

FEDERAL MEDIATION AND CONCILIATION SERVICE

ARBITRATION AWARD

_____)	
IN THE MATTER OF ARBITRATION)	
)	
Between)	
)	FMCS# 12-56516-3
DEER RIVER HEALTH CARE CENTER)	
)	
and)	
)	John Remington,
)	Arbitrator
MINNESOTA NURSES ASSOCIATION)	
)	
_____)	

THE PROCEEDINGS

The above captioned parties, having been unable to resolve a dispute over the discharge of Grievant AMBER HAMMERLUND, selected the undersigned Arbitrator John Remington, pursuant to the provisions of their collective bargaining agreement and under the rules and procedures of the Federal Mediation and Conciliation Service, to hear and decide the matter in a final and binding determination. Accordingly, a hearing was held on September 24, 2012 in Deer River, Minnesota at which time the parties were represented by counsel and were fully heard. Oral testimony and documentary evidence were presented; no stenographic transcription of the proceedings was taken; and the parties requested the opportunity to file post hearing briefs which they did subsequently file on November 2, 2012. These briefs were exchanged through the Arbitrator.

The following appearances were entered:

For the Association:

Joseph Mihalek	Attorney at Law
Rene Bourassa	Human Resources Representative

For the Union:

Philip Finkelstein	MNA Legal Counsel
Robert Pandiscio	Labor Relations Representative

THE ISSUE

DID THE EMPLOYER HAVE JUST CAUSE TO TERMINATE GRIEVANT AND, IF NOT, WHAT SHALL THE REMEDY BE?

PERTINENT CONTRACT PROVISIONS AND RULES

ARTICLE 6 MANAGEMENT RIGHTS

6.1 Except as expressly limited by the specific provisions of this Agreement, the management, direction, control, supervision, method of operation, direction of the work force, and scheduling of the Employer's business, personnel and facilities are exclusively the function of the Employer. Such management rights and responsibilities shall include, but not be limited to the following:

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the right to direct the work force and determine assignments of work; the right to observe and evaluate an RN's job performance and to apply disciplinary action to assure a full day's work for a fair day's wages; the right to require observance of reasonable rules, regulations and policies established by the Employer for the operation of the Employer's facilities; the right to determine methods

of compliance with state and federal regulations pertaining to health care;

ARTICLE 15 RESIGNATION, DISCIPLINE

15.1 Resignation. The nurse will be required to give the Medical Center two (2) weeks written notice for termination of employment and the Medical Center will give the nurse two (2) weeks written notice for termination of employment, except in the case of discharge for just cause. (See Article 13 regarding advance notice of layoff.)

15.2 Just Cause. An RN who has completed the required probationary period shall not be disciplined or discharged except for just cause.

15.3 Representation at Investigatory Interview. An RN has the option to request the presence of an Association representative at an investigatory interview in cases where the nurse reasonably believes the interview may result in discipline of the RN.

15.4 Discharge-Suspension Notices- Copies to RN. A written notice of any discharge, suspension or written disciplinary notice shall be given to the RN and copied to the Minnesota Nurses Association.

15.5 Progressive Discipline. The parties to this contract recognize the principles of progressive discipline. The Employer is not required to impose discipline in strict progressive order; the degree of discipline to be applied depends upon the situation.

15.6 Access to Personnel Records. An RN shall be allowed to inspect and copy the RN's personnel record in accordance with Minn. Stat. 181.960. Under the statute there are certain records which the Employer is not required to make available for inspection and copying.

ARTICLE 16 GRIEVANCE PROCEDURE

16.1 No Reprisal. The Employer and Association desire that each registered nurse have a means by which grievances may be given timely, fair, and continued consideration until resolved. In order to facilitate

confidence in this procedure, a nurse shall not be subject to criticism or reprisal for using the grievance procedure.

16.2 Definition of a Grievance. A grievance is defined as a dispute or disagreement as to the interpretation of or adherence to the terms or provisions of this Agreement.

