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

IN ARBITRATION PROCEEDINGS PURSUANT TO
AGREEMENT OF THE PARTIES

In Arbitration Proceedings Between:	)	Case No. DRC-2017-03548-11
State of Ohio Department of Rehabilitation and Correction	)	ARBITRATION OPINION AND AWARD
and	)	
Service Employees International Union, District 1199	)	DATE: September 18, 2019
Re: Last Chance Agreement, Anderson	)	

APPEARANCES:
Emily Paine, Labor Relations Officer 3 and Allison Vaughn, Labor Relations Administrator for the Department of Rehabilitation and Correction; Victor Dandridge, Assistant Manager, for the Ohio Office of Collective Bargaining; and Josh Norris, Executive Vice President, SEIU District 1199.

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, Teddi Anderson, was terminated on September 12, 2017. The Employer alleged that the Grievant had violated a Last Chance Agreement. The Union grieved the termination on September 13, 2017 pursuant to the collective bargaining agreement in effect at the time, 2015 – 2018. The grievance was heard at Step 2 of the Grievance Procedure on September 15, 2017, and it was denied by the Employer. Following appropriate steps of the Grievance Procedure, the grievance was appealed to arbitration. The Grievant is a Registered Nurse who was employed at the Franklin Medical Center, a medical facility of the Ohio Department of Rehabilitation and Correction.

The arbitrator was selected to hear this matter pursuant to Section 7.07 of the 2015 - 2018 collective bargaining agreement. Hearing was held over two consecutive days, June 11 and 12, 2019, the first day at the Franklin Medical Center and the second day at the offices of SEIU, District 1199. The parties agreed to submit post hearing briefs following the evidentiary hearing, and, by agreement, said briefs were due no later than August 13, 2019. Post hearing briefs were timely filed.

JOINT STIPULATIONS

The parties, prior to hearing of this matter, agreed to the following joint stipulations which were submitted at the commencement of the hearing.

1. The grievance is properly before the arbitrator.
2. The Grievant was hired by the State of Ohio on 5/8/2006.

3. The Grievant's position was Nurse 1.
4. The Grievant was terminated on September 12, 2017.
5. The Grievant had active discipline – 2 day fine, 5 day fine.
6. The Grievant was removed for violation of a Last Chance Agreement.

In addition to the joint factual stipulations, the parties agreed to Joint Exhibits 1 through 3 (a through uu).

WITNESSES

TESTIFYING FOR THE EMPLOYER:
Christopher Ajongako, Nursing Supervisor
Norman Robinson, Former Warden at Franklin Medical Center and Current Warden at London Correctional Institution
Jennifer Clayton, Deputy Director of Holistic Services
Anita M. Carr, Health Planning Administrator 3

TESTIFYING FOR THE UNION:
Joseph Daniels, Union Coordinator
Nancy Greathouse, RN and Union Delegate
Teddi Anderson, Grievant

LAST CHANCE AGREEMENT

The following constitutes a ***Last Chance Agreement*** made by and between **Franklin Medical Center** (Agency), the SEIU/1199, and **Teddi Anderson, *Registered Nurse*,** parties hereto.

Agency agrees to:
1. Hold implementation of the **removal** in abeyance for a period of three (3) years, this will serve as a working suspension for the purposes of Article 30.02. This removal will not be implemented unless there is a violation of this Last Chance Agreement.

The Employee agrees to:
2. Strictly adhere to Agency policies and work rules with no further performance related violations.

All parties agree that if Employee fails to keep any part of the above terms, said actions will violate this Last Chance Agreement and the appropriate discipline shall be termination, or if there is any violation of any part of the PERFORMANCE TRACK, the appropriate discipline shall be termination.

Any grievance arising out of this discipline shall be limited to the question of whether or not the grievant did indeed violate this Last Chance Agreement. The Agency need only prove that the Employee violated the Agreement or the discipline grid. The Arbitrator shall have no authority to modify the discipline. All parties acknowledge the waiver of the contractual due process rights to the extent stated above.

This Last Chance Agreement is in full force and effect for a period of three (3) years from the date of the Employee's signature on this Agreement. This three (3) year period shall be extended for the duration of any absence of fourteen (14) days or more.

