IN THE MATTER OF ARBITRATION

BETWEEN

OHIO DEPARTMENT OF REHABILITATION AND CORRECTIONS

AND

SEIU DISTRICT 1199

Grievant: Jennifer Yeoman, Discharge

Case # 27-30-20100914-0105-02-12

BEFORE: Robert G. Stein, Arbitrator

FOR THE EMPLOYER:

Buffy Andrews, Labor Relations Officer 3
Department of Rehabilitation and Corrections
770 West Broad Street
Columbus OH 43222

FOR THE UNION:

Joshua Norris, Organizer
SEIU District 1199
1395 Dublin Road
Columbus OH 43215

INTRODUCTION

This matter came on for hearing before the arbitrator pursuant to the terms of the collective bargaining agreement ("Agreement") (Joint Ex. 1) between SEIU/District 1199, The Health Care and Social Service Union ("Union") and The State of Ohio, Department of Rehabilitation and Correction ("Employer" or "Department"). That Agreement is effective for calendar years 2009 through 2012 and included the conduct which is the subject of this grievance.

Robert G. Stein was mutually selected by the parties to impartially arbitrate this matter, pursuant to the terms of Article 7, Section 7.07(A) of the Agreement as a member of a panel of arbitrators chosen by the parties. A hearing was conducted on June 27, 2011 at NCCI, located in Marion, Ohio. The parties mutually agreed to that hearing date and location, and they were each provided with a full opportunity to present oral testimony, documentary evidence, and arguments supporting their respective positions. The hearing, which was not fully recorded via a written transcript, was closed upon the parties' individual submissions of post-hearing briefs.

ISSUE

The parties framed and stipulated to the following as a statement of the issue to be resolved:

> Was the Grievant, Jennifer Yeoman, removed from her position of Nurse II for just cause? If not, what shall the remedy be?

RELEVANT CONTRACT PROVISIONS

Article 3—Management Rights
Article 6.01 Non-Discrimination
Article 8.02—Progressive Discipline
Article 8.04—Investigations
Article 45.03-Disciplinary Actions

BACKGROUND

Jennifer Yeoman ("Watkins" or "Grievant") began her employment as a Registered Nurse with the Department on January 22, 2008. In the Spring and Summer of 2010 the Grievant was investigated and eventually terminated by the Employer on September 7, 2010 for violating:

1. Rule #7-Failure to follow post orders, administrative regulations, policies, or directives.

2. Rule #22-Falsifying, altering, or removing any document or record.

3. Rule #41-Unauthorized actions that could harm any individual under supervision of the Department.

The Grievant had no prior discipline in her record at the time of her termination, and was terminated from her employment based upon the

findings of the Employer that the Grievant had violated the above rules in April of 2010, when she falsely documented inmate/patient files claiming she had seen them and assessed them when she had not, and on May 14, 2010, when she re-labeled a night stock medication for an inmate/patient.

The Grievant was terminated on September 7, 2010 and the Union subsequently filed a grievance in opposition to the Employer's action. After passing through the requisite steps of the grievance procedure contained in Article 7 the matter remained unresolved. In accordance with Section 7.06, it was then submitted to by the Union to arbitration for final and binding resolution.

SUMMARY OF THE EMPLOYER'S POSITION

The Employer's basic contention is that it did have "just cause" to terminate the Grievant's employment based on its investigation and findings in this matter. The Employer's investigative findings revealed that Jennifer Yeoman had violated the previously stated rules as follows:

> **1st Issue:** During the month of April 2010, the Grievant falsely documented in three (3) different chronic care inmate files that she had seen them and did a full assessment of them when in fact she did not see these inmates. The Grievant alleges she saw all three inmates at the same time and on the same date when that is not possible. The Employer points out that chronic cases are designed for one on one meetings between the patient and provider in order to maintain patient confidentiality.

The Grievant falsified Inmate D-5's, HIV Management Flow Sheet when she recorded in a chart that she met with him and Dr. Dawes on April 26, 2010 and discussed his medical care. Dr. Dawes left the employment of the Department on March 31, 2010 and could not have been in this meeting. Later the Grievant stated that the Employer misread her date notation and the meeting took place on April 6, 2010. According to the Employer, even that date is still after the departure of Dr. Dawes, proving that the Grievant falsified inmate D-5's record.

The Grievant stated she mixed up two inmate patients who had the same last name D-2 and D-5, and charted them incorrectly. Medical Records are to be kept in chronological order so that the medical professionals know what procedures, prescriptions, and test have been ordered. The records related to the instant matter were not in chronological order and it appears that the Grievant made late entries in the records without using proper procedures to do so.

