

**Decision and Award in the Matter of Arbitration between:**

**Ohio Department of Rehabilitation & Correction  
Chillicothe Correctional Institution**

**and**

**Service Employees International Union  
District 1199**

**DRC- Case Number: 2018-02567-11**

**Grievant:** Angela Clark

**Arbitrator:** John F. Buettner

**Hearing Date:** August 23 and August 30, 2019

**Date Briefs Received:** October 12, 2019

**Date Decision Issued:** December 16, 2019

**Representing the Management:**

Don Overstreet

Labor Relations Officer 3, ODRC

**Representing the Union:**

Josh Norris

SEIU/District 1199

**In Attendance for Management: August 23 and August 30, 2019**

Neil Glendening	CCI-DRC
Don Overstreet	DRC
Eric Eilerman	OCB
Tom Dunn	OCB
Jack Myers	OCB
Rayma Jensen	QIC, Witness
Katie Trostel	CCI-DRC, Witness
Stacey Kepler	CCI-DRC, Witness
Chris Mavis	CCI-DRC, Witness
Debbie Tinsley	CCI Contractor, Witness
Tereasa Moorman-Jamison	Witness
Lisa Bethel	RCI/HRA, Witness

**In Attendance for the Union: August 23 and August 30, 2019**

Josh Norris	Executive Vice President
Amanda Schulte	Administrative Coordinator, Second Chair
Angela Curtis (Clark)	Grievant

By mutual agreement the Hearing was convened on August 23, 2019, at 10:00 AM. The Hearing was held at the offices of the Chillicothe Correctional Institution, Chillicothe, Ohio. A second day of hearing was held on August 23, 2019, at the Terry Collins Re-Entry Center in Chillicothe, Ohio. John F. Buettner was jointly selected by the parties to arbitrate this matter in accordance with Article 8, Section 7.07, of the Collective Bargaining Agreement (CBA), and was officially appointed to the case by the State Employment Relations Board.

The parties jointly stipulated to the statement of the issue, a series of background facts, and the admission of joint exhibits. The Parties also agreed to the following:

1. The testimony and admitted documentation provided by witnesses Shelly Viets, Rayma Jensen, Gary Artrip, John Hamm and Beverly Hardy in the Beverly Hardy Arbitration is part of the official records, and shall be given the weight the

Arbitrator deemed appropriate when admitted, for each of the following arbitration cases:

Beverly Hardy

Denise Dunn

Angela Clark

2. The testimony and admitted documentation provided by witness Denise Dunn during the Beverly Hardy Arbitration is part of the official record, and shall be given weight the Arbitrator deemed appropriate when admitted, for the Angela Clark Arbitration.

3. The testimony and admitted documentation provided by witness Angela Clark during the Beverly Hardy Arbitration is part of the official record, and shall be given weight the Arbitrator deemed appropriate when admitted, for the Denise Dunn Arbitration.

4. Denise Dunn will testify during the Arbitration of her own case in chief and Angela Clark will testify during the Arbitration of her case in chief.

5. This agreement does not prohibit witness testimony not previously provided.

The parties have also agreed to the arbitration of this matter. No issues of either procedural or jurisdictional arbitrability have been raised, and the matter is now properly before the arbitrator for a determination of the merits.

The Parties mutually agreed to have the awards for the three (3) falsification of medical records arbitrations issued at the same time.

**The following were submitted as Joint Exhibits:**

Joint Exhibit #1                      SEIU District 1199 Contract (2015 to 2018)

Joint Exhibit #2                      Standards of Employee Conduct (May 1, 2016)