Signed by the Grievant, Union Representative and FMC Agency Representative on December 16, 2016

GRIEVANCE

Statement of Grievance: Grievant was terminated without just cause on September 12, 2017 from her position as an RN at FMC for the issue of missing patient ECW records. Management is well aware that the DAS server that runs DRC's ECW has a continuous issue with losing entries. Also Management did not follow Article 8 of the collective bargaining agreement and used a LCA to terminate the grievant.

Resolution Requested: Make grievant whole in every way including but not limited to reinstatement of grievant back to her RN position at FMC, Removal of all related discipline from grievant's personal file, Back pay and benefits, seniority, and reinstate schedule and good days.

PROVISIONS OF COLLECTIVE BARGAINING 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.

BACKGROUND

The Grievant, Teddi Anderson, was employed as a Registered Nurse at the Franklin Medical Center, a hospital facility managed by the Ohio Department of Rehabilitation and Correction. Her employment at FMC commenced in May 2006. She served in the capacity of an RN until the date of termination of employment. The Grievant was an LPN early in her career and was certified as an RN in 1989. In addition to many duties, nurses at the facility are responsible for documenting the amount of food eaten by patients after each meal. In most cases, meals are served by inmate porters. The observation by the nurse, after each meal, is visual. This is necessary in order to track the progress made regarding the medical condition of

the inmate, and this is especially true for inmates suffering from wounds. In addition, nurses are responsible for completing a Braden Risk Scale to be completed when a patient is admitted to the facility, regardless of the shift. The Braden Risk Scale is to be reviewed and updated every Monday. The Grievant generally worked on the first shift and occasionally worked on other shifts as necessary. On April 7, 2017, the Grievant's supervisor, Christopher Ajongako, completed an incident report stating that the Grievant failed to complete the Braden Risk Scale for Inmates O'Neal and Hall on April 3, 2017. The incident report continued to state that she failed to record the percentage of dinner eaten by Inmate Woodruff on April 5, 2017. Supervisor Ajongako completed an incident report on May 26, 2017 stating that the Grievant failed to document breakfast and lunch percentages for Inmate Brown on May 19, 2017. The Supervisor filed another incident report on June 8, 2017 stating that the Grievant failed to record the percentage of lunch and dinner consumed by Inmate Brown on June 6, 2017. The incident report indicated further that the Grievant failed to report meal percentages for Inmate Antill. It is important to note that nurses are required to file their reports in an electronic system, eClinical Work (eCW). Data, which is entered into the system, must be saved and locked in order that it is retained in electronic format.

A series of investigative meetings were conducted by management with the Grievant and Union representative in response to the incident reports. The Employer scheduled a pre-disciplinary hearing on August 17, 2017. Following the hearing, the hearing officer completed his findings as follows.

> On April 3, 2017 Nurse Anderson did not document the Braden Risk scale for inmates O'Neal 695956 or Hall 131405. On April 5, 2017 Nurse Anderson did not document the

> meal percentage eaten on patient Woodruff 621190. On June 2, 2017 Nurse Anderson did not document the meal percentage eaten on patient Brown 586567.
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> Mitigating: Nurse Anderson stated her computer has not been working correctly since she returned to FMC in December. She stated she notified a supervisor earlier this year. She stated they just fixed part of her computer problems 2 weeks ago. She also stated all the computers are messed up and when they enter things into ECW it drops or loses the information. The union stated the staff are overworked and have too large of a case load.
>
> Aggravating: Even though Nurse Anderson stated her computer has not worked properly since December, she has nothing to show she informed a supervisor. She also has been working for 8 months with her computer not working and accepting the consequences by not filling out a ticket to have her computer fixed. Do to the argument given by the Union and Nurse Anderson, contact was made with Jennifer Clayton, Health Care Analytics Administrator – Office of Correctional Healthcare. Attached is a statement from Jennifer Clayton stating that they have no record of ever being contacted for assistance with any ECW issues by Teddi Anderson. Further the individual computer worked on by any employee does not effect ECW other than to input and lock the data. Since 2015 there are no documented or proven instances of data or patient information being lost once it is saved and or closed/completed.