16.3 Procedure. A grievance, as defined in paragraph 21.2¹ above shall be resolved in conformance with the following procedure.

Step 1.

Step 2.

Step 3. If the grievance is not resolved in Step 2, either the Employer or the RN may refer the matter to arbitration.

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A decision of the Arbitrator shall be final and binding upon the Association, the Employer and the nurse. The decision shall be made within thirty (30) workdays following the close of the hearing. The fees and expenses of the neutral arbitrator shall be divided equally between the Employer and the Union.²

The authority of the arbitrator shall be limited to making an award relating to the interpretation of or adherence to the written provisions of this Agreement and the arbitrator shall not have the authority to add to, subtract from or modify in any manner the terms and provisions of this Agreement. The award of the arbitrator shall be confined to the issues raised in the written grievance and the arbitrator shall have no power to decide any other issue.

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EMPLOYEE HANDBOOK

ARTICLE 1- PURPOSE

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¹ Apparently a reference to an older version of the collective agreement since a grievance is clearly defined by the parties in Article 16.2 as noted above.

² The parties jointly waived this provision with respect to the thirty workday requirement at the arbitration hearing.

This *Deer River HealthCare Center* Employee Handbook applies to all employees for all purposes except where inconsistent with an applicable collective bargaining agreement. The grievance procedure is available to bargaining unit employees for all non-union contract issues.

ARTICLE 2 – EMPLOYEE RELATIONS

Deer River HealthCare Center believes that it is necessary to have open direct communication with all staff. This is best accomplished when employees, at all levels, may communicate with management regarding all issues affecting their employment. We know that the most effective working relationship can be accomplished with us working together for all concerned.

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ARTICLE 48 – DISCIPLINARY ACTION FOR RULES VIOLATIONS

Disciplinary action is necessary to enforce work rules, encourage positive behavior and ensure the safety of patients, residents, visitors and employees.

It becomes necessary to use disciplinary action when an employee's conduct is contrary to accepted practices. Employees in violation will receive one of the following actions at the discretion of the *Center*.

- A. Verbal Warning (verbal warnings re not considered disciplinary action)
- B. Written Warning
- C. Suspension without Pay
- D. Termination of Employment/ Discharge

The type of action shall be determined by the seriousness of the violation as determined by the *Center*. These constitute guidelines for disciplinary action, are no mandatory or exclusive, and the *Center* retains the right to alter or amend at will.

The *Center* reserves the right to alter or amend the disciplinary process at any time due to the circumstances of the incident in question.

The following actions or any combination thereof may result in discharge following a written warning and/or suspension:

- A. Unexcused absences.
- B. Soliciting gratuities from patients, residents or their families.
- C. Failure to follow safe practices, facility policies and procedures, and state/federal rules and regulations.

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When an employee's conduct is considered cause for disciplinary action, the Supervisor will inform the employee by completing the "Employee Counseling Form." The employee will sign the notice and receive a copy. Another copy will be retained by the Supervisor. The original will be placed in the employee's personnel file.

Verbal warnings without documentation are not considered disciplinary action. A disciplinary action must be documented using the "Employee Counseling Form."

In order to assure uniformity and consistency between departments, Administration shall be consulted in all disciplinary actions.

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BACKGROUND

Deer River Health Care Center Inc. (DRHCC), hereinafter referred to as the "EMPLOYER or COMPANY," operates a hospital and an attached nursing home in Deer River, Minnesota. Registered Nurses (RN's) employed at this facility are represented for purposes of collective bargaining by the Minnesota Nurses Association, hereinafter referred to as the "ASSOCIATION or UNION." Amber Hammerlund, the Grievant in this matter, was employed by the Employer from October 19, 2011 to January 24, 2012 as a Registered Nurse. She was licensed as an RN in June of 2009 and was employed at a

³ Grievant acknowledged receipt of, and familiarity with, the Employee Handbook on 10/11/11.

nursing home and as a traveling nurse before beginning her employment at the Deer River Health Care Center.