On May 4, 2010, the Employer argues it provided the Grievant with an opportunity to correct the record in accordance with the Charting Directive Protocol #4. A chart review was conducted in June of 2010 and the record was still not corrected, even though the Grievant stated on May 4, 2010 the records would be corrected.

2nd Issue: On May 14, 2010, Nurse Yeoman re-labeled a night stock prescription medication to a patient (inmate # 577-733). The Employer contends that the Grievant placed a medication label over the night stock prescription medication bag and the accountability sheet.

According to the Employer, this is in direct violation of Medical protocol B-10 Medical Administration Section IV E (12) (eff 5/4/06), which states that "prescription labels are never altered; if the prescription label is incorrect the prescription must be relabeled." This can only be done by a licensed pharmacist (see Medical protocol, E-4 Pharmacy Distribution and Dispensing Operations Section III A (1, 2) (eff 12/4/06). The Employer claims that the Grievant's actions also violated Administrative Codes #4729-5-01 (B), 4729-5-25 (A), and 4729 -17-01 (D). The Employer asserts the code is very clear that preparing, labeling, packaging, and dispensing drugs is the responsibility of the pharmacist. The Employer argues that removal of a controlled medication from the night stock

medication had the potential of creating harm to a patient, who may need the medication after the Pharmacy is closed.

In the instant matter, however, the Grievant relabeled the prescription drug testosterone, which is not a drug that could have been life threatening to a patient if given to the wrong patient. The Employer does point out that the Grievant failed to adhere to the "Five Rights+1" of medication administration:

1. Right Person + Inmate Number
2. Right Drug
3. Right Dosage
4. Right Route
5. Right Time

By way of explanation, the Employer states Protocol B-10, which the Grievant is charged with violating, deals with medication accountability. Stock medication is checked applying the previously stated Five (5) Rights. It is not prescribed to one particular person. Therefore, when it comes from the pharmacist all labels are matched up making sure that the medication matches the labels, and then it is put in the night stock drawer until it is needed. If the medication is needed it is retrieved from the night stock drawer and the prescription is drawn from the night stock to match the prescription for the patient and logged on the patient's kardex. The amount that is drawn from the night stock is then logged on the controlled substance accountability record. In the instant matter the prescription drug testosterone is a controlled substance, with each dose having to be accounted for as a matter of protocol.

The Employer argues that the container of testosterone was labeled as a controlled substance (with a red C) in three separate locations, and the Grievant should have seen the labeling if she was following basic nursing protocol for administering medications. (See Employer Opening Statement and Brief)

The Employer provided no evidence regarding a third inmate.

Based upon the totality of its findings, the Employer determined that the Grievant should be terminated for what it considered a violation of its policies. The Employer requests that the Union's grievance be denied in its entirety and that the Grievant's termination be upheld.

SUMMARY OF THE UNION'S POSITION

As included in its opening statement, closing brief, and other representations made at the arbitration hearing, the Union's basic contention is that the Employer has failed to meet its burden of proving with sufficient evidence that it did have "just cause" to terminate the Grievant's employment based on the evidence and facts in this case. The Union first argues that the Employer conducted an incomplete and flawed investigation. It further asserts that in terms of the charges related to documentation of records in April of 2010, the Grievant did properly document inmates' records and did see the inmates, D-2 and D-5, on different dates (e.g. D-5 was seen on 4/6/10 and not on 4/26/10, as mistakenly assumed by the Employer).

In terms of Issue #2, the Union also argues that Nurse Yeoman simply affixed labels that had been provided by the pharmacy and did not cover up the pharmacy labels as accused. Moreover, the medication was readily identified by the pharmacy as being intended for the inmate (#577-733) who it was administered to by LPN Bahr. However, the Union asserts that prior to administering the testosterone and affixing the label, Nurse Yeoman and LPN Bahr discussed and collaborated on how to properly proceed, and once they were able to confirm that the medication was indeed intended for inmate (#577-733) by verifying all

pertinent materials, they reviewed the discharge orders from CMC, the admission orders to NCCI, verified the patient's chart (with verified signature of the Doctor's orders), checked for patient allergies, verified no other inmates were ordered the medication, and then followed proper protocols to ensure that the medicine was what was prescribed to the inmate The Grievant did admit that she did not know testosterone was a controlled substance and that she missed the "red C" label on the packing and container holding the testosterone, but affirmed that the testosterone was administered to the right inmate, by properly following the 5 R's plus one method and only then did LPN Bahr inject the inmate on her own.