Joint Exhibit #3	Grievance Snapshot DRC-2018-02567-11
Joint Exhibit #4	Notice of Removal effective July 31, 2018
Joint Exhibit #5	Pre-Disciplinary Meeting Hearing Officer's Report dated July 19, 2018
Joint Exhibit #6	Pre-Disciplinary Hearing Sign In Sheet dated July 19, 2018
Joint Exhibit #7	Just Cause Worksheet dated September 10, 2018
Joint Exhibit #8	Department of Rehabilitation and Corrections Policy 69-CH-06 Electronic Health Utilization and responsibilities dated April 9, 2018
Joint Exhibit #9	Pre-Disciplinary Meeting Notice dated July 12, 2018
Joint Exhibit #10	Angela Clark Acknowledgment of Pre-Disciplinary Meeting Notice dated July 12, 2018
Joint Exhibit #11	Acknowledgement and Waiver of Right to Representation
Joint Exhibit #12	Notice of Interview/Conference
Joint Exhibit #13	Administrative Investigation Summary Report dated June 5, 2018
Joint Exhibit #14	Incident Report written by Beth Higginbotham dated March 19, 2018
Joint Exhibit #15	Angela Clark Investigatory Interview Questions and Answer Document dated May 17, 2018
Joint Exhibit #16	Angela Clark Garrity Right Form signed May 17, 2018
Joint Exhibit #17	Angela Clark Acknowledgement and Waiver of Right to Representation dated May 17, 2018
Joint Exhibit #18	Angela Clark Notice of Interview/Conference Dated May 17, 2018
Joint Exhibit #19	Rayma Jensen Investigatory Interview Questions and Answers dated June 4, 2018
Joint Exhibit #20	Rayma Jensen Acknowledgement and Waiver of Right to Representation dated June 4, 2018

Joint Exhibit #21	Rayma Jensen Notice of Interview/Conference Dated June 4, 2018
Joint Exhibit #22	Denise Dunn Investigatory Interview Questions and Answer Document dated June 4, 2018
Joint Exhibit #23	Denise Dunn Garrity Right Form signed June 7, 2018
Joint Exhibit #24	Denise Dunn Acknowledgement and Waiver of Right to Representation dated June 7, 2018
Joint Exhibit #25	Denise Dunn Notice of Interview/Conference dated June 7, 2018
Joint Exhibit #26	Lisa Holdren Investigatory Interview Questions and Answer Document dated May 29, 2018
Joint Exhibit #27	Lisa Holdren Garrity Right Form dated May 29, 2018
Joint Exhibit #28	Lisa Holdren Acknowledgement and Waiver to Right of Representation dated May 29, 2018
Joint Exhibit #29	Lisa Holdren Notice of Interview/Conference dated May 29, 2018
Joint Exhibit #30	Email from Rayma Jensen dated February 14, 2017
Joint Exhibit #31	Email from Rayma Jensen dated February 22, 2017
Joint Exhibit #32	History of Nursing 2-hour safety checks on QA log
Joint Exhibit #33	Medical Staff Meeting Minutes dated June 1, 2017
Joint Exhibit #34	Read and Sign Memo Infirmary Service 68-MED-21 dated April 21, 2017
Joint Exhibit #35	Department of Rehabilitations and Corrections Policy 68- MED-21 Infirmary Care dated July 15, 2018
Joint Exhibit #36	Nurses Staff Meeting dated August 17, 2017
Joint Exhibit #37	Department of Rehabilitations and Corrections Protocol B-4 dated May 1, 2007
Joint Exhibit #38	eCW Documents

Joint Exhibit #39	Administrative Investigation Summary Report dated May 7, 2018
Joint Exhibit #40	Incident Report written by Rayma Jensen dated March 14, 2018
Joint Exhibit #41	Incident Report written by Rayma Jensen dated March 16, 2018
Joint Exhibit #42	Incident Report written by Beth Higginbotham dated March 19, 2018
Joint Exhibit #43	Rayma Jensen Investigatory Interview Questions and Answer Document dated March 28, 2018
Joint Exhibit #44	Beth Higginbotham Investigatory Interview Questions and Answer Document dated March 28, 2018
Joint Exhibit #45	Beth Higginbotham Acknowledgement and Waiver to Right of Representation dated March 28, 2018
Joint Exhibit #46	Angel Clark Investigatory Interview Questions and Answer Document dated April 23, 2018
Joint Exhibit #47	Angel Clark Garrity Right Form dated April 23, 2018
Joint Exhibit #48	Angel Clark Acknowledgement and Waiver to Right of Representation dated April 23, 2018
Joint Exhibit #49	Angela Clark Administrative Leave Notice dated March 15, 2018
Joint Exhibit #50	Angela Clark Kronos 3/3/2018-3/18/2018
Joint Exhibit #51	eCW Documents
Joint Exhibit #52	Regional Nurse Administrator/BOMS log
Joint Exhibit #53	History of Nursing 2-hour Safety Checks on QA log
Joint Exhibit #54	Email from Rayma Jensen dated February 14, 2017
Joint Exhibit #55	Medial Staff Meeting Minutes dated June 1, 2017