On January 23, 2012, Charge Nurse Sherri Lidholm sent a note to Patient Care Director Katie Troumbly regarding Grievant. This note states, in relevant part:

On January 8th during the day shift, the ultrasound equipment from the radiology department was at the nurse's desk. The ER nurse offered to return the machine back to the department it belonged in. Amber (Grievant) told him no as she was going to use it again today on herself. Dr. Howard asked Amber if she was having any issues. She said not really but has had issues with a possible cyst on her ovary and she was having some cramping and discomfort. Stated she checked herself yesterday and wanted to check herself that day.

Amber also stated that she needs some practice as that way she could do a quick look on a patient if need be. I asked her what she meant and she said, well if we were questioning a baby's position on an OB. I told her she couldn't do that. I explained that a nurse can not do an ultrasound on patients. That this is outside our scope of practice as a nurse.

.....

This conversation brought to light questioning if Amber was serious and if she really thinks she could do ultrasounds as a nurse.

I really did not take it that she was joking.

Just want you to know and put my concerns in writing.

Lidholm, who testified at the hearing, stated that Grievant told her that she hadn't used the ultrasound equipment at the Center in the past and that Dr. Howard told her that she needed to have training to use it on patients. Lidholm further testified that she was aware that Grievant had personal medical problems and had only planned to use the ultrasound machine on herself. Lidholm testified that it "wasn't worrisome" that Grievant was using

the ultrasound machine on herself although it was “outside our scope of practice at Deer River” for a nurse to perform an ultrasound on a patient. Lidholm did not explain why she had waited over two weeks to notify Troumbly of her “concerns” in writing.

Troumbly met with Grievant on January 23, 2012 and the following day issued her an Employee Counseling/ Disciplinary Form calling for Grievant’s “Termination.” This Form indicates that Grievant had declined Union representation and states:

Problem: Amber stepped outside of nursing scope of practice when she used hospital ultrasound equipment to perform an ultrasound on herself while she was working.⁴ The ultrasound was obtained from the imaging department for personal use. It is not the practice of Deer River HealthCare Center to train and certify nursing staff on the use of the ultrasound equipment.

Resolution of Problem or Action Taken: termination of employment

The document was signed by Troumbly and witnessed by DRHCC Director of Quality Vicki Quirk. Troumbly also issued Grievant a Resignation/Termination of Employment Form on January 24 terminating Grievant’s health care benefits effective January 31, 2012.

The Union responded to Grievant’s termination on January 27, 2012 in a letter from MNA Labor Relations Specialist Kathleen Olson to DRHCC Chief Executive Officer Jeffry Stampohar. This letter states:

Please consider this a formal letter of grievance for the wrongful termination of Amber Hammerlund. She was terminated without just cause.

I am requesting a copy of her personnel file along with any supervisory notes and orientation record.

⁴ There is nothing within the record of the hearing to indicate that Grievant used the ultrasound on herself during her working hours.

I would like to set a hearing date as soon as possible.

Thank you for your time and attention to this matter.

Stampohar responded to this grievance letter on February 27, 2012, as follows:

This is to advise that the Amber Hammerlund grievance is denied.

The Grievant was discharged for conduct that occurred during the probationary period. She was advised of the discharge very shortly after the expiration of the probationary period, the delay being attributable to the time spent finalizing the investigation before the discharge decision was announced. Since the discharge was based on conduct occurring during the probationary period, the Grievant has no contractual right to grieve the discharge.⁵

Furthermore, the Grievant was discharged for misconduct consisting of inappropriate and unprofessional use of medical equipment without authorization and outside her scope of practice, which would constitute just cause for discharge regardless of whether the conduct had occurred during the probationary period or thereafter.

The Union, in a letter from Labor Relations Specialist Robert Pandiscio to Stampohar on March 15, 2012, rejected Stampohar's denial of the grievance and demanded arbitration in accordance with the provisions of Article 16.3 of the parties' collective agreement. There is no dispute that the grievance of Amber Hammerlund is properly before the Arbitrator for final and binding determination.