The Union further argues that the Grievant was treated in a disparate manner and that no other nurses involved in medication errors that entailed altering a medication label have even been disciplined, let alone discharged. (Union Ex. 11)

The Union also points out the Grievant had exemplary performance evaluations in 2008 (Union Ex. 3) and 2009 (Union Ex. 4), yet in 2010 suddenly her performance was unsatisfactory. (Union Ex. 5) The Union points out that the 2010 evaluation of the Grievant was conducted by HCA Andrea Casteneda, and that prior to Ms. Casteneda filling the HCA position, the Grievant temporarily held the HCA position and according to the evidence did an exemplary job. The Union contends that

Casteneda's attitude and actions were more designed to "put the Grievant in her place" rather than being an accurate representation of the Grievant's performance. The Union also points out that following her 2010 evaluation and after the dates of the incidents that are the basis for the Grievant's termination, the Grievant was placed on a Performance Improvement Plan (PIP) and it only lasted three (3) weeks before she was terminated.

Based on those assertions, the Union requests that the Grievant be reinstated with full back pay and benefits from the date of her termination by the Employer.

DISCUSSION

The precise issue for resolution here is whether the Employer has proven that the Grievant's termination was based on "just cause" required by the Agreement. One of the most firmly-established principles in labor relations is that management has the right to direct its workforce, normally through the utilization of a collective bargaining agreement, which details the parties' respective rights and duties. In the exercise of its identified management rights, the Employer is governed by the rule of reasonableness, and the exercise of its management rights must be done in the absence of arbitrary, capricious, or unreasonable conduct. *Cal. Edison and Int'l Bhd. of Elec. Workers, Local 47*, 84 LA 1066 (2002). "While it

is not an arbitrator's intention to second-guess management's determination, he does have an obligation to make certain that a management action or determination is reasonably fair." *Ohio Univ. and Am. Fed'n of State, County, and Mun. Employees, Ohio Council 8, Local 1699*, 92 LA 1167 (1989). In the absence of contract language expressly prohibiting the exercise of such power, an arbitrator, by virtue of his authority and duty to fairly and finally resolve disputes, has the inherent power to determine the sufficiency of a case and the reasonableness of a disciplinary action or penalty imposed. *CLEO, Inc. (Memphis, Tenn.) and Paper, Allied-Indus., Chem., and Energy Workers Int'l Union, Local 5-1766*, 117 LA 1479 (Curry 2002).

When a collective bargaining agreement, in effect between the parties to facilitate their reciprocally cooperative relationship, reserves to the Employer the right to discipline for "just cause," but fails to define what actually does constitute "just cause," it is proper for an arbitrator to look at the Employer's policies and rules and also the conduct in dispute to determine whether or not the challenged discipline was actually warranted and justified. *E. Assoc. Coal Corp. and United Mine Workers of Am., Dist. 17*, 139 Lab. Arb. Awards (CCH) P 10,604 (1998). "'Just cause' is not a legal concept, but it embodies the principles of industrial justice. The purpose of 'just cause' is to protect employees from unexpected, unforeseen, or unwarranted disciplinary actions, while at the same time

protecting management's rights to adopt and to enforce generally-accepted employment standards." *Phillips Chem. Co. and Pace, Local No. 4-227, AFL-CIO*, 00-2 Lab. Arb. Awards (CCH) P 3553 (Taylor 2000).

Generally, in an employee disciplinary matter, an arbitrator must determine whether an employer has sufficiently proved that a discharged employee has committed one or more acts warranting discipline and that the penalty imposed is appropriate under the specific circumstances. *Hy-Vee Food Stores, Inc. and Local 747, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen, and Helpers of Am*., 102 LA 555 (Bergist 1994).

Arbitrators do not lightly interfere with management's decisions in discipline and discharge matters, but that does not mean to suggest that they will sustain an action found to be unjust or unreasonable. *Operating Eng'rs. Local Union No. 3 and Grace Pac. Corp*., 01-2 Lab. Arb. Awards (CCH) P 3971 (Najita 2001). In making a determination regarding the validity and reasonableness of the challenged Company-imposed discipline, the arbitrator must consider, among other circumstances, the nature of the Grievant's offense(s), the Grievant's previous work record, and whether the Employer has acted consistently with respect to similar offenses. *Presource Distrib. Serv., Inc. and Teamsters Local 284*, FMCS No 96001624 (1997). It is proper for an arbitrator to look at the Employer's policies and rules and also the conduct in dispute to determine whether or not the challenged discipline was actually warranted and justified. *E.*

Assoc. Coal Corp. and United Mine Workers of Am., Dist. 17, 139 Lab. Arb. Awards (CCH) P 10,604 (1998).