Joint Exhibit #56	Email form Rayma Jensen dated February 22, 2018
Joint Exhibit #57	Email form Beth Higginbotham dated February 28, 2018
Joint Exhibit #58	Email form Beth Higginbotham dated March 1, 2018
Joint Exhibit #59	Email form Polly Schmalz dated March 2, 2018
Joint Exhibit #60	Nurse Assignment sheets
Joint Exhibit #61	Department of Rehabilitations and Corrections Policy 68-MED-21 Infirmary Care dated July 2, 2015
Joint Exhibit #62	Angel Clark Policy/Protocol Training #54 Post Test 68-MED-21
Joint Exhibit #63	Angel Clark 68-MED-21 Read and Sign dated November 20, 2014
Joint Exhibit #64	Angel Clark 68-MED-21 Read and Sign dated April 21, 2017
Joint Exhibit #65	DCR Training Session report dated March 16, 2018
Joint Exhibit #66	Department of Rehabilitations and Corrections Protocol B-4 dated May 1, 2007
Joint Exhibit #67	Angel Clark Nursing Seeing Patients Manual Read and Sign dated November 20, 2014
Joint Exhibit #68	Administrative Investigation Summary Report dated April 12, 2018
Joint Exhibit #69	Incident report written by Rayma Jensen dated March 9, 2018
Joint Exhibit #70	Incident report written by Nicole Reffitt dated March 9, 2018
Joint Exhibit #71	Incident report written by Beth Higginbotham dated March 12, 2018
Joint Exhibit #72	Incident report written by Stacy Kepler dated March 13, 2018
Joint Exhibit #73	Incident report written by Debbie Tinsley dated March 13, 2018
Joint Exhibit #74	DCR Training Session Report dated August 17, 2017

Joint Exhibit #75	Stacey Kepler Investigatory Interview Questions and Answer Document dated March 27, 2018
Joint Exhibit #76	Stacey Kepler Acknowledgement and Waiver to Right of Representation dated March 27, 2018
Joint Exhibit #77	Stacey Kepler Notice of Interview/Conference dated March 27, 2018
Joint Exhibit #78	Debbie Tensley Investigatory Interview Questions and Answer Document dated March 27, 2018
Joint Exhibit #79	Beth Higginbotham Investigatory Interview Questions and Answer Document dated March 28, 2018
Joint Exhibit #80	Beth Higginbotham Acknowledgement and Waiver to Right of Representation dated March 28, 2018
Joint Exhibit #81	Beth Higginbotham Notice of Interview/Conference dated March 28, 2018
Joint Exhibit #82	Rayma Jensen Investigatory Interview Questions and Answer Document dated April 2, 2018
Joint Exhibit #83	Rayma Jensen Acknowledgement and Waiver to Right of Representation dated April 2, 2018
Joint Exhibit #84	Rayma Jensen Notice of Interview/Conference dated April 2, 2018
Joint Exhibit #85	Chris Mavis Investigatory Interview Questions and Answer Document dated April 2, 2018
Joint Exhibit #86	Chris Mavis Acknowledgement and Waiver to Right of Representation dated April 2, 2018
Joint Exhibit #87	Chris Mavis Notice of Interview/Conference dated April 2, 2018
Joint Exhibit #88	Nicole Reffitt Investigatory Interview Questions and Answer Document dated April 4, 2018
Joint Exhibit #89	Nicole Reffitt Acknowledgement and Waiver to Right of Representation dated April 4, 2018