The hearing officer concluded that the Grievant had violated Rule 7, "Failure to follow post orders, administrative regulations, policies, or written or verbal directives" and Rule 8, "Failure to carry out a work assignment or the exercise of poor judgement in carrying out an assignment." Notice of Disciplinary Action was presented to the Grievant on August 28, 2017, and official "NOTIFICATION OF REMOVAL" was presented to the Grievant and made effective on September 12, 2017. This notice was signed by Warden N. Robinson and stated:

> This letter is your official notification of Removal from the position of Nurse 1 at the Franklin Medical Center effective 9/12/2017. The reason for this removal is that you are in violation of the Ohio Department of Rehabilitation and Correction Employee Code of Conduct as well as the Last Chance Agreement you entered into on 12/15/2016.

The Union grieved the removal on September 13, 2017 which was denied by the Employer. The matter was appealed to arbitration by the Union.

It is to be noted that Supervisor Ajongako issued an email notice to approximately 45 nurses at FMC reminding them to record percentage of food intake following meals of inmates and the necessity to complete the Braden Risk Scale upon admission and every Monday on first shift. The email addressed other issues as well.

At hearing, the parties were unable to agree on the issue to be resolved by the arbitrator. There was disagreement regarding issues of just cause and the binding nature of a Last Chance Agreement.

POSITION OF THE EMPLOYER

The Employer states that the Grievant has a history of discipline including a five day fine on September 21, 2015, a five day suspension on January 1, 2016 and termination of employment on December 15, 2016. The termination was converted, by agreement of the Employer, Union and Grievant, to a Last Chance Agreement. The Employer emphasizes that the Last Chance Agreement (LCA) states that there can be no mitigation of penalty for any subsequent violation of policy, work rules or any violation of the performance track. The arbitrator must recognize and enforce the terms of the LCA as this is what the parties have agreed upon and signed. The Grievant signed the LCA without coercion. The Employer states that Supervisor Ajongako sent a reminder/directive memo to nurses at FMC, including the Grievant, on March 16, 2017 regarding the requirement to record the percentage of meals eaten by inmate patients and the requirement to complete the Braden Risk Scales. Just weeks

following the memo, the Grievant failed to document Braden Risk Scales and meal percentages for Inmates O'Neal and Hall on April 3, 2017 and meal percent for Inmate Woodruff on April 5. The Grievant then failed to document percent of meal eaten by Inmate Brown on May 19, 2017 and again on June 2. The Employer argues that the Grievant is governed by the Ohio Nurse Practice Act and is therefore in violation of the statute by failing to document. The Employer argues that registered nurses are held to a higher standard as they are responsible for direct patient care.

The Employer discounts the Union's argument that the eCW system was not functioning properly on the dates in question. Testimony is clear that data is never lost data if it is entered properly, saved and closed. And there is no evidence, in any event, that eCW was not functioning on the days in question. There is no evidence that the Grievant ever submitted help desk requests for her computer. The Employer states that, by failing to document meal percentages and failing to complete the Braden Risk Scales, the Grievant violated basic nursing protocol and national practice. The Employer refutes the suggestion by the Union that the Grievant mistakenly placed the dinner meal percent on April 5, 2017 in the space for lunch as she was working second shift on that day. The Employer states that the Grievant worked both day and evening shifts on the day in question.

The Employer states that, the Union's argument regarding disparate treatment, was not proven at hearing as there was no evidence to support this contention. In any event, the arbitrator is required to reject any argument regarding disparate treatment on the basis that the foundation of the termination is based on violation of the Last Chance Agreement. The Employer argues that the Grievant has been trained to properly enter data into the eCW

system. The Grievant is a veteran nurse who understands the importance of documenting meals and Braden Risk Scales. She clearly violated policy and is in violation of the Last Chance Agreement. The arbitrator is barred from mitigating the penalty by agreement of the parties and Grievant. Sustaining the termination of employment is the only possible outcome of the Union's appeal.

