



## **INTRODUCTION**

This matter came on for hearing before the arbitrator pursuant to the collective bargaining agreement (“Agreement”) (Joint Ex. 1) between SEIU District 1199, The Health Care and Social Services Union, Change to Win, CLC (“Union”) and The State of Ohio (“CCI” or “Employer”). That Agreement was effective from 2015 through 2018 and included the conduct which is the subject of this grievance.

Robert G. Stein was mutually selected by the parties to impartially arbitrate this matter, pursuant to the terms of Article 7, Section 7.07(A) of the Agreement, as a member of a pre-selected panel of arbitrators. A hearing on this matter, grievance number DRC-2018-00070-11, was conducted on April 25, 2019. The parties mutually agreed to that hearing date, and they were each provided with a full opportunity to present both oral testimony and documentary evidence supporting their respective positions. The hearing, which was not fully recorded via a written transcript, was subsequently declared closed upon the parties’ individual submissions of post-hearing briefs. The parties have agreed to the submission of three (3) joint exhibits.

## **ISSUES**

- (A) Is the Union’s grievance procedurally arbitrable?
- (B) Did the Board violate the terms of the Article 42, Section 42.04 of the Agreement?  
If so, what shall the remedy be?

## **RELEVANT AGREEMENT PROVISIONS**

ARTICLE 7—Grievance Procedure  
ARTICLE 42.04—Nursing Duties

## **BACKGROUND**

The State of Ohio’s Department of Rehabilitation and Correction (“DRC”) operates the Chillicothe Correctional Institution (“CCI”). The Union represents the twenty-three (23) registered nurses (RNs) in the Nurse 1 job classification working at that facility. Because the RNs perform all the nursing duties of typical hospitals, clinics, or doctors’ offices, they must utilize or handle biohazardous materials, including needles or sharps. The RNs are required to place a used needle/sharp in a container specifically designated to hold the biohazardous needles/sharps. CCI had previously used trained inmate porters to dispose of the other forms of biohazardous waste from designated large trash cans to the lower or basement level of the facility. Because CCI changed procedures in January 2018 (Employer Ex. 1) for biohazardous trash disposal and discontinued the assignment of inmate porters to remove the biohazardous waste from the main level clinical area, the task was assigned to the CCI medical staff, including the RNs assigned there. (Employer Ex. 1)

On January 6, 2018, Denise Dunn (“Dunn”) initially filed a class action “working out of class” (“WOOC”) grievance. (Union Ex. 2) At the Step 2 grievance hearing on this matter, the Union sought to modify the grievance to only allege a violation of Article 42.04 of the Agreement, entitled “Nursing Duties,” and to remove the previously alleged WOOC class action violation. The Employer has maintained its objection on procedural grounds and also

denied the grievance on its merits. The matter was advanced to the arbitration level of the grievance procedure identified in Article 7, and thus has been submitted to this arbitrator for final and binding resolution.

### **SUMMARY OF THE UNION'S POSITION**

(A) In response to the Employer's claim that the Union's grievance is not procedurally arbitrable, the Union asserts that, in filing grievances including the one under review herein, the Union makes the decision regarding which article(s) and section(s) of the Agreement that it deems to have been violated in view of the language included therein. Specifically, Dunn cited to Agreement Section 42.04 in the "Grievance Details as Submitted" segment of the grievance as filed. (Union Ex. 2) Section 42.04 includes the following language: "... [R]egistered nurses will not be routinely asked to assume responsibilities outside their classification." Despite the fact that working outside of a nurse's classification is included as part of the language in that specific article, the Union argues that that particular inclusion of that referenced language does not automatically translate the Union's grievance to be an assertion of a grievance pursuant to Article 38 of the Agreement, entitled "Working out of Class." The Union also avers that Dunn's inclusion of a response on page two of the grievance form in reference to the pre-printed language stating "WOC Grievated Duties," does "not force the grievance to fall under Article 38." (Union brief p. 1) The Union notes that CCIs Step 2 response, included on the second page of the instant grievance, notes that "[Dunn] has requested to modify this grievance to reference [Section] 42.04 only and to drop the Working out of Class [designation]." (Union Ex. 2)

In response to the Employer's prior assertion that grievances, originally filed as alleging violation of Article 38 of the Agreement, may not be filed as a class action grievance, the Union asserts that that alleged preclusion is irrelevant because the instant grievance was modified and then recognized as having been filed as alleging a violation of Section 42.04 exclusively.

As a result, the Union requests that the instant grievance be deemed to be procedurally arbitrable and subject to a review on its merits.

