

Thomas J. Nowel, NAA  
Arbitrator and Mediator  
Lakewood, Ohio

IN ARBITRATION PROCEEDINGS PURSUANT TO  
AGREEMENT OF THE PARTIES

|  |   |               |
|--|---|---------------|
| Arbitration Proceedings Between:               | ) |               |
|  | ) | Case No. DMH- |
| State of Ohio, Department of Mental Health and | ) | 2020-02638-11 |
| Addiction Services, Ohio Pharmacy Services     | ) |               |
|  | ) | ARBITRATION   |
| and  | ) | OPINION AND   |
|  | ) | AWARD         |
| Service Employees International Union,         | ) |               |
| District 1199                                  | ) | DATE:         |
|  | ) | July 28, 2021 |
| Re: Alfred Hill, Jr. Removal                   | ) |               |

APPEARANCES:

John Jones, Member Arbitration Services, for SEIU, District 1199 and Todd M. Viars, Labor Relations Specialist, for the Department of Mental Health and Addiction Services.

## INTRODUCTION

This arbitration arises pursuant to a collective bargaining agreement between the State of Ohio and the Service Employees International Union, District 1199. The employment of the Grievant, Alfred Hill, Jr., was terminated effective July 14, 2020 based on alleged violation of Code of Conduct, HR-22, and General Work Rules, Rule 2.6. The Union appealed the termination on July 15, 2020 pursuant to Article 7 of the collective bargaining agreement. The grievance was denied by the Employer, and was carried forward to arbitration on October 6, 2020.

The arbitrator was selected to hear the grievance pursuant to Section 7.07 of the collective bargaining agreement. The arbitration hearing was conducted on June 2, 2021 by way of video platform, Zoom. The parties agreed that the matter was properly before the arbitrator, and, at the conclusion of the hearing, the parties agreed to submit post hearing briefs no later than July 19, 2021. The record of hearing was closed on that date. The parties had full opportunity to present their cases, facts and argument.

## WITNESSES

### TESTIFYING FOR THE EMPLOYER:

Laurie Spolarich, Labor Relations Administrator  
Denise Dean, Central Pharmacy Director  
Leah Atkins, Staff Pharmacist  
Gregory Cudzil, Former Supervisor

### TESTIFYING FOR THE UNION:

Alfred Hill, Jr., Grievant  
Michelle Flowers, Pharmacist and Union Delegate

## JOINT STIPULATIONS

### Joint Statement of the Issue:

Did the Employer have just cause to terminate Al Hill for violation of HR-22 Code of Conduct and General Work Rules, Rule 2.6, failure to perform work assignments/duties: Failure to perform assigned duties in a specified amount of time, or failure to adequately perform duties of the position. If not, what shall the remedy be?

### Joint Stipulations:

1. This grievance is properly before the Arbitrator.
2. The Grievant was hired by Ohio Pharmacy Services on April 21, 2014.
3. At the time of his removal, the Grievant was employed as a Pharmacist.
4. July 8, 2020 the Grievant was removed from his position.
5. At the time of the termination, the Grievant had an active 5-day working suspension, effective pay period ending October 14, 2017 for Code of Conduct and General Work Rules, violation of: Work Rule 2.6, Failure to perform work assignments/duties.
6. At the time of the termination, the Grievant had an active 3-day working suspension effective pay period ending May 28, 2016 for Code of Conduct and General Work Rules, violation of: Work Rule 1.12 Sixteen hours or less of unauthorized leave. Work Rule 1.2, Call – off procedures.
7. At the time of the termination, the Grievant had an active 1-day working suspension effective pay period ending July 26, 2015 for Code of Conduct and General Work Rules, violation of: Work Rule 3.8, Failure to maintain control of security equipment, all classes of tools keys, identification badges and other related equipment.

