

## Before the Arbitrator

### In the Matter of the Arbitration of a Dispute Between

State of Minnesota  
(DOC)

and

BMS Case 12 PA 1184 (C.D.H.  
Grievance)

Minnesota Nurses  
Association

#### Appearances:

Ms. Joy Hargons, Esq., and Ms. Rebecca Wodziak, Esq., Labor Relations Representatives, Principal, State of Minnesota Management & Budget, 658 Cedar Street, St. Paul, Minnesota 55155, on behalf of the Department of Corrections (DOC)

Mr. Phillip Finkelstein, Esq., Legal Counsel, 345 Randolph Ave., Suite 200, St. Paul, Minnesota 55102, on behalf of the Association (MNA) and the Grievant.

#### Arbitration Award:

According to the terms of the 2009-11 labor agreement between the parties and pursuant to Article 16, Section 2D thereof, the parties selected Arbitrator Sharon A. Gallagher through the Minnesota Bureau of Mediation Services to act as the sole arbitrator of a dispute between them concerning registered nurse C.D.H.<sup>1</sup>, employee of the Red Wing Correctional Facility. The parties expressly waived the contractual arbitration panel.

The parties agreed to hold hearings at St. Paul, Minnesota, on October 2 and November 6, 2012. No stenographic transcript of the proceedings was taken. One Joint exhibit and nineteen Association exhibits were received, and the DOC submitted ten Tabs of exhibits, all consisting of multiple pages. At the hearing, witnesses were sequestered. Ten witnesses testified on oath or affirmation. The parties had full opportunity to submit evidence, to make objections and to argue their cases.

At the close of the hearing on November 6<sup>th</sup>, the parties agreed to submit their initial post-hearing briefs by regular mail by close of business on December 14, 2012. The parties reserved the right to file reply briefs by regular mail by close of business on December 21, 2012. The Arbitrator received the last brief herein on December 14. On

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<sup>1</sup> Due to the sensitive nature of the various allegations in this case, the Grievant's name and that of her immediate supervisor have been initialized as C.D.H. and B.L., respectively.

December 18, the parties advised that no reply briefs would be submitted, whereupon the record was closed.

Issues:

The parties were unable to stipulate to the issues to be decided in this case. However, they agreed that the Undersigned could frame the issues based upon the relevant evidence and argument and after considering the parties' suggested issues.

The MNA suggested the following issues:

1. Did the Employer violate the labor agreement, Sections (Articles) 15 and 10, in refusing C.D.H.'s return to work after her FMLA leave?<sup>2</sup>
2. If so, what is the appropriate remedy?

The DOC suggested the following issues:

1. Did the Employer violate Article 10, Leaves of Absence, of the MNA collective bargaining agreement, when they placed C.D.H. on an unpaid medical leave effective August 22, 2011?
2. If so, what is the appropriate remedy?

Having considered the relevant evidence and argument as well as the parties' suggested issues and noting specifically that the grievance does not refer to Article 1J and that the evidence in this case failed to prove that C.D.H. was, in fact, terminated by the DOC, I find that the DOC's issues more accurately and appropriately describe the dispute between the parties, and they shall be determined herein.

Relevant Contract Provisions:

**ARTICLE 10 – LEAVES OF ABSENCE**

**Section 1. Application and Authorization for Leave.** All requests for a leave of absence shall be submitted in writing by the nurse to the nurse's supervisor. All requests for leave shall be submitted as soon as the need for such a leave is known. The request shall state the reason for and the anticipated duration of the leave of absence.

Authorization for or denial of a leave of absence shall be furnished to the nurse in writing. Such authorization shall include the beginning and ending date of the leave of absence.

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<sup>2</sup> The Union's counsel submitted this issue in writing at the hearing (using the word "Sections" rather than "Articles", but meaning "Articles"). This issue is the one that must be used in this Award because it was agreed upon on the record.

**Section 2. Unpaid Leaves of Absence.**

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**G. Administrative Leave.** The Appointing Authority may at its discretion place a nurse on paid administrative leave for up to thirty (30) calendar days where the nurse has been involved in a critical incident or where continued presence in the workplace poses a risk to the nurse or the organization. Upon placing a nurse on administrative leave, the Appointing Authority shall notify the nurse in writing of the basis for placing the nurse on such leave and the estimated duration of the leave. The Commissioner of Minnesota Management & Budget may authorize the leave to be extended for a period not greater than thirty (30) calendar days, unless the Association has agreed to an extension(s) of longer duration. It is the Appointing Authority's policy to return a nurse to active duty status as soon as is practical and prudent.

Any nurse who is placed on an administrative leave with pay shall be given a written statement indicating that the nurse is being placed on an administrative leave and the reasons for the leave.

Paid leaves of absence granted under this Article shall not exceed the nurse's normal work schedule.

**Section 3. Unpaid Leaves of Absence.**

**A. Medical Leave.** Leave of absence up to a cumulative total of one (1) year shall be granted to any permanent nurse who, as a result of an extended illness or injury, has exhausted his/her accumulation of sick leave. Upon the request of the nurse, such leave may be extended.

**B. Employer-Initiated Disability Leave.** If the Appointing Authority has reasonable cause to believe that a nurse is unfit or unable to perform the duties of his/her position as a result of disability, illness or injury, the nurse may be placed on a leave of absence for a period not to exceed one (1) year in duration.

Such leave shall be based on an evaluation by a medical practitioner. In the event that the Appointing Authority requires the nurse to go to a specific medical practitioner, the Appointing Authority agrees to pay for the cost of such evaluation.

The nurse may take advantage of the Appointing Authority's Employee Assistance Program or a similar program.

The Appointing Authority agrees to provide notice to the Association prior to placing the nurse on such leave and will meet with a local representative, and an Association representative in the presence of the nurse prior to effecting the leave, if so requested by the Association.

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**Section 4. Return from Leave.** Nurses returning from leave shall return to a position in their same classification, option, if any, and seniority unit. Nurses returning from extended leaves of absence (one (1) month or more) shall notify their Appointing Authority at least two (2) weeks prior to their return from

leave. Nurses who give the Appointing Authority notice of returning to work thirty (30) days or more in advance of their return from leave shall be given a specific fourteen (14) day work schedule. Nurses who give the Appointing Authority less than thirty (30) days notice of returning from leave to work shall only receive a specific start date/time. Nurses may return to work prior to the agreed upon termination date with the approval of the Appointing Authority. Leaves of absence, or extensions of such leave, which are subject to the discretionary authority of the Appointing Authority, may be cancelled by an Appointing Authority upon reasonable written notice to the nurse.

An employee on an approved leave of absence is required to contact the Appointing Authority if an extension is being requested. Failure to contact the Appointing Authority about an extension prior to the end of the approved leave period shall be deemed to be a voluntary resignation, and the employee shall be severed from state service.

**Section 5. Statutory Leaves.** A list of statutory leave is contained in Section F of this Agreement. Statutory leaves are subject to change or review and are not grievable or arbitrable under the provisions of this Agreement.

## Relevant DOC Policy:

**PURPOSE:** In order to ensure a safe and secure work environment for all employees, if at any time the Appointing Authority has reasonable belief that an employee(s) is not fit to perform their duties safely and constitute a hazard to themselves, co-workers or the public, the Appointing Authority may remove an employee(s) from the workplace and/or not allow an employee(s) to return to the workplace until concern for the safety and security risks have been acceptably reduced or eliminated.

The procedures are established for requiring a current employee to participate in a job related and consistent with business necessity medical examination to determine fitness for duty when the Appointing Authority has a reasonable belief, based upon objective evidence, that (1) an employee's ability to perform essential job functions will be impaired by a medical condition; or (2) an employee will pose a direct threat due to a medical condition. the required medical examination will not be materially broader or more intrusive than reasonably necessary.

### **DEFINITIONS:**

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Direct threat – a significant risk of substantial harm that cannot be eliminated or reduced by reasonable accommodation. Direct threat determinations must be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job, considering a reasonable medical judgment relying on the most current medical knowledge and/or best available objective evidence. To determine whether an employee poses a direct threat, the following factors should be considered: (1) the nature and severity of the potential harm; (2) the likelihood that potential harm will occur; (3) the imminence of the potential harm; and (4) the duration of the risk.

Essential functions – the fundamental job duties of the employment position that the individual holds. A job function may be considered essential for any of

several reasons, including but not limited to the following: (1) the function may be essential because the reason the position exists is to perform that function; (2) the function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or (3) the function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

Medical examination – a procedure or test usually given by a health care professional or in a medical setting that seeks information about an individual’s physical, mental impairments and/or health.

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**PROCEDURES:**

If the Appointing Authority guided by the concern for the safety and security of the workplace has a reasonable belief, based upon objective evidence, that (1) an employee’s ability to perform essential job functions will be impaired by a medical condition; or (2) an employee will pose a direct threat due to a medical condition, the Appointing Authority may require the employee to participate in a medical examination for the purposes of establishing fitness for duty.

The Appointing Authority will follow the procedures defined herein as well as other policies that apply to the specific situation. The Appointing Authority may consult with Human Resources and Legal Services in going through the following steps to determine the need for a medical examination and to ensure the examination will not be broader or more intrusive than reasonably necessary:

**A. Step 1 Documentation**

In preparation for consultation with a department contracted medical professional for a preliminary opinion on the need for a medical examination the following information should be prepared, fully considered, and discussed with the Appointing Authority:

1. Document a general description of employee’s problematic conduct (pattern of conduct or an episode of egregious behavior) including collecting supporting documentation of the incident, conduct or behavior) [sic] and articulate how it may impact the safety and security of the workplace.
2. Articulate any basis to believe the employee’s problematic conduct or episode of egregious behavior is related to a medical condition (as opposed to performance issues) (attach any supporting documentation).
3. Describe essential functions of the employee’s job. (reference relevant documents such as position descriptions, post orders, etc.)
4. Articulate whether the employee has been disciplined in the past for performance problems or identified conduct that is problematic.
5. Articulate any basis to believe the employee will be a “direct threat” due to the perceived medical condition.

6. Articulate if there is a less intrusive alternative to medical examination.
7. Articulate whether the employee had/has requested any reasonable accommodation for the perceived medical condition.
8. Articulate if any “reasonable accommodations” were considered to remedy the problematic conduct (regardless of whether the employee requested the reasonable accommodation) such as reassignment to light post or other alternative duties.
9. Articulate whether the employee will directly consent to participate in a medical examination as a fitness for duty?

B. Step 2 Consultation with Medical Expert

The Appointment [sic] Authority should consult with a department contracted medical professional regarding the problematic conduct for a preliminary opinion on the perceived medical condition and the need for medical examination to determine fitness for duty.

C. Step 3 Notification of Employee

If the Appointing Authority determines a Fitness for Duty evaluation is appropriate, the Appointing Authority or designee will meet with the employee to explain the process for fitness for duty examination.

Human Resources staff will arrange for the evaluation to take place with a physician contracted by the department under the annual plan.

1. A referral will be provided to the employee in writing stating the full reason for said referral.
2. Compensation will be addressed in accord with provisions of the applicable bargaining agreement.

D. Step 4 Employee Assistance Program

The supervisor may provide the employee with information regarding Employee Assistance Program (EAP) as appropriate.

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Introduction:

The State of Minnesota operates prison facilities throughout the state which house 9,400 offenders. During all times relevant to this case, Nanette Larson has been the Health Services Director for the DOC. As such, Larson acts as the “appointing authority” for approximately 470 health services employees employed by DOC at its various correctional facilities. These employees include RNs, LPNs, MDs, Mental Health, Chemical Dependency, Sexual Offender, and other health professionals needed at the facilities to address day-to-day offender health issues.

The Red Wing Correctional facility houses troubled youth under 18 years of age who have committed serious felonies, including violent and sex crimes, but who were not mainstreamed into adult prison by the courts. These youth sometimes have serious health

and mental health issues. they are often manipulative, potentially dangerous, and if they are not rehabilitated at Red Wing, they could end up in adult prisons later in life.

