

IN THE MATTER OF THE ARBITRATION)
BETWEEN:)
)
1199SEIU United Healthcare Workers East)
)
and)
)
Wellpath Recovery Solutions LLC at)
Bridgewater State Hospital)

Decision and Award
Re: Discharge of [REDACTED]

APPEARANCES

- Arbitrator: Sheila Mayberry, Esq.
- For the Authority: Shannon M. Boyne, Esq.
- For the Union: Ian O. Russell, Esq.

I. ISSUE

The parties stipulated that the issue is:

Did the Employer have just cause to discharge the Grievant, [REDACTED], and if not, what shall be the remedy?

II. RELEVANT ARTICLE OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE 20 – DISCIPLINE AND DISCHARGE

Section 20.1. No Employee who has completed their probationary period shall be disciplined or discharged without just cause. Employees who have not completed their probationary period may be disciplined or discharged without recourse to the grievance procedure.

Section 20.2. Union representation is available to an Employee, at the Employee’s request, during an investigation that may lead to the Employee’s discipline.

Section 20.3. An Employee suspected of serious misconduct may be placed on “investigatory leave”, pending a review or investigation of the situation. Investigatory leaves initiated by the Employer will be without pay, provided, however, that if the investigation does not lead to discipline, the time spent on investigatory leave will be paid. Should an Employee be excluded under Access to Workplace by the DOC, the suspension will be unpaid, subject to the Access to

the Workplace Article in this Agreement. The Employee who is placed on investigatory leave will be told whether the leave was initiated by the Employer or the DOC at the time the Employee and the Union are notified of the leave.

III. RELEVANT RULES AND POLICIES

POLICY 500-14

PATIENT ACTIVITY MONITORING MANAGEMENT SYSTEM (PAMM)

CATEGORY: PROVISION OF CARE

3. POLICY

3.1. Safety and accountability for all is the primary reason for resident/detainee safety checks. Applicable Wellpath Recovery Solutions facilities will use Patient Activity Monitoring Management (PAMM) tablet computers to document routine and special precautions/observations for all resident/detainees onsite at the facilities.

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5. PROCEDURE

5.1. The primary purpose of this activity is the assurance of resident/detainee safety.

5.2. All resident/detainee status and location will be observed and appropriately logged in the PAMM tablets, in accordance with ordered observations.

5.3. Observation Check Requirements:

5.3.1. Identification is the first step. Each resident/detainee has an armband or picture ID card that includes their picture and bar code.

5.3.2. The resident/detainee's picture and a bar code will also be displayed on the wall next to their bedroom.

5.3.3. Frontline staff will use the PAMM tablets to perform observation checks within the ordered timeframe. During the PAMM check, the staff member will conduct a face-to-face observation check and verify positive signs of life.

5.3.4. The minimum expectation is that PAMM activity logging will be done at all times that an observation status is assigned per precaution orders.

5.3.5. In the event of equipment failure, paper-based observation forms must be initiated with immediate effect to ensure resident/detainee safety and regulatory compliance. These will be readily available to nursing supervisors 24/7. Facility IT support will be available 24/7 to assist in resolving technical issues in real time. This includes prompt attention to malfunctioning dashboards and unit monitors.

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5.3.8. PAMM activity loggings are continuous and up to the minute reports and trend analysis are available for nursing supervisors and facility management to access through the reports available on the company Intranet (World of Wellpath) and the provider dashboard. It is the responsibility of the Nursing Supervisor or designated lead to continuously monitor compliance throughout their shift.

5.3.9. Licensed nurses are directly accountable for the unlicensed staff on their units, and are expected to routinely check the PAMM tablets for compliance.

5.3.10. Any discrepancies will be referred to the Nursing Supervisor.

5.4. PAMM Tablet Procedure:

5.4.1. To begin the process, the staff member will first log into the PAMM tablet and scan their own picture ID card to identify themselves as the staff member who is doing the activity logging.