## RELEVANT PROVISIONS OF THE AGREEMENT

### ARTICLE 8 – DISCIPLINE

8.01 Standard. Disciplinary action may be imposed upon an employee only for just cause.

8.02 Progressive Discipline. The principles of progressive discipline shall be followed. These principles usually include: A. Written Reprimand. B. A fine in an amount not to exceed five (5) days' pay. C. Suspension. D. Removal. The application of these steps is contingent upon the type and occurrence of various disciplinary offenses. The employee's authorization shall not be required for the deduction of a disciplinary fine from the employee's paycheck. If a bargaining unit employee receives discipline, which includes lost wages or fine, the Employer may offer the

following forms of corrective action:

1) Actually having the employee serve the designated number of days suspended without pay; or receive only a working suspension, i.e., a suspension on paper without time off; or pay the designated fine or; 2) Having the employee deplete his/her accrued personal leave, vacation, or compensatory leave banks of hours, or a combination of any of these banks under such terms as may be mutually agreed to between the Employer, employee, and the Union.

If a working suspension is grieved, and the grievance is denied or partially granted and all appeals are exhausted, whatever portion of the working suspension is upheld by an arbitrator will be converted to a fine. The employee may choose a reduction in leave balance in lieu of a fine levied against him/her.

#### ARTICLE 6 – NON-DISCRIMINATION

Neither the Employer nor the Union shall unlawfully discriminate against any employee of the bargaining units on the basis of race, sex, creed, color, religion, age, national origin, political affiliation, Union affiliation and activity, handicap or sexual orientation, or discriminate in the application or interpretation of the provisions of this Agreement, except those positions which are necessarily exempt by bona fide occupational qualifications due to the uniqueness of the job, and in compliance with the existing laws of the United States and or the State of Ohio. In addition, the Employer shall comply with all the requirements of the Federal Americans with Disabilities Act and the regulations promulgated under that Act.

The Employer and Union hereby state a mutual commitment to equal employment opportunity, in regards to job opportunities within the Agencies covered by this Agreement.

6.02 Agreement Rights. No employee shall be discriminated against, intimidated, restrained, harassed, or coerced in the exercise of rights granted by this Agreement.

#### GRIEVANCE

STATEMENT OF THE GRIEVANCE: Management has unjustly terminated grievant without just cause. "Grievant believes that management has discriminated/harassed/intimidated him in regards to his rights as a union member. Grievant feels treatment against him now and in the past has been biased and unfair."

RESOLUTION REQUESTED: To be made whole in every way including but not limited to restoring grievant to his previous position with back pay, seniority, leave accruals, and any other benefits due him.

## BACKGROUND

The Grievant, Alfred Hill, had been a registered Pharmacist for forty-one years. He served as a manager for a number of years during his employment prior to service with the State of Ohio. The Grievant was hired as a part-time employee by the Ohio Department of Mental Health and Addiction Services in 2012. He became a full-time Pharmacist on April 21, 2014 at which time he was a member of the Union's bargaining unit. He remained in that position until the termination of his employment effective July 14, 2020. At the time of the Grievant's termination, his record reflected three active discipline cases, a one-day working suspension; a three-day working suspension; and a five-day working suspension. A five-day suspension is the final step prior to termination pursuant to the Employer's discipline grid. Of course, all discipline must be for just cause.

Gregory Cudzil was a new supervisor in the Pharmacy Section of the Department. Along with Supervisor Ives, he developed an updated production tracking system for the "final check" system for Pharmacy Services during mid and late 2019 immediately following his appointment as supervisor. The final check process includes scanning the bar code of each filled prescription, verifying the name of the patient, and making certain that the proper amount of medication is being shipped to the involved state department, usually Rehabilitation and Correction. This process involves both manually filled prescriptions as well as those filled automatically. The new system, developed by Supervisor Cudzil, requires Pharmacists to track their work

performance by entering the number of final checks performed during a specified amount of time. During the last week of September 2021, a new worksheet was introduced to each Pharmacist. During a seven-week pilot program, final check production rate per hour was ascertained. Pharmacists were notified on December 2, 2019 that the new production standard of 175 final checks per hour had been established. The new standard included an average of 175 final checks per hour during a work week, the standard being achieved 50% of weeks performed. The Grievant was not present at the staff meeting, and Supervisor Cudzil personally met with him to discuss the new production standards.