On-site Red Wing Health Services consist of full-time Nursing supervisor B.L. (RN) and three part-time RNs. B.L.'s direct supervisor, John Agrimson, DOC Director of Nursing, has his office in Minneapolis. Agrimson reports to DOC Health Services Director Nan Larson. The facility is secured and run by prison guards who report to the warden, Stan Barber. Although Barber is not considered part of the supervisory hierarchy for Health Services staff at Red Wing, Agrimson often advises Barber of or asks him to participate in issues involving Red Wing nurses.

It is a DOC/Red Wing practice to have RNs complete a self-evaluation form prior to having their work assessed, using the DOC's Performance Review document. Performance Reviews are not necessarily done annually. The self-evaluation form was changed in 2009 to a self-assessment form, which form contained the following questions:

1. Training requirements for the previous fiscal year were completed in the following areas:
  - a. Mandatory Courses  Yes  No
  - b. Minimum Hours  Yes  No
  - c. Annual Employee Development Plan  Yes  No

If no to any of the above, list reason for non-completion:

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2. What are the position related responsibilities/tasks at which you excel?

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3. What are the position related responsibilities/tasks you find most difficult?

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4. Describe any training you believe will assist you to improve your knowledge, skills, and abilities over the next year.

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5. Describe special career goals, if any, your supervisor could assist you with over the next year.

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6. What can supervisory staff do to assist you in improving your ability to carry out position related responsibilities?

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7. What suggestions do you have that would improve the delivery of services to residents or the operations of the facility?

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8. Additional Comments/Concerns:

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Background:

The Grievant, C.D.H., has been employed as a Registered Nurse by the DOC at its Red Wing Correctional facility since April 16, 2008. To date, C.D.H. has not received any formal discipline during her employment. At her six-month review (covering the period 4/16/08 through 9/6/08), C.D.H.'s supervisor, B.L., rated C.D.H. as follows on the DOC's Performance Review form, which then had 33 measures of performance:

3 Exceeds standards  
21 Fully meets standards  
9 Minimally meets standards  
(Tab 2, pp. 1-5).

In a memo dated September 14, 2008, C.D.H. disagreed with one of B.L.'s comments on the evaluation, "Carol presents on occasion as being somewhat territorial and non-accessible." C.D.H. stated in the memo that B.L.'s comment was "unfair and unjustified" and that she felt "humiliated, degraded and confused" by the comment; that the comment was "negative" and "offensive" (Tab 1, p. 9). C.D.H. delivered her memo to B.L. on the same day as B.L. presented C.D.H. with her performance review.

On November 7, 2008, B.L. submitted an amended performance review for C.D.H. in which B.L. changed the nine "minimally meets standards" ratings to "fully meets standards" ratings (Tab 1, pp. 10-11).

On November 26, 2008, C.D.H. passed her probation and was promoted to RN-Senior (Tab 1, p. 13). In a letter dated December 28, 2008<sup>3</sup>, C.D.H. listed six complaints about B.L.'s treatment of her, but C.D.H. listed no dates or specifics in her letter. These complaints can be summarized as follows:

1. C.D.H. felt disrespected, scoffed at, criticized, fearful, and very uncomfortable because she (C.D.H.) tried to uphold quality and good nursing policy and standards;
2. B.L. was defensive, snapped at and humiliated C.D.H. and created an atmosphere of anger and hostility;
3. B.L. made negative, incorrect and unfair judgments, at times, without having all the facts;
4. C.D.H. felt apprehensive and fearful that B.L. would not allow her to speak because B.L. was sarcastic and defensive;
5. B.L. had been overheard making derogatory and hurtful comments to other staff;
6. C.D.H. and other staff felt B.L. was unavailable or unapproachable at times (Tab 2, pp. 1-2).<sup>4</sup>

B.L. took C.D.H.'s letter to her supervisor, John Agrimson, Director of Nursing for Red Wing. Agrimson asked B.L. to meet with him and C.D.H. to get specifics from C.D.H. C.D.H. then sent another letter to B.L., dated January 11, 2009, that listed twelve situations that she stated had caused her "discomfort or concern" since her hire (Tab 2, pp. 3-5). Again, C.D.H. listed no dates in this letter. The situations described by C.D.H. in this second letter can be summarized as follows:

1. Use of on-call physicians;
2. Thorough and accurate file documentation;
3. Medication administration and delivery;
4. Medicine expiration date standards;
5. Guidelines for testing procedures;
6. Steps to prevent patients' allergic reactions;
7. Age-appropriate medications/vaccinations;
8. Patient assessment practices;
9. Drug interaction prevention;
10. Two employees to count inventory medications;
11. Protection of patient rights when collecting DNA;
12. Release of private patient information only after releases have been collected.

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<sup>3</sup> At Tab 9, pp. 1-2, B.L. described C.D.H.'s demeanor and conduct on December 24 and 26, 2008, as being extremely defensive and anxious, confrontational, quite agitated, and that she called B.L. "flippant" about nursing license requirements. (C.D.H. did not testify regarding the occurrences on these dates.)

<sup>4</sup> The adverbs/adjectives (descriptives in general) used above are C.D.H.'s. In this document, C.D.H. also listed five qualities or ways of treatment she needed from her supervisor to continue her employment and function at an optimal level.

Again, in her January 11, 2009, letter, C.D.H. described her feelings using adjectives such as “discouraged”, “criticized”, “pressured”, “uncomfortable”, “concerned”, and “unsupported”.

B.L. then shared C.D.H.’s second letter with Agrimson. Agrimson stated herein that he and B.L. met and went through all twelve items and that he asked for B.L.’s response/position on each. Agrimson stated that after his meeting with B.L. he was uncertain what the facts were because he felt C.D.H.’s complaints had been reasonable but he also felt B.L.’s explanations had been good. Agrimson asked that there be another meeting with C.D.H. present so the three could discuss C.D.H.’s concerns.

The meeting occurred on February 27, 2009. Agrimson went through each complaint and C.D.H. and B.L. gave him their positions. At the end of this meeting, Agrimson decided to put a memo together to address all of the issues/concerns raised at the February 27<sup>th</sup> meeting, to make it clear how to handle situations the three had discussed and to make sure his expectations and correct DOC procedures and practices would be followed in the future. Agrimson stated that after the February 27<sup>th</sup> meeting, he believed both B.L. and C.D.H. felt they had been heard and he believed that all of C.D.H.’s concerns had been dealt with.<sup>5</sup> Agrimson’s memo was addressed to B.L. and dated March 8, 2009. It read as follows and asked B.L. for a completion date on each item:

This is a follow up to our February 27, 2009 discussion. The following issues require immediate attention:

- Officer standing orders – This practice must stop effective immediately. Work with Steve Hammer to inform the others. Discuss the impact this will have on the facility so we can address any related problems or concerns as they arise. Be sure staff direct offenders to Health Services if they are requesting medication. Make necessary revisions to the medication administration training for non-licensed staff. (Work with Chuck Sieber).  
**Completion date:** Meds Removed 3/2/09 – Process ongoing<sup>6</sup>
- Officer’s taking telephone orders/implementing from practitioners – This practice must stop effective immediately. Discuss the impact this will have on the facility.  
**Completion date:** 4/1/09 On going process.
- Consent forms – Work with Administration to define what cares can be provided under the General Consent form signed by the juvenile offender’s parent/guardian at time of intake. Instruct health care staff

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<sup>5</sup> It is important to note that Agrimson stated that he believed that the first four bullet points on his memo concerned antiquated nursing practices from county jails that had been instituted by the supervisor in charge before B.L. and that B.L. had just continued those practices after the latter became Nursing Supervisor at Red Wing. Agrimson stated that B.L. had never worked as a supervisor before her promotion at Red Wing and she had had no supervisory training when promoted. Agrimson also stated that he has never disciplined B.L. for any reason and has not reported her to the Board of Nursing. Agrimson stated that after he issued his memo and after B.L. held the March 9<sup>th</sup> staff meeting all issues raised by C.D.H. had been fully dealt with and put to rest.

<sup>6</sup> The dates and notations next to each item after “**Completion date**” are B.L.’s.

to obtain a separate consent form for neuroleptic medications that must be generated by the practitioner prescribing the medication.

**Completion date:** On going

- Medication verification procedure – Review Health Services practice to ensure that all medications are verified according to policy.

**Completion date:** 3/9/09

The following are issues in which you and /or [sic] your staff have questions requiring clarification. These are my expectations regarding nursing practice and policy. This information must be given to staff immediately to ensure everyone is practicing within the scope of their license.

1. On-call practitioner – Nursing staff must contact the on-call practitioner for all medication orders not listed on the approved standing orders. A nurse is expected to consult with a practitioner whenever there is a question regarding an offender's health care status based on his/her assessment.

**Completion date:** 3/9/09

2. Documentation – Staff must document all encounters in which offender assessments are done, making clear, concise entries in the medical record. Documentation is critical and must be given high priority/emphasis with nursing staff.

**Completion date:** 3/9/09

3. MARs must be reviewed by a licensed nurse, checking for accuracy of all orders and matching the instruction sheets with the written orders. Be sure practitioners are writing accurate orders, including exact dosage, route and frequency.

**Completion date:** 3/9/09

4. Medical supplies – Do not use expired supplies. Develop a procedure for monitoring supply expiration dates and an ordering process to ensure that an adequate supply is maintained.

**Completion date:** 3/9/09

5. Mantoux tests – Direct staff to follow DOC policy. Reading results must occur between 48-72 hours. Re-do skin test if outside of these hours.

**Completion date:** 3/9/09

6. Work with Sheila Packwood, dietician, regarding a procedure for communicating confirmed offender food allergies with the kitchen.

**Completion date:**

7. Vaccines – Instruct staff that VIS must be reviewed with offenders prior to giving any vaccines.

**Completion date:** 3/9/09

8. Direct nurses to assess offenders presenting with medical complaints. Emphasize the importance of documentation based on their objective findings.

**Completion date:** 3/9/09

9. Drug interaction forms must be given/made available to the providers. Do not file in the medical record.  
**Completion date:** 3/9/09
10. Two staff must count controlled medications according to DOC policy.  
**Completion date:** 3/9/09
11. Work with Steve Hammer to set up a system that ensures someone (OSI/designee) reviews all DNA cases prior to the list coming to HS to be sure they meet statute [sic] requirements. Discussion is being held regarding having Joanne Popkin complete these DNA tests.  
**Completion date:**
12. Release of information forms must be used on all requests for medical information.  
**Completion date:** 3/9/09

Additional areas to be aware of:

- Take a close look at your communication style with staff.
- Our focus is to provide quality patient care and we are all in this together.

On March 9, 2009, B.L. held a staff meeting at Red Wing during which she reviewed each item she had listed as completed on March 9<sup>th</sup> with C.D.H. and all other nursing staff. B.L. followed the agenda below during this staff meeting, a copy of which was given to all staff:

- On-Call practitioner- Nursing staff must contact the on-call practitioner for all medication orders not listed on the approved standing orders. A nurse is expected to consult with a practitioner whenever there is a question regarding an offender's health care status based on his/her assessment.
- Documentation- Staff must document all encounters in which offender assessments are done, making clear, concise entries in the medical record. Documentation is critical and must be given high priority/emphasis with nursing staff.
- MAR's must be reviewed by a licensed nurse, checking for accuracy of all orders and matching the instruction sheets with the written orders. Be sure practitioners are writing accurate orders, including exact dosage, route and frequency.
- Medical supplies- do not use expired supplies.
- Mantoux tests- Follow DOC policy. Reading results must occur between 48-72 hours. Re-do skin test if outside of these hours.
- Vaccines- VIS must be reviewed with offenders prior to giving any vaccines
- Nurses must assess offenders presenting with medical complaints. Document objective findings.
- Drug interaction forms must be made available to the providers. Do not file in the medical record.
- 2 staff must count controlled medications according to DOC policy
- Release of information forms must be used on all requests for medical information.