CONTENTIONS OF THE PARTIES

The Employer takes the position that Grievant exceeded her scope of practice as a Registered Nurse when she gave herself an examination utilizing an ultrasound without a physician's order, training or certification. In this connection the Employer notes that the

⁵ The Employer withdrew the assertion regarding the probationary period at the hearing. Indeed, the record of the hearing reflects that Grievant's probationary period ended on January 8, 2012.

DRHCC Job Description for an RN at page 2 only authorizes an RN to assist with diagnostic procedures and exams. Further, it argues that there is no authority within this job description to administer ultrasounds or other types of diagnostic procedures and that state law limits such administration to RNs certified as advanced practice registered nurses and that Grievant was not so certified. The Employer further contends that the delay in disciplining Grievant for this offense was attributable to Lidholm's workload but that Lidholm had verbally reported the matter to Troumbly prior to January 23 and that Troumbly was only waiting for a written confirmation (which she received on January 23, 2012) before taking action. At this point Troumbly conducted an investigation and promptly met with Grievant to address the matter. The Employer argues that it has the sole right, under the collective bargaining agreement and the Employee Handbook, to determine the level of discipline for a particular offense and that the Arbitrator has no authority to substitute his judgment for that of the Employer in this instance. Finally, the Employer argues that even if the grievance is sustained, reinstatement would be inappropriate and pointless. Accordingly, it urges that the grievance must be denied.

The Union takes the position that the Employer's stated reason for terminating Grievant, the unauthorized and inappropriate use of an ultrasound machine in violation of both hospital rules and Grievant's scope of practice as a Registered Nurse, was a pretext, and that the real basis for the termination was Grievant's reporting of what she perceived to be a dangerous failure to properly clean birthing tubs. It argues that this interpretation is supported by the delay in taking disciplinary action; the notes of Troumbly's interview with Grievant on January 23; the Employer's changed reasons for terminating Grievant over time; and the inconsistent testimony of Employer witnesses. The Union further

takes the position that Grievant's use of an ultrasound on herself did not exceed her scope of practice and that the use of an ultrasound is a common practice for RNs in other facilities. Finally, the Union contends that the disciplinary action taken against Grievant was not progressive as required by the collective agreement and inconsistent with discipline taken against other nurses for more serious violations. Accordingly, the Union requests that the grievance be sustained and that Grievant be reinstated to her position with full back pay and benefits in remedy.

DISCUSSION, OPINION AND AWARD

It is readily apparent to the Arbitrator that the crucial issue in this matter is whether or not Grievant knowingly and clearly engaged in medical practice beyond the scope of her license as a Registered Nurse. If so, it is clear that it is the Employer that has the right, both under its own rules and the requirements of the collective bargaining agreement, to determine the appropriate penalty for such action. The Arbitrator has no authority to substitute his judgment for that of the Employer or to overturn or modify the discipline imposed unless the Employer is unable to demonstrate that it had just cause for its actions. However, the record is far from certain in establishing the Employer's contention that Grievant did, in fact, exceed the permissible scope of her practice.

It is clear from the record that Grievant was uncertain concerning her authority to utilize an ultrasound machine. Further, it is noted that there is nothing within the DRHCC RN Job Description which either permits or prohibits the use of an ultrasound by an RN although this Job Description does indicate that RNs "assist with diagnostic procedures and exams." Neither is there a written policy that such a practice is prohibited

nor is there evidence that Grievant was made aware of such a prohibition at DRHCC until her chance encounter with Lidholm on January 8, 2012. Obviously Grievant had no forewarning or foreknowledge of the consequences of administering an ultra sound on herself prior to being counseled by Lidholm.