After two weeks, every Pharmacist except two, had met the production standard. Supervisor Cudzil met with both Pharmacists, including the Grievant, to provide further guidance and problem solving, and, within a short period of time, only the Grievant failed to meet the final check standard. While most Pharmacists in the Department were assigned to a variety of duties besides final check, the Grievant's assignments were generally limited to final check during a weekly schedule of four ten hour shifts. Evidence indicates that final check is a very repetitive function.

The Grievant continued to fall below the 175 average standard, and Supervisor Cudzil continued to meet with him one on one on a weekly basis. Evidence indicates that the Grievant failed to meet the hourly rate of 175 final checks, 50% of the time, every week but one during a twenty-five week period. All other Pharmacists met the standard during this same period of time. Again, final checks are performed on both manually filled and robotically filled prescriptions. 175 final checks equate to three scans per minute.

The Employer determined that the Grievant had failed to perform his duties in a timely manner pursuant to Department policy. A pre-disciplinary hearing was conducted on June 22, 2020. The Grievant was charged with violation of HR-22, Code of Conduct and General Work Rules, Rule 2.6. Hearing Officer, Amanda Parson, determined that there was just cause for discipline. The Employer determined, based on the Grievant's disciplinary record, that Removal was an appropriate level of discipline. On July 8, 2020, the Department Director, Lori Criss, issued a notice of "Removal" to be effective July 14, 2020. The Union appealed the termination of the Grievant's employment, and, following the various steps the Grievance Procedure, the matter was appealed to arbitration.

The Grievant is ADA qualified due to conditions involved with diabetic neuropathy. Based on his condition, the Employer allowed the Grievant to sit and stand during the completion of his duties, and he was permitted flexibility regarding restroom breaks.

#### POSITION OF THE EMPLOYER

The Employer states that the new worksheet, developed in September 2019, gathers more data and accurately depicts the amount of time that is spent by Pharmacists doing the various functions of their job. Following a pilot program, it was determined that 175 final checks per hour, averaged through the week, is a reasonable and attainable standard, and the standard must only be achieved 50% of the weeks performed. Supervision met with employees to inform and train. The Employer states that the Grievant was not present at the staff meeting which involved the presentation regarding the new standards, but Supervisor Cudzil met with him one and one. Two weeks into the roll-out of the plan, only two Pharmacists failed to meet

the 175 final check standard. This included the Grievant. Supervisor Cudzil met with both Pharmacists one on one, and, as the Grievant struggled, he met with him weekly in an attempt to assist and train in the revised process.

The Employer states that the Grievant had an ADA accommodation regarding sitting and standing. The Employer states that it accommodated him with a chair and reflective mat to eliminate the glare on his computer screen.

The Employer states that the average rate of 175 final checks per hour is a low threshold. It involves only three final checks per minute. And the threshold must be met at a rate of only 50%. A pharmacist must meet the threshold two weeks in a month. Supervisor Cudzil continued to meet with the Grievant in an effort to move him to satisfactory performance. Nevertheless, the Grievant failed to meet the standard twenty-four of twenty-five weeks. The Employer refers to the testimony of Pharmacist Adkins who had no issues or concerns regarding the average hourly rate of 175 final checks.

The failure of the Grievant to meet the average 175 final checks per hour was reported and came to the attention of management of the Department. The Employer initiated a thorough investigation of the Grievant's lack of satisfactory production. It was noted that the Grievant had completed annual training for the HR-22 Policy on July 9, 2019. He was therefore aware of the responsibility to perform his duties in a timely manner. The Grievant was notified that he was the subject of a pre-disciplinary hearing, and the hearing officer recommended that there was just cause for discipline. The Employer argues that termination of employment was the appropriate level of discipline based on the HR-22 discipline grid based specifically on the



Grievant's active discipline, suspensions of one day, three days and five days. The Employer states that the discipline grid is consistently applied.

All other Pharmacists in the Department met the 175 average final checks standard. The Employer accommodated the Grievant regarding his ADA claim. The Grievant was terminated for failure to meet reasonable production standards and all testimony and evidence at the arbitration hearing clearly confirms the case of the Department. The Grievant was given a twenty-five week window to change his behavior and failed to do so. The Employer requests that the grievance be denied in its entirety.