B.L. performed a one-year Performance Review of C.D.H., covering the period November 7, 2008, through November 7, 2009, and discussed and shared it with C.D.H. prior to November 30, 2009 (Tab 1, pp. 13-6). This review rated C.D.H. as fully meeting standards on 21 of 33 measures and as exceeding standards on 12 of 33 measures and gave her an overall satisfactory rating. On November 16, 2009, C.D.H. filled out a self-assessment form in which she stated, "I feel things are going well for the most part" (Tab 1, p. 17).

From November 8, 2009 through March 20, 2011, B.L. did not do a Performance Review of C.D.H.'s work. During the summer of 2009 and until October, 2010, C.D.H. filed no complaints/concerns with management. C.D.H. wrote that during the summer of 2009, things began to stabilize, got better and became tolerable at work (Tab 4, p. 14).

Starting in the spring and summer of 2010, C.D.H. wrote in her notes that B.L. was hostile toward her and unable to deal calmly with her (Tab 4, p. 14). Nonetheless, C.D.H. did not file any concerns or complaints regarding B.L.'s treatment of her. However, C.D.H. wrote that on October 1, 2010, "after an extended period of ill-treatment...in terms of rudeness, anger [sic] outbursts, etc." she told B.L. of her feelings but B.L. refused to talk to C.D.H. about her concerns (Tab 4, p. 14).

According to B.L., C.D.H.'s request to talk on October 1st, came at the end of a difficult day (Tab 9, p. 6). B.L. stated herein that C.D.H. accused her of not treating nursing staff as kindly as other staff and of disliking C.D.H. B.L. asked if C.D.H. had specific work issues she wanted to discuss and C.D.H. became extremely agitated, saying B.L. was not being friendly to her and was making her feel foolish. B.L. then requested to end the conversation, saying she did not want C.D.H. judging her personally (Tab 9, p. 6).

On October 4, 2010, B.L. requested that C.D.H. come to her office for a supervisory conference to resolve their conflict on October 1<sup>st</sup>. C.D.H. became "defensive" and "anxious", refused to meet "without representation" or without another nurse present. B.L. stated the conference "was not meant to be discipline" and she just wanted to discuss some things. C.D.H. wrote in her notes that B.L. told her she was going to put something in her file; C.D.H. wrote that she felt intimidated, very fearful and very upset (Tab 4, p. 14). B.L. wrote in her notes that C.D.H. accused her of being "after" her (C.D.H.) (Tab 9, p. 7). B.L. asked to end the meeting. C.D.H. admittedly left the meeting crying (Tab 4, p. 14).

Later on October 4<sup>th</sup>, C.D.H. visited a Red Wing H.R. staffer, Katie O'Neill, to complain about how B.L. was treating her. O'Neill gave her the DOC general harassment policy and a complaint form.<sup>7</sup> O'Neill did not state her opinion regarding the merits of a complaint C.D.H. might file. On October 4<sup>th</sup>, C.D.H. filed a general harassment complaint with O'Neill against B.L. using the DOC form. That form, on the top of page 1, contained the following printed legend:

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<sup>7</sup> O'Neill stated herein that she had had eight to ten interactions with C.D.H. during the period from 2008 to May, 2011; that C.D.H. spoke to O'Neill about numerous complaints she had against B.L., about C.D.H.'s performance reviews and about nursing practices. O'Neill stated that during their interactions, C.D.H. was always emotional, that she cried and was fearful. O'Neill stated other Red Wing employees did not act this way in meetings with O'Neill.

Information: This form is used to file a general harassment complaint under department Policy 103.228. General harassment is defined as “A repeated and persistent pattern of behavior that interferes with or jeopardizes an individual’s employment or career opportunities, or creates an intimidating, hostile, or offensive work environment. The behavior may include verbal, psychological, symbolic, social or physical method(s) of intimidation, ridicule, entrapment, degradation, coercion, or harm. General harassment does not include actions taken by a supervisor that are within the scope of the supervisor’s responsibilities and are considered reasonable and appropriate actions, such as performance reviews or supervisory conferences.

C.D.H.’s original complaint was 2.5 single-spaced pages long and read in its entirety as follows:

In April of 2008 I began my employment at MCF-RW as a Registered Nurse at which time B.L. became my supervisor.

Throughout my employment I feel that there have been periods of on-going harassment. Following is a description of the way in which I feel I have been harassed; [sic]

-For nearly the first year of my employment, I was criticized and scoffed at for my attempts to uphold standards and policies. With this I also felt in fear for my nursing license as I felt pressured to go against what I believe to be right as a nurse.

-I was and have continued to be snapped at, and have been humiliated in the presence of others.

-I have worked in an atmosphere of hostility and anger on many occasions and have felt fearful about bringing concerns to my supervisor as she frequently has responded in an angry and defensive manner.

I, for many months following the beginning of my employment, and periodically since, have gotten stomachaches prior to going to work each day because I felt fearful of further hostility and anger. I have cried after work and on weekends on many occasions. In addition, I have had trouble sleeping on numerous occasions as I felt upset. I also have felt the need to seek, and have sought, assistance from a counselor secondary to the severe stress I was feeling and have felt due to the issues with Bonnie in my workplace.

Bonnie has displayed her anger in the way of pounding her fists on the desk, getting red in her face, throwing her hands up in the air and saying I’m done!, slamming cupboard doors, moving abruptly about the nurses station, and making statements like, “I’ll just go back in my hole!” (meaning her office). Bonnie has made the statement; “I’m going to get really angry” multiple times. These things have happened in the past and fairly recently.

Working in an atmosphere of hostility and fear has, at many times, made it difficult for me to work at my optimal level as my ability to concentrate has been affected.

In addition to what I have previously described, I have felt hurt, rejection, and humiliation when I have attempted to have normal human everyday conversation with Bonnie as she has ignored or not responded to what I am

telling her. Another staff person has notice that Bonnie does this and has told me that she cringes when she sees me try to share something with Bonnie and Bonnie ignores me. I most recently felt embarrassed and humiliated due to a recent angry outburst Bonnie displayed in the office in the present [sic] of non health service staff.

In the past, at one point, when I brought concerns forward to B.L.'s supervisors I felt very threatened because Bonnie said my bringing the concerns to them bordered on insubordination and I felt in fear for my job. I have frequently felt in fear of retaliation.

Though there have been periods of time in which what I have described above has lessened to some degree, there has been reemergence of the things I described on many occasions.

Being treated in the ways I have described has left me feeling as though I am enduring, in a sense, a sort of abuse, and secondary to this going on for such a long period of time, my tolerance level has decreased.

I have tried, as well as the rest of the health service staff, to speak to Bonnie about the problems that I described as these things have affected others in health service too. Bonnie has met our attempts at discussion and resolution of these problems and concerns with defensiveness and anger.

Recently, about a month and 1/2 or so ago, one of my co-workers spoke with a staff person from the administration building about her concerns and our concerns as a group. My co-worker had told me that she also was having upset stomachs and had cried on multiple occasions secondary to B.L.'s behavior. Shortly after this, Bonnie told my co-worker that she should have brought the complaint to her first. My co-worker then told Bonnie that she was very unapproachable. Bonnie brought this up in a staff meeting shortly thereafter and said if anyone feels that she is unapproachable we should follow chain of command to make a complaint. She then said in the meeting that she is a person who snaps, that is just who she is, and she will probably snap until the day she dies. Bonnie did not speak to us about our concerns. The matter was closed with her comments about snapping.

I feel very fearful at this time that Bonnie will attempt to retaliate against me for recently voicing my concerns and feelings to her about her treatment towards me and others in health service. My speaking to Bonnie recently was precipitated by an angry outburst that she displayed in health services late last week.

I would like to mention that at one point I had symptoms at work relating to improper adjustment of a medication I was taking and Bonnie wrote up a statement worded in such a way that would cause others to think that I had these symptoms secondary to anxiety at work in an attempt to possibly, I thought, cause others to believe that I wasn't capable of doing my job. I had already explained to her that I had the symptoms secondary to a medication side effect though I had been under a great deal of stress related to B.L.'s behavior. Following B.L.'s actions, I obtained my doctors [sic] report that

clearly indicated that the symptoms were due to a medication side effect as I already explained to Bonnie.<sup>8</sup>

I was very stressed due to B.L.'s actions and the need for me to correct and undo what she had done.

I would like to say that I have been a nurse for 28 years and have never before had problems like I have described in the workplace. I have generally been described as an easygoing person who is happy most of the time. My present co-workers and I have very good working relationships and get along with each other well. Again, though my tolerance level has decreased for the way in which Bonnie has behaved in the office and the way in which she has treated me and others secondary to the extended period of time in which these things have taken place. I, as a person, have been greatly affected by these things. In addition, due to B.L.'s behavior, general morale in our office as a whole at times has been deeply affected. I am feeling now uncertain as to whether I can continue to work well in this type of environment. I though do not want to have to leave a job that I enjoy doing and the co-workers I enjoy working with.

Please see attached letters written in the past to Bonnie and e-mails written to Linda Lange, Union representative.

. . .

O'Neil sent this document to H.R. Regional Director Tammy Nelson for review. On October 5<sup>th</sup>, C.D.H. e-mailed B.L.'s supervisor, Agrimson, as follows:

There have been serious problems in health services secondary to B.L.'s behavior which has affected me in the past and is currently affecting me. B.L.'s behavior has affected other health service staff as well and our secretary recently spoke about our concerns related to Bonnie with another staff person located in the administration building. There have been periods in which Bonnie has improved as far as not having as many angry outbursts etc. but then problems with this and other things re-emerge. There is a long history with B.L.'s poor treatment of me and others and my tolerance for what I liken to abusive behavior has decreased. Bonnie will not address problems with our group even though problems have been brought to her attention. The end of last week, following B.L.'s angry gestures and words in health services, I asked to speak to her. It did not go well. I told her that this is not about just me, it is about how we as individuals and as a group are treated in health services. I did not sleep much of the night and currently feel under threat by Bonnie. I am an easygoing person for the most part and do not feel that I should continue to have to work in conditions of hostility and anger. Bonnie has displayed her anger by pounding her fists on the desk, turning red in the face, throwing up her hands and saying "I'm done!" and at one point said, "I'll just go back into my hole!" She also continues to treat me with disrespect in that she has ignored me or blown me off so to speak when I have tried to share something with her on a human level. Other staff have noticed this happening. I have felt embarrassment and humiliation on a couple of occasions when Bonnie has had an angry outburst in the presence of non-health service staff. I have felt the need to seek assistance from a counselor at different times throughout my employment at Red Wing secondary to the stress B.L.'s behavior as [sic] caused me to feel. I have had stomachaches on many occasions and have lost many hours of sleep. There have been periods in which morale has suffered

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<sup>8</sup> No documents authored by B.L. or C.D.H.'s "coworker" on these points were submitted herein.

greatly in our office due to B.L.'s behavior. I did not want to have to bring these issues to your attention, however; I feel currently under threat and feel as though I had no choice other than to contact you.<sup>9</sup>

When Agrimson received the above e-mail, he passed it onto H.R. Regional Director Tammy Nelson and to Nan Larson, DOC's Appointing Authority (his supervisor). Agrimson has no authority to deal with such complaints. Larson has the ultimate authority to hear/decide general harassment complaints in consultation with Nelson. Larson and Tammy Nelson then met and discussed C.D.H.'s complaint. They agreed that they needed more specifics, such as the dates and the number and circumstances of specific incidents in order to make a decision.