It is undisputed that at no time did Grievant administer an ultrasound to a patient. When she questioned whether or not it was appropriate for her to do so she was told in no uncertain terms by Lidholm that nurses at DRHCC were not permitted to administer ultrasounds to patients. While this is clearly the RN practice at DRHCC, based on the testimony at the hearing it is apparent this is neither a consistent or uniform practice for RNs at other facilities in Minnesota or elsewhere. Accordingly, Grievant's uncertainty in this regard is not surprising given her short tenure at DRHCC and her limited experience as an RN. At the same time Lidholm expressed no concern whatsoever that Grievant had, and proposed again, to utilize the ultrasound on herself. Given the above discussion together with Grievant's open admission of her past self administration of the ultrasound in the presence of her Charge Nurse and a DRHCC physician, it is obvious that she had no knowledge of the Employer's policy on January 8 until being informed by Lidholm, and had no reason to believe that self administration was either prohibited or beyond the scope of her practice. As the Employer recognizes in its post hearing brief, it is a fundamental requirement of just cause that the Employer demonstrate that an employee have forewarning or foreknowledge of the consequences of her conduct. The Arbitrator is compelled to find that she did not have either such forewarning or foreknowledge. Further, based on the testimony of both Employer and Union witnesses, it is doubtful that self administration of an ultrasound be should be deemed beyond the scope of Grievant's

practice. Significantly, Vicki Quirk, the Director of Quality who is also a senior and highly qualified Registered Nurse, credibly testified that while Grievant's conduct was "outside of our policies" at DRHCC, she did not view it as outside the scope of Grievant's practice and did not believe that the incident was reportable to the Board of Nursing. The Arbitrator must therefore find that Grievant did not violate or exceed her scope of practice as a Registered Nurse.

Katie Troumbly, also an RN and the Patient Care Director at the hospital since August of 2011, was Grievant's immediate supervisor and effectively recommended Grievant's termination.⁶ Troumbly testified that she consulted with Quirk and Stampohar prior to reaching her decision to terminate Grievant. However, Quirk testified that she did not recommend or oppose termination but was under the impression that both Lidholm and Troumbly supported termination.⁷ Troumbly further testified that she conducted an investigation of the charge against Grievant and met with Grievant on January 23, 2012. It is readily apparent from the record that this investigation consisted solely of the note from Lidholm and the meeting with Grievant. Troumbly did not indicate that she had followed up with either Lidholm or Dr. Howard who was also present at the January 8 incident. Troumbly explained that although she had only received the written report from Lidholm that same day, the incident with the ultrasound had been verbally reported to her earlier. She was unable to specify when this verbal report had occurred or why she permitted Grievant to continue to work for over two weeks without providing corrective counseling or taking disciplinary action.

⁶ Troumbly had previously served as the Patient Care Director at the attached nursing home facility for DRHCC since 2003. She testified that she recommended discharge but that the formal authority to discharge Grievant resided with CEO Jeff Stampohar.

⁷ On the contrary, Lidholm testified that she had "mixed feelings" about the proposed termination of Grievant.

Article 15.5 of the parties' collective agreement, supra, commits the parties to utilize progressive discipline. As commonly understood and practiced, progressive discipline has two elements; the use of discipline as a corrective rather than punitive measure and the attempt to match the severity of penalties with the seriousness of offenses. As the term "progressive discipline" implies, it also provides increasingly severe penalties for repeated or additional infractions of the employer's rules. Minor or first offenses are typically dealt with through counseling or, as the Employer's policy at Article 48 provides, a "verbal warning" which is not considered disciplinary under the policy. The increasingly severe disciplinary penalties of "written warning," "suspension without pay," and "discharge," are also available to the Employer, at its discretion, for more serious or repeated offenses.

Based on the record of the hearing, it would be fair to say that, at the very most, Grievant was given a non-disciplinary verbal warning by Lidholm as the result of her proposed future use of ultra sound equipment on January 8. The next event does not occur until the January 23 meeting between Troumbly and Grievant. The Arbitrator is here compelled to observe that Troumbly's notes from the January 23 meeting (Employer Exhibit #6) are somewhat at variance with Troumbly's characterization of the meeting as an investigation of the ultrasound charge. Troumbly's notes clearly indicate that the purpose of the meeting was a general review of Grievant's work performance and not an investigatory meeting as contemplated by Article 15.3 of the collective agreement. These notes are identified as a "Follow up meeting with Amber Hammerlund" and continue "meeting today with Amber to discuss how things are going with her new position. Amber said that things are going good." The matter of the ultrasound was not

even raised until late in the meeting (Item #4 of 6 listed by Troumbly). The notes state, in relevant part:

I asked Amber if she used ultrasound equipment to do an ultrasound on herself. She said yes she did. She wanted to learn and thought that it would be helpful in case she needed to check on OB patient. I talked about how an ultrasound needs to be ordered by a physician and she was practicing medicine which is out of her scope of practice. She looked at me and asked “so is that wrong?” “I can’t do it?” I explained no and why.

We talked about the infant demise and she said it was very difficult but she was finding it helpful to have OB patients immediately following.

The last thing we talked about was suggestions and concerns. Amber thought that it would be helpful to send all staff education scenarios that they would have to research and respond back. Amber’s only concern that she reports is that she feels after talk with a housekeeper that the OB tubs are not cleaned well enough. I asked Amber to email her concern to me and I would follow up with the housekeeping manager + IC.

Significantly, there is no mention of even possible discipline for the unauthorized ultrasound use. Grievant submitted the above requested email concerning the OB tubs later that evening.

Troumbly also provided a “Confidential Supervisory Note” (Employer Exhibit #7) from her meeting with Grievant the following day. This Supervisory Note reflects that Quirk, Troumbly and Grievant were present and that the purpose of this meeting was to notify Grievant of her termination. This can hardly be considered an investigatory meeting as Troumbly suggests since it is abundantly clear from the Supervisory Note that the decision to discharge Grievant had already been made. This note reviews the charge of acting outside the scope of Grievant’s practice and states that Troumbly did not intend

to file a charge with the Board of nursing “because she (Grievant) did not practice on a patient.” “She (Grievant) asked if the termination was related to the email that she sent with her concerns about the OB tubs and infection control.” “Amber asked why we took so long to follow-up and why she was able to work last night if she was unsafe. I explained that I have no control over when people report concerns to me”

The note continues:

I also told her that I would hold the termination paperwork until Friday, January 27 in order to allow her time to consider resigning versus the termination. When I was helping Amber obtain her belonging (sic) from her employee mailbox, I found two lab Petri dishes along with the new forms that she was creating for the nursing assistances (sic). Vicki and I helped Amber collect her personal belongings from the nurses’ station, mailbox, locker room, and staff break room and assisted her to her car.

The foregoing note was submitted by the Employer as a summary of the termination meeting. Under the circumstances this meeting might well be deemed an ambush. Such an inference is warranted by the above noted circumstances including the delay in addressing what the Employer alleged to be a serious breach of RN practice together with Troumbly’s offer to hold the termination in abeyance while Grievant considered resigning. There can be no dispute that the Employer had decided to terminate Grievant before the meeting began. Accordingly, it is technically irrelevant whether or not Grievant was offered Union representation since it was not an investigatory meeting. It is troubling, however, that Grievant was offered an opportunity to resign in lieu of termination since the Employer had already determined that she was guilty of practicing beyond the scope of her license, according to the Employer a serious and terminable

offense. If the Employer truly believed Grievant to be guilty of such an offense it would have been unconscionable to allow her to resign with a clean record. It is also of concern that Troumbly knew that Grievant, an inexperienced and naive but otherwise apparently competent and intelligent nurse as reflected by her probationary review and the testimony of her Charge Nurse, did not believe she had committed an offense that would subject her to discipline.