#### POSITION OF THE UNION

The Union states that, as a registered Pharmacist for forty-one years, the Grievant received awards for service and served as a manager for ten years. Although there are a number of disciplinary issues on his record, only one involved a production matter. The Union states that the Employer failed to assist the Grievant in overcoming his difficulties which were related to his disability. The Employer failed to meet the elements of just cause by failing to notify the Grievant that the performance issues could be grounds for termination. The Employer failed to consider flaws in training tools and the fact that the Grievant suffers from diabetic neuropathy. Performance expectations were designed to be used as a tool to assist employees and not for evaluation purposes. The Union delegate, Ms. Flowers, testified that supervision stated to her that the expectations would not be used to measure performance. Supervisor Cudzil did not assist the Grievant when asked, and he moved to another shift and was, therefore, unavailable to him.

The Union states that the final check process included locating errors created by the manual filling of prescriptions. These take a great deal of time to complete and negatively effects productivity. Final check also involved the inspection of prescriptions filled by a robotic process. The Employer did not address these issues when considering the termination of the Grievant.

The Grievant was assigned to final checks nearly every working hour. The work is tedious and repetitive. All other Pharmacists in the Department rotated to other assignments which allowed them to have inflated numbers when completing final check. The Union argues that the manner in which the Employer assigned the Grievant to final check was designed to intentionally punish him. Supervisor Cudzil was not aware that the Grievant performed final checks 100% of the time. The Union argues that the termination was based on false information. When other Pharmacists performed final checks during a full work day, it was not counted against their productivity rates. The Grievant was held, in a discriminatory manner, to a standard which no other Pharmacist was forced to endure. The Employer was aware of the Grievant's disabilities but utilized measures which applied to employees without disabilities.

The Union states that daily productivity reporting was on an honor system. The Union Delegate confirmed that it was easy to "fudge" daily reports resulting in made-up numbers. The Union states that there was an environment of rampant misrepresentation. The Grievant's errors were reported while the errors of other Pharmacists were not. The Union claims that race played a part in the termination of the Grievant. No other Pharmacist had been disciplined within three years for failing to meet expectations. The Grievant was singled out. Supervisors inflated the numbers for other employees but did not assist the Grievant in this manner.

The Union argues that Supervisor Cudzil had no supervisory experience prior to working at the Department. Evidence indicates that he never consulted with other states or regions regarding the new productivity standard which he developed. He lacked training regarding the development of performance standards.

The Union argues that the requirement to stay in a small space conducting final checks for an entire shift resulted in discomfort for the Grievant due to his disability. This impacted his productivity. Supervisor Cudzil failed to accommodate the Grievant in any way. The Union states that it became clear at the hearing that Supervisor Cudzil paid little attention to the Grievant, contrary to his testimony and statements. He stated that the Grievant performed certain final checks twenty hours per week when in reality he was assigned to the process for forty hours per week, 100% of his work week.

The termination of the Grievant was unreasonable based on his years of service with the State and forty-one years of service as a Pharmacist. The termination was not for just cause, and the Employer violated Article 6 of the collective bargaining agreement, the Non-Discrimination provision. Based on the Grievant's disability, the Employer should have adjusted the performance measures. The Union requests that Grievant Hill be reinstated and made whole in every respect.

#### ANALYSIS AND OPINION

Gregory Cudzil became a supervisor in June 2019. He immediately determined that there was a more efficient manner in which to evaluate Department Pharmacists. With assistance from Supervisor Ives, he developed a modified way to measure production data, and

he established an increased expectation target for final checks. The former target was an average of 150 final checks per hour, and the new expectation was 175. Mr. Cudzil established flexibility as the new expectation was to be met 50% of the time, two weeks in a four week period for example. He met with the Pharmacist staff in September 2019 to discuss the revised standard and ran a pilot session for a number of weeks. The Union argues that he did not consult with other professionals in the field in Ohio or elsewhere, but this is not necessarily a negative. But evidence suggests that Supervisor Cudzil did not utilized the staff of Pharmacists in the development of the new standard. While not a violation of the management rights provision of the collective bargaining agreement, it is a missed opportunity in the promotion of team work among professionals. The Union had previously raised concerns regarding the final check process during labor management meetings. Although most Pharmacists were able to quickly meet the new standards, two fell behind. After one on one training, only the Grievant failed to meet the standard on a consistent basis.

