.4, p. 3. Consequently, the Grievant did not need Mr. Olson to research and report on the consequences of the decision to not return the uniform items as directed which he announced on Wednesday February 19. Both the Performance Improvement Guidelines and the Company rulebook should have provided the Grievant with adequate notice that he risked discipline for insubordination by refusing to return the uniform items without regard to the fact that Mr. Olson also testified that he likewise advised the Grievant on Wednesday, February 18 that discipline for insubordination could be a possibility.

Beyond the Performance Improvement Guidelines and Company work rules is the well-established and common sense notion that:

> employees must not take matters into their own hands, but must obey orders and carry out their assignments, even when they believe those assignments are in violation of the agreement, and then turn to the grievance procedure for relief.

See Elkouri & Elkouri, **How Arbitration Works 6th Ed.** (2003) at p. 262. The above-quoted principle is, of course, a recitation of the more simply stated rule of "Do it and grieve." While the Grievant claimed that he questioned Mr. Olson about how he could be eligible for benefits but not the uniform allowance, the undisputed fact is that he never filed a grievance raising this argument before being suspended pending termination for insubordination. In regard to the obey and grieve course, the Grievant opted to do neither.

The Grievant continued to neither comply with the direction to return the uniform items, nor grieve the propriety of that order on Thursday, February 20 even though the Grievant admitted that Union representative Ali had relayed the message to him that he was expected to return the uniform items.

The Grievant was suspended pending termination for

insubordination on Friday, February 21 and then dismissed, because Company management, more specifically Director of Public Transit Tom George, believed that the Grievant continued his insubordination on that Friday, thereby issuing a direct challenge to the Company's authority over him. Thereafter, from the Company and Director George's perspective, the critical question became whether the Company should allow an employee to obtain a pass on a direct challenge to his supervisor's authority because of subsequent Union efforts to rally behind and save the recalcitrant employee. Director George's answer to this question was no.

The subsequent efforts to save the Grievant included President Crehan presenting the argument that the Grievant was entitled to the uniform allowance in 2014 because the §18-16 "borrowing" provisions for benefits should also apply to the §12 definition of required attendance for uniform allowance purposes. **See** Jnt. Ex. 4. As noted in the statement of facts, there is contract language indicating that uniform allowances are not included in the §18 "benefits" for which borrowing is permitted. **See** Jnt. Ex. 1 at §§12-15(a) & 12-13 pp. 50 & 60. Consequently, the entitled-through-borrowing argument could reasonably

be expected to simply irritate Company management rather than provide cause to overlook insubordination. Further, and more importantly, as explained by Director George during his testimony, the argument that the Grievant was actually entitled to the uniform allowance after all was beside the point. There were procedures available to the Grievant to make the claim that he was entitled to keep the uniform items and these procedures should have made the Grievant's insubordination and this proceeding unnecessary. Significantly, there was testimony that 20-25 other drivers were similarly advised that they needed to return uniform items because they were subsequently determined ineligible and the present matter was the only case of insubordination that resulted. Plainly Company management was merely attempting to administer and police the 2014 uniform program in good faith and not looking to create opportunities to terminate operators for insubordination.

Another effort to save the Grievant included advice from Union representative Preston to just return the uniform items. Of course, the Grievant received the same message from Union representative Ali the day before and admittedly was not interested in returning the uniform

items at that time. The presentation of a suspension pending termination notice for insubordination, however, provided the motivation that the Grievant required to comply with a directive given him three (3) days earlier. In this regard, while there exists significant differences between the Parties concerning the details of the meeting between Mr. Olson and the Grievant on the morning of Friday, February 21, there is also agreement.

According to the testimony presented by the Union, on Friday, February 21, the Grievant was issued the suspension pending termination notice and then asked if he was willing to return the uniform items. Supposedly, at that point the Grievant agreed to return the uniform items, but Mr. Olson continued the suspension pending termination despite the Grievant's willingness to return the items that day.

Mr. Olson, in contrast, testified that he gave the Grievant one last chance to comply with the directive to return the uniform items before proceeding with the suspension. In giving the Grievant one last chance to comply, Supervisor Olson could have actually shown the Grievant the suspension notice, leaving the Grievant's

actual response to Mr. Olson's threat of insubordination discipline as the only true conflict between the Grievant and Mr. Olson's versions of events.