Joint Exhibit #90	Nicole Reffitt Notice of Interview/Conference dated April 4, 2018
Joint Exhibit #91	Beverly Hardy Investigatory Interview Questions and Answer Document dated April 9, 2018
Joint Exhibit #92	Beverly Hardy Acknowledgement and Waiver to Right of Representation dated April 9, 2018
Joint Exhibit #93	Beverly Hardy Notice of Interview/Conference dated April 9, 2018
Joint Exhibit #94	Lisa Holdren Investigatory Interview Questions and Answer Document dated April 9, 2018
Joint Exhibit #95	Lisa Holdren Acknowledgement and Waiver to Right of Representation dated April 9, 2018
Joint Exhibit #96	Lisa Holdren Notice of Interview/Conference dated April 9, 2018
Joint Exhibit #97	Angela Clark Investigatory Interview Questions and Answer Document dated April 12, 2018
Joint Exhibit #98	Angela Clark Garrity Right Form dated April 2, 2018
Joint Exhibit #99	Angela Clark Acknowledgement and Waiver to Right of Representation dated April 12, 2018
Joint Exhibit #100	Angela Clark Notice of Interview/Conference dated April 12, 2018
Joint Exhibit #101	Department of Rehabilitations and Corrections Policy 31-SM-02 Standard of Employee Conduct dated May 1, 2016
Joint Exhibit #102	Angel Clark Standards of Employee Conduct Certificate of Information Received dated May 1, 2016
Joint Exhibit #103	Position Description – Nurse 1
Joint Exhibit #104	Video #3 dated March 4, 2018
Joint Exhibit #105	Video #8 dated March 6, 2018
Joint Exhibit #106	Video #9 dated March 6, 2018

Joint Exhibit #107	Video #10 dated March 6, 2018
Joint Exhibit #108	Video #11 dated March 6, 2018
Joint Exhibit #109	Video #13 dated March 7, 2018
Joint Exhibit #110	Video #17 dated March 9, 2018
Joint Exhibit #111	Video #18 dated March 9, 2018
Joint Exhibit #112	Video #27 dated March 13, 2018
Joint Exhibit #113	Video 3-9-18 RN A. Clark - Whaley

**The following were submitted as Management Exhibits:**

Management Exhibit #1	Department of Rehabilitation and Correction Standards of Employee Conduct
Management Exhibit #2	4723-4-06 Standards of nursing practice promoting patient safety
Management Exhibit #3	Notice of Disciplinary Action: Jonathan Hamm
Management Exhibit #4	Notice of Disciplinary Action: Sherie Harmon

**The following were submitted as Union Exhibits:**

Union Exhibit #1	Email: Discipline Files
Union Exhibit #2	Documents concerning abuse of sick leave
Union Exhibit #3	Documents concerning Evelyn Odum
Union Exhibit #4	Beth Higginbotham letter of resignation
Union Exhibit #5	Letter from Leonard Stamper commending Nurse Clark

**Background:**

The Grievant, Angela Clark, was a Registered Nurse (RN) for the Ohio Department of Rehabilitation and Corrections (DRC) at the Chillicothe Correctional Institution for over eleven (11) years having been hired on February 26, 2007. On July 31, 2018, she was terminated for violating the following Standards of Employee Conduct Rules:

Rule 7: Failure to follow post orders, administrative regulations, policies, or written or verbal directives.

Rule 22: Falsifying, altering, or removing any document or record.

Rule 41: Unauthorized actions or failure to act that could harm any individual under the supervision of the department.

Rule 44: Threatening, intimidating, coercing, or use of abusive language toward any individual under the supervision of the Department.

The Grievant had no active discipline at the time of her removal.

**Issue:**

Was the grievant, Angela Clark, terminated for just cause? If so, what shall the remedy be?

**Management's Position:**

Management contends that they had just cause to terminate the Grievant for violating Rules 7, 22, 41 and 44 of the Standards of Employee Conduct Rules. Each work rule violation allows for removal on the first offense. Three incidents were cited that led to the termination.

The first incident occurred on March 9, 2018. The Grievant was directly observed by staff members yelling and at screaming at a restrained, mentally ill patient and then

slamming her hand down on the desk. When leaving the room another employee, Stacey Kepler, overheard Clark state, "I don't care if he dies." (Joint Exhibit #76, p. 159) The Grievant was not the nurse conducting the medical assessment but had interjected herself into the situation.

Several documents govern such behavior. The Standards of Employee Conduct, under Personal Conduct, state that, "Employees should display a professional and courteous demeanor and be appropriately responsive when interacting in-person, over the phone or by any other electronic/computer means with offenders, inmate visitors, victims, volunteers, contractors, applicants or other members of the general public." (Joint Exhibit #2) The Ohio Administrative Code, Standards of Nursing Promoting Patient Safety (Management Exhibit #2), also calls for licensed nurses to treat patients with "courtesy, respect, and with full recognition of dignity and individuality." The Grievant failed to do this by her unprofessional behavior.