5.4.2. The PAMM Tablet/Patient Countdown Timer screen will reflect names of resident/detainees that are due for activity logging:

- *A red screen indicates that the observation is due immediately;
- *Green indicates that no observation is due for at least 5 minutes;
- *Yellow indicates that an observation is due within 2-5 minutes.

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5.4.7. If the resident/detainee is in their room, staff will take a photo of the permanent bedroom door number or barcode.

5.5. Equipment Care:

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5.5.5. All equipment malfunctions will be reported immediately to the Nursing Supervisor for follow up and/or replacement.

5.5.6. If the tablet has malfunctioned, a backup tablet is available through facility MIS staff.

5.5.7. The replacement unit may be signed out by the nursing leadership and assigned to the housing unit with the malfunctioning device.

5.5.8. The malfunctioning PAMM Tablet will be returned to facility MIS staff for repair.

5.5.9. Nursing Supervisors or designated leads need to ensure availability and access to the extra tablets on their shift, especially after hours during the night shift, weekends and holidays.

5.5.10. The extra tablets must be inspected each shift by the department responsible for the activity to ensure their good working order.

IV. FINDINGS OF FACT

Wellpath Recovery Solutions, LLC (“Employer”), contracts with the Massachusetts Department of Corrections to provide medical and mental health services to patients at its 275-bed facility at Bridgewater State Hospital (“Hospital”). The Employer provides behavioral health services to individuals needing pre-trial competency evaluations and those deemed incompetent to stand trial or found not guilty by reason of insanity. They also provide “aid in sentencing” evaluations and inpatient psychiatric hospitalization for those who meet the criteria for strict security.

The Employer and 1199SEIU United Healthcare Workers East (“Union”) are parties to a collective bargaining agreement, with effective dates from July 1, 2021 to August 31, 2024. The bargaining unit consists of healthcare employees, including the position of Recovery Treatment Assistant (“RTA”).

The safety and health of patients at the hospital is the priority of staff. Part of the protocol involves continuously monitoring patients by using an electronic viewing system called Patient Activity Monitoring Management (“PAMM”). The system uses a handheld imaging device, much like a computer “tablet.” Using the tablet, staff continuously take photographs of patients

during all shifts (“PAMM checks”). At night, staff shine a flashlight into the door window of a patient's room as they take the photograph.

The policies regarding the use of a PAMM tablet are specific and training is provided to staff on its use. The relevant policies guiding the proper usage and supervision of the tablet are well documented. If a tablet malfunctions, Policy 500-14 guides the process to be followed, including these specific steps:

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5.5.9. Nursing Supervisors or designated leads need to ensure availability and access to the extra tablets on their shift, especially after hours during the night shift, weekends and holidays.

RTAs are required to conduct patient safety checks using the tablets. They are assigned to a unit for a particular shift and are to conduct PAMM checks every 15 to 30 minutes, depending on the level of care of each patient. RTAs share the monitoring responsibilities during a shift. When an RTA is not performing PAMM checks, they are either in an area called the “Trap,” where they observe the patients via security cameras, or they are performing other tasks, such as restocking supplies.


If patients request assistance while an RTA is performing PAMM checks, the RTA contacts another employee to assist the patient. There may be times when the request for aid is

urgent and the RTA may be required to provide help before someone else arrives. This may delay the PAMM checks.

A PAMM tablet has an illuminated timer. A green light indicates that there are more than five minutes left to perform a check; a yellow light signals when there are two to five minutes left; a purple light means that there are less than two minutes left¹; and a red light indicates that the time check is overdue. The red light does not indicate how much time has passed after a check was due.

In addition to continuous monitoring by the Nursing Supervisor, the Employer's Information Technology Department ("IT") also monitors all PAMM checks electronically. Data collected indicates whether they are being done timely. If PAMM checks are missed or late, IT will notify supervisors.

There are occasions when a tablet is not working correctly. Pursuant to the reporting policies, complaints are to be lodged with supervisors. RTAs may also register a complaint directly with IT. The type of complaints include indicator lights on the tablet erratically alternating between green and red or the tablet spontaneously shutting down. RTAs sometimes try to address these problems by rebooting the tablet, which takes a minute or two, but sometimes longer.