On October 11, 2010, in response to Larson and Nelson's request for more information, C.D.H. submitted a 3.5-page single-spaced document which recounted incidents dating back to July, 2008, through January 11, 2009 (Tab 4, pp. 21-24). The incidents C.D.H. listed can be summarized as follows:

1. July, 2008: B.L. hand counted controlled medications alone but asked C.D.H. to co-sign the count sheet. C.D.H. felt afraid for her license, intimidated and upset.
2. July 16, 2008: B.L. insisted C.D.H. should throw away medication adverse effect sheets, not put them in the MD's folder for the patients for review. C.D.H. felt pressured and frightened for her license.
3. November, 2008: C.D.H. wanted to call the on-call doctor about what appeared to be a patient's infected toe, that antibiotics should be ordered. B.L. looked at the toe and stated that whether antibiotics were needed could wait until Monday, when a doctor would be there for a regular visit. C.D.H. stated this situation intimidated and upset her, she worried about it all weekend and she felt frightened that cellulitis would develop.
4. December, 2008: C.D.H. discovered that all test kits for blood in stools had expired in June, 2008. She ordered new kits. C.D.H. then scheduled a patient to be seen by the doctor the next workday. C.D.H. then spoke to B.L. about the situation who was concerned about the cost of ordering a hemoglobin on the patient as C.D.H. wanted to do. C.D.H. stated she waited to call the on-call doctor but was "almost afraid to do it".
5. January 11, 2009: C.D.H. submitted the document at Tab 2, pp. 3-5, summarized *infra*. C.D.H. state she feared for her nursing license, that she felt criticized, intimidated, uncomfortable and in a hostile environment.

C.D.H. closed her additional information memo with the following:

These examples are some examples in which I experienced extreme stress and upset due to either being criticized for adhering to what I believed was correct according to professional nursing practice or being pressured to deviate from what I believed to be right at which time I would then feel extremely fearful that my nursing license could be in jeopardy (Tab 4, p. 24).

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<sup>9</sup> No other Red Wing nurses filed any complaints concerning B.L.

Larson and Nelson met regarding C.D.H.'s complaint and additional information. Larson stated herein that the additional information C.D.H. sent in concerned mostly C.D.H.'s general feelings about B.L. and issues concerning nursing practices that had been laid to rest in 2009 by Agrimson's memo and B.L.'s staff meeting. Larson stated that C.D.H.'s complaint and additional information did not demonstrate a repeated, intentional and persistent pattern of harassing behavior. Therefore, Larson decided not to order an agency investigation of the charges.<sup>10</sup> B.L. had no knowledge of or input into Larson's decision.

On October 20, 2010, Larson directed Nelson to issue the following letter dismissing C.D.H.'s general harassment complaint:

On October 5, 2010, Human Resources received in writing your complaint of general harassment naming B.L., Registered Nurse Supervisor as the respondent. In your complaint you described a series of interactions between you and your supervisor.

After reviewing your complaint, a decision was reached to not further investigate this complaint. The rationale is that even if the incidents as you described them are accurate, these behaviors would not constitute a policy violation. General Harassment, as defined in DOC Policy 103.288, is a repeated or persistent pattern of behavior with the intent to interfere with or jeopardize an individual's employment or career opportunities or to create an intimidating, hostile or offensive work environment.

The Department is committed to maintaining a work environment free from any form of discrimination or harassment, general or otherwise. Additionally, all employees are expected to conduct themselves in a manner that is professional, courteous and respectful to others and every effort is made, and will continue to be made, to reinforce this standard at all times.

Given the situation you described in your complaint, I would like to suggest that you and B.L. consider engaging in conflict resolution session(s). This facilitated process is voluntary and requires that you both consent to this and are committed to improving your work interactions. It provides a structured, assisted opportunity to restore working relationships. If you are interested in this assistance, please contact Ruth Kuehni.

. . .

On November 8, 2010, C.D.H. wrote to Nelson disagreeing with the dismissal of her complaint, but stating that she respected the decision and thanked those involved for their consideration. C.D.H. also stated she would not pursue conflict resolution through the DOC as offered on October 20<sup>th</sup> (Tab 4, p. 19).

C.D.H. stated herein that in December, 2010, two incidents between her and B.L. occurred. On December 20, 2010, B.L. asked C.D.H. to come to her office because there had been a complaint about how long it had taken C.D.H. to get a list of a resident's medications for Officer Prahl. C.D.H. reported that she felt intimidated and frightened to be called into B.L.'s office (Tab 4, p. 17). B.L. directed C.D.H. to e-mail Prahl with the facts and said it was a closed book (Tab 4, p. 18). C.D.H. stated that she went to B.L.'s

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<sup>10</sup> Larson stated she has made this same decision in other cases in the past.

office later to tell B.L. that she had been frightened and upset by how B.L. had treated her in the latter's office. B.L. would not listen and sent C.D.H. back to work. That night, C.D.H. cried and could not sleep (Tab 4, p. 18).

On December 21, 2010, C.D.H. sent B.L. an e-mail in which C.D.H. referred to "what occurred yesterday", which read in part as follows:

...I cannot continue to be under this type of stress at work. My well-being is being adversely affected. I was so upset by the interactions with you that in addition to my ending up being in tears at work I was unable to sleep much of the night. I really wanted to be able to feel at peace over Christmas. I have a family and a life outside of work just as you do. I do not want to continue feeling uncomfortable at work and feeling as though you would just as soon see me depart from my workplace at Red Wing DOC. Yesterday, I felt intimidated and frightened after being called in to your office and at your wording of the situation you were referring to. There was no wrongdoing on my part. I worked very hard to get to this place in my life and I take my job very seriously, and always try to do my very best at work and I believe you know this. I have been feeling very uncomfortable regarding your approach towards me and this has created a decreased trust level pertaining to communications with you. Due to this, I would prefer from this point on to have present one of my co-workers if a private conversation or summons into your office is requested (Tab 9, p. 8).

. . .

At the end of this e-mail, C.D.H. offered to sit down with B.L. to discuss things either formally or informally to come to a "peaceful understanding and resolution in our working relationship" (Tab 9, p. 8). The second incident alleged by C.D.H. occurred on December 27, 2010, and concerned B.L.'s having discharged a partially expended albuterol inhaler into the air outside the building rather than sending the inhaler out to be emptied as hazardous material. C.D.H. took exception to B.L.'s action and told her so.

On March 21, 2011, C.D.H. refused to meet with B.L. to discuss C.D.H.'s Performance Review without a representative or co-worker present (Tab 1, p. 19). B.L. told C.D.H. DOC policy did not allow a Union representative or co-worker to be present at such a meeting. B.L. suggested that Warden Captain Barber could attend the review. C.D.H. became angry and upset and she refused this offer, saying Barber "is not my supervisor". B.L. then asked C.D.H. to put her complaints in writing so they could be resolved. B.L. reported C.D.H.'s refusal to meet with her to Agrimson (Tab 1, p. 19).

The Performance Review B.L. completed on C.D.H. covering the period between November, 2009, and March, 2011, rated her as fully meeting standards in 27 of 36 standards and as exceeding standards on 9 of 36 standards. On this, B.L. wrote in positive terms about C.D.H., including describing C.D.H. as having "good assessment and triaging skills", being "very conscientious", "helpful", "always prompt", and a "firm, fair and consistent" "professional" who works "cooperatively with her peers", among other things. B.L. gave C.D.H. an overall satisfactory rating.

C.D.H., in her self-assessment, dated March 20, 2011, stated that there were on-going morale issues because B.L. was not working as part of "our team"; that C.D.H. did not feel she could approach B.L. without fear when asking her for assistance; that the unit was short-staffed and the work load was exceptionally high; that B.L. criticized another nurse for consulting with other nurses; that C.D.H. and other nurses would like to feel

supported on a more consistent basis regarding medication administration issues (Tab 1, p. 23). In a separate memo dated March 22, 2011, C.D.H. stated that the Red Wing nurses unit had sent a letter to B.L. objecting to added Lead Worker duties and that they believed rigid and strict roles for nurses “would actually be counter productive in our work as a team” (Tab 1, p. 25).<sup>11</sup>

C.D.H. stated herein that she felt fearful and intimidated to meet with B.L. but she later agreed to meet with B.L. alone concerning her Performance Review. This meeting occurred on March 23, 2011. At this meeting, C.D.H. stated herein that she voiced her concerns but B.L. twisted the facts. B.L. made contemporaneous notes on this March 23<sup>rd</sup> meeting (Tab 9, pp. 9-10). B.L. testified herein and her notes confirm that B.L. was unable to discuss C.D.H.’s Performance Review with her because C.D.H. began talking about her feelings when B.L. mentioned team leadership, and being more positive about B.L.’s supervision. B.L. could not get C.D.H. to discuss C.D.H.’s review. It is undisputed<sup>12</sup> that C.D.H. became defensive, appeared threatened and cried, and that C.D.H. made the following comments (among others) during this March 23<sup>rd</sup> meeting:

“You treat ‘us’ like children”

“You micromanage every move we make”

“You want to be so “separate” from us [sic]

“You don’t listen to our issues”

“We are grown professionals”

“I have never had such problems with management”

“We are so unhappy- we are all going to be leaving/quitting soon”<sup>13</sup>

“Oh, I suppose now that I’ve made myself vulnerable to you...you’ll have to go tell someone that too!”

“I have always had better reviews in my other jobs!!”

From her date of hire through April, 2011, C.D.H. received no formal discipline at Red Wing.

### Facts:

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<sup>11</sup> No such letter was placed in this record.

<sup>12</sup> As C.D.H. was not asked to confirm or deny the contents of Tab 9, pp. 9-10, herein, the comments thereon must be credited. However, on rebuttal, regarding this encounter, C.D.H. stated that she told B.L. she had twisted the facts and made false statements and that she (C.D.H.) did not trust B.L. I have credited B.L.’s version of the events.

<sup>13</sup> No Red Wing nurses employed at this time have quit.

On May 4, 2011, C.D.H. had a dental appointment at 11:00 AM and reminded B.L. of this fact at 10:30 AM. C.D.H. stated that she would take her lunch break after the dentist. This upset B.L. because C.D.H. was working slowly that day and B.L. would be working alone for a large part of the day, working one nurse short. B.L. then suggested that C.D.H. take compensatory time off for the rest of the day after her appointment (Tab 9, p. 11 and Tab 4, p. 6). C.D.H. stated that she became defensive, frustrated, angry, uncomfortable and confused, because B.L. had accused her of abusing time off and/or not properly recording her time (Tab 4, p. 9). B.L. told C.D.H. that she just needed C.D.H. to give her an accounting of her time off. C.D.H. said she would skip lunch. B.L. stated she was not denying C.D.H. comp time, lunch or sick leave.

When C.D.H. returned from the dentist, B.L. asked if she had included lunch in her time off and insisted that she (B.L.) had not denied C.D.H. lunch. C.D.H. said she hadn't done anything wrong and B.L. was taking her frustrations out on the staff. B.L. told C.D.H. that the latter's tone was confrontational and disrespectful and that C.D.H. was harassing B.L. B.L. then went back to her office. C.D.H. admitted that she was very upset by this conversation and that she was feeling ill.

About one hour later, C.D.H. called B.L. in her office from the front office of the unit. C.D.H. admitted that she told B.L. she was feeling ill and going home on sick leave and C.D.H. told B.L. that she "was not planning to come in to work in [sic] the next day unless..." C.D.H. stated, she started "feeling better" (Tab 4, p. 6). Later that day, C.D.H. called B.L. again from her home. B.L. asked whether C.D.H. was going to cover her 5:30 AM shift the next day to check staff mantoux. C.D.H. did not answer clearly. Both C.D.H. and B.L. were upset. B.L. ultimately told C.D.H. to follow procedure and call the watch center the next day if she wished to take sick leave.

On May 5<sup>th</sup>, C.D.H. called the watch center prior to 5:30 AM and said she was taking sick leave that day. The watch officer asked if someone else would be there at 5:30 AM to check staff mantoux. C.D.H. said B.L. already knew she (C.D.H.) was not coming to work that day (Tab 4, p. 6).<sup>14</sup>

B.L. covered C.D.H.'s 5:30 AM shift on May 5<sup>th</sup>. B.L. was upset with C.D.H. and the way she had handled her sick leave, which B.L. believed was against DOC policy. B.L. decided she needed to have a non-disciplinary supervisory conference with C.D.H. to confirm proper sick procedures with C.D.H. B.L. wrote the following memo and dated for May 9<sup>th</sup>, believing that she would have the supervisory conference with C.D.H. that day:

On 05-09-11, we met for a supervisory conference to discuss the procedure for sick time notification on 05-05-11 and the way sick time was used on 05-04-11/ inability to return to work after lunch.

