

**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: 2018-02568-11**

**Grievant:** Beverly Hardy

**Arbitrator:** John F. Buettner

**Hearing Date:** May 10 & 16, 2019

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

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

**Representing the Management:**

Neil Glendening

Labor Relations Officer 2, CCI

Don Overstreet

Labor Relations Officer 3, DRC

Eric Eilerman

Labor Relations Officer 3, DAS/OCB

**Representing the Union:**

Josh Norris

Executive Vice President,  
SEIU District 1199

Amanda Schulte

Esquire, Union 2<sup>nd</sup> Chair

**In Attendance for Management: May 10, 2019**

|                   |               |
|-------------------|---------------|
| Neil Glendening   | LRO-2/CCI     |
| Don Overstreet    | LRO-3/DRC     |
| Eric Eilerman     | LRO-3/DAS/OCB |
| Shane Stevens     | UM/CCI        |
| Nicole Frederick  | AHCA/SOCF     |
| Chad Ward         | CCI           |
| Timothy L. Wilson | DDS           |
| Rayma Jensen      | CCI/QIC       |
| Gary Artrip       | CCI/CNP       |

**In Attendance for the Union: May 10, 2019**

|                |   |
|----------------|---|
| Josh Norris    | Union Advocate/Executive Vice President |
| Amanda Schulte | Union 2nd Chair                         |
| Beverly Hardy  | RN, Grievant                            |

**In Attendance for Management: May 16, 2019**

|              |         |
|--------------|---------|
| Shelly Viets | Witness |
| Rayma Jensen | CCI/QIO |

**In Attendance for the Union: May 16, 2019**

|               |              |
|---------------|--------------|
| Beverly Hardy | RN, Grievant |
| Jon Hamm      | RN           |
| Angel Curtis  | RN           |
| Denise Dunn   | RN           |

By mutual agreement the Hearing was convened on May 10, 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 May 16, 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 (2015-2018)  |
| Joint Exhibit #2  | Grievance Snapshot DRC-2018-02568-11   |
| Joint Exhibit #3  | Notice of Removal effective July 31, 2017  |
| Joint Exhibit #4  | Pre-Disciplinary Meeting Hearing Officer's Report dated July 17, 2018                        |
| Joint Exhibit #5  | Just Cause Worksheet dated September 10, 2018  |
| Joint Exhibit #6  | Pre-Disciplinary Hearing Sign-In Sheet dated July 10, 2018                                   |
| Joint Exhibit #7  | Pre-Disciplinary Meeting Notice dated July 5, 2018   |
| Joint Exhibit #8  | Beverly Hardy Acknowledgement of Pre-Disciplinary Meeting Notice dated July 6, 2018          |
| Joint Exhibit #9  | Acknowledgement and Waiver of Right to Representation  |
| Joint Exhibit #10 | Notice of Interview/Conference   |
| Joint Exhibit #11 | Administrative Investigation Summary Report dated March 27, 2018                             |
| Joint Exhibit #12 | Incident Report written by Beth Higginbotham dated March 5, 2018                             |
| Joint Exhibit #13 | Chad Ward Investigatory Interview Questions and Answers dated March 14, 2018                 |
| Joint Exhibit #14 | Chad Ward Acknowledgement and Waiver of Right to Representation dated March 14, 2018         |
| Joint Exhibit #15 | Chad Ward Acknowledgement and Waiver of Right to Representation dated March 14, 2018         |
| Joint Exhibit #16 | Nicole Frederick Investigatory Interview Questions and Answers dated March 14, 2018          |
| Joint Exhibit #17 | Nicole Frederick Acknowledgement and Waiver of Right to                                      |
| Joint Exhibit #18 | Nicole Frederick Notice of Interview/Conference dated March 14, 2018                         |
| Joint Exhibit #19 | Nicole Reffitt Investigatory Interview Questions and Answers dated March 14, 2018            |
| Joint Exhibit #20 | Nicole Reffitt Acknowledgement and Waiver of Right to Representation dated March 14, 2018    |
| Joint Exhibit #21 | Nicole Reffitt Notice of Interview/Conference dated March 14, 2018                           |
| Joint Exhibit #22 | Beth Higginbotham Investigatory Interview Questions and Answers dated March 14, 2018         |
| Joint Exhibit #23 | Beth Higginbotham Acknowledgement and Waiver of Right to Representation dated March 14, 2018 |
| Joint Exhibit #24 | Beth Higginbotham Notice of Interview/Conference dated March 14, 2018                        |
| Joint Exhibit #25 | Beverly Hardy Investigatory Interview Questions and Answers dated March 21, 2018             |
| Joint Exhibit #26 | Beverly Hardy Acknowledgement and Waiver of Right to Representation dated March 21, 2018     |