 ("Grievant") started working for the Employer as an RTA on November 3, 2018; she was trained on the PAMM system and the policies for using the PAMM tablet. She worked five days a week on the shift from 11:00 p.m. to 7:30 a.m.

Between April 13 and August 17, 2022, the Grievant was issued four Corrective Actions ("CAs"). One CA was for untimely PAMM checks occurring on April 25 and April 26. Her written comments, which were added to the CA form, indicated that she was having technical problems with the PAMM, which had been reported. None of the CAs were grieved.

¹ While the Policy does not refer to a purple indicator light, the un rebutted testimony of the Grievant was there is a purple indicator light showing less than two minutes until the PAMM check is overdue.

The Grievant received a performance evaluation for the period of November 2021 to November 2022. The supervisor's comment stated, "(The Grievant) needs to complete PAMM checks on time and correctly every time." The comment in the Goals section stated, "Complete PAMM checks correctly every time."

On January 10, 2023, the Grievant was working a double shift in the Carter 2 Unit. That unit includes 30 patient rooms, 15 on each side of the hallway. Every 30 minutes during the first two and a half hours of the shift, she conducted PAMM checks. The Grievant testified that at some point during a 30-minute round, she noticed that her tablet was not functioning correctly. It appeared to freeze and then the indicator light began to jump from green to red. The Grievant recalled that she rebooted the tablet at least once, but the problems persisted.

The Grievant reported the PAMM issues to [REDACTED], the Nursing Supervisor, who directed her to continue doing the checks. Later, another RTA, who was working on the B1 Unit, told the Grievant that he was also having problems with his tablet. While on their lunch breaks, they reported to RTA Supervisor, [REDACTED] that they were having problems with the PAMM system. [REDACTED] responded, "Okay. I've got you" and that she would "take care of it." The Grievant believed that Supervisor [REDACTED] was going to report the problems to the IT department. Despite the problems, she continued to perform her PAMM checks in what she believed was a timely manner.

The Grievant's RTA colleague on Carter 2 took over the PAMM checks after the Grievant had been doing them for two and a half hours. When the colleague handed the tablet back to the Grievant later, she agreed that the PAMM was "acting up." The Grievant continued to notice problems with her tablet but kept performing PAMM checks in a timely manner until the end of her shift. Later in her shift, she tried to call IT to report the problems with her tablet but was unable to reach anyone. At 7:30 a.m., her shift ended and she left the facility.

[REDACTED], a management information specialist, worked in IT at the Hospital and was responsible for reviewing PAMM checks for timeliness and investigating claims of hardware or software malfunction, such as problems with the screens, the device running slowly, or a

² The supervisor's last name was not given and is unclear in the submitted documentation. Herein she will be referred as Supervisor [REDACTED]

non-working camera. Upon reviewing the Grievant's PAMM checks on January 10, 2023, he noted that approximately 41% of her checks were late, as indicated by the red light indicators reported. He testified that the average number of late PAMM checks occurring during an RTA's shift was approximately 10% and that a rate of 41% was considered out of compliance. He also testified that the PAMM indicators do not measure how late the PAMM checks are performed, only whether the light on the PAMM is red when the check is done. He also testified that he was not aware of any other evidence that indicated the Grievant's PAMM checks were performed late. He acknowledged that he was not asked to inspect the tablet being used by the Grievant, but was generally aware that the indicator light on a tablet could erratically change from green to red. As he was required to do, he reported the data related to the Grievant's PAMM checks to a supervisor.

The Grievant's designated supervisor, [REDACTED], issued a CA report on January 10, 2023, stating the following:

RTA (Grievant) on the 11-7 shift failed to complete the unit PAMM checks on time. Violation PC 500-14 5.3.3. Staff was stationed on C2. Staff completed a total of 180 checks for the date of 1/10/23 missing 73 checks. Missing a total of 41% of her checks for the night of 1/10/23.

The form indicated that Supervisor [REDACTED] requested that the Grievant be discharged.