The Union argues that the Employer discriminated against the Grievant on the basis of disability and race, and the Non-discrimination provision of the Agreement was cited as part of the written grievance. Nevertheless, the parties entered into a stipulated "Issue" which is before the arbitrator, and there is no mention of such discrimination. Additionally, there was no specific evidence presented to support the allegation. The Employer generally accommodated the Grievant's disability by allowing him to sit and stand when completing final checks.

The discipline record of the Grievant is of concern. It is not known if the three disciplinary suspensions were grieved, but the record of active discipline includes suspensions

of one day, three days and five days. The next step, according to the Employer's discipline grid, is termination of employment for a violation of policy if just cause is determined. What is noted here is no record that the Grievant was disciplined for failure to meet final check expectations when the standard was set at 150 per hour.

Supervisor Cudzil spent significant time working with the Grievant in an attempt to assist him in reaching the 175 goal. Data indicates that, in a twenty-five week period, the Grievant reached the 175 average on only one occasion. Evidence and exhibits indicate that the Grievant was open to training and positive criticism. He admitted to making errors, from time to time, and stated that he was open to using a number of methods and techniques to elevate his performance. The "Report of the Investigation" of the Grievant included his response when questioned regarding his lack of productivity. "Mr. Hill said he is 'open to supervisor's suggestions for improvement.' He stated, 'I have experimented with different positions for monitor, keyboard, repositioned my monitor and keyboard height, modification of final check procedures/methods, and changed the way I check manual, prepacked, Dosis, multiple blister cards Rx's.'" There is no evidence that he was insubordinate or not open to making an effort to increase his productivity and elimination of errors. The reality was that an employee, with forty-one years as a Pharmacist and working with a disability, which caused discomfort while sitting and standing, was unable to attain the new standard of an average 175 final checks per hour. The Grievant was assigned primarily to final checks while other Pharmacists engaged in other duties which broke the repetitive routine. The Employer argues that the Grievant's slow pace created a morale issue among other Pharmacists in the Department, but there was no evidence to confirm this assertion. Supervisor Cudzil stated

during the investigation that all Pharmacists worked diligently to meet the new standards with the exception of the Grievant, but, again, there is no evidence that the Grievant did not make an effort. Mr. Cudzil stated, as part of the investigation of the Grievant, that he himself performed 371 final checks from 3:00 am to 4:00 am during a particular shift while in a seated position and determined that the task could be performed whether seated or standing. This was a one-time focused scenario, conducted during what was probably a less hectic time, which was not comparable to a regular work day of the Grievant or other Pharmacists.

The Employer emphasized the training the Grievant received and specifically the annual review of Code of Conduct HR-22 on July 9, 2019 which requires the completion of “assigned duties in a specified amount of time...” This training occurred prior to the change to an average 175 final checks per hour. The Grievant was undoubtedly unaware of the changes at the time of the policy review.

The Union has argued that the Grievant was not sufficiently notified that his failure to meet the expectation of 175 final checks per hour could result in disciplinary action. This argument is compelling. Supervisor Cudzil met with the Grievant on numerous occasions to provide training and guidance in the new level of final check expectation. The Grievant continued to fall short. Nevertheless, there is no evidence that Supervisor Cudzil, or any member of management, at any time, suggested the possibility of discipline, and in particular termination of employment, if unable to meet the new standard. The record of hearing provides no exhibits or testimony to this effect, and the Record of Discipline contains no evidence that the Grievant was notified that he would face discipline if he failed to complete 175 final checks per hour 50% of the time. Supervision did not make it clear to the Grievant

that failure to meet the new standard would be a violation of HR-22, Code of Conduct and General Work Rule 2.6. This is a critical factor in this case.