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| Joint Exhibit #27 | Beverly Hardy Notice of Interview/Conference dated March 21, 2018   |
| Joint Exhibit #28 | Lisa Holdren Investigatory Interview Questions and Answers dated March 27, 2018                               |
| Joint Exhibit #29 | Lisa Holdren Acknowledgement and Waiver of Right to Representation dated March 27, 2018                       |
| Joint Exhibit #30 | Lisa Holdren Notice of Interview/Conference dated March 27, 2018  |
| Joint Exhibit #31 | Denise Dunn Investigatory Interview Questions and Answers dated March 27, 2018                                |
| Joint Exhibit #32 | Denise Dunn Acknowledgement and Waiver of Right to Representation dated March 27, 2018                        |
| Joint Exhibit #33 | Denise Dunn Notice of Interview/Conference dated March 27, 2018   |
| Joint Exhibit #34 | Unit Log Book Print D2 out of 3/4/2018  |
| Joint Exhibit #35 | DRC Training Session Report dated February 23, 2018   |
| Joint Exhibit #36 | Beverly Hardy Triage of Dental Pain Read and Sign dated November 20, 22014                                    |
| Joint Exhibit #37 | Email from Beth Higginbotham, Dental Pain dated February 23, 2018   |
| Joint Exhibit #38 | Henning Medical Encounter Log dated 3/22/2018   |
| Joint Exhibit #39 | Series of emails between Unit Manager Nicole Frederick and Assistant Health Care Administrator Nicole Reffitt |
| Joint Exhibit #40 | Monthly Emergency Telephone Log Feb/March 2018  |
| Joint Exhibit #41 | Dental Health Services Request Log 2018   |
| Joint Exhibit #42 | Medical Schedule March 2018   |
| Joint Exhibit #43 | Department of Rehabilitations and Corrections Policy 68-MED-21 Infirmary Care dated July 2, 2015              |
| Joint Exhibit #44 | Nurses Staff Meeting August 17, 2017  |
| Joint Exhibit #45 | Administrative Investigation Summary Report dated May 7, 2018   |
| Joint Exhibit #46 | Series of Incident Reports  |
| Joint Exhibit #47 | Beverly Hardy Investigatory Interview Questions and Answers dated April 23, 2018                              |
| Joint Exhibit #48 | Beverly Hardy Acknowledgement and Waiver of Right to Representation dated April 23, 2018                      |
| Joint Exhibit #49 | Beverly Hardy Garrity Right Form dated April 23, 2018   |
| Joint Exhibit #50 | Gary Artrip Investigatory Interview Questions and Answers dated March 28, 2018                                |
| Joint Exhibit #51 | Gary Artrip Acknowledgement and Waiver of Right to Representation dated March 28, 2018                        |
| Joint Exhibit #52 | Beth Higginbotham Investigatory Interview Questions and Answers dated March 28, 2018                          |
| Joint Exhibit #53 | Beth Higginbotham Acknowledgement and Waiver of Right to Representation dated March 28, 2018                  |