[REDACTED], the Employer's Human Resources Manager, approved the Grievant's discharge. She testified that she relied upon Mr. [REDACTED] reports regarding PAMM tablet data. She had been aware of several complaints of malfunctioning tablets since she began working at the Hospital in 2020. The types of complaints included Wi-Fi disconnect or a tablet turning off mid-check.

Ms. [REDACTED] testified that the Grievant had not provided any explanation for the violations and based upon the report of the PAMM violations on January 10, 2023 and the Grievant's prior disciplinary record regarding similar PAMM violations, she believed that she had just cause to discharge the Grievant.

On January 10 or 11, 2023, the Grievant was summoned to speak with [REDACTED], the Unit Manager, who informed her that she was discharged. This was the Grievant's first notification of being discharged. During the discussion, the Grievant reported that she had technical problems with her tablet during her shift.

The Notice of Termination, dated January 12, 2023, stated:

Since receiving a Final Warning for PAMM violations on 8/23/22, (the Grievant) has continued to struggle adhering to policies and procedures related to PAMM checks. On 1/10/23, Ms. [REDACTED] did not complete PAMM checks in a timely manner during her shift. A total of 73 out of 180 checks (41%) were late. This does not comply with policy PC 500.14.5.3.3.

On January 23, 2023, the Union submitted its Step 1 grievance form. In its response, the Employer stated:

Please accept this email as the Company's Step 1 written response to the grievance dated 1/23/23, challenging the termination of [REDACTED]. During the parties' Step 1 discussion, the Grievant claimed that she reported technical difficulties with the PAMM to the RTA Supervisor. The Company investigated that claim and the evidence established that no such report was made. The Grievant also claimed she attempted to call the IT HelpDesk but the call could not connect. The Company also investigated that claim and the evidence established there were no reported issues with the phone systems on the night in question. For this reason, and because the Company had just cause to terminate the Grievant, the grievance is denied.

The Step 2 grievance was then submitted. In its Step 2 response, the Employer stated:

Please accept this email as the Employer's Step 2 written response to the grievance filed over the termination of [REDACTED]. (It should be noted that no one on behalf of the Union "showed up" for the scheduled Step 2 discussion). The grievance is denied.

The Union submitted into evidence CA reports issued in 2023 to six other employees who failed to complete PAMM checks on time. Two employees included comments indicating that they had problems with the tablets they were using, including the screen turning black, flickering indicator lights, the red light turning on right after taking a photograph, "freezing," and not connecting to the system.

V. POSITIONS OF THE PARTIES


The Employer

The Employer argues that it had just cause to discharge the Grievant. It contends that the Grievant failed to comply with its policy governing PAMM checks, PC 500-14, by not timely completing PAMM checks during her shift on January 10, 2023. It asserts that the Grievant had a history of receiving corrective action on numerous occasions in the nine months prior for performance issues and policy violations, two of which involved PAMM check violations.

The Employer argues that the Grievant testified that she acknowledged and understood the importance of conducting timely PAMM checks, yet failed to do so on January 10, 2023, without any justifiable reason. It states that the Grievant's testimony, that she believed that she completed every PAMM check in a timely fashion, undermined her reason given during the Step 1 grievance meeting, when she said she experienced technical issues with her tablet.

The Employer contends that if the Grievant experienced technical issues with her tablet during her shift on January 10, 2023, per Policy 500-14, she was required to immediately use paper-based observation forms to ensure resident/detainee safety and regulatory compliance. It also suggests that a backup tablet would have been available for the Grievant's use, but she chose not to seek one out.

The Employer also notes that the Grievant's testimony, that the alleged technical issues began at the beginning of her shift and then improved later in her shift, is undermined by the compliance log that indicated a majority of her late PAMM checks occurred later in her shift on January 10, 2023.

The Employer also avers that even if the Grievant had technical issues, the errors were not reflected on the PAMM check log that is used to monitor employee compliance with PAMM checks, as explained by .

Accordingly, it argues that the Grievant's failure to comply with policy PC 500-14 was just cause for imposing disciplinary action.