On the afternoon of 05-04-11, you stated you would return to work after your dental appt. and lunch break. This did follow a conflict with me earlier in the day. When you returned to work, you were very distressed and were unable to perform the work duties at hand. You called me from one phone in the office to my office phone- (unable to come to me directly) and requested to go home sick. There was a total of about 60 minutes in between returning to work and going home sick.

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<sup>14</sup> B.L. denied herein that C.D.H. notified her that she (C.D.H.) would not work her shift on May 5th.

Later in the afternoon, you called me and stated “This is a courtesy call to inform you that I ‘may’ be calling in sick to work tomorrow. I requested to you that you follow the correct procedure by notifying the watch center and then they would notify me if need be. The following morning you called to the security unit- perhaps by default and it was relayed to me when I came to work that you told them “Bonnie already knows” – which I did not.

Discussion:

Plan: Review the procedure of sick call notification.  
If you have additional questions or need any additional assistance please contact me.

Cc: Supervisory file

Although C.D.H. was at work on May 9<sup>th</sup>, no supervisory conference occurred regarding the above memo until May 12<sup>th</sup> because C.D.H. refused to meet with B.L.

However, on May 9<sup>th</sup>, the following incident occurred between C.D.H. and B.L. That day, C.D.H. was treating a patient who had reported that he felt he might be about to have a seizure (a condition he was subject to). C.D.H. was in an exam room monitoring this patient when he told her the feeling had passed. At this point, B.L. entered, saying she needed the room for another patient and B.L. directed C.D.H. to move her patient to another room so he could rest. The patient was moved. Because the exam table in the other room had no railings (but one side was up against a wall), C.D.H. was concerned that the patient might go into a seizure and fall off the table, and so she refused to leave him. B.L. did not respond to C.D.H. Rather, she turned off the lights in the room where C.D.H. stood on the open side of the exam table, holding her patient’s hand. C.D.H. was offended, upset and frightened at the lights being turned off (Tab 4, p. 2).

B.L. stated herein that she did this not to upset C.D.H. but to allow the patient to rest. C.D.H. stated herein that B.L. rolled her eyes at C.D.H. and C.D.H. believed B.L. wanted her to leave the patient alone in the room. C.D.H. stayed with the patient. Then, when the patient later went into a seizure, B.L. came back into the room at C.D.H.’s call for help, and helped get the patient safely to the floor and stabilized. The patient suffered no harm. C.D.H. wrote she felt shaken up, confused and upset at B.L.’s “serious lack of judgment” (Tab 4, p. 3). At the end of the day on May 9<sup>th</sup>, B.L. said she wanted to give C.D.H. a supervisory conference, but C.D.H. refused to meet with B.L.

On May 9<sup>th</sup> before she left work, C.D.H. called Red Wing H.R. employee Katie O’Neill. O’Neill wrote up a confidential incident report regarding C.D.H.’s contacts with her on May 9<sup>th</sup> and 10<sup>th</sup> (Tab 3, p. 4). On May 9<sup>th</sup>, O’Neill wrote that she received a call from C.D.H., as follows:

Carol seemed to be emotional over the phone and indicated that she was told by B.L. (RN Supervisor) that she would be receiving a Supervisory Conference/Coaching on Thursday, May 12, 2011 (Carol’s days off are Tuesday/Wednesday) and that Bonnie told her at the end of the day before her two days off on purpose. She claims Bonnie also indicated that if she refuses the Supervisory, she will receive discipline. I asked Carol what the purpose of the coaching would be and she said it was from “issues last week”. Carol told

me (KO) that she has “had ENOUGH and will quit because I can’t take this anymore” and that she has “told Bonnie this needs to stop”. Carol told me that everyone else in the unit feels the same way. I stopped Carol and told her that if the others feel this way, they need to come forward, that she can’t be speaking for the others. Carol said she didn’t know what to do and that she might contact the union. I told her that was her right if she so chooses. Carol also mentioned that she would call John Agrimson (DOC Nursing Director) and again, I told her she certainly could. She said that she may get herself and [sic] attorney because she’s “HAD ENOUGH”. Carol also referenced several times that she “felt ill”.

On 5/10/11 at 0800, I listened to a phone message by Carol. She was very emotional/crying and said, “you don’t have to do anything for me anymore, I’m going to end up leaving, I do not feel well. I just cannot stand this anymore. I’m really upset and no one wants to hear it anymore. I haven’t made this stuff up, I’m angry now, I told Bonnie it has to stop. She’s calling me into her office to discipline me in some way because I spoke the truth to her. There’s nothing anyone needs to do....I’m going to do what I have to do to defend myself and I’m going to leave as soon as I can, I do not feel well, I feel extremely ill. Thank you for everything you’ve done, Katie, I know you’ve tried”. I [O’Neill] contacted Al Pfeilsticker (Electrician) to have him save the voice recording.

On 5/10/11 at 0840, I contacted John Agrimson (DOC Nursing Director) and informed him of the situation.

On 5/10/11 at 0925, I talked with Tammy Nelson (HR Director) and informed her of the situation.

On 5/10/11 at 1000, Maria Scheidegger (RN Senior) and Tamara Eissa (RN Senior) talked with me about their concerns in the Health Services Unit. They reiterated C.D.H.’s past concerns of Bonnie not having supervisory or people skills, talks to offenders in a demeaning tone, throws her hands up often in disgust, and doesn’t collaborate with other nurses/team.

\*\*NOTE: Tamara stated that she was concerned about C.D.H. Apparently Tamara and C.D.H. talked via phone the evening of May 9<sup>th</sup> and C.D.H. indicated to Tamara a reference about suicide. Tamara did talk with C.D.H. this morning (5-10-11) and said C.D.H. seemed much better and had cooled off.

O’Neill stated herein that after she received the voicemail from C.D.H. she arranged to have the voicemail saved on a CD (ER Exh. 11) and (as stated above) O’Neill called Nelson and Agrimson. Later on May 9<sup>th</sup>, RNs Tamara Eissa and Maria Scheidegger lodged verbal complaints described above about B.L. Eissa stayed after Scheidegger left and told O’Neill about C.D.H. having spoken of committing suicide with Eissa. Neither Scheidegger nor Eissa had previously filed any verbal or written complaints about B.L. and neither told O’Neill on May 10<sup>th</sup> that B.L. had harassed C.D.H.

On May 12<sup>th</sup>, C.D.H.’s next workday, B.L. asked C.D.H. to come to her office at 7:10 AM; she gave C.D.H. a copy of the memo quoted above, saying that she wanted to talk to C.D.H. about it. C.D.H. refused to enter the office and sit down and requested to read the memo first. At this point, C.D.H. became very upset and B.L. wrote (Tab 3, p. 2) and stated herein that C.D.H. made the following comments to her: “You are unethical” “You are a liar” “You have not [sic] right to say these lies” “You are so dishonest” “This

is all a complete lie, and I am a strong person- I don't have to take this" (Tab 3, p. 2). C.D.H. left saying "in front of other staff and a resident, 'I know you are writing this all down and sending people these records, but I'm ready too'"<sup>15</sup>

Around noon on May 12<sup>th</sup>, C.D.H. e-mailed B.L. that she was not feeling well and was leaving for the day (Tab 3, p. 3). On May 13<sup>th</sup>, C.D.H. e-mailed B.L., saying she would be off on FMLA leave for an undetermined period, effective May 12, 2011 (Tab 3, p. 5). DOC placed C.D.H. on FMLA leave as of May 12, 2011. On June 23, 2011, Dr. Jane Whiteside, Ph.D., L.P., submitted a "Report on Workability" to DOC, stating C.D.H. would be off on FMLA for an "undetermined" period of time (Tab 3, p. 6).

On July 19<sup>th</sup>, C.D.H. e-mailed Agrimson stating she hoped to return soon from FMLA and wanted to meet with him before her return (Tab 10A) on July 20<sup>th</sup>. Agrimson replied to C.D.H.'s e-mail, confirming a meeting should occur (Tab 10A). O'Neill called C.D.H. on July 20<sup>th</sup> and left a message. C.D.H. returned O'Neill's call around 3:00 PM on July 20<sup>th</sup>. O'Neill told C.D.H. that she needed to tell O'Neill when she had received a return to work date from her doctor and that the doctor would then have to send O'Neill a Report of Workability form. O'Neill told C.D.H. that she would not be allowed simply to return to work on her return date—C.D.H. would have to give O'Neill advance notice and arrange to meet with Barber, Agrimson and B.L. At this point, O'Neill stated herein that C.D.H. became very upset and made the following statements to O'Neill (which O'Neill wrote about in a July 20th e-mail, as follows):

- I don't feel comfortable with the meeting and I'm NOT going to sit there and be intimidated.
- This is threatening and inappropriate. I've done nothing wrong and this is one more step in terms of harassment.
- This is precisely why I'm out on FMLA, because of Bonnie.
- I will not be intimidated by those 3 people (John/Stan/Bonnie)
- I suspected Bonnie would try to do this thing before I returned.
- They have no right to intimidate me.
- Stan knows nothing about me and nothing about Health Services so I don't know why he should be there.
- I want a union rep here and other advocates for me (my other co-workers) present.
- This is wrong and not just about me
- I want to meet with John in person and in private
- I will not be present in a meeting with all three and be intimidated (said this repeatedly
- I saw my doctor today and now I'm not sure about my return date because of this stuff now.
- Do you guys want me to take legal recourse? (Tab 3, p. 7)

O'Neill stated that C.D.H. stated she was going to contact Agrimson about meeting with him directly; that C.D.H. was "almost crying" during their conversation. O'Neill told

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<sup>15</sup> C.D.H.'s version of this encounter, written on July 24, 2011, contained hearsay not corroborated by testimony herein at Tab 4, p. 3.

C.D.H. that B.L. had the right to call a meeting and talk about expectations, to which C.D.H. replied, B.L. still had to be respectful.<sup>16</sup>

On July 21<sup>st</sup>, Agrimson e-mailed Larson, Nelson, O’Neil and Barber regarding his July 21<sup>st</sup> conversation with C.D.H.:

FYI. I did return a call to C.D.H. last evening around 4:45pm as she left me 3 messages to call her. She expressed concerns about having to meet with Captain Barber, Bonnie and myself upon her return. She believes it is very intimidating and she should not have to participate. After some lengthy discussion she asked if it would be okay for her to meet with Stan and myself without Bonnie being present. I said I would think about it and get back to her. After talking with Stan today we are both in agreement that we can meet with her and hear what her concerns are. I will also make it clear to her that we are meeting at her request without Bonnie being present just so she has the opportunity to share the serious accusations she discussed with me, but that Bonnie is her direct supervisor and that she will be expected to work through her before jumping the chain of command in the future (Tab 10B).

The meeting between Agrimson, Barber and C.D.H. occurred on July 25<sup>th</sup>. At Agrimson’s request, C.D.H. brought documentation including dates, times, names, etc., concerning her charges against B.L.; that is, all documents submitted herein as Tab 4, pages 1 through 30. Agrimson stated herein that he and Barber were never able to speak to C.D.H. about DOC expectations for her behavior after she returned to work—that B.L. would be her supervisor and that she (C.D.H.) would be expected to meet with and take direction from B.L. and work appropriately with B.L. Agrimson stated that this was so because he and Barber went through every document C.D.H. had given them and because she felt that C.D.H. was too distraught, upset and anxious about working with B.L. to receive his directives about working with B.L. in the future.

After this meeting, Agrimson and Barber discussed the fact that C.D.H.’s anxiety and level of stress seemed no better after her leave. Agrimson discussed the situation with Larson including his thought that the complaints raised by C.D.H. on July 25<sup>th</sup> had been put to rest in March, 2010.

On July 28<sup>th</sup>, psychologist Dr. Whiteside faxed a Report of Workability to O’Neill, stating that C.D.H. had been released to work on August 9, 2011, but with the understanding that C.D.H. could receive “intermittent FMLA” for flare-ups of her condition (Tab 5, pp. 1-2). On August 23, 2011, Dr. Whiteside withdrew the reference to intermittent FMLA in the Report of Workability (Tab 5, pp. 3-4).