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| Joint Exhibit #54 | Rayma Jensen Investigatory Interview Questions and Answers dated March 28, 2018                  |
| Joint Exhibit #55 | Rayma Jensen Acknowledgement and Waiver of Right to Representation dated March 28, 2018          |
| Joint Exhibit #56 | Nurse Assignment Sheets  |
| Joint Exhibit #57 | eCW documents  |
| Joint Exhibit #58 | Beverly Hardy Administrative Leave Notice dated March 15, 2018                                   |
| Joint Exhibit #59 | Unit Log Book Print Out Medical 3/14/2018  |
| Joint Exhibit #60 | Beverly Hardy Kronos 3/3/2018—3/18/2018  |
| Joint Exhibit #61 | Beverly Hardy Nurses Seeing Patient's Manual Read and Sign dated May 18, 2017                    |
| Joint Exhibit #62 | Beverly Hardy Infirmary Care Read and Sign dated April 26, 2017                                  |
| Joint Exhibit #63 | Regional Nurse Administrator/BOMS log  |
| Joint Exhibit #64 | Series of Emails and Memos   |
| Joint Exhibit #65 | Department of Rehabilitations and Corrections Protocol B-4 Charting Directives dated May 1, 2007 |
| Joint Exhibit #66 | Department of Rehabilitations and Corrections Policy 68-MED-21 Infirmary Care dated July 2, 2015 |
| Joint Exhibit #67 | Administrative Investigation Summary Report dated June 22, 2018                                  |
| Joint Exhibit #68 | Incident Report written by Beth Higginbotham dated March 19, 2018                                |
| Joint Exhibit #69 | Beverly Hardy Investigatory Interview Questions and Answers dated May 17, 2018                   |
| Joint Exhibit #70 | Beverly Hardy Garrity Right Form dated May 17, 2018  |
| Joint Exhibit #71 | Beverly Hardy Investigatory Interview Questions and Answers dated May 17, 2018                   |
| Joint Exhibit #72 | Beverly Hardy Notice of Interview/Conference dated May 17, 2018                                  |
| Joint Exhibit #73 | Beverly Hardy Investigatory Interview Questions and Answers dated June 22, 2018                  |
| Joint Exhibit #74 | Beverly Hardy Garrity Right Form dated June 22, 2018   |
| Joint Exhibit #75 | Beverly Hardy Acknowledgement and Waiver of Right to Representation dated June 22, 2018          |
| Joint Exhibit #76 | Beverly Hardy Notice of Interview/Conference dated June 22, 2018                                 |
| Joint Exhibit #77 | Rayma Jensen Investigatory Interview Questions and Answers dated June 4, 2018                    |
| Joint Exhibit #78 | Rayma Jensen Acknowledgement and Waiver of Right to Representation dated June 4, 2018            |
| Joint Exhibit #79 | Rayma Jensen Notice of Interview/Conference dated June 4, 2018                                   |
| Joint Exhibit #80 | Lisa Holdren Investigatory Interview Questions and Answers dated June 19, 2018                   |

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| Joint Exhibit #81  | Lisa Holdren Garrity Right Form dated June 19, 2018  |
| Joint Exhibit #82  | Lisa Holdren Acknowledgement and Waiver of Right to Representation dated June 19, 2018                         |
| Joint Exhibit #83  | Lisa Holdren Notice of Interview/Conference dated June 19, 2018  |
| Joint Exhibit #84  | Denise Dunn Investigatory Interview Questions and Answers dated June 22, 2018                                  |
| Joint Exhibit #85  | Denise Dunn Garrity Right Form dated June 22, 2018   |
| Joint Exhibit #86  | Denise Dunn Acknowledgement and Waiver of Right to Representation dated June 22, 2018                          |
| Joint Exhibit #87  | Denise Dunn Notice of Interview/Conference dated June 22, 2018   |
| Joint Exhibit #88  | Series of Emails and Memos   |
| Joint Exhibit #89  | Series of eCW Documents  |
| Joint Exhibit #90  | Department of Rehabilitations and Corrections Protocol B-4 Charting Directives dated May 1, 2018               |
| Joint Exhibit #91  | Department of Rehabilitations and Corrections Policy 68-MED-21 Infirmiry Care dated July 2, 2015               |
| Joint Exhibit #92  | Beverly Hardy Standards of Employee Conduct Certificate of Information Received dated May 1, 2015              |
| Joint Exhibit #93  | Department of Rehabilitations and Corrections Policy 68-MED-12 Dental services dated December 26, 2015         |
| Joint Exhibit #94  | Department of Rehabilitations and Corrections Protocol A-2.35 Nurse's Sick Call Access dated December 26, 2015 |
| Joint Exhibit #95  | Video #1 dated March 4, 2018 10:39 am  |
| Joint Exhibit #96  | Video #2 dated March 4, 2018 1:16 pm   |
| Joint Exhibit #97  | Video #15 dated March 9, 2018 6:55 am  |
| Joint Exhibit #98  | Video #16 dated March 9, 2018 8:47   |
| Joint Exhibit #99  | Video #18 dated March 9, 2018 1:20   |
| Joint Exhibit #100 | Video #20 dated March 11, 2018 6:53 am   |
| Joint Exhibit #101 | Video #29 dated March 14, 2018 11:24   |