There is no dispute that Mr. Olson had endeavored to arrange compliance with the directive to return the uniform items on Thursday. Accordingly, that he would proceed with the insubordination discipline after the Grievant agreed to return the items must be viewed as unlikely.

Instead, the actual scenario was most likely as recited by Supervisor Olson in Company Exhibit 1, i.e., the Grievant continued to state, as he did on the two prior days, that he was not going to return the uniform items despite the direction to do so and threat of discipline for insubordination. Accordingly, Supervisor Olson proceeded to issue the discipline notice and go forward with the related suspension. After the notice was issued and the suspension imposed, Union representative Preston, quite rightly so, advised the Grievant that he was in serious trouble and succeeded in convincing him to return the uniform items.

On cross-examination Director George was asked if he contacted anyone from the Union to get their version of events. Actually, the Union had the opportunity to provide the Company and Director George with their version of events before the discharge decision was made via at least the grievance filed on February 25, 2014. The Union could have certainly called into question Transportation Supervisor Olson's version of events on the morning of February 21 by explaining in that grievance that the Grievant was suspended pending termination for insubordination even though he had actually told Supervisor Olson that he was returning the uniform items. Instead, this significant claim was saved for the actual discharge arbitration and Director George was left to decide whether the Grievant was properly discharged for insubordination with the Union counter-agreement that the Grievant was entitled to the uniform allowance because he should have been allowed to make up for a current shortfall in attendance by borrowing from prior years' surplus attendance pursuant to §18-16 of the CBA. **See** Jnt. Ex. 4. Even the grievance filed on March 11, 2014 to protest the actual discharge decision merely continues to harp about the purported right to borrow under §18-16 and omits the obviously significant claim that the Grievant

was terminated for insubordination even though he had actually told Supervisor Olson that he would return the uniform items. **See** Jnt. Ex. 5. Thus, as testified to by Director George, he was left with the decision on whether the Grievant's actual entitlement to the uniform allowance warranted giving the Grievant a pass on the insubordinate refusal to return the uniform items and he decided no, because the Grievant had procedures he could have utilized to obtain relief from that order.

Supervisor Olson's recitation of the events on the morning of Friday, February 21 is also consistent with the prior serial discipline of the Grievant for violating Rule 7.2.1 by not maintaining proper radio contact with the Controllers. **See** Co. Exs. 2 & 3, at p. 35. While he attempted to explain that these violations were supposedly peculiar to a particular route assignment, the Grievant likewise mentioned during cross-examination that these disciplinary actions were discussed with Union representative Ali who rather than filing a grievance had instead advised the Grievant that he had to comply with what Company management wanted. Significantly, as was pointed out in questioning by Union counsel, when the discipline for failing to maintain proper radio contact

with the Controllers reached the point where one (1) more violation meant discharge, the Grievant was then able to maintain radio contact with the Controllers as required regardless of the route assignment.

From the Company's perspective, the same basic behavior pattern as exhibited vis-à-vis the radio contact rule violations was exhibited in the present matter. The Grievant pushed Mr. Olson right up to the discharge threshold. This time, however, the Grievant pushed too far as he was suspended pending termination for insubordination and Director of Public Transit Tom George decided to proceed with the prescribed penalty for insubordination. This was the risk the Grievant took via his refusal to obey the directive to return the uniform items.

During the cross-examination of Labor Relations Manager Giardina counsel for the Union raised two other incidents in which employees in other departments were simply sent home after refusing to comply with non-work related requests of their supervisors. However, there was no evidence presented that either of these two other employees were ever formally charged with insubordination

with senior management then asked to consider whether they were appropriately discharged for insubordination. While these employees may have taken the risk of being formally charged with insubordination, their supervisors, for whatever reasons they had, opted to simply give the follow-up order to punch out and go home, a directive that both employees obeyed. The Grievant, in contrast, did allow himself to receive a formal insubordination charge with his fate as a Company employee then transferred up to senior management for final decision.