In late July or early August, 2011, Nelson and Larson met after receiving C.D.H.’s return to work date from Dr. Whiteside. Larson stated that she had asked Barber and Agrimson to meet with C.D.H. in late July, 2011, to make departmental expectations clear that C.D.H. must work appropriately with B.L. and that refusals to meet with B.L. would be unacceptable in the future. Larson stated that Agrimson and O’Neill had fully advised her of their contacts and meetings with C.D.H. Larson stated she was concerned that C.D.H. had repeatedly refused to meet with B.L. and was continuing to do so (on July 25<sup>th</sup>); that C.D.H.’s actions showed C.D.H. had refused to follow chain of command; that C.D.H. was highly emotional and distraught with O’Neill and Nelson and that she continued to be so on July 25<sup>th</sup> despite her leave. In addition, Larson found it highly

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<sup>16</sup> C.D.H. stated herein that she never refused to meet prior to her return to work.

contradictory and suspicious that three days after C.D.H. had exhibited high anxiety and stress in her meeting with Barber and Agrimson, that C.D.H.'s doctor released her to return to work. On the basis of this evidence, Larson decided that C.D.H. was not composed and not supervisable and it would put the safety and security of the Red Wing facility at risk if C.D.H. were returned to work before passing a fitness for duty exam.

Therefore, on August 8<sup>th</sup>, Nelson called C.D.H. The call was emotional and confrontational on C.D.H.'s side (U. Exh. 19). Nelson followed up with a letter dated August 9, 2011, which read as follows:

This is to follow up on our phone call from August 8, 2011. I have received your report of workability from your medical provider. Prior to returning to work, we must have sufficient and acceptable medical documentation that you are fit for duty in all capacities and are able to return to work safely to perform all the functions of your Registered Nurse Senior position. Because of our concern for you and for the safety of the facility, we reserve the right to have a second medical opinion prior to your return. The cost for the examination will be paid by the Red Wing Correctional Facility.

Effective today, you are being placed on a paid administrative leave. This leave will be in effect until we have received further medical documentation that any concern for the safety and security of the facility have [sic] been acceptably reduced or eliminated. Until further notice you are not to report to work or call the facility other than to speak to Nanette Larson, Director Health Services or myself.

You will receive further information in writing regarding a referral to our medical provider with the date and time of your appointment. Because you are in paid status you are to make yourself available during normal business hours.

You are reminded that the State provides an Employee Assistance Program (651/259-3840). The Employee Assistance Program is a confidential program that is available to help employees overcome problems that may be affecting them. Assessment, referral and short-term counseling is available free of charge. Information discussed is kept confidential (Tab 6, p. 1).

C.D.H. was notified on August 18<sup>th</sup> that her fitness for duty exam would be held on August 22<sup>nd</sup> (Tab 6, p. 2).

C.D.H. did not respond. C.D.H. did not attend the August 22, 2011, fitness for duty exam DOC had arranged for her. On August 26<sup>th</sup>, Nelson wrote to C.D.H. stating she had been placed on unpaid medical leave due to her failure to attend her August 22<sup>nd</sup> fitness for duty exam (FFDE) and asking C.D.H. to call to reschedule another FFDE (Tab 6, p. 3). Nelson stated herein, without contradiction, that she called Union Representative Lange on August 26<sup>th</sup> and left her a voicemail stating that C.D.H. had been placed on unpaid leave. The DOC sent letters on September 9<sup>th</sup> (U. Exh. 1) and September 26<sup>th</sup> (U. Exh. 2) to C.D.H. and O'Neill and e-mailed her, but C.D.H. did not respond.

On November 2, 2011, Nelson sent C.D.H. a letter stating that if she did not reschedule her FFE, she would be considered to have voluntarily resigned if she did not contact Nelson by November 9<sup>th</sup>, to request either additional FMLA or request to be placed on a one-year unpaid administrative leave (Tab 6, p. 5).

On November 3<sup>rd</sup>, C.D.H. called Nelson screaming and crying and said that Nelson should be ashamed of herself for sending the November 2<sup>nd</sup> letter (Tab 6, p. 6).

On November 8<sup>th</sup>, C.D.H. sent the following e-mail to Larson, Nelson and O'Neill:

Because you have threatened to terminate my employment if I do not comply with your illegal request for an adverse "fitness for duty exam" after my medical provider has repeatedly certified my fitness for duty, I feel coerced into requesting to be placed on medical leave. Therefore, I request to be placed on medical leave.

On September 8, 2011, C.D.H. filed the following grievance:

1. NATURE OF GRIEVANCE (facts upon which it is based):

RN went on FMLA leave and was later released to return to work without restrictions by her treating MD. Employer affirmed on 8-5-11 to MNA Labor Relations Staff member that RN was returning to work on 8-9-11 the Employer placed RN on paid administrative leave and eventually requested the RN to obtain a second medical opinion on 8-22-11 before returning to work. RN notified Employer that she is not required under FMLA to obtain a second medical opinion for fitness-for-duty, and asked to return to work. On 8-26-11, Employer retroactively placed RN on unpaid administrative leave starting 8-22-11 and did not offer a return to work date. On 8-30-11 RN's private attorney indicated that FMLA law prohibits the DOC from requiring RN to have a second opinion for fitness-for duty certification prior to returning to work and asked that RN be returned to work.

MNA was told on 8-5-11 that RN would be returned to work on 8-9-11. The employer has no basis for an unpaid leave of absence starting 8-22-11.

2. WHAT CONTRACT PROVISIONS HAVE BEEN VIOLATED IN THIS GRIEVANCE?

ARTICLE 1 PREAMBLE, ARTICLE 2 RECOGNITION, ARTICLE 31 DURATION, AND All other Applicable Contract Language as the Investigation may determine relevant, including: Article 10 Leaves of Absence, and Appendix L FMLA.

3. REMEDY OR RELIEF REQUESTED: Make Grievant Whole. Place RN on paid administrative leave from 8-22-11 until RN is returned to work. Other suitable remedies are possible.

This case was then brought forward for arbitration by Union Representative Linda Lange and later by Bev Hall, who replaced Lange.<sup>17</sup>

The Union presented one former and two current Red Wing nurses as witnesses. Their testimony can be summarized as follows:

1. Jereme Parks stated that during her two years of employment at Red Wing, B.L. (then her co-worker) made it hard for her to do her job and she singled Parks out for negative treatment; that B.L. had a bad temper, slammed drawers and cupboards; and that B.L. and Parks ended up having

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<sup>17</sup> The Union made requests for information which DOC did not respond to (U. Exh. 6).

to go to conflict resolution intervention (CRI) at Red Wing but it did not work - B.L. stormed out, saying she did not have time for CRI.

2. Maria Scheidegger, current Red Wing RN since 2006, complained that after B.L. became RN Supervisor, Scheidegger was not allowed to start her shift later (which later start time the prior supervisor had granted Scheidegger because she had to travel to Red Wing from her home in the Twin Cities). Scheidegger said the three nurses complained about this in a memo to B.L. but B.L. said there would be no preferences and she assigned the three nurses under her to equal 7:00 AM and 8:00 AM shifts.

Scheidegger also stated that B.L. did not allow nurses to combine their 15-minute coffee breaks with their 30-minute lunch periods as the prior supervisor had done. Scheidegger also stated that B.L. did not like notes left at desks and wanted to micro-manage what desks and chairs her nurses used.

Scheidegger stated that, in her opinion, C.D.H. was a highly skilled, professional and safe nurse who was a strong patient advocate and very aware of DOC policies and the law. But when C.D.H. worked with B.L. they both became erratic when they were in conflict with each other. Regarding changing nursing practices, Scheidegger stated that B.L. would always tell the nurses, "this is the way we have always done things" and she would refuse to change anything; that B.L. would waive off C.D.H., walk away or roll her eyes when C.D.H. raised nursing practices complaints. Scheidegger stated that disputes between the nurses and B.L. have become less frequent since C.D.H. has been out on leave.

3. Current Red Wing RN Tamara Eissa, employed at Red Wing since 2008, stated that C.D.H. is a very safe, competent, professional, thorough nurse and a good mentor. Eissa stated B.L. is a micro-manager who wants to control everything, including how nurses care for their patients. Eissa stated that B.L. would roll her eyes and would walk away when C.D.H. talked to her. Eissa stated C.D.H. became very upset over this treatment. Eissa also confirmed that B.L. did not like post-it notes on office desks, which C.D.H. and Eissa liked to use as reminders and that B.L. shook Eissa's chair once for using a post-it. Eissa stated that B.L. would get angry and hit the table. Eissa stated that C.D.H. raised the lack of flu shot parental waivers and that she (Eissa) complained to B.L. that H.I.V. blood draws were being done on all residents in violation of their rights. B.L. told Eissa DOC policy/standing orders required this and this was what they had always done. Eissa confirmed that the nurses were discouraged from calling the on-call doctor because it was too expensive. Eissa stated that she still calls the on-call doctor nonetheless and does not care if B.L. gets upset with her.<sup>18</sup>

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<sup>18</sup> Eissa was not asked to confirm or deny the statements she made to Katie O'Neill on May 9, 2011, regarding C.D.H.'s reference to suicide, which O'Neill described in her incident report at Tab 3, p. 4. Therefore, the document and O'Neill's testimony herein stand unrefuted on this point.

## Positions of the Parties:

### Union's Position:

The Union argued that the State should have investigated Supervisor B.L.'s abusive behavior toward employees working under her and that it should have disciplined B.L. or sent her for a fitness for duty exam based on the testimony of the Union's witnesses. But the Union noted, to date, the State has taken no steps to restrain B.L. Despite B.L.'s treatment of her, C.D.H. submitted her written concerns about nursing practices at Red Wing in January, 2009.<sup>19</sup> The Union urged that because B.L.'s supervisor, Agrimson, directed B.L. to take corrective action in every area C.D.H. had complained about and to conduct a staff meeting thereon, B.L. increased her abuse of C.D.H.—disrespecting the latter (not listening, rolling her eyes, cutting C.D.H. off, walking away), being abrupt and rude; and refusing to respond to the nurses' valid requests.

As a result of this escalating abuse, on October 5, 2010, C.D.H. filed a harassment complaint against B.L. and she supplemented the complaint on October 11<sup>th</sup>. In a letter dated October 20, 2010, the Appointing Authority refused to investigate C.D.H.'s allegations even though, the Union asserted, C.D.H.'s complaint showed B.L. had bullied and harassed C.D.H. as prohibited by DOC policy.

The Union asserted that in the winter of 2011, B.L.'s abuse of C.D.H. increased, "pounding the desk, walking away, rolling the eyes, all continued" (U. Br., p. 5). By May, 2011, C.D.H. was "at her wit's end" when B.L. turned off the lights and directed C.D.H. to leave a patient prone to seizures alone in an exam room. Later, when C.D.H. became ill after a dental appointment, B.L. threatened to discipline C.D.H. At this point, in consultation with her doctor, C.D.H. requested and was granted FMLA leave.

The Union asserted that it was reasonable for C.D.H. to refuse to meet with her abuser present at her return to work meeting with Agrimson and Barber. The Union noted that, contrary to Agrimson's testimony herein, Agrimson's notes of that meeting do not describe C.D.H. as upset and anxious, nor did Agrimson's notes describe C.D.H.'s tone of voice (U. Exh. 19). Rather, the notes stated that C.D.H. wanted B.L. to sit down with all three nurses, be part of the team and treat the team with respect. These statements belie Agrimson's assertions concerning C.D.H.'s demeanor on July 25<sup>th</sup>.

The Union argued that Tamara Eissa's testimony showed the Agency was out to get C.D.H., when Barber warned Eissa that the other nurses should not support C.D.H.<sup>20</sup> On July 28<sup>th</sup>, Dr. Whiteside released C.D.H. to work August 9<sup>th</sup> with a request for

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<sup>19</sup> In its brief, the Union referred to an alleged January 15, 2009, W.C. report of injury. No evidence was submitted on this point herein, and the Union's assertion thereon has been disregarded.