A second incident occurred on March 14, 2018. The Grievant documented that an inmate was resting quietly in bed in the medical unit when the patient was actually in the Transitional Program Unit (TPU). Correctional Nurse Practitioner (CNP) Gary Artrip went to see the patient at approximately 11:30 am and could not locate him in the medical unit. The inmate had been moved to TPU at around 9:26 am.

Heath Care Administrator (HCA) Beth Higginbotham and Quality Insurance Coordinator (QIC) Rayma Jensen reviewed the E Clinical Works (eCW) healthcare records for the inmate in question. The eCW showed an entry at 11:24 am by Nurse Beverly Hardy. This entry was falsified since the inmate was not in the medical unit at the time. The Grievant was observed on video making a safety check at 11:24 am. Having been notified that the patient was missing, Clark created a late entry in the patient's electronic health record stating that the previous entry was in error.

Further administrative investigation found five (5) other instances where the Grievant falsified documentation showing that she conducted a Safety Check on an inmate. Video evidence for the documented times show that Nurse Clark did not make a safety

check nor did any other nurse. Such behavior threatens the health and well-being of the patients in a nurse's care.

After further investigation by HCA Higginbotham, the Grievant was charged with falsely documenting safety checks which were conducted by other nurses and failing to document checks she conducted herself. Management confirmed this through video evidence on four occasions:

Video # 8 Dated March 6, 2018 at 7:12 am (Joint Exhibit #105)

Video # 9 Dated March 6, 2018 at 9:01 am (Joint Exhibit #106)

Video # 9 Dated March 6, 2018 at 1:23 pm (Joint Exhibit #106)

Video # 13 Dated March 7, 2018 at 1:19 pm (Joint Exhibit #109)

Management cited this as an example of falsification of a document which is a clear violation of Rule 22: Falsifying, altering, or removing any document or record.

The Union contended that it was a common practice for nurses to document safety checks for one another and that Management knew about and engaged in the practice. This was investigated and the supervisors at CCI all stated that this has never been an acceptable practice nor have they engaged in it. Evidence showed the supervisors at CCI have assisted others in conducting safety checks but each supervisor only documented safety checks they themselves had completed. The Union produced no evidence that Management had any foreknowledge of the practice or that it was condoned.

Management contended that each of these violations could have jeopardized the health and well-being of the inmates in the Grievant's care. Taken collectively, Management felt that they had just cause for termination.

**Union Position:**

The Union contended the Employer did not establish just cause for termination of the Grievant, Angela Clark. Further, clear and convincing proof to sustain the allegations was not presented.

Regarding the incident on March 9, 2018, the Union contended that the Grievant did not use abusive language, threaten or intimidate the inmate. Nurse Clark admitted to interacting with the inmate in question but only to advise the patient as to why the attending nurse was asking questions. Management claimed that the Grievant was so loud that her voice was heard outside by a witness. Another witness, however, who was three (3) to four (4) feet away did not recall hearing the Grievant raise her voice. Yet another witness, Stacey Kepler, was not able to recall any of the exact words that were said. When questioned at the hearing, she testified that the Grievant did not threaten or intimidate the patient or use profanity. CO Mavis also testified that the grievant was loud but that she did not threaten, intimidate or make profane or abusive statements.

Management also contended that Nurse Clark pounded on the desk in anger during the incident. The Grievant explained that the loud noise was her hand hitting the desk when she tripped over the cords from the computer.

The Union contended that the Grievant was treated more harshly than others for the same alleged offense. CO Mavis and Witness Tinsley testified that other staff members had yelled at inmates but no one was terminated. They received corrective counseling and/or training.

In conclusion, no witness confirmed that the Grievant used abusive language toward the inmate or used any threatening action. Nurse Clark became loud which is not prohibited by any rule.

The issue of "safety checks" was another issue in the termination of the Grievant. The Union cited numerous reasons as to why Management's arguments fell short in justifying the termination. While the Grievant was charged with documenting safety checks that another nurse performed or performing safety checks that another nurse

documented, the Union argued that over half of the bargaining unit nurses at CCI testified that they had also used that same practice when completing safety checks. Further, a key witness and accuser, HCA Beth Higginbotham, was unable to be interviewed and absent from the proceedings. The Union believed she would have testified to the acceptance of said practice.