POSITION OF THE UNION

The Union argues that the issue is one of just cause. The parties never waived the contractual right to the principle of just cause. In order for an arbitrator to be barred from consideration of a mitigated decision, the parties must explicitly waive the just cause requirement, and this did not occur in the instant matter. The Union suggests that Inmate O'Neal was not the Grievant's patient on April 3, 2017, and the Employer never verified that the Grievant failed to complete the Braden Risk Scale for Inmate Hall. The Union argues further that the Grievant simply failed to place data regarding percentage of meal for Inmate Woodruff in the appropriate place in the eCW format. She was working second shift and monitored percentage of dinner eaten by the inmate. She placed the amount eaten in the space reserved for lunch. The Grievant usually worked first shift. The Union states that this was simply a clerical error. The Union states further that the Grievant documented the fact that Inmate Brown had a "fair" appetite on June 2, 2017. It follows then that she, in fact, documented the percentage eaten by the inmate, but the eCW system did not save her entry. The Union argues that the Grievant did not violate policy.

The Union states that the Employer did not warn the Grievant and other employees of the possible disciplinary consequences of failure to comply with Supervisor Ajongako's memo of March 16, 2017 in which he reminds the nursing staff of the need to complete the Braden Risk Scale and of the need to record the percentages of food consumed by patient inmates. The Union states that no other nurse ever received discipline for failure to record meal percentages and completion of Braden. The Grievant was singled out and targeted. The Union argues that the Employer's investigation was inconsistent. Neither inmates nor other nurses at the facility were interviewed. The Union argues that there are many inconsistencies regarding delivery of meals and retrieval of trays. Inmate porters deliver trays which are then left on the floor or outside rooms. Inmates throw away food; they share it with other inmates; they flush food down the toilet. It is difficult if not impossible to accurately record the amount of food consumed by any one inmate. Inmates are often not honest regarding the amount of food consumed following a meal. Further, the Union states that the tour of the Grievant's former ward during the arbitration hearing proved nothing except that an inmate was observed eating from a carton separate from a documented delivered meal in violation of protocol.

The Union states that Supervisor Ajongako was not timely in completing the incident reports. It is obvious he was only interested in terminating the employment of the Grievant. There is no official Department policy regarding the documentation of meal percentages and completion of the Braden Risk Scale. The parties did not waive the just cause principle when drafting and executing the Last Chance Agreement. The report from the Ohio State Highway Patrol confirms that data has been lost when entered into the eCW system. The Union argues that this case must be determined based on a "clear and convincing" level of proof. There was

no just cause to terminate the Grievant. Nor was there a violation of the LCA. The Union asks for the reinstatement of the Grievant and that she be made whole in every way with no mitigation of earnings she may have realized since her termination.

ANALYSIS AND OPINION

Both parties have prepared well and have produced compelling evidence and arguments. The Employer argues that this is strictly a matter of violation of the Last Chance Agreement and that the arbitrator is barred from mitigating the penalty. The Union argues that the Grievant cannot be disciplined except for just cause, that this principle has been bargained by the parties and cannot be dismissed in any disciplinary action. Both positions are credible in part. The Last Chance Agreement does not waive the just cause provision, but, by inference, certain aspects of the principle are not to be considered by the parties and arbitrator. The investigation must be fairly and comprehensively conducted. The affected employee must have foreknowledge of potential disciplinary consequences. The Employer must enforce its policies without discrimination. These elements of the just cause provision are always enforced. What the Union and affected employees waive, when entering into a Last Chance Agreement, is the arbitrator's ability to mitigate the penalty based upon certain evidence involving length of service, an employee's overall record of service, disciplinary record, disparate treatment and other such factors. The affected employee either violated policy or not, and, if so, termination of employment is the outcome based on the Employer's investigation and finding of policy violation. This is what the parties bargained when they executed the Last Chance Agreement.

Of course, parties have the ability to completely waive just cause as an element of a Last Chance Agreement, but this is not the case in the instant matter.

It is noted that there were multiple allegations of failure to document meal percentages and Braden Risk Scales prior to the pre-disciplinary hearing and even during the arbitration hearing. Nevertheless, the focus of this matter is limited to the three dates of occurrence as stated in the Notice of Disciplinary Action dated August 28, 2017 and signed by the Grievant on September 12, 2017, namely April 3, April 5 and June 2.

There was a great deal of testimony and deliberations regarding the difficulties the nursing staff encounter in attempting to determine the percentage of meals eaten by inmate patients. Testimony makes it clear that inmates discard food on trays. Inmate porters may eat some of the food being delivered, and food may be shared among patients. Nurses at FMC have many responsibilities beyond monitoring food eaten by inmates. They nevertheless have a responsibility to record what they visually monitor regardless who may have actually eaten the food or if it was discarded. Nurses have the ability to report the eating habits of those who they monitor to physicians and others if there are issues of improper behavior. At the end of the day, they are directed to report what they have seen. Much of the testimony regarding what happens to the food is not specifically relevant to this matter as argued by the Employer.