(B) The Union's underlying contention in this matter is that the RNs at the CCI are being required on a routine and regular basis to remove biohazardous waste from their working areas at that facility and to take it to the basement where they have to tape together boxes and assemble the waste for subsequent removal by an independent commercial service provider. The Union asserts that the CCI RNs have been required to assume this on-going and routine responsibility in direct violation of Section 42.04 of the Agreement, which states:

**In order to provide the necessary time to perform properly the duties of their job classification, registered nurses will not routinely be asked to assume responsibilities outside their classification. Housekeeping duties, clerical duties, and other duties which can be and normally are performed by paraprofessional employees shall not be required of the registered nurses, other than in irregular or unusual circumstances.**

The Union contends that, although the Agreement's Management Rights language included in Article 5 of the Agreement includes its right to manage staff, the above negotiated language limits the Employer's right to assign specific job duties to the RNs.

The Union specifically notes that the RNs dispose of used needles or sharps by placing each one in an individual plastic biohazard sharps container and then tapes the lid shut. An individual corrections officer unlocks a gate, thereby permitting the RN to descend

two levels to the basement to gain entry into the biohazard trash room. The RN locates a red plastic biohazard bag there and then places the sharps contained inside an assembled cardboard box. After closing and taping the box and placing it on the stack of boxes ready for pick-up by the biohazardous waste company, the RN counts the number of new and empty sharps containers in the room, records the number on a form, and takes an empty container with her upstairs to replace the one she just disposed of. (Union brief p. 3) Although sharps are counted when they come into the facility, each nurse must write on a tracker when she uses a sharp, and then the used sharps go into a sharps container, the Union notes that the number of used sharps is never counted or recorded. The Union consequently asserts that taking the used sharps to the basement “does not actually impact the RN’s tracking of sharps inventory, it falls outside their job duties.” (Union brief p. 5)

The Union claims that the hearing testimony of witness RN Jon Hamm indicated that he has taken the used sharps containers to the prison basement approximately twice each week on the night shift and the biohazardous waste containers to the same location approximately three (3) times each week. The Union asserts that that recognized regularity or frequency meets the definition of “routinely,” as prohibited in Section 42.02. Grievant Dunn also indicated that she took biohazardous material to the prison basement one (1) or two (2) times each week during her first shift assignment. The Union claims that the frequency of those occurrences render them to be routine and not occurring infrequently as a result of special events or circumstances.

The Union further asserts that the Nurse 1 classification or job description (Union Ex. 3) does not include any reference(s) to biohazardous trash removal, thereby recognizing that function as purportedly being outside the Nurse 1 classification specification.

The Union identifies three (3) categories of duties identified in Section 42.04 which the RNs are not required to perform: housekeeping duties, clerical duties, and other duties which can be and normally are performed by paraprofessional employees. Although CCI previously utilized inmate porters to perform most housekeeping tasks, including the disposal of biohazardous waste, procedures changed in January 2018 when CCI stopped permitting the inmate porters to remove the waste and ended the long and well-established practice. (Union brief p. 6; Employer Ex. 1) As a result, that responsibility has been assumed by the RNs at CCI on a routine basis despite the facts that: (1) doing so is not part of their classification's job duties on a routine basis; (2) they are not trained to do it; (3) other medical facilities use housekeeping or paraprofessional staff to do this; and (4) it takes time away from the nurses' clinical duties. (Union brief p. 9)

Based on the above claims, the Union requests that its grievance be sustained.

#### **SUMMARY OF THE EMPLOYER'S POSITION**

(A) The Employer emphasizes the fact that Dunn's grievance was procedurally defective based on its original identification as a WOOC grievance, which may be filed on behalf of only individual employees and not as a class action grievance. The Employer notes that, although the Union modified its claim at the Step 2 hearing on this matter, the Employer "strongly asserts the grievance is procedurally defective" . . . "since this case is not actually a WOOC case." (Employer brief pp. 1, 2) As such, the Employer notes that it would object to any class-action WOOC remedy being granted.

(B) The Employer insists that the Union has failed to meet its burden of establishing by a preponderance of the evidence that there has been a violation of the Agreement based on the evidence presented. Specifically, the Employer claims:

... [T]he Union has ... failed to establish that Management has violated Article 42.02 of the contract. Ultimately, the work that the nurses at CCI were asked to perform requires a *de minimis* amount of time and effort, occurs infrequently, may be performed when a nurse has down time, is already contained within their job classification and further enhances the safety and security of everyone within the institution.