The Union questioned Management's idea that every nurse would know that signing off on a safety check one did not complete would be falsification. The Grievant was documenting what was "learned" from another nurse or vice versus. There was no attempt to deceive anyone or cause harm. Policy 68-MED-21 (Joint Exhibit #68) states that, "A licensed nurse shall make rounds and document a safety check..." It does not specify that the same nurse must do both. The Union stated that Management encouraged teamwork and that the nurses were working together to comply with safety check requirements. It was common practice for one nurse to physically make the observation and then communicate this to a nurse at a computer who would enter the information. Several nurses testified that this was an acceptable practice, that managers knew about it, and engaged in it themselves. They did not know that entering safety check information would be considered falsification of a medical record.

Further, The Union contended that if this policy was as clear as Management purported it to be, there would have been no need to hold a meeting on or about March 18, 2018, to inform CCI nurses that the practice of documenting for one another was not acceptable. Management's own witnesses testified that after the meeting no further concerns regarding documenting of safety checks had been discovered. Hence, a verbal counseling rectified the issue rather than a termination. Also, no warning or progressive discipline was applied prior to termination.

On April 9, 2018, ODRC created a new policy, MED-69-OCH-06, that specifically defined "falsification" as documenting work performed by another person. The new policy was created after the alleged instances by which the Grievant was terminated.

The Union argued that the discipline levied against the Grievant was inconsistent with that of other accused individuals. Another nurse received a 2-day suspension for the

same safety check allegations. Beth Higginbotham's Incident Reports (Joint Exhibits # 14 and 42) signed on March 19, 2018, named other nurses who had presumably documented for each other. Only four (4) of them were interviewed. Eight (8) other nurses were presumably not investigated or disciplined. Thus, the allegation of abusive conduct toward a patient would have to be egregious enough on its own merits to warrant termination.

The Union also alleged that the video evidence used to support Management's position was insufficient. Management showed only 10 to 15 minutes prior to any alleged rule violation when a safety check could have happened at a time that was not shown at the hearing.

The Union contended the Grievant was improperly terminated and that Management did not have just cause in doing so.

## **DISCUSSION:**

In reviewing the issue, I have analyzed the testimony, videos, and all evidence put forth by both sides. The job of an Arbitrator, in a disciplinary case, is to evaluate the evidence and determine if "just cause" exists to support the action taken by Management. An Arbitrator generally must determine whether an employer has clearly proven that an employee has committed an act warranting discipline and that the penalty of discharge is appropriate under the circumstance. [*Hy-Vee Food Stores, Inc. and Int'l Brotherhood of Teamsters, Warehousemen, and Helpers of America, 102 LA 55 (Bergist 1994)*]. Three (3) incidents were investigated by Management to determine if just cause existed for termination of the Grievant. Each incident must, therefore, be reviewed on its own merits.

As in all discipline/discharge cases, the Arbitrator evaluates Management's actions against the Seven Tests as written by Arbitrator Carroll Daugherty [Brand, N. & Biren,



M. H. (Eds.) (2015). Chicago, IL: American Bar Association. Discipline and discharge in arbitration, third edition.] The questions an Arbitrator must consider:

1. Did the employer give notice?
2. Was the rule reasonably related to operations?
3. Was there an investigation prior to discipline?
4. Was the investigation fair?
5. Was there sufficiency of proof?
6. Were the rules applied in a nondiscriminatory way?
7. Was the penalty appropriate?

The first incident involved alleged verbal abuse of a patient by the Grievant. The Standards of Employee Conduct Work Rule 44 (Management Exhibit #1, p. 14) prohibit, "Threatening, intimidating, coercing or use of abusive language toward any individual under the supervision of the Department." A first offense could result in a 2-day suspension or removal.

A review of the incident provided mixed messages. Officer Stacey Kepler directly observed the incident. The Grievant was shouting loud enough that Officer Kepler left her desk to investigate. In the investigatory Interview on March 27, 2018 (Joint Exhibit #75) Kepler testified that, "She (Grievant) was cussing at him, too. She was basically telling him he was stupid and doesn't know what he is talking about... As she walked out the door she said, 'I don t care if he dies.'" The Union questioned Officer Kepler at the hearing and she was unable to recall exactly what Nurse Clark was yelling, but testified that she was not threatening, intimidating or cursing at the patient. This questioning, however, took place almost five months after the incident.