The Grievant was charged with failing to document the Braden Risk Scale for Inmates O'Neal and Hall on April 3, 2017. The Grievant testified that she was uncertain if Inmate O'Neal was her responsibility on the day in question, and the summary of investigation, issued on June 13, 2017, indicated that "patient information for A161405 could not be verified." The same conclusions exist regarding Inmate Hall. There is no substantial evidence confirming the

allegations of April 3, 2017. The Grievant was charged with failure to document meal percentage for Inmate Woodruff on April 5, 2017. The Grievant claims she accidently documented dinner eaten percentage in the space reserved for lunch as she was working second shift. The Union claims clerical error and no violation. The Employer asserted that the Grievant worked both first and second shift and failed to document meals during the long work day. There was no evidence, such as time sheets, to clearly indicate that the Grievant worked a double shift on April 5, 2017. The STNA Daily Duty Sheet (Union Exb. 7) indicates that LPN Floyd documented meal percentages for Inmate Woodruff for breakfast and lunch on April 5, 2017. The same document shows the Grievant also submitting data for breakfast and lunch but, as the Employer asserts, not dinner. The Union's contention regarding clerical error must be considered. Finally, the Grievant was charged with failure to document meal percentage eaten for Inmate Brown on June 2, 2017. The Grievant testified that she documented the meal eaten by the inmate in two locations, on the Infirmary Chart and in the eCW system. The Infirmary Chart (Union Exhibit 8) indicates that the Grievant wrote "Appetite Fair" in the assessment section. There is, nevertheless, no documentation to indicate that actual meal percentages were documented. The Grievant claims she entered the data in the eCW system but that it was never recorded. It must be noted that the investigation regarding these incidents were conducted months following their occurrence. Nurses have heavy workloads with many patients and multiple responsibilities on any given day. The Grievant's inability to remember specifics is understandable. Supervisor Ajongako suggested the same when asked to recall incidents which occurred months earlier.

There was significant testimony and argument regarding the reliability of the eCW data collection system. Union witnesses claimed there have been consistent problems with data being saved and/or lost in the system. Those responsible for the administration of the electronic data gathering system asserted that data, if properly entered, has never been lost since the platform was effective in 2015. It is clear that once data is entered in the system it must be saved and then also locked. On any busy work day, it is possible that nurses enter data, save it, and move on to the next task. Without locking the entry following the saving of it, the data may be lost. The Employer objected to the admission of Union Exhibit 9 during the hearing. This document was determined to be relevant in the matter as it is the report and findings of the Ohio State Highway Patrol from March 18, 2018. Trooper Boysel conducted an investigation of the eCW system in relation to its reliability in saving entered data. Troopers Garrett and Boysel interviewed Anita Carr, the Health Planning Administrator for the Department of Rehabilitation and Correction. Ms. Carr was a witness during the arbitration hearing. She writes the work flow for the electronic health record based on Department policies. She testified that an employee must save and lock data entries in order for it to be saved. It is unclear why the Highway Patrol was asked to investigate the eCW system in relation to the instant case or other matters, but the final report is helpful in that it confirms that there have been flaws in the system. The conclusions of the report are, in part, as follows.

> Anita Carr stated she had been notified by her supervisor about an upcoming arbitration referencing the lack of documentation in the EHR. Anita said she was asked to look at this because **she is the EHR clinical specialist. There were reported problems with data loss in the EHR,** so she was tasked with testing it.
> **Anita Carr stated she did verify there were issues with the EHR which she found through testing, as claimed by the union in the arbitration.**

> **Anita Carr stated she did verify there was an issue with the EHR in which the union member attempted to place a note in the system; however the note was not present.** (Bold entries are as they appear in the Report.)

The Grievant may have documented the meal percentage eaten by Inmate Brown on June 2, 2017 and perhaps other instances, and she may have forgotten to lock after saving, or the system may have lost the data as that possibility is documented in the report of the Ohio State Highway Patrol. Knowing this, the clear and convincing evidence required to sustain the Employer's case may not exist regarding allegations of missing data.