(Employer brief p. 8)

The Employer disputes the Union's description of the process of removing the used sharps to the basement level as routine and time-consuming. It notes that CCI's Health Care Administrator, Dave Conley ("Conley"), indicated that it was approximately fifty (50) steps from the medical area where the RNs are stationed to the basement disposal area. As a result, Conley estimated that the process of transporting the used sharps there would take approximately five (5) minutes for each trip or visit. Nurse Hamm testified that he made the trip to empty the used sharps containers approximately twice each week, while Dunn testified that she carried the used sharps to the basement once or twice each week, using about ten (10) minutes to do so. (Employer brief p. 4) The Employer calculates that, at most, approximately forty (40) staff work minutes are dedicated to that sharps disposal effort, which is purportedly equivalent to .01% of the staff's total work time. (*Id.*) The Employer also claims that the time dedicated to the removal of the sharps is discretionary for the most part because that function may be carried out when time is available and should not preclude any RN from performing more critical or timely duties. CCI thus asserts: "Management is clearly in compliance with the contract as nurses are provided with more than ample time to properly perform the duties of their job classification and are not 'routinely' asked to

assume responsibilities that would interfere with their ability to properly perform the duties of their classification.” (Employer brief p. 4)

The Employer also asserts that the Union’s comparison of the CCI medical facility to other public hospitals and health care facilities is not valid because of the security needs and the requirements for extra levels of caution and safety, especially to prevent the used sharps from being circulated within the prison population as happened on an identified date prior to the elimination of inmate porters being used in the sharps disposal process.

The Employer also specifically notes that no evidence was offered by the Union to demonstrate that the disposal of the used sharps resulted in any delay in responding to any specific medical need or emergency.

The Employee directly rebuts the Union’s argument that taking the used sharps containers to the basement is outside of the RN job classification (Union Ex. 3), which requires each RN to “maintain constant & exact inventory of all controlled drugs, medication & equipment.” Additionally, the Employer notes that the position description for the Nurse 1 position (Employer Ex. 6) states that nurses “assist with inventory & ordering of medical supplies.”

The Employer requests that the Union’s grievance be found procedurally defective and/or in the alternative denied in its entirety.

## **DISCUSSION**

(A) The arbitrator’s initial role in this particular matter is to determine whether it is procedurally arbitrable and subject to the arbitrator’s review and jurisdiction. Once it has been determined that the parties have submitted the subject matter of a dispute to

arbitration, issues, which grow out of a dispute and bear on its final resolution, should be left to an arbitrator.” *John Wiley and Sons v. Livingston*, 376 U.S. 543, 84 S.Ct. 908, 918-19 (1964).

The issue of a grievance’s arbitrability is a question within the function and jurisdiction of arbitrators to decide. *City of Lincoln, Neb. and Lincoln Firefighters Ass’n, Local 644, Int’l Ass’n of Firefighters*, 00-2 Lab. Arb. Awards (CCH) P 3589 (Berquist 2000).

In the final analysis, the issue of arbitrability must be determined by the arbitrator. This is especially true when issues of procedural arbitrability are in dispute. Essentially, in such circumstances, the function of an arbitrator is to decide whether or not an allegation of non-arbitrability is sound. This is often compared to the responsibility of a trial judge, who is asked to dismiss a complaint on motion for a directed verdict or failure to state a sustainable cause of action. Essentially, the decision on arbitrability by the arbitrator is part of his or her duties.

*Operating Eng’rs v. Flair Builders*, 406 U.S. 487 (1972).

The process of arbitration is intended to permit parties to have their employment issues resolved in a less formal manner than in the judicial system. Reliance upon procedural technicalities in determining a grievance, instead of addressing the substantive issues, does little to further the administration of the parties’ Agreement. National policy in the United States favors the arbitration and resolution of existing and recognized disputes. The presumption of arbitrability is so strong that the U.S. Supreme Court has resolved that “doubts should be resolved in favor of coverage.” *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 80 S.Ct. 1347 (1960). The presumption of arbitrability is particularly strong when the issue is a procedural one. *St. Vincent de Paul Residence*, 199 LA 1133 (Gregory 2004).

Article 7, Section 7.03 of the Agreement specifically provides: “The grievance may be amended at the Step 2 meeting,” which was, in fact, done legitimately by the Union in this

matter. Additionally, the Union has the recognized right to cite to what it deems to be the applicable section(s) of the parties' Agreement that have allegedly been violated. Then it assumes the burden of proving that to be true. In this case, the parties have ultimately and belatedly agreed that Dunn's grievance is based on Section 42.04 and is not a class action grievance, thereby precluding a class action remedy or award but not precluding the arbitrator's review of its merits.