Another witness was Officer Christopher Mavis. In the Investigative Interview on April 2, 2018 (Joint Exhibit # 85) Officer Mavis stated that he did observe Nurse Clark yelling. She was "loud" but he could not recall any single word, phrase, profanity, threat or anything of the like. Yet another witness was Debbie Tensley who was walking by

outside of the building. She testified in an Investigatory Interview on April 9, 2018 (Joint Exhibit #78) that, "I heard someone getting really loud with someone."

Nurse Beverly Hardy was in and out of the room at the time of the incident and testified that she did not recall the Grievant yelling at an inmate or anyone. (Joint Exhibit # 91) Lisa Holdren, who was the attending nurse at the time of the incident, testified that, "I do not recall her slamming her hand down or yelling or screaming at him. I zone out people when I'm assessing my patient." (Joint Exhibit # 94)

A preponderance of evidence, however, showed that some verbal altercation arose causing enough noise that two officers intervened, and someone outside the building heard it. No witness could exactly state what was said to know if it was "threatening, intimidating, coercing or use of abusive language." In such a situation, termination does not seem warranted, especially when other options such as corrective counselling or a 2-day suspension are available. The Grievant had no other disciplines on her record.

The next issue involved the Grievant documenting safety checks that another nurse had performed and performing safety checks that other nurses documented. The Union and Management both stipulated to the fact that these events occurred and video evidence was shown to confirm it.

Video #8 (Joint Exhibit #105), March 6, 2018, shows Nurse Lisa Holdren making a safety check at 7:12 am. On March 6, 2018 at 7:12 am Nurse Angel Clark documented the check.

Video #9 (Joint Exhibit #106), March 6, 2018, shows Nurse Lisa Holdren making a safety check at 8:56 am. On March 6, 2018 at 9:01 am Nurse Angel Clark documented the check.

Video #13 (Joint Exhibit #109), March 7, 2018, shows Nurse Denise Dunn making a safety check at 1:17 pm. On March 7, 2018 1:19 pm Nurse Angel Clark documented the check.

The issue then becomes what the penalty should be for said infractions. The Union stated that Management knew about this practice and that it was accepted so no

penalty should be levied. There was no evidence presented from any of the witnesses, Union or Management, to corroborate that Management knew about the practice or participated in it. The Union further alleged as proof of Management's prior knowledge that they created a new policy addressing the issue after the fact. The new policy, MED-69-OCH-06 (Joint Exhibit # 8), clearly delineates that staff cannot log into other's accounts or document work performed by another. It states that these represent falsification of documents. This effort by Management codified regulations in an effort to clarify and prevent these types of incidents from happening again. It was not an admission of fault.

Management deemed the instances of nurses signing safety checks for one another as "falsification" of records, a violation of Rule 22. The nurses were still performing safety checks on patients so care was not compromised, but they failed to sign their own names. Policy 68-MED-21 (f) states that a licensed nurse shall make rounds and document a safety check. The Union argued that it does not require that the same nurse do both the check and the documentation. Conversely, it does not state that one nurse can sign for another. The question then begs to be asked as to why the Grievant and other nurses did not sign their own names to the safety checks they completed. Further exploration of Policy 68-MED-21 (f) shows that part (i) states, "Safety checks shall include visualizing the patient and briefly documenting behavior and general condition." If a nurse has not actually seen the patient, it would seem improper to document such on a safety check. Nurses are taught to document only what they personally see, hear, do and teach. This is reflected in DRC's nursing policies, specifically 68-MED-21 Infirmary Services (Joint Exhibit #35) and Protocol B-4 Charting Directives (Joint Exhibit #37).

Mitigating circumstances are a factor to be considered in falsification cases. Penalties may be reduced in instances where the conduct is found "not to be deliberate, willful, or intended to deceive." [Drazin, A. L., Editor (2001). *Discipline and Discharge in Arbitration, 2001 Supplement*. Chicago, IL, American Bar Association.] By that standard, the Grievant did consciously falsify safety checks in that her signature misrepresented who actually did the checks. While it was falsification, it appeared that no malice or

subterfuge was intended. Patients were not put at risk since they were still being monitored. It seemed the Grievant and other involved nurses were striving to follow the mandate of completing safety checks which had been an issue in the past.