Director George, as he testified, did not find anything in the attending circumstances or the Grievant's work record to mitigate against imposing the prescribed penalty for insubordination which is discharge. **See** Jnt. Ex. 2 at Rule 1.7. The Grievant has only a May 10, 2010 seniority date and thus was not a long-term employee. His work record was not particularly good as he had 25 rule infractions on his record in an employment that was less than four (4) years and, as mentioned, had taken progressive discipline for failing to maintain proper radio contact with the Controllers up to the suspension with final warning before termination step. **See** Co. Ex. 2. As Director George testified, that Grievant was

actually entitled to the uniform allowance likewise did not mitigate against discharging him for his insubordination since there were established procedures in place for the Grievant to complain about being unjustly denied his uniform allowance and establish his eligibility for it. There were 20 to 25 other drivers who like the Grievant had been told that their designation of eligibility for the uniform allowance was erroneous and therefore they were required to return the uniform items they obtained, but no evidence that any of the other drivers were discharged or even charged with insubordination.

In conclusion the Company argues that the work rules under which the Grievant worked plainly warned that insubordination could be punished with discharge. Rather than following the work rules and the principle of "do it and grieve," the Grievant opted to neither do what he was told, nor grieve what he viewed as an unjust work order. Moreover, the insubordination at issue was not a single instance of refusing to obey a work order, but a refusal that the Grievant decided on after a considering the decision and adhered to for several days until formally charged with insubordination. The Grievant's supervisor

warned the Grievant that he risked insubordination discipline and gave him several opportunities to avoid being charged with insubordination. The Grievant, however, opted to stand on his refusal until charged with insubordination. At that point senior management decided to proceed with the prescribed penalty for insubordination after determining that no mitigating circumstances were present. In fact, the Grievant's work record and relatively short tenure with the Company do not stand as positives warranting a departure from the prescribed discipline for insubordination. Under these circumstances there was plainly justification for terminating the Grievant's employment within the meaning of §11-1 of the Parties' CBA as well as the Performance Improvement Guidelines and the present grievances should be denied.

The Union argues that the Company did not have justification to suspend then terminate the Grievant.

First, Mr. Williams conduct did not rise to the level of insubordination. Both NODs in question cite Rule 1.3.4 of the Company's rulebook as allegedly being violated by Mr. Williams. That Rule specifically states employees must obey the **orders** of Company officials and supervisor and

that refusing to obey such orders will be considered insubordination. Black's Law Dictionary (Sixth Edition – 1990) defines the term "order" as "a mandate, precept, command or direction authoritatively given, rule or regulation." Based on the credible evidence here it cannot be reasonably argued that Supervisor Olson ever gave Mr. Williams an order to return the uniform items in question or to pay for them as that term is properly defined under law. Supervisor Olson testified that on February 18, 2014, he asked Mr. Williams to return the items and Williams agreed. When Olson spoke with Williams the next day and was advised Williams had changed his mind, Olson could not definitively answer Mr. Williams' questions about the actual consequences of his actions. Again, when asked about the consequences, Olson said "I don't know." Olson's handwritten report of the interaction prepared on February 20th reads that he merely told Williams there would be more to come and it would be advisable to return the items.

The foregoing cannot reasonably be said to rise to the level of an order as law defines that term. Asking an employee to do something or telling them it is advisable to do it without clearly defining a potential consequence for not following such advise can hardly be termed

insubordination. Rather, Mr. Williams' actions may be viewed as a "failure to follow instruction." According to the negotiated Performance Improvement Guidelines, failure to follow instructions (not insubordination) calls for the imposition of a four-step regular discipline schedule the first step of which involves the issuance of a Final Warning Before Discipline. That penalty would be more appropriate here.

Further, Black's Law Dictionary (Sixth Edition-1990) defines the term "insubordination" as follows:

> "State of being insubordinate, disobedience to constituted authority. Refusal to obey some order which a superior officer is entitled to give and have obeyed.
>
> **Term imports a** willful **or** intentional **disregard of the** lawful **and** reasonable **instruction of the** employer."

Here, in the alternative, if the Arbitrator believes Mr. Williams was in fact given an "order" as that term is defined by law, to return the uniform items in question or pay for them, then the charge of insubordination is still inappropriate as Mr. Williams's actions did not demonstrate a "willful or intentional disregard of the lawful and reasonable instruction of the employer" (citing the definition of insubordination, Id). Rather, said instruction

was far from lawful or reasonable as it is undisputed that Mr. Williams was contractually entitled to the uniform allowance benefit to begin with.