<sup>20</sup> U. Br. p.7. No transcript was taken in this case, so the Arbitrator's personal notes are the only record of the proceedings. The Arbitrator's notes do not confirm Union counsel's description of this encounter. Rather, the notes showed that Barber called Eissa into his office because she had written a confidential report concerning a conversation she had had with an adult offender and he wanted to know why she had waited so long to write/submit the report. During this meeting, Barber told Eissa that B.L. was sorry she did not tell Eissa to submit the report immediately. Barber told Eissa that he intended to help B.L. become a better supervisor - that "the past was not her fault." Eissa told Barber that she was not sure C.D.H. was ready to come back. Barber then told Eissa that the negative talk in the unit about B.L. went back for years and that he had told Maria (Scheidegger) that as a senior nurse she should not be negative. The Arbitrator's

possible intermittent FMLA leave for flare ups of her condition. But on August 8<sup>th</sup>, Nelson called and told C.D.H. she could not return to work the next day but that she would have to attend a fitness for duty exam with a doctor of the Agency's choosing. The CD audio recording of that conversation showed that C.D.H.'s tone and tenor were even and marshaled and did not evidence upset or anxiety, or a lack of control, contrary to Nelson's testimony herein.

On August 23<sup>rd</sup>, Dr. Whiteside submitted a second workability report, removing the reference to intermittent leave and offering to talk to the DOC about any concerns. At the same time, the DOC responded to Whiteside that it needed no additional information, e-mails were exchanged with the Agency's possible plans to terminate C.D.H. for her refusal to attend the August 24<sup>th</sup> fitness for duty exam. Instead, on August 26<sup>th</sup>, the Agency placed C.D.H. on unpaid medical leave. At this point, believing her FMLA rights were being violated, C.D.H. hired her own attorney who, on August 30<sup>th</sup>, inquired why C.D.H. had not been returned to work following her doctor's release.

The Union filed this grievance at the second step on September 8, 2011. With no other viable options, C.D.H. was then forced to request unpaid medical leave, effective September 15<sup>th</sup>. The Union noted that the Agency failed to notify the Union of this leave. It was not until November 2, 2011, that the Agency first revealed why it had requested C.D.H. to submit to a fitness for duty exam, cryptically mentioning safety concerns, sent only to C.D.H.'s private attorney. The Union requested documentation but never received any concerning why the Agency had requested a fitness for duty exam.

The Union asserted that the facts of this case show that the burden of proof should be on the State because the record facts clearly showed that the State did, in fact, terminate C.D.H. Here, the State used C.D.H.'s refusal to give up her FMLA right to return to work as a means of terminating her. In addition, the State's complete failure and refusal to respond to the Union's repeated requests for information as to why and on what basis the State insisted C.D.H. take a fitness for duty exam, make it all the more appropriate for the Arbitrator to shift the burden of proof to the State in this case. The State should not profit from its ill-treatment of C.D.H. and be given such incentive in the future to mistreat other similarly situated employees.

The Union conceded that the parties stipulated that this Arbitrator should not decide whether the State violated the FMLA by its treatment of C.D.H.<sup>21</sup> However, it asserted that the State violated the contract and its policies as they applied to C.D.H. and the Arbitrator must sustain the grievance. Here, the State did not have "reasonable cause" to believe C.D.H. was unfit or unable to perform her duties in August, 2011, as required by the contract. In addition, the State failed to properly notify C.D.H. and the Union that she was going to be placed on paid leave initially. Furthermore, the State never notified the Union why they were requesting a fitness for duty exam, and it only told C.D.H.'s personal attorney on November 4, 2011, of its reason for requiring this fitness for duty exam, essentially a "second opinion", prior to C.D.H.'s return to work. When C.D.H. was

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notes contained no threatening language to Eissa by Barber. Therefore, the Union's assertion on this point has been disregarded.

<sup>21</sup> Nonetheless, the Union argued herein that the FMLA prohibits employers from requiring a fitness for duty exam unless the employer requires it of all employees with the same serious medical condition. Here, the State submitted no evidence to show that it had ever required any other employees with the same condition to submit to a fitness for duty exam.

placed on unpaid administrative leave, the State failed to notify her of the basis therefor and the duration thereof. The State's actions toward C.D.H., the Union contended, demonstrated the State's intention to circumvent just cause and discipline C.D.H. for lodging complaints against B.L. and for bringing nursing practice concerns to light at Red Wing.

The Union next detailed facts that in its view showed that the State failed to follow the nine steps contained in the fitness for duty policy in C.D.H.'s case. The Union contended that the State cannot supersede FMLA rights because Article 27 Saving Clause of the effective labor agreement expressly states that "statutes and ordinances shall prevail" over provisions of the labor agreement found to be inconsistent therewith.

Finally, the Union contended that the State violated Article 2, Recognition Clause of the agreement by bypassing and ignoring the Union when it failed to notify the Union of the unpaid leave C.D.H. had been put on and failing and refusing to reveal requested information. The Union noted that such conduct would constitute an unfair labor practice before the NLRB.

Based on the above, the Union requested the Arbitrator to sustain the grievance, to order that C.D.H. be returned to work with full backpay and benefits, that she be put on paid leave until her return to work, and that the Arbitrator retain jurisdiction over the effectuation of the remedy.

#### Employer's Position:

The State described the relevant facts concerning C.D.H.'s employment at Red Wing in detail. It also described the grievance and its processing, noting specifically that the grievance cited Articles 1, 2, 10, 31 and Appendix L as being violated (but the grievance did not state how these provisions had been violated), that the grievance stated that the State could not request a second medical opinion from C.D.H. under the FMLA and that the State had no basis for placing C.D.H. on an unpaid leave of absence. The remedy requested was to place C.D.H. on paid administrative leave until she returned to work (ER Tab 7, p. 1). The State noted that the Union's position while processing the grievance was that the State had violated FMLA and that C.D.H. had never requested unpaid medical leave. The State's position was that the contract (Article 10) and DOC policy allowed it to require a fitness for duty exam and that it expected C.D.H. to reschedule and submit to such an exam (in pay status) before she could return to work. These positions essentially did not change thereafter.

The State argued that no violation of the contract as alleged in the grievance occurred here. It noted that the Union failed to submit any evidence that the State violated Article 10. Rather, the evidence showed that the State followed Article 10 Section 2G, when it placed C.D.H. on paid administrative leave on August 9, 2011. In any event, the grievance did not object to C.D.H. being placed on paid leave, nor did the Union ever raise such an argument herein. Furthermore, the State argued that the evidence also showed that it followed Article 10, Section 3B, when it placed her on unpaid, employer-initiated disability leave.

The State contended that there is no contractual basis for the remedy requested in the grievance—that C.D.H. be placed on paid leave until she returns to work. In this regard, the State observed that under Article 10, Section 2G, paid leave is discretionary

with the employer and the State had no obligation to use it. Instead, the State could have immediately placed C.D.H. on Article 10, Section 3B, unpaid leave. In all of these circumstances, it was reasonable and appropriate under the contract for the State to remove C.D.H. from paid leave when she failed to attend the fitness for duty assessment as directed and no contract violation arose.

The State argued that the record evidence clearly showed that the Appointing Authority had reasonable cause to believe that C.D.H. was unfit to perform her duties after her meeting with Barber and Agrimson in July, 2011 and her call to O'Neill in August, 2011. In this regard, the State noted that by her own testimony, that of other witnesses and according to the documentary evidence herein, C.D.H. "had a history of becoming fearful, overly emotional and visibly distraught when interacting with her supervisor" (ER Br., p. 17). And even after 2.5 months of FMLA leave, at the July 25<sup>th</sup> meeting with Barber and Agrimson, C.D.H. continued to be overly emotional and unduly fearful and intimidated, accusing B.L. of harassment and dredging up past complaints which had been dealt with in February, 2009.

The State asserted that in a correctional environment like Red Wing, employees must be able to work without becoming overly emotional and distraught; that nurses must be reliable and act quickly and safely in emergencies. The juvenile offenders held at Red Wing have committed serious felonies; they are dangerous and manipulative, seeking to use vulnerable, emotional, distraught and distracted employees to get what they want. The State argued that, in her highly emotional state, C.D.H. presented an opportunity to offenders to take advantage of her at the risk of the security and safety of other staff and residents. In addition, the State urged that all employees in a correctional setting must be able to get along and work together. They must follow chain of command. It is essential that employees take direction from and meet with their supervisors as necessary.

Here, Ms. Larson, the Appointing Authority, found it suspicious that C.D.H.'s workability report, which stated she was able to return to work, was dated just three days after C.D.H. exhibited the same stress, fears and emotional responses she had exhibited before her FMLA leave at her meeting with Agrimson and Barber. Also, the workability report completed by C.D.H.'s psychologist did not fully release C.D.H. for work, stating C.D.H. might require further FMLA leave for "flare ups". Later, C.D.H.'s psychologist amended her report to remove references to "flare ups". Based on the evidence, the Appointing Authority had valid concerns about C.D.H.'s fitness for duty and Larson was entitled to insist upon its doctor making an independent evaluation of C.D.H.'s fitness given the clear contract language and DOC policy, and C.D.H.'s disturbing conduct in July and August, 2011. This was particularly true given the DOC's recent experience with an employee who had been released to return to work and committed suicide in the presence of staff. In all of the circumstances, C.D.H.'s continued refusals to meet with B.L. and her inability to deal with B.L. without becoming distraught, stressed and overly emotional would not only fail to meet Agency needs but would also threaten the safety and security of Red Wing. The Appointing Authority therefore had reasonable cause to believe the Grievant was not fit for duty and it had the right to place her on unpaid leave and insist that she pass a fitness for duty examination before returning to work.

The State noted that it properly notified Union representative Lange, by Nelson leaving her a voicemail, stating the State had placed C.D.H. on an unpaid leave. This notice met the contractual requirement under Article 10. Lange must have received this

notice because she then filed the grievance for C.D.H. shortly thereafter. The State observed that Lange failed to request an Article 10 meeting regarding C.D.H.'s being placed on unpaid leave. Here, the State met all of its contractual obligations and the Arbitrator should not grant the Union's request to return C.D.H. to work so long as she refuses to submit to a fitness for duty exam.

Because the Union failed to present any evidence that the State violated Articles 1, 2, and 31 as alleged in the grievance, the State urged the Arbitrator to reject these claims. In addition, the State argued no violation of Appendix L could have occurred because this DOC policy on FMLA is expressly neither grievable nor arbitrable.

At the hearing, the Union attempted to include Article 15 Discipline as an issue even though Article 15 was never alleged in the grievance, nor were any facts presented to show that C.D.H. was disciplined in any way. Because C.D.H. had refused to attend a fitness for duty exam and because she had also refused to reschedule the exam, the State notified C.D.H. that her refusals to comply to these agency directives could be considered a voluntary resignation. However, no decision was ever made to terminate C.D.H. and she chose to take an unpaid medical leave rather than submit to a fitness for duty exam, which decision the State accepted. C.D.H. is still an employee of the State. Also, the State recently extended C.D.H.'s leave and she remains on leave.

The State contended that despite the Union's in-depth attempt to prove that B.L. harassed C.D.H., the evidence actually proved that this allegation was entirely false and no evidence was presented to show B.L.'s conduct constituted a contract violation. In this regard, the State noted that none of the Union's witnesses reported that they had been harassed by B.L., that they had reacted like C.D.H. or that they believed B.L. had harassed C.D.H. Rather, the evidence showed that B.L. provided C.D.H. with positive evaluations and feedback; that she sought Agrimson's guidance regarding how to deal with C.D.H.'s outbursts and challenging behavior; and that B.L. tried to deal with C.D.H.'s concerns when they arose. In sum, the State argued that the Union's effort to blame B.L. for C.D.H.'s own fears and insecurities would be unfair. In any event, the unsupported allegations against B.L. are irrelevant to whether C.D.H. is fit to return to work and these allegations have nothing to do with the State's decisions regarding this case, as B.L. had no input into any of those decisions.