In addition to "the right to discipline and discharge employees," the Agreement also includes the Company's "... right to make and enforce such reasonable rules applicable to Employees covered by this Agreement ..." As recognized by another arbitrator:

> [The Agreement's language] does more than grant the Company rule-making authority. It also authorizes the Company to impose the discipline. Otherwise it would be impossible to require employees to observe the rules. The authority agreed upon is more than what is needed to merely issue work rules; the authority includes the enforcement of the rules.

Weyerhauser Co. and PACE, Local 7-0345, 00-2 Lab. Arb. Awards (CCH) P 3539 (Kessler 2000). The language of the contract, which gives the Company the authority to create work rules, also allows the Company to impose discipline in order to enforce the rules. Otherwise, it would be a hollow right and meaningless provisions. *Weyerhauser Co.*

Based on a thorough review of all of the hearing testimony, the evidence submitted into record here (including the provisions of the Agreement that define and limit the arbitrator's authority in rendering a decision), and all of the arguments and claims included made at the hearing, the arbitrator finds that the Employer has met its burden of establishing with sufficient evidence that the Grievant's conduct merited the imposition of corrective action.

1st Issue. The sum of the evidence and testimony, while demonstrating that the Grievant was clearly negligent in her responsibilities does not support an allegation of falsification of documents which requires proof of an intentional and willful act. When considering a termination and possible action which potentially could effectively terminate a medical career the stakes are high. Therefore, the burden on the Employer is substantial when charges such as falsification of medical records are levied against a medical professional. "The employer bears the burden of proving that the act was deliberate if it chooses to impose a penalty which is more commensurate with intentional misconduct than with carelessness." *Giant Eagle Mkts. Co., Inc. and United Food and Commercial Workers International Union AFL-CIO-CLC, Local Union No. 23*, 08-1 Lab. Arb. Awards (CCH) P 4140 (Dean 2007). In this specific case, the evidence did not establish that the Grievant knowingly, intentionally or willfully falsified patient records. However, under the applicable reasonableness standard, a reasonable person, taking into account all relevant circumstances, would find sufficient justification, based upon the Grievant's conduct, to warrant the imposition of appropriate discipline for his careless and non-compliant conduct. *RCA Communications, Inc*., 29 LA 567, 571 (Harris 1961); *Riley Stoker Corp*., 7 LA 764, 767 (Platt 1947).

The evidence regarding this issue is circumstantial in nature. In order for circumstantial evidence to support a charge it must be so conclusive as

to not reasonably allow for more than one interpretation. The Employer relies on circumstantial evidence to draw its conclusion that the Grievant willfully and purposefully falsified patient records and that the Grievant never saw three inmates in the Chronic Care Clinic that she claims she treated and documented, albeit improperly. However, when considering all the circumstantial evidence in this case that has been relied upon as proof, it could reasonably lead to more than one conclusion. The statements of the inmates and the testimony of inmate Dunlap in the hearing are confusing and inconclusive, which leaves the Employer with erroneous and conflicting documentation as the main proof that the Grievant intentionally falsified patient records. While not attractive alternatives, negligence or carelessness are two other plausible explanations for the Grievant's actions, and conceivably there may be others. However, the Employer's evidence does support that errors in documentation were made by the Grievant and were inexplicably not corrected by her even after she was given an opportunity to correct the record on or after May 4, 2010. Regardless of the explanation or differences of opinion as to how the patient records were erroneous, why Nurse Yeoman did not correct the record once given an opportunity is both troubling and underscores a lack of professional accountability. Patient records must be relied upon by other medical professionals, and if they contain erroneous information it could result in harm to an inmate in

the custody of the Employer. Moreover, the potential liability to the Employer is considerable. The Employer provided sufficient proof to support a Rule #7 and #41 violation regarding this issue. Therefore the Employer had just cause to impose corrective action when this situation was discovered and after the Grievant failed to correct her errors.