Moreover, notwithstanding his entitlement to said benefit, Mr. Williams's actions do not rise to the level of "willful or intentional disregard" for his supervisor. To the contrary, he became concerned over his supervisor's view of the situation after speaking with Union Executive Board Member (MetroLink) Muhammad Ali on Thursday, February 20, 2014. This prompted Mr. Williams to make an earnest attempt to seek out Supervisor Olson that day to clarify the potential seriousness of the situation. Unfortunately, Mr. Williams was unable to find Supervisor Olson before having to begin his regular run. As credibly noted by Mr. Williams during his arbitration testimony, had Supervisor Olson told him in clear terms on Thursday, February 20, 2014 that he would be suspended pending recommendation for termination for alleged insubordination unless he returned the uniform items, he would have done so immediately. Unfortunately, he was never given the opportunity to receive said clarification as the decision to issue the first Notice of Discipline was cast by Mr. Thorpe, not Supervisor Olson, at approximately 7:50 a.m. on the morning of Friday, February

21, 2014.

Overall, the only true "order" that appears to exist in this unfortunately saga is the one given by Retired Lieutenant Colonel USA, James N. Thorpe, to Supervisor Olson the morning of February 21, 2014 to suspend Mr. Williams pending recommendation for termination. Dutifully, Supervisor Olson carried out that "unexpected" command (paraphrasing Supervisor Olson's arbitration testimony in which he stated he "was not expecting a call from Mr. Thorpe").

The Union further argues that given the totality of circumstances the penalty of termination cannot be justified. Significantly, the parties' negotiated Performance Improvement Guidelines recognizes the significance of mitigating factors and specifically states: "No penalty may be more severe than that shown in these guidelines, **but it may be** ~lessened **because of mitigating factors**" (emphasis added).

Here, many mitigating factors exist, to wit: 1) Mr. Williams was contractually entitled to his uniform allowance benefit from day one. Therefore, but for the Company's error in calculating the total number of days worked in calendar year 2013, this entire situation would and should have been avoided. 2) All communications

occurring between Supervisor Olson and Mr. Williams on Wednesday, February 19, 2014 were unwitnessed by anyone else and there is a significant disparity between Mr. Williams view of those events versus Supervisor Olson's. For example, contrary to Supervisor Olson's typed written report dated February 21, 2014 (Company Exhibit 1), which should be given little weight (see previous arguments, supra), Mr. Williams adamantly denies that Supervisor Olson said anything about the possibility of discipline let alone "termination." According to Mr. Williams credible testimony the word "insubordination" was never brought up by Supervisor Olson until the first Notice of Discipline was presented to Mr. Williams on the morning of Friday, February 21, 2014. Further, Mr. Williams adamantly denies that he ever told Supervisor Olson that "He didn't care what the Company did to him." As alluded to in Mr. Williams's arbitration testimony only a "crazy man" would say something like that. 3) At no point in time did Supervisor Olson advise Mr. Williams, in the presence of a Union Representative, about the seriousness of the situation and the potential consequence of his decision not to return or pay for the uniform items. Rather than hold such a meeting Supervisor Olson asked Union Executive Board Member (MetroLink), Muhammad Ali, to "**encourage**" Mr. Williams to

return the uniform items. According to Mr. Ali Supervisor Olson never stated the consequence associated with not returning the uniform items and at no time used the term "insubordination." 4) But for the involvement of Retired Lieutenant Colonel USA, James N. Thorpe, it does not appear that Supervisor Olson intended to charge Mr. Williams with insubordination on the: morning of February 21, 2014. AS previously testified, Mr. Thorpe's call came as a surprise to Mr. Olson. Had it not been for the involvement of Mr. Thorpe, Mr. Olson would likely have worked the matter out with Mr. Williams and the Union, however given the phone call that would have been contradictory to Mr. Thorpe's order. 5) Given the long-standing history associated with calculating uniform allowance eligibility, and the number of operators negatively affected by the change, the Company should have advised the Union in advance of its decision to change the manner in which the benefit was being administered. Certainly such communication should have occurred prior to the imposition of any associated discipline. 6) It is noted that the issue at hand (i.e. returning or paying for uniform items) had nothing to do with Mr. Williams's performance of duties as a Metro operator. The parties' negotiated Performance Improvement Guidelines focuses upon "rules and regulations as to how [operator] **duties** are to be performed" Since Mr. Williams's conduct had nothing to do with the performance of his "duties"

per se the Company arguably misapplied the Performance Improvement Guidelines to this case. 7) Finally, an otherwise competent operator such as Mr. Williams should not lose his job over $125 worth of socks and other extraneous clothing items.[8]

Finally, for all of the same reasons cited in this Brief, Mr. Williams's termination is not justified under Section 11-1 of the parties' collective bargaining agreement either.