The Union argues that there is no specific policy regarding the documentation of meal percentages and completion of the Braden Risk Scales. While these responsibilities appear to be routine and are necessary for the recovery of patients, the Union's arguments regarding the lack of specific policy and consequences for failure to comply are compelling. On March 16, 2017, Supervisor Ajongako emailed a reminder to the nurses at FMC regarding documentation of meal percentages, the requirement to complete the Braden Risk Scale upon admission and then every Monday and other matters. The memo did not suggest disciplinary consequences for non-compliance. It was issued due to the fact that it was not uncommon for the nursing staff to fail to record meal percentages and to complete the Braden Risk Scales on a timely basis. We know that the facility was under-staffed and workloads high. The Union makes a compelling argument that the Grievant never received notification that non-compliance could result in discipline, a key element in the just cause principle and one to consider even in light of a LCA. When asked on cross examination, if there is a Departmental policy regarding the documentation of meals, Supervisor Ajongako responded that he could not recall. His testimony on cross examination regarding Department policy and rules was vague as he stated

that he does not engage in disciplinary matters and is not aware when discipline occurs. This is difficult to believe. Mr. Ajongako has been employed at FMC since 2003 and has been nursing supervisor for a significant number of years at the facility. His response regarding possible discipline lacked credibility. He testified that he did not know if he conducted corrective counselings for nurses who do not properly document. This is difficult to comprehend, and it is clear that it is not uncommon for nurses to miss documentation on busy days, and, as the Union contends, employees are not disciplined or counselled. Supervisor Ajongako testified as follows regarding his memo of March 16.

> Well, after you talk and talk and talk, and try to coach and coach and coach, when it's not happening, eventually you have to spend time and put it in a letter, in an email, to remind people.

In response to the issuance of corrective counseling for failure to document meal percentages and failure to timely complete Braden Risk Scales, Mr. Ajongako stated the following.

> At one point they told us not to, but now at one point they said do. Sometimes they say no, don't. . . .
>
> Q. Do you recall, did not write any corrective counselings to any of the nurses you supervised for meal percentages or Braden scores not being properly documented?
> A. I cannot recall.

Supervisor Ajongako testified further on cross examination that there is a nurse shortage at FMC. His responses regarding discipline and corrective counseling were problematic.

While an argument regarding disparate treatment may not be relevant when a discipline occurs based on a Last Chance Agreement, an Employer may not change its standards or policy regarding the issuance of discipline in an attempt to target an individual who is the subject of a LCA. Evidence indicates that this is the case regarding Grievant Anderson. Nancy Greathouse,

former Union Delegate at FMC and Registered Nurse at the facility for twelve years, testified that she was not aware of a specific policy regarding the documentation of meal percentages or the requirements for completion of the Braden Risk Scale. The Grievant's testimony mirrored that of Ms. Greathouse regarding specific Department policy.

The Union argues that the standard of proof to be applied to a case involving termination of employment, even in light of a Last Chance agreement, is "clear and convincing evidence." This is an accurate assessment. Arbitrator McDonald made the following finding.

> In deciding the amount of proof to be produced, I do not believe that labor arbitration should be bound by criminal law doctrines such as "beyond a reasonable doubt." At the same time, I do believe that in cases as serious as this involving discharge, and certainly involving a person's reputation, a degree of proof above and beyond that normally used should be required. As such, I am convinced that the best standard is requiring that the Employer carry the burden of demonstrating by "clear and convincing evidence" reasons that would justify the serious penalty of discharge.
> *Michigan Milk Producers Assn. and United Dairy Workers, Retail, Wholesale and Department Store (RWDSU) Local 86. 114 LA 1024 1029. Arbitrator Patrick McDonald*

Arbitrator Smith came to the following conclusion regarding the clear and convincing standard and the raising of reasonable doubts similar to this matter.