2nd Issue. The evidence and testimony regarding the issue of re-labeling support the contention that on May 14. 2010, the Grievant affixed a label to the night stock medication bag and the accountability sheet and it was administered to inmate #577-773. (See Grievant's testimony and Joint Ex. 4, p. 5) The Grievant stated she did this because she wanted to make sure the patient (inmate #577-773) was going to receive the medication over the weekend, and there was no harm done to the patient. The Employer in its step 1 response to the grievance, stated, *"The grievant relabeled medication that was a controlled substance. Even though the grievant verified that the inmate was the right inmate to receive the medication and the inmate was the only inmate that receives that medication, she is not authorized to re-label medication."* (Joint Ex. 2, p. 1) I found the testimony of Pharmacist Burris and that of DRC Administrator Shelly Viets to be substantive and credible regarding the proper protocol to be followed regarding the of relabeling of a controlled substance. And, the arbitrator finds that the testimony of the Grievant, particularly as it related to her conduct in April and on May 14,

2010, to be confusing, unfocused, detached and even somewhat cavalier regarding the gravity of her conduct. It is recognized that the conditions at NCCI are far from ideal in terms of certainty, staffing, and morale, yet regardless of the conditions a professional must act like a professional in adhering to standards and protocols in dealing with patients. The evidence and testimony support the Employer's findings that it had just cause to impose corrective action regarding this issue.

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When an employee has engaged in conduct meriting disciplinary action, it is primarily the function of management to decide upon the proper penalty. *Graphic Communications, Local 540-M and Commercial Printing Co.*, 01-1 Lab. Arb. Awards (CCH) P 3791 (Statham 2000). The "just cause" principle also applies to the level of discipline imposed, as well as to the reason for the challenged discipline. That means that there must be some proportionality between the offense(s) and the punishment imposed, and the Employer must weigh all mitigating and aggravating factors, such as the employee's seniority, the magnitude of the offense(s), and the employee's past work and disciplinary record. *Lorillard Tobacco Co., Greensboro, N.C. and Bakery, Confectionery and Tobacco Workers Int'l Union, Local 317T*, 00-1 Lab. Arb. Awards (CCH) P 3433 (Nolan 2000).

It is the Employer's burden in a disciplinary matter to prove both the employee's guilt of wrongdoing and to also show "good cause" for the

discipline which was actually imposed. *San Diego Transit Corp. and Int'l Bhd. of Elec. Workers, Local 465*, 03-2 Lab. Arb. Awards (CCH) P 3542 (Prayzich 2003). "Disciplinary actions must reflect the circumstances of each incident and the employment record of the individual employee." *Paper, Allied Indus., Chem., and Energy Workers Int'l Union, AFL-CIO, Local 8-0784 and Chinet Co.,* 01-1 Lab. Arb. Awards (CCH) P 3819 (Nelson 2000).

> Circumstances that must be taken into account when determining the appropriate discipline to be imposed include the nature of the offense, the degree of fault or culpability, and the mitigating and aggravating factors.

S.B. Thomas, 92 LA 1055, 1058 (Chandler 1989).

The Union in defense of the Grievant raised issues related to bias by HCA Schmalz and disparate treatment. While it is certainly curious that the Grievant, after receiving exemplary evaluations in 2008 and 2009 (Union Exs. 3 and 4, a period of about 1.5 years), and after temporarily holding the position of HCA and receiving recognition for it (Union Ex.2), took a drastic turn in performance under Ms. Schmalz (Union Ex. 5), there was no other evidence to support an accusation of bias. Supervisors have varying standards and employees can perform differently from one year to the next. The Union also accused the Employer of disparate treatment and the evidence introduced into the record does not demonstrate that any other bargaining unit member has been discipline for like circumstances. However, it is noted that a March 7, 2011 (Union Ex. 11) memo from Polly Schmaltz was issued to several bargaining unit

members well after the instant matter and dealt with a similar topic that is the subject of the second issue in this matter, "changed pharmacy label." Curiously the email/memo does not contain a stern warning (there is no mention of a potential discipline/termination) that one would expect after hearing the testimony in the instant matter.

Nevertheless, the facts in this case demonstrate that what occurred and did not occur in April and May of 2010 was the responsibility of the Grievant, regardless of the relationship she may or may not have had with Ms. Schmalz and regardless of an employment atmosphere. An obviously troubling factor in this matter was the Grievant's lack of awareness regarding her conduct. It is one thing to make errors in judgment and execution, then realize what had been done and make corrections, and quite another to basically deny your culpability in core matters of one's profession (patient documentation and medication protocols). It is also apparent that the Grievant had a relatively short tenure as a regular employee with the Department. The arbitrator finds the Employer had sufficient reason in terminating the Grievant for her violation of Employer policy, medical protocols, the administrative code and law.

AWARD

The grievance is denied, however, the charge of falsification of patient records (Rule #22) shall be removed from her record and her discharge shall reflect violations of Rule #7 and #41.

Respectfully submitted to the parties this 7th day of September 2011.

Robert G. Stein, Arbitrator