The Arbitrator has no authority or basis to speculate on whether or not Troumbly, as the Employer's agent, was motivated to terminate Grievant for any other reason than Grievant's alleged practice outside the scope of her license as an RN. While the Union suggests an ulterior motivation based on Grievant's claim of unclean OB tubs and infection control problems in connection with the above noted death of an infant born in the hospital, its evidence in this regard is wholly circumstantial and speculative. Accordingly, this contention must be rejected by the Arbitrator. However, it cannot be denied that the testimony of Katie Troumbly was less than credible and was effectively contradicted in several instances by the testimony of Employer witnesses Lidholm and Quirk as well as by Union witnesses. In summary, it is readily apparent that Troumbly conducted little, if any, significant investigation of the charges against Grievant or that this investigation can be deemed either fair or objective. The evidence against Grievant at this point consisted of an e-mail from Lidholm to Troumbly in which Lidholm states that Grievant had self administered an ultrasound and that Lidholm had cautioned Grievant not to perform ultrasounds on patients together with Grievant's admission of the above self administration. There is no evidence that Grievant administered any ultrasounds after being cautioned by Lidholm. Neither is there testimony that Troumbly

followed up with Lidholm, Howard or with Grievant's personal physician who had performed an ultrasound on Grievant the previous week. Neither is there any indication in the record that Troumbly attempted to determine the circumstances under which the admitted self administration of an ultrasound had occurred.

It is here noted that the comments in the Confidential Supervisory note regarding the petrie dishes and forms which Troumbly discovered in Grievant's mailbox are barred from consideration by the Arbitrator as after acquired evidence not in the possession of the Employer at the time the decision to discharge Grievant was made. It is well established in labor arbitration that, in establishing just cause, an Employer must rely only upon the evidence it had at its disposal at the time it took disciplinary action.

Brief comment is warranted with regard to the Employer's contention that Grievant's discipline was applied in an even-handed and consistent manner. Based on the evidence submitted at the hearing, specifically the written warning to nurse Trudel and the suspension to nurse Baker, the Arbitrator must find that the termination of Grievant was excessive, punitive and not consistent with the Employer's stated policy.

The Arbitrator has made a particularly detailed review and analysis of the entire record in this matter, and has carefully read and considered the post hearing briefs submitted by the parties. Having done so, he is satisfied that the critical issues that arose in the instant proceeding have been addressed above and that certain other issues raised by the parties must be deemed immaterial, irrelevant, or side issues at the very most and therefore have not been afforded any significant treatment, if at all, for example: whether or not Grievant was certified as an advance practice nurse; whether or not Grievant was an "eager beaver" and needed to exercise greater restraint in "not crossing boundaries;"

whether or not Lidholm also serves as a union representative; who made the decision not to file a report with the Board of Nursing about Grievant's self administration of an ultrasound; whether or not Grievant had foreknowledge of the consequences of practicing outside the scope of her RN license since it has been determined that she did not practice outside the scope of her license; the assertion that reinstatement would be inappropriate and pointless; and so forth.

Having considered the above review and analysis, together with the findings and observations hereinabove made, the Arbitrator has determined, and so he finds and concludes, that with the specific facts of the subject grievance and within the meaning of the parties collective bargaining agreement, the Employer failed to establish, by even a preponderance of the evidence, that it had just cause to terminate Grievant's employment. Accordingly, an award will issue, as follows:

AWARD

THE EMPLOYER DID NOT HAVE JUST CAUSE TO TERMINATE GRIEVANT. THE GRIEVANCE OF AMBER HAMMERLUND MUST BE, AND IS HEREBY, SUSTAINED.

REMEDY

GRIEVANT SHALL BE REINSTATED FORTHWITH WITH NO LOSS OF SENIORITY AND ALL RIGHTS, BENEFITS AND BACKPAY RETROACTIVE TO JANUARY 24, 2012. FURTHER, ALL REFERENCE TO GRIEVANT'S TERMINATION, INCLUDING BUT NOT LIMITED TO THE CONFIDENTIAL SUPERVISORY NOTE OF JANUARY 24, 2012, SHALL BE EXPUNGED FROM HER PERSONNEL RECORD.

THE ARBITRATOR RETAINS JURISDICTION IN THIS MATTER SOLELY WITH RESPECT TO IMPLEMENTATION OF THE ABOVE REMEDY FOR NINETY (90) DAYS FROM THE DATE OF THIS AWARD.

John Remington, Arbitrator

November 23, 2012

Indianapolis, IN