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

|                       |  |
|-----------------------|--|
| Management Exhibit #1 | Phone Log, 2/13/18   |
| Management Exhibit #2 | Training for Medical Staff in Dental Screening / Dental Emergency Triage |
| Management Exhibit #3 | Summary View for E. Frederick, 3/14/18                                   |
| Management Exhibit #4 | Summary View for M. Hornsby, 3/9/18                                      |
| Management Exhibit #5 | Electronic Health Record Utilization and Responsibilities                |
| Management Exhibit #6 | Standards of Nursing Practice Promoting Patient Safety                   |

Management Exhibit #7  
Management Exhibit #8

Notice of Disciplinary Action, Angela Clark, 7/24/18  
Notice of Removal, Denise Dunn, 7/24/18

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

Union Exhibit #1  
Union Exhibit #2

Note of Disciplinary Action, Jonathan Hamm, 6/28/18  
Training session Report, Infirmary Care, 3/16/18

**Background:**

The Grievant, Beverly Hardy, was hired as a Registered Nurse (RN) at the Chillicothe Correctional Institution on August 12, 2013. 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.

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

**Issue:**

Was the Grievant, Beverly Hardy, terminated for just cause, and if not, what shall the remedy be?



### **Management's Position:**

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

The Grievant was charged with falsely documenting safety checks which were conducted by other nurses and failing to document safety checks she conducted herself. Both Parties stipulated that on three (3) occasions the Grievant did, indeed, perform a safety check but failed to document it and on one occasion documented a safety check performed by another nurse. Management cited this as an example of falsification of a document which is a clear violation of Rule 22. The Union countered that this was a common practice, which Management was aware of, and that Management engaged in the practice. If such was the case, Management contended Ms. Beth Higginbotham, the Health Care Administrator (HCA), would not have filed the initial incident report thereby implicating herself. Additionally, Ms. Rayma Jensen, the Quality Insurance Coordinator (QIC), testified that neither she nor anyone else from Management was aware of this practice until the incident report was filed. The Union produced no witness who could testify that Management had any foreknowledge of the practice or that it was condoned.

Management also contended that the Grievant falsified medical records regarding safety checks that never occurred on March 8, 2018. This situation was discovered when Nurse Practitioner Gary Artrip went to see an inmate who was listed by the Grievant as resting comfortably in the infirmary. The inmate was not there and had been released several hours prior. Indeed, several hours passed in which no one in the medical department knew the inmate's whereabouts. Management presented video evidence that no one, including the Grievant, completed a safety check on two (2) separate occasions when Nurse Harding documented that a safety check had been done.

Management also cited an incident where the Grievant failed to provide dental care for a patient. Corrections Officer (CO) Chad Ward called the infirmary on behalf of an inmate who was experiencing severe dental pain on March 4, 2018. The Grievant denied the inmate the opportunity to be seen by a medial nurse. The inmate was not assessed or treated, putting him in a potentially dangerous medical situation. While the Union denies that the call took place, CO Ward testified that the Grievant answered the call. He recognized her voice and she answered with, "Medical, this is Bev." The Grievant was on the medical schedule for that day in the "2" role which designates the person primarily responsible for answering phone calls. CO Ward reported the incident to the Unit Manager (UM), Nicole Frederick, who subsequently reported it to the Assistant Health Care Administrator. These concerns led to an incident report being filed. An investigation was done by Shane Stevens UM which concluded that the Grievant did fail to respond to an inmate's dental issues when called by CO Ward.