(B) The second issue in dispute in this matter is whether the evidence establishes a potential violation of the parties' negotiated Agreement by the Employer. Probably no function of the labor-management arbitrator is more important than that of interpreting the parties' negotiated documents. The majority of arbitration cases involve disputes regarding the rights under such agreements and determining if there has been a violation. In these cases, the negotiated document itself is the focus, and the function of the arbitrator is to interpret and apply its provisions.

In this arbitral proceeding, the burden of proof falls upon the Union, as the party asserting that the RNs are improperly being required to routinely dispose of used sharps and other biohazardous waste from their work area, to establish by a preponderance of evidence that a violation of the Agreement has, in fact, occurred.

An established principle in labor arbitrations is that the party alleging a violation of a [negotiated] agreement bears the responsibility of proving by persuasive evidence that there has been a violation. There is no rigid formula stating the amount or degree of evidence that is necessary to sufficiently prove a contract violation. An arbitrator should evaluate all of the circumstances surrounding the alleged contract violation and weigh the relative worth and relevance of all the evidence presented in relation to the terms of the collective bargaining agreement.

*Am. Std., Paintsville, Ky. and United Steelworkers of Am., Local 7926, 05-2 Lab. Arb. Awards (CCH) P 3213 (Allen 2005).*

An arbitrator's decision may not be based on competing equities or sympathies, but rather on the basis of the language which the parties themselves have adopted to govern their on-going relationship. The arbitrator is a creature of the contract from which he derives his authority. He is limited thereby and must, therefore, confine his decision as directed or prescribed. Although he may use his expertise in interpreting and applying the contractual provisions, the arbitrator cannot substitute his own sense of equity and justice because his award must be grounded in the negotiated terms.

After a thorough review of the facts surrounding this dispute, the evidence submitted, and the arguments presented by the parties, the arbitrator finds that the Union has partially met its burden of establishing that the Employer acted in violation of the Agreement's terms in relying on the various RNs, including Dunn, to remove all of the biohazardous waste from the clinical area where they generally render medical services to the inmates. Although the Employer's post-hearing brief focuses on the requisite need to properly dispose of the used sharps, no arguments were identified there regarding the challenged requirement that the RNs should be required to remove the other hazardous waste materials to the facility's basement. There is no reference in either the RN classification description (Union Ex. 3) or in the Agreement for RNs being expected or required to carry out that duty. Yet, the January 4, 2018 memorandum issued by CCI's healthcare administrator specifically advised that "no inmates are to be involved in the disposing of biohazard materials," including "all sharps containers and trash in red biohazard bags." (Employer Ex. 1) That same memo specifically mandated that "[b]iohazard waste is to be processed by [m]edical staff only." That function is not included or recognized in either the DR tool control policy (Employer Ex. 3, p. 14) or the Nurse 1 position or classification description. (Employer Ex. 6)

Therefore, pursuant to those specific documents and the explicit language of Section 42.04 in the current Agreement, the RNs at CCI may be required to be involved in the proper removal and disposal of sharps. However, in the absence of irregular or unusual circumstances requiring RNs to remove other biohazardous waste (other than sharps), regardless of its accumulation rate and existing need for removal, is in violation of Section 42.04 of the Agreement and the Employer is directed to cease this specific requirement of RNs and to develop a viable alternative to the removal of other biohazardous waste that complies with Section 42.04.

## **AWARD**

The Union's grievance is granted in part and denied in part. The RNs shall continue to maintain the requisite records regarding the unused or new sharps and also account for those which have been used. RNs shall also continue to be responsible for the required disposal of the used sharps pursuant to CCI and DRC directives. However, RNs shall not be responsible for or be assigned the duty of routine removal and disposal of the other biohazardous waste materials generated at the facility's medical clinic area. The CCI and/or DRC shall assign that duty to non-RN personnel at CCI on a regular basis within a reasonable period of time, but no later than thirty (30) calendar days from the date of this Award.

The arbitrator shall maintain jurisdiction of implementation of this Award for a period of sixty (60) calendar days or longer as so determined by the arbitrator.

Pursuant to Article 7, Section 7.07(C), the arbitrator's fees and expenses shall be shared equally by the parties.

Respectfully submitted to the parties this 13th day of August 2019.

***Robert G. Stein***  
**Robert G. Stein, Arbitrator**