The Union also asserts that Mr. William's work record demonstrates his ability to respond to corrective action. During Mr. Williams's cross-examination he was asked whether or not he felt Supervisor Olson had treated him "unfairly" in the past to which he responded "yes." Mr. Williams then went on to explain that he had received several disciplinary write-ups for allegedly failing to "sign-on" his bus radio before pulling out of his home station (Frontier) as required under Rule 7.2.1 of Metro's Rule Book (Company Exhibit 3). Said write-ups were issued by Supervisor Olson even though Supervisor Olson had previously given Mr. Williams permission to deviate from the published route schedule during the course of his work day. Specifically, this deviation allowed Mr. Williams to

end the first half of his run Downtown at the Ellicott loop (directly across the street from the bus station) rather than at his home station, Frontier, as called for in the published route schedule.

Said deviation eliminated the need for Mr. Williams to transport his bus from the Frontier station to Downtown before beginning the second half of his run, a travel time of approximately twenty (20) to twenty-five (25) minutes. This deviation was beneficial to both the Company and Mr. Williams and did not have a negative effect on customer service, to wit: 1) Since the customer service portion of Mr. Williams's second half run started Downtown anyway, the Company saved the added cost of fuel required to transport the bus from the Frontier station to Downtown. 2) Eliminating the travel time between the Frontier station and Downtown provided Mr. Williams with an extended lunch/break for an additional period of twenty (20) to twenty-five (25) minutes. However, from a technical standpoint, this arrangement caused what appeared to be a failure to "sign on" at the appropriate time as per the published scheduled which is monitored by downtown controllers. As demonstrated by the **TRANSPORTATION DEPARTMENT REPORT** dated 08/23/13 (Union Exhibit 8) it was

claimed that Mr. Williams (Operator 5316) "failed to log on by 3:50 p.m.", rather he "logged on at 4:15 p.m. twenty-five (25) minutes late."

However, the twenty-five (25) minutes in question involved the travel time built into the published schedule allowing for the transporting of Mr. Williams's bus from the Frontier Station to Downtown which, of course, became unnecessary due to the arrangement worked out with Supervisor Olson. Yet, Mr. Williams was still disciplined for allegedly failing to "sign-on." As a consequence, between October 26, 2012 and August 23, 2013, Mr. Williams received six (6) Disciplinary Notices pursuant to the SEVEN-STEP DISCIPLINE schedule set forth in the parties' negotiated Performance Improvement Guidelines which placed him on the verge of termination" (see Union Exhibit 9 and Company Exhibit 2). However, from that point forward Mr. Williams, knowing the fatal consequence of another failure to "sign-on" violation, he corrected his behavior. Mr. Williams's turn around demonstrates his concern for his job as a Metro Operator and serves as a testament to the effectiveness of fundamental progressive disciplinary principles which seek to correct employee behavior before the fatal act of termination is imposed. Clearly, the parties' negotiated Performance Improvement Guidelines

embrace these progressive disciplinary principles. Had said principles been applied here, Mr. Williams would never have lost his job, unfortunately that did not occur here.

Had the Company applied progressive discipline, it is clear from Mr. Williams past record of responding to discipline that he would have suffered nothing more than a one-day suspension if that.