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, Beverly Hardy. Further, clear and convincing proof to sustain the allegations was not presented.

The issue of "safety checks" was a major 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, the Union contended this practice was known and accepted by Management. Nurses from two different bargaining units, SEIU 1199 and OCSEA, followed this

practice. Testimony from a Union nurse affirmed that members of Management not only knew of the practice but were active participants. A key witness and accuser, Beth Higginbotham HCA, 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 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 contends 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. Further, on April 9, 2018, ODRC created a new policy, 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. Management, therefore, was enforcing a rule change after the fact.

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 allegations. Management held a meeting to convey to the other nurses that the practice of documenting for one another should stop. 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.

The Grievant was also accused of documenting safety checks that did not occur. Management showed videos of these instances to support their allegations but only 10 to 15 minutes portions of the videos. Safety checks are done every two (2) hours so a check could have been done in a time that wasn't shown on video at the hearing.

Additionally, the Union also contended that they were not provided sufficient time to view the video footage.

The Grievant also allegedly violated Rule 47 when Management contended she received a phone call on March 4, 2018 from CO Ward regarding a patient presenting with a dental issue. Nurse Hardy allegedly told CO Ward she did not have time to see the patient. The Union argued that the phone call did not take place. Management produced no witness who heard the phone call, and no one saw CO Ward make the call. CO Ward logged the call only because his UMA instructed him to do so. The investigator of the case did not pull video footage from the area at the time of the alleged phone call and admitted he could not affirmatively state that the call was made. Interviews of three (3) nurses working in the infirmary at the time showed no recall of any phone call coming in. Further, when the Union requested an internal call log, it was not produced in a timely fashion and ruled inadmissible when Management attempted to submit it at the hearing. Thus, there was no proof one way or another that the phone call took place so the Grievant cannot be found at fault.

## **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 March 4, 2018, incident involved an inmate who was experiencing severe dental pain. The CO, Chad Ward, stated he called medical and that Nurse Hardy answered the phone. He stated that he recognized her voice. He said that Hardy told him there was nothing that could be done until the next day so there was no need to bring in the inmate. CO Ward reported the incident to the Unit Manager, Nicole Frederick, who then reported it to the Assistant Health Care Administrator. These concerns led to an incident report (Joint Exhibit 12) being filed over the issue. An investigation was conducted by UM Shane Stevens. His determination was that the phone call did take place and that Nurse Hardy failed to respond to an inmate's dental issue when called by CO Ward (Joint Exhibit 11).

The Grievant, however, testified that she had no recollection of the call. Management had no witnesses who heard the call, and no one saw CO Ward make the call. The two (2) nurses on duty at the time with the Grievant, Lisa Holdren and Denise Dunn, both testified that they knew nothing about the call and that they themselves probably took calls that day (Joint Exhibits #28 and #31). The Union requested an internal call log which would have shown if the call had been made. The document was never produced until the day of the hearing at which point it was ruled inadmissible since it was not produced in a timely matter. Additionally, the investigator, when cross examined, admitted that he did not pull video footage from the area to verify that a call had been

made and that he could not affirmatively say that CO Ward actually made the phone call.

The details of this incident are inconsistent and solid proof is lacking to fully support either side of the investigation. Therefore, discipline on this incident was not warranted.

The next issue involved the Grievant documenting a safety check 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 #1 (Joint Exhibit #95), March 4, 2018, 10:39 AM shows the Grievant making a safety check. On March 4, 2018, 10:39 AM Nurse Lisa Holdren documented the safety check.

Video #2 (Joint Exhibit #96), March 4, 2018, 1:16 pm, shows the Grievant making a safety check. On March 4, 2018, 1:16 pm, Nurse Lisa Holdren documented the safety check.