Finally, the State urged that the Arbitrator decide this case based solely on the labor agreement. Here, Article 16 of the contract states that arbitration decisions "shall be based solely on...interpretation or application of the express terms of this Agreement and the facts of the grievance presented." In all the circumstances, the State urged the Arbitrator to find no contract violations occurred and to find that the State has the right to insist that C.D.H. submit to and pass a fitness for duty examination with the State's doctor before the State must return her to work.

## Discussion:

The first issues that must be determined here are what this dispute concerns and what it does not concern. First, it is clear from the grievance that the Union's complaint on behalf of C.D.H. was that she had been placed on unpaid leave and that C.D.H. had been required to submit to a fitness for duty examination (requested by the State in its August 9, 2011, letter to C.D.H.) before returning to work. The grievance listed Articles

1, 2, 10, 31 and Appendix L (FMLA) only. And the remedy requested was to make C.D.H. whole and to place her on paid leave from August 22, 2011, until her return to work.

In my view, the language of the grievance demonstrates that no issue of discipline was ever raised by the Union. Indeed, C.D.H. was never terminated by the State. In this regard, I note that Article 15 Discipline was not alleged as violated in the grievance. In addition, nowhere during the processing of the grievance did the Union assert that C.D.H. had been disciplined or discharged. In these circumstances, the State was never put on notice that the Union intended to argue, as it did for the first time at the hearing herein, that C.D.H. had been constructively discharged. Therefore, as a matter of fairness and in these circumstances, this Arbitrator lacks authority to address the Union's constructive discharge assertion and it must be and have been disregarded in reaching this Award.

Second, the Union's contention that the burden of proof should be shifted to the State must also be rejected. As found *infra*, given the language of the grievance, this is clearly a contract interpretation/application case. Thus, the Union should fairly bear the burden of proof to prove that the contract violations alleged in the grievance occurred in fact.

The Union has also argued that the State should have investigated B.L.'s conduct and/or required her to submit to a fitness for duty examination. What the State does or does not do regarding the conduct and performance of its supervisors is irrelevant and immaterial to this case, based on general principles of management rights and specifically here, where supervisors are specifically excluded from coverage by the labor agreement in Article 2.

The parties stipulated that the Arbitrator should not decide whether the State violated the FMLA by its treatment of C.D.H. It is important to note that the Union alleged in the grievance that Appendix L (FMLA Policy) had been violated. However, by its terms, Appendix L was intended to assist State agencies in understanding and administering FMLA, "[t]o provide guidelines to agencies on implementation of the Federal Family Medical Leave Act of 1993 (FMLA) and the regulations thereunder." Appendix L is also not grievable by employees under this labor agreement (Jt. Exh. 1, pp. 126-7; 132). In addition, the State is correct that Article 16 limits me to deciding this contract interpretation grievance based upon the express terms of the Agreement and the facts presented herein. In these circumstances, this Arbitrator lacks authority to consider any Union arguments asserting the State violated the FMLA.

The Union has contended that the State's failure and refusal to notify the Union of its actions regarding C.D.H.<sup>22</sup> and to provide requested information to the Union concerning C.D.H.'s case violated Article 2 (and the latter would constitute an unfair labor practice at the NLRB). Although the grievance herein lists Article 2 as violated, nowhere does it specify that the reference to Article 2 was because the State failed to properly notify the Union concerning C.D.H.'s situation. I find that Nelson properly notified Lange that the State had placed C.D.H. on unpaid leave on August 26th by leaving Lange a message on voicemail. This is so because paragraph 4 of Article 10, Section 3B does not state how notice must be given and because after the notice, it is the Union's responsibility to pursue the matter further.

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<sup>22</sup> The State's assertion that it notified Lange on voicemail of C.D.H.'s unpaid leave stood undisputed by the Union.

Also the Union's inclusion in the grievance of Articles 1, 2 and 31 were never supported by any specific facts or allegations, either in the grievance or during its processing, there is insufficient record evidence to find any violations thereof. Therefore, the Union's assertions on these points are not properly before me and they have not been considered herein.<sup>23</sup>

The extensive Background and Facts sections of this Award demonstrate that this Arbitrator felt it was vital to the understanding of her ruling in this case that she detail the past relationship of C.D.H. and B.L. and fully describe the character and personalities of both of these employees. Having said that, this Arbitrator is convinced that she has no authority to second-guess the action taken by the State concerning C.D.H.'s harassment complaint. In this regard, I note that this complaint and its processing are not before me in the instant grievance. Also I note, in any event, that C.D.H. never appealed the State's dismissal of her complaint or otherwise continued to pursue the complaint. Furthermore, it is important that B.L. never disciplined C.D.H. or gave her a below-average evaluation, so C.D.H.'s employment opportunities were never interfered with or jeopardized. Although the evidence surrounding C.D.H.'s harassment complaint and its processing was fully described herein, it is only relevant to this case insofar as it provides background for the State's later actions regarding the FFDE and unpaid leave of absence.

The above analysis must also be applied to evidence concerning incidents which C.D.H. alleged occurred in December, 2010, as well as C.D.H.'s initial refusal to meet with B.L. regarding her March, 2011, evaluation and the meeting of March 23<sup>rd</sup> thereon, and the incidents in May, 2011, which culminated in C.D.H. requesting and being granted FMLA leave. Again, no grievances were filed by C.D.H. concerning any of these incidents and none of these incidents was placed before me in the instant grievance. However, as stated above, the facts surrounding these incidents are relevant as background for the instant case.

The sole issue at hand based upon the express terms of the grievance before me is whether the Appointing Authority violated Article 10 of the collective bargaining agreement when it placed C.D.H. on unpaid leave of absence on August 22, 2011, and, if so, what is the appropriate remedy. Here, the Appointing Authority properly requested that C.D.H. meet with her supervisor along with human resources staff as a condition of the former's return to regular employment. C.D.H. refused to meet with her supervisor but did meet with Agrimson and Barber on July 25th. Based on the content of the July 25th meeting as well as C.D.H.'s past history, her continued refusal to meet with her supervisor, as well as the recent events (including conversations with O'Neill and Nelson) the Appointing Authority became concerned that C.D.H. was not fit to return to work and a danger to herself and others. However, just three days after the July 25th meeting, C.D.H.'s doctor released C.D.H. to return to work as of August 9th.

The Appointing Authority stated herein that she doubted this release, noting that the doctor had advised that C.D.H. might need intermittent FMLA leave for flare-ups, so the release was not unconditional. Based on these facts and her analysis thereof, the Appointing Authority directed Nelson to issue the letter of August 9th, the Appointing Authority requested that C.D.H. submit to and pass a medical evaluation, a fitness for

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<sup>23</sup> Also, any allegation concerning an unfair labor practice is outside this Arbitrator's jurisdiction.

duty exam, to be performed by a doctor of its choosing before she could return to work. C.D.H. then refused to submit to the requested medical evaluation/FFDE and she filed the instant grievance.

Article 10 is vague. Article 10, Section 3B, paragraph 1 states that, "If the Appointing Authority has *reasonable cause* to believe that a nurse is unfit or unable to perform the duties of his/her position as a result of disability, illness or injury, the nurse may be placed on a leave of absence for a period not to exceed one (1) year in duration" (emphasis added). Nowhere are the terms "unfit" or "reasonable cause" defined.

The second paragraph of the same section states that: "Such leave shall be *based on* an evaluation by a medical practitioner. In the event that the Appointing Authority requires the nurse to go to a specific medical practitioner, the Appointing Authority agrees to pay for the cost of such evaluation" (emphasis added). Again, the term medical "evaluation" is also not defined.

Although in this Arbitrator's view, this second paragraph of Article 10 Section 3B is unclear on its face, it uses many of the same terms as the State's FFDE Policy and therefore Article 10 must be understood and applied by reference to the State's FFDE Policy. In this regard, I note that the Policy clearly provides that if the Appointing Authority "has reasonable belief that an employee(s) is unfit to perform their duties safely and constitute a hazard to themselves, co-workers, or the public, the Appointing Authority may...not allow an employee(s) to return to the workplace until concern for the safety and security risks have been acceptably reduced or eliminated." Also, the term "medical examination" is defined in the Policy as one to determine "fitness for duty." The Policy also defines a "direct threat" to safety and security as a "significant risk of substantial harm that cannot be eliminated or reduced by reasonable accommodation."

Long accepted principles of contract construction hold that contract language should be read in a way that gives meaning and effect to all language. In this case, it is necessary and appropriate to read Article 10 and the FFDE Policy together to give effect to all language in the labor agreement. The fact that the Policy was not negotiated with the Union does not require a different conclusion, as no evidence was submitted to show that the Union ever objected to the establishment and application of the Policy prior to this case.

Under the facts of this case (as detailed in depth above), prior to August 9th, the Appointing Authority had reasonable cause to believe C.D.H. was unfit for duty under Article 10 and the Authority also had a reasonable belief that C.D.H. was not fit to perform her duties and that she constituted a hazard to herself and/or other Redwing staff and residents. In the circumstances proved here, it was legitimate for the Appointing Authority to demand that C.D.H. submit to a fitness for duty examination performed by a doctor of the Authority's choosing (so long as the State paid for the exam) as a condition of her return to employment. C.D.H.'s recent conversations, her refusal to meet with her immediate supervisor on July 25<sup>th</sup>, the content of the July 25th meeting, her past behavior toward her supervisor, her inability to act according to the chain of command and her threat of suicide constituted reasonable cause for the Authority to determine that C.D.H. was unfit for duty and that she constituted a direct threat to the safety and security of herself and others at Red Wing, all of which provided sufficient basis for C.D.H. to be placed on unpaid leave of absence, without more.

Therefore, to be perfectly clear, no violation of Article 10 occurred when the State placed C.D.H. on unpaid leave and required her to submit to and pass an FFDE, pursuant to Article 10 and its Policy, with a doctor of the State's choosing at the State's cost, before she would be allowed to return to work. C.D.H. chose to refuse, and go on unpaid leave. This means that the State has the right to continue to insist that C.D.H. submit to and pass a FFDE with a doctor of its choosing at its cost before the State must return her to work. However, the clear language of Article 10 Section 3B also states that unpaid leaves "shall not exceed one (1) year in duration." Therefore, the State violated Article 10 Section 3B by extending C.D.H.'s unpaid leave beyond one year. This Arbitrator believes that it is the fair approach in light of the language of Article 10, that she order the State to pay C.D.H. backpay and benefits for the period from August 22, 2012 through date that C.D.H. either refuses to submit to the State's FFDE or she completes the State's FFDE. What happens after the latter date is for another arbitrator to decide.

In light of the above analysis, and based on the specific authority of this Arbitrator under this grievance, I issue the following

### AWARD

The Employer had the right to place C.D.H. on unpaid leave of absence, effective August 22, 2011, because the Appointing Authority had reasonable cause/belief to find her to be unfit for duty under both Article 10 and its FFDE Policy. The Employer also had and continues to have the right to insist that C.D.H. submit to and pass a FFDE with a doctor of its choosing at its cost before she returns to work

However, the Employer violated Article 10, Leaves of Absence, of the MNA Collective Bargaining Agreement, when it allowed C.D.H.'s unpaid leave to exceed one year in duration. Therefore, the Employer is ordered to pay C.D.H. full backpay and benefits for the period from August 22, 2012, through the date C.D.H. either refuses to submit to a FFDE or she completes the State's FFDE.

If the State chooses to request that C.D.H. submit to a FFDE with a medical practitioner of its choosing at its cost, it may rely on its original finding of reasonable cause. Upon receipt of the State's written request, C.D.H. is ordered to respond in writing within 7 business days to the State's request for an FFDE, either by stating that she refuses to submit or by stating that she will attend and complete the FFDE. If C.D.H. refuses to submit or fails to respond to the State's request in a timely fashion, the State may then take whatever action it believes is necessary/warranted. If C.D.H. submits to and passes the State's FFDE, she shall be reinstated to her former position at Red Wing. The grievance is denied and dismissed in all other respects.

I will retain jurisdiction of the remedy only for 60 days after the date of this award.

Dated and signed at Oshkosh, Wisconsin, this 26th day of December, 2012,

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