Finally, the Union argues that the Company's own actions prior to the Grievant's actual termination demonstrate the harsh nature of the penalty imposed. during the two (2) week period between Mr. Williams's suspension pending recommendation for termination occurring February 21, 2014 and his actual termination effective March 7, 2014, numerous communications were exchanged between the parties. Significantly, the Company's Manager of Labor Relations, Louis Giardina, acknowledged to Union President and Business Agent, Vincent G. Crehan that "in hindsight, perhaps as an alternative to a directive and discipline for insubordination, the company should **have** just deducted the value of the uniform from Mr. Williams and let the litigation begin"

Certainly, this type of approach would have avoided the mess that ultimately followed. However, even more significantly, in response to President Crehan's inquiry about what penalty the Company ultimately intended to impose upon Mr. Williams Mr. Giardina responded by stating that a thirty (30) day penalty would be appropriate. Yet, despite the above-referenced comments by Mr. Giardina the Company ultimately decided to issue the draconian penalty of termination against Mr. Williams for failing to return $125.00 worth of uniform items.

Mr. Giardina's pre-termination comments are certainly telling.

Based upon the above-referenced arguments the Union respectfully seeks a Decision and Order from the Arbitrator immediately reinstating the grievant, Lawrence Williams, with full back-pay and benefits less a two (2) day suspension consistent with the application of Rule 4.5 Failure to follow instruction (not insubordination)" and the FOUR-STEP REGULAR DISCIPLINE progression contained in the parties' negotiated Performance Improvement Guidelines.

DISCUSSION AND ANALYSIS

Because this is a disciplinary matter, the Company bears the burden of proving the facts it asserts are true and that the proven facts provide justification for the penalty imposed, in this case, termination.

In addition to the references to employee discipline contained in the collective bargaining agreement, the matter of discipline is addressed in the Performance Improvement Guidelines ("Guidelines") entered into the record as Joint exhibit 2. That document contains several provisions directly related to this dispute. Specifically, stated in the Guidelines is the following; "No penalty may be more severe than that shown in these guidelines, but it may be lessened because of mitigating factors. Any operator who feels the procedure has been applied unfairly may utilize the grievance procedure provided in the collective bargaining agreement." "The following actions will result in termination of employment: 1.7 insubordination" "The following actions will result in four-step regular discipline: 4.5 Failure to follow instruction (not insubordination)."

I find first that Mr. Williams is guilty of insubordination. The clear facts here show that Mr. Williams was told to return his uniform issue and refused to do so until days later and only. There is no claim that Williams was not told to return the uniform or that he did not know what that meant. There is no evidence to show that the directive was at any point lifted. The only counter claims here are basically categorized as "Guilty with an Excuse." The fact that Williams was later found to actually be eligible for the uniforms does not relieve him of his responsibility to comply. The long-held tenet of "work now grieve later" clearly applies when an employee is directed to do something and that something is in the employee's opinion, in violation of the Agreement. The only exemption to that tenet is if an employee is given a directive that is illegal or unsafe. The circumstances here do not show that compliance with the directive would place the Grievant or anyone else in an unsafe position. The circumstances here do not show that Williams was asked to do anything that violated the Law. The directive did lead to a situation where compliance turned out later to be contractually wrong but again, that does not relieve and employee from the work now grieve later requirement.

The Union asserts that Williams was never given a direct order where he was told the consequences of his failure to comply. I find the evidence shows he was given a clear order, he simply did not agree with the order. He had a responsibility to comply. Further, while the failure to know the exact consequences of failing to follow an order may provide some mitigation employees are not permitted to weigh the consequences and then decide if the cost of insubordination is higher than the employee is willing to pay.

Further, I cannot find that employers must follow every order or directive with a threat of consequences in order to gain employee compliance. Who would want to work in a word place where every directive is followed with a threat as to what consequences would follow a failure to follow the order? I would agree, as I do below, that the failure to state consequences in a termination matter may be used as a factor to mitigate termination but the failure to advise Mr. Williams as to the specific consequences does not give Mr. Williams license to disobey a directive or to drag out compliance.

The facts show Mr. Williams was given a clear directive, he understood the directive and all he was quibbling about was what the cost of his failure to comply would be. This is totally unacceptable and reasonably gives the Company concern for Mr. Williams' attitude towards the performance of his job. Mr. Williams knew what he was being told to do and then purposely delayed in complying. The Company is justified in addressing such behavior.