Section 8.01 of the collective bargaining agreement provides that discipline may be imposed only for just cause. One of the critical elements of just cause is appropriate notice of possible discipline. While not all labor arbitrators adhere to all seven tests of just cause, as elicited by Arbitrator Carroll Daugherty in *Enterprise Wire Company*, 46 LA 359, neutrals generally find that an Employer is required to provide notice of the consequences of an employee's behavior if discipline is to be imposed. Failing to do so results in a lack of just cause. Arbitrator Daugherty posed the question. Did the Employer give any warning as to any possible discipline or consequence that could result from the employee's action, behavior or failure? Arbitrators have determined that the Employer must advise the employee that any act of misconduct or improper behavior, violation of policy, would result in discipline. And the statement must be clear, unambiguous and inclusive of any potential penalty. Supervisor Cudzil met with the Grievant one on one. He corresponded with him via email. Evidence suggests that the Grievant made attempts to achieve the new production standard. There is no evidence that Supervisor Cudzil, or any other supervisory employee, made it clear at some point that failure to complete an average of 175 final checks per hour would lead to discipline and possible termination of employment. This is a significant flaw in the Employer's case. The termination was therefore not for just cause and a violation of Article 8 of the collective bargaining agreement.

There is no evidence that the Grievant was disciplined when the standard was 150 final checks per hour. Supervisor Cudzil imposed the new standard unilaterally with little or no input from Department Pharmacists. This is not to say this was a violation of the Agreement, but a team effort involving the Grievant, who has been a Pharmacist for 41 years and has served as a manager in previous employment, may have allowed for an easier transition and avoided the instant disciplinary matter. Issues involving the Grievant's disability may have been taken into account when it was determined that 175 final checks would be the new standard. Most importantly, the Employer's case against the Grievant is flawed as supervision failed to notify the Grievant that failure to complete an average 175 final checks would, at some point, result in discipline, and, in this case, termination of employment.

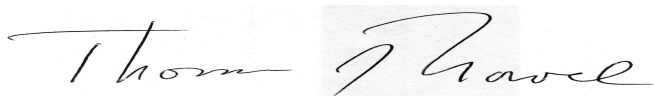
The termination of the Grievant's employment was not for just cause. The Employer violated Article 8 of the collective bargaining agreement when terminating the employment of Grievant Hill. The Grievant is to be reinstated and made whole for all lost wages, less any interim earnings including unemployment compensation if applicable, benefits, the cost of health care for items which would have been covered by the Employer's health care plan, lost seniority accumulation, and placement on the shift and work schedule to which he was assigned at the time of the termination. The Grievant is to be reinstated no later than two full pay periods from the date of this award. The termination of his employment occurred over one year ago. He therefore is to receive adequate training regarding the duties of his position including the final check process.



## AWARD

The grievance of the Union, regarding Alfred Hill, is sustained. The termination of the Grievant was not for just cause and was therefore a violation of Article 8 of the collective bargaining agreement. The arbitrator retains jurisdiction for 60 calendar days from the date of this Award for purposes of remedy only.

Signed and dated this 28<sup>th</sup> day of July 2021 at Lakewood, Ohio.

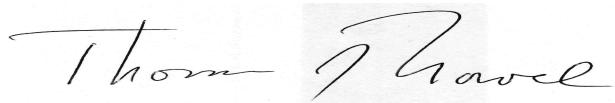
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Thomas J. Nowel, NAA  
Arbitrator

### CERTIFICATE OF SERVICE

I hereby certify that, on this 28<sup>th</sup> day of July 2021, a copy of the foregoing Award was served by electronic mail upon Todd M. Viars, Labor Relations Specialist, for the Department of Mental Health and Addiction Services; Pete Hanlon, MRC Director, for SEIU District 1199; John Jones for SEIU District 1199. In addition, copies of the Award are served upon Kate Nicholson and Victor Dandridge for the Ohio Office of Collective Bargaining.

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Thomas J. Nowel, NAA  
Arbitrator