> . . . it seems reasonable and proper to hold that alleged misconduct of a kind which carries the stigma of general social disapproval as well as disapproval under accepted canons of plant discipline should be clearly and convincingly established by the evidence. Reasonable doubts raised by the proofs should be resolved in favor of the accused.
> *Kroger Company and Teamsters Local 406. 25 LA 906 908. Arbitrator Russell A. Smith*

While it is possible that the Grievant may have failed to document on the dates incident reports were completed, clear and convincing evidence to conclusively support the various allegations does not exist. While there was testimony from Deputy Director Clayton that the

system never loses data, this contention was not supported by the Ohio State Highway Patrol investigation and conclusion. Additionally, based on the memo issued on March 16, 2017 by Supervisor Ajongako and his testimony at hearing, it appears that failing to document meal percentages and completing Braden Risk Scales in a timely basis was a fairly common occurrence among nurses at FMC and that neither discipline nor corrective counseling rarely if ever resulted for such oversight. The Employer cannot now discipline the Grievant for failures which were acceptable behavior among nurses at FMC. No evidence exists that discipline or counseling were authorized or administered. The Union's argument that the Grievant was targeted is credible.

It is critical that a Last Chance Agreement receive serious consideration at arbitration. This arbitrator wrote the following in a matter involving a LCA.

> The Last Chance Agreement is an important tool utilized by labor and management to resolve disputes, allow for continued employment and provide for that one last chance. It must be honored by the arbitrator.
> *State of Ohio Department of Rehabilitation and Correction and the Ohio Civil Service Employees Association, AFSCME Local 11. Case No. DRC-2016-00418-3.*

Nevertheless, the subject employee, who has signed and agreed to a Last Chance Agreement, must not be terminated if evidence does not support violation of policy. The termination of the Grievant's employment was based on alleged violations of Rule 7, "Failure to follow post orders, administrative regulations, policies, or written or verbal directives;" and Rule 8, "Failure to carry out work assignment or the exercise of poor judgment in carrying out an assignment." Based on the findings as outlined herein, there is no evidence to support the alleged violations of policy,

and, therefore, there is no violation of the Last Chance Agreement. The grievance of the Union is therefore sustained. The Grievant is to be reinstated to the same or similar nursing position at the Franklin Medical Center on the shift she held at the time of her removal. The Grievant is to be made whole including lost wages but less interim earnings from any sources of employment. This includes restored seniority, benefit banks, and medical expenses which would have been covered by insurance. The parties and Grievant had agreed that the Last Chance Agreement would remain in full force and effect for a period of three years with the understanding that it was to be extended for the duration of any absence of fourteen days or more. The Last Chance Agreement is hereby extended in order that the Grievant serve the full three years as agreed by the parties. The arbitrator maintains jurisdiction for 45 calendar days from the date of this award for purposes of remedy only.

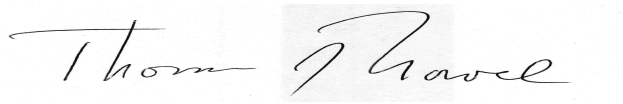
AWARD

The grievance of the Union is sustained. The Grievant is to be reinstated to the same or similar nursing position at the Franklin Medical Center on the shift she held at the time of her removal. Reinstatement is effective fourteen calendar days from the date of this Award. The Grievant is to made whole including lost wages but less interim earnings from any sources of employment. This includes restored seniority, benefit banks and medical expenses which would have been covered by insurance.

The Last Chance Agreement is hereby extended in order that the Grievant serve the full three years as agreed by the parties.

The arbitrator retains jurisdiction for 45 calendar days from the date of this Award for purposes of remedy only.

Signed and dated this 18th Day of September 2019 at Lakewood, Ohio.



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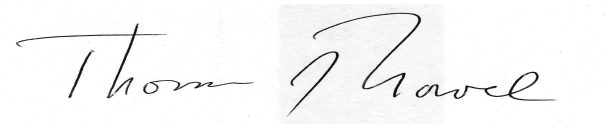
Thomas J. Nowel, NAA
Arbitrator

CERTIFICATE OF SERVICE

I hereby certify that, on this 18th Day of September 2019, a copy of the foregoing Award was served, by electronic mail, upon Emily Paine, Labor Relations Officer 3, for the Ohio Department of Rehabilitation and Correction; Victor Dandridge, Assistant Manager, Ohio Office of Collective Bargaining; Cassandra Richards (OCB); and Josh Norris, Executive Vice President of the Service Employees International Union, District 1199.



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Thomas J. Nowel, NAA
Arbitrator