As noted above, I find the facts prove insubordination and not a failure to follow instruction. The difference between the two rules is one of intent. An employee can fail to follow instruction for a number of reasons including the lack of ability to do so. Insubordination is intentional. Here, the record shows that Mr. Williams clearly understood that he was to return his uniforms and he chose not to comply unless he was told the consequences and I assume only if the consequences were high enough to motivate him to comply; given the record, a reasonable assumption on my part but nevertheless he chose not to comply until after he was told he was to be suspended then fired. His intentional failure to comply justifies a finding that he was insubordinate.

Given the above, I find that the Company had justification to discipline Mr. Williams. I do not find justification to terminate given the mitigating factors. The Guidelines show insubordination is grounds for immediate termination but they also read, as the Union asserts, that the penalties listed in the Guidelines are maximum penalties that may be reduced where there are mitigating factors.

Several factors exist here. First, Mr. Williams ultimately complied with the directive. Albeit a couple of days had passed but the nature of the directive was such that the Company suffered no real harm as a result of the delay. Second, Mr. Williams turned out to be right so it was the Company's error that provoked the insubordination. While this factor alone would not be sufficient to change the outcome of this dispute, it must be taken into consideration in order for a fair review of the matter to take place. Finally, the record shows the Union provided the preponderance of the evidence that Mr. Williams was never warned that his failure to comply would result in termination until after he was notified of the discipline. Mr. Olson's testimony was that he never did tell Williams he would be suspended pending termination until the

disciplinary meeting and then Williams was given one last opportunity to comply. However, that testimony was contrary to that of Mr. Williams and the Union representative at the meeting who both said he was given the discipline without the last chance to comply. The preponderance of the evidence thus shows that Mr. Williams was not warned his failure to comply would result in termination. Even the testimony presented by the Company reinforces that Mr. Williams should have been warned that his failure to comply would result in termination.

While there are situations where an Employer needs immediate compliance this is not one of them. There would have been no harm coming from the Company advising Williams he was to comply or face termination once the matter reached the stage where the Company was seriously contemplating termination. Williams would still have been subject to having discipline imposed but he could have had the opportunity to save his job.

Finally, I address the claim that the penalty imposed upon Mr. Williams is excessive given the testimony that other employees who the Company deemed to be insubordinate were given a one-day suspension therefore Mr. Williams

should have at most received a one-day suspension for the same offense. What the testimony provided did show was the Company can, under the Guidelines, impose a lesser penalty for the offense of insubordination but the testimony did not contain enough information to allow a determination that the prior instances of insubordination allow an "apple to apple" comparison. First, the insubordination Mr. Williams is here found to have engaged in was prolonged. He failed to comply with the directive for days. Second, Mr. Williams does not a clean work record. His record shows that he has been disciplined prior to his current misconduct; discipline that includes prior suspensions in excess of one day. There is no information in the record of this hearing to show the two employees who were given one-day suspensions had prior discipline. Mr. Williams while now claiming his prior discipline was unjust should have made that claim when the prior discipline was imposed. His acceptance of the prior discipline means that his work record as it now stands shows an employee with prior discipline. In summary, I accept the evidence as proof that the Company is not bound to impose termination for every act of insubordination. However, the evidence presented does not show the only fair penalty available to the Company, based on all of the factors proper for

consideration here, limits the Company's address of Mr. Williams' insubordination to a one-day suspension. When all of the factors are taken together, a far greater penalty than a one-day suspension is justified.

Given all of the above, I do not find the Company had justification to terminate Mr. Williams considering all of the facts and circumstances I review here. The Company does have justification to impose a serious penalty given that insubordination is proven. I find that the proper penalty here is the imposition of a 30-day suspension without pay and a warning that should Mr. Williams again engage in insubordination, he will be subject to termination.

AWARD

The penalty of termination was not justified under the parties' negotiated Performance Improvement Guidelines and/or Section 11.1 of the parties' collective bargaining agreement.

The imposition of a 30-day unpaid suspension and a final warning concerning insubordination is justified under the collective bargaining agreement and the Guidelines.

As remedy for the above, within two weeks of this Award, Mr. Williams is to be reinstated with full back pay and benefits less the 30-day unpaid suspension referred to above.

AFFIRMATION

STATE OF NEW YORK)
) ss.:
COUNTY OF ERIE)

I, MICHAEL S. LEWANDOWSKI, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my award.

Date: August 8, 2014

MICHAEL S. LEWANDOWSKI