Video #20 (Joint Exhibit #100), March 11, 2018, 6:53 am, shows the Grievant making a safety check. On March 11, 2018, 6:53 am, Nurse Denise Dunn documented the safety 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, however, from any of the witnesses, Union or Management, to corroborate this. The Union further stated 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, clearly delineates that staff cannot log into other's account 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, and suspended several of the nurses involved. The nurses were still checking on patients so care was not compromised, but they failed to sign their own names. Policy 68-MED-21 (f) states 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 then 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) (Joint Exhibit #91) 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 Infirmity Services (Joint Exhibit #91) and Protocol B-4 Charting Directives (Joint Exhibit #65).

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 appears that no malice or subterfuge was intended. Patients were not put at risk since they were being monitored. It seems the Grievant and other involved nurses were striving to follow the mandate of completing safety checks.

Management provided evidence that the Grievant was aware of the policies that were in place. DRC Protocol B-4 Charting Directives (Joint Exhibit #90) states that one should, “Never falsify or obliterate any entry on an inmate’s medical record.” The Grievant signed that she had read the Standards of Employee Conduct Certificate of Information on May 1, 2016 (Joint Exhibit #92). 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 disciplined for documenting safety checks they did not perform received a two-day suspension. The CBA 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, does not seem commensurate with the seriousness of the offense 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, Videos #15 (Joint Exhibit #97) and Video #18 (Joint Exhibit #99), that the Grievant did not do a safety check at the reported and documented time. 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. The most compelling evidence however, is the fact that the Grievant documented that a patient was resting in his room when the inmate had been taken to segregation and was not in the clinic (Management Exhibit #3 and Joint Exhibit #52). The Grievant testified during an investigatory interview on April 23, 2018 (Joint Exhibit 47) to the following:

Q: So, if I review the cameras, I will see a nurse at approximately, give or take a few minutes, going into the patient's room and allegedly doing a patient safety/security check?

A: Yes, as far as I know. It could have been Angel or me.

Additionally, Management Exhibit #3 shows the documentation for the patient in question. The Grievant did a 9:32 AM safety check on the patient but made a notation that it was a late entry for 9 AM. Had the 11:24 time not been accurate, the Grievant would have documented it as such as she had done previously. Hence, the video evidence for a window of time supports Management's position. Management's argument was backed by evidence as well as a compelling argument to support their allegation.

This last instance shows a serious lapse in judgment on the part of the Grievant. The health and well-being of an inmate was compromised as well as the safety of the facility

in that the patient went missing. Documents were falsified and, in this case, with the intent to deceive. The Grievant deceived administration into thinking a safety check had been done when it had not. This act clearly violates all of the Standards of Employee Conduct Rules that management cited:

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

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

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

Application of the steps of Progressive Discipline are contingent on the type of offense and occurrence of various offenses as stated in Section 8.02. This offense, coupled with the other, is serious enough to justify termination.

The Union has contended that the Grievant received discriminatory treatment in that she was terminated when others who were charged with only safety check violations received 2-day suspensions. Arbitrator Benjamin Aaron stated: "An absolute consistency in the handling of rule violations is, of course, an impossibility, but that fact should not excuse random and completely inconsistent disciplinary practices." [Aaron, *The Uses of the Past in Arbitration*, Proceedings of the 88<sup>th</sup> Annual Meeting of NAA, 1, 10 (BNA Books, 1955)] The Grievant's termination was not random nor inconsistent with others. Had she only been found guilty of safety check violations, the same 2-day suspension would have been recommended. The last charge of documenting safety checks that were not done raised the level of gravity. Coupled with the first offense, the discipline was 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 failure to provide dental care to a patient, there is not conclusive evidence to support the allegation.

On the charge of falsifying records by signing safety checks for one another, Management's position is sustained.

On the charge of documenting safety checks that were not completed, Management's position is sustained.

Management has met the burden of just cause in two of the three charges, and the severity of the charges warrants the levied penalty. The grievance is denied.

This concludes the arbitration.

Respectfully submitted this 16th day of December, 2019,

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