Management provided evidence that the Grievant was aware of the policies that were in place. DRC Protocol B-4 Charting Directives (Joint Exhibit #37) states that one should, “Never falsify or obliterate any entry on an inmate’s medical record.” The Grievant signed that she had received and was responsible for reading the Standards of Employee Conduct Certificate of Information on May 1, 2016 (Joint Exhibit #102). This policy specifically states, “Failure to comply with the Standards of Employee Conduct shall result in discipline, up to and including removal.” Thus the Grievant was aware of the penalties that could result from her actions.

According to Article 8-Discipline, Section 8.02-Progressive Discipline, progressive discipline includes:

- A. Written reprimand
- B. A fine in an amount not to exceed five (5) days pay
- C. Suspensions
- D. Removal

Management did, on or about March 18, 2018, hold a meeting instructing CCI nurses to stop the practice of documenting safety checks for one another. This was in essence a reprimand. Management’s witnesses testified that after the meeting no further instances regarding safety checks were discovered. If the goal of discipline is to provide corrective feedback and to positively change behavior, that goal was met. Nurses who were documenting safety checks they did not perform were disciplined. Section 8.02 states, “The application of these steps is contingent upon the type and occurrence of various disciplinary offenses.” This does allow Management to skip steps in the process. Termination, however, seems unwarranted since the issue was remediated.

The last incident of which the Grievant was charged was documenting safety checks that did not take place. This is different from one nurse documenting for another and

raises the level of severity. Management provided video evidence that on five (5) occasions the Grievant did not do a safety check at the reported and documented time nor did any other nurse.

Video #3 (Joint Exhibit #104) dated March 4, 2018 (14:30 hrs. – 16:30 hrs.)

Video #10 (Joint Exhibit # 107) dated March 6, 2018 (10:02 hrs. – 12:02 hrs.)

Video #17 (Joint Exhibit #110) dated March 9, 2018 (09:43 hrs. – 11:43 hrs.)

Video #18 (Joint Exhibit #111) dated March 9, 2018 (12:21 hrs. – 14:21 hrs.)

Video #27 (Joint Exhibit # 112) dated March 13, 2018 (08:00hrs. – 10:00 hrs.)

The Union argued that only a 10 to 15 minute period surrounding the alleged rule infraction was shown at the hearing. A safety check could have happened at a time that wasn't shown on the video. Safety checks are documented and the time they occurred is documented. Management showed video within a 10 to 15 minute period of the documented time. If the safety check was done as recorded, it should have been in the video. The Union further argued that there was sufficient time at the hearing to show more of the video, but yet the Union did not request to continue reviewing the video in order to refute Management's position.

Management does bear the burden of proof in this instance. The Union cited several cases whereby the standard of "clear and convincing evidence" must be proven in order to justify a termination. Also to be considered is the burden of persuasion and the burden of establishing a sufficient quantum of proof. [Nolan, D.R. (2003). Labor and Employment Arbitration. St. Paul, MN: West Group.] The video evidence was clear and convincing. If a time is documented for a safety check, then the video should show the person doing the check at that time otherwise it could be considered falsification of a document. Not performing safety checks yet documenting that they had been done escalates the potential for harm to patients and the safety of the facility and its staff. For these actions termination is warranted.

**AWARD:**

At the hearing, all Parties were afforded the right to call, examine, and cross-examine witnesses, present relevant documentary evidence, and argue their respective positions. The Parties filed post hearing briefs which this Arbitrator carefully considered. Accordingly, based upon the entire record including the post hearing briefs, and observation of the credibility of the witnesses, I make the following finding:

On the charge of abusive conduct toward a patient, there is conflicting evidence in support of both Parties' positions. This Arbitrator finds that a lesser disciplinary action was warranted.

On the charge of falsifying records by signing safety checks for one another, there was sufficient evidence to support Management's allegations, but mitigating circumstances as outlined above do not seem sufficient to sustain the termination.

The five (5) instances, however, when the Grievant documented that she conducted safety checks when no one had completed one are of a more serious nature. Due to the gravity of those cases, termination is warranted.

Management had just cause for termination. Thus, the grievance is denied.

This concludes the arbitration.

Respectfully submitted this 16th day of December, 2018,

John F. Buettner, Arbitrator

## **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that one (1) copy each of the Arbitration report was delivered via email on the 16th day of December, 2019, to

Neil Glendening, LRO-2/CCI

Don Overstreet, LRO-3/DRC

Josh Norris, Union Advocate/Executive Vice President

and

Amanda Schulte, Union 2nd Chair

*Jack Buettner*

Jack Buettner