Concerning the level of discipline, the Employer argues that discharge was appropriate and consistent with progressive discipline. It cites the Grievant's prior disciplinary actions, which occurred on four separate occasions in the nine months before her discharge. It also cites her performance evaluation from November 2022, which identified the Grievant's PAMM checks as being untimely and her need to properly complete them. It contends that the Grievant failed to improve her performance in this area, as shown by the corrective actions she received thereafter. The Employer believes that discharge was the only appropriate action in this case.

The Union

The Union argues that the Employer lacked just cause to discharge the Grievant. It asserts that the Employer did not provide sufficient evidence to prove that the Grievant was untimely in performing her PAMM checks on January 10, 2023. It argues that Employers relied upon one report indicating that the light indicator on the Grievant's tablet was red 41% of the time on January 10, 2023. It stated that there was no evidence indicating when any of the PAMM checks should have been performed, or whether they were missed for longer than one second. It urges that this single report cannot be relied upon to establish that such a large number of the Grievant's PAMM checks were late.

The Union cites credible evidence, as reported by at least two RTAs during the shift in question, that the PAMM system was having problems that night, problems that could explain why so many of the PAMM checks registered as late. The Union argued that if a tablet is improperly showing the correct status light, or the light is spontaneously flipping between green and red, the reliability of what the tablet is reporting to the PAMM system is compromised.

Furthermore, the Union contends that even if there was a delay in photographing patients, there may have been a justifiable reason for it. A legitimate delay in taking a picture of one

patient could lead to all of the following PAMM checks being recorded as late if they were not performed within a particular 30-minute period.

The Union asserts that because there was no record of any investigation or witness testimony of what may have occurred, it cannot be determined if there were any significant work performance issues. It also claims that simply the lack of investigation requires a finding that the Employer lacked just cause for the discharge.

Finally, the Union argues that the Grievant was not informed that she would be discharged the next time her PAMM checks were late, which is integral to the system of progressive discipline.

VI. DISCUSSION

The issue in this matter is whether the Employer had just cause to discharge the Grievant. A just cause analysis takes into consideration fundamental issues of due process, including notice of rules, equitable administration, consistency of judgment, concern for precedence, equitable determinations, and a proper investigation of the alleged violations. *Labor and Employment Arbitration, Second Edition*, Ch. 14, Bornstein, Gosline, Greenbaum, and Mayberry (LexisNexis / Matthew Bender & Co.). Each disciplinary action involves two sub-issues: whether there was just cause for the imposition of discipline for the particular conduct, and whether there was just cause for the penalty imposed on the grievant, given the severity of the violation. *Id.* Disciplinary actions have been reversed where the lack of due process violated basic notions of fairness. *How Arbitration Works*, F. Elkouri and E. Elkouri, at 15-47 (8th Ed. 2016) (case cited therein).

During 2022, several employees were issued CAs for failing to timely and accurately use the PAMM system, some of whom complained of technical difficulties with the tablets. The Grievant disputes the allegation that she failed to timely and properly use the PAMM system on January 10, 2023, explaining that there were technical problems with the tablet's indicator lights, which had been spontaneously flickering between green and red.

There is no dispute that the Grievant has had a history of failing to properly do her PAMM checks. Her written performance evaluation from 2022 specifically noted problems in conducting proper and timely PAMM checks. Despite being put on notice that she needed to improve in this area, she failed to timely perform PAMM checks on April 25 and 26. While she did not file a grievance, she did comment that there were technical problems with the PAMM system, and that she had reported them.

What is troublesome is that Mr. [REDACTED] from IT acknowledged that the same type of technical issues reported by the Grievant had also occurred with other tablets. Also, at least two other RTAs reported similar issues after they were disciplined for untimely PAMM checks. Furthermore, the Grievant's colleague told her that his tablet was malfunctioning on that same shift.

The Grievant's un rebutted testimony, that she reported these problems to two supervisors during her shift on January 10, 2022, is credible. Neither supervisor testified to refute her claim. Her testimony is also supported by the data provided by Mr. [REDACTED]. There is no wonder that the Grievant was alarmed by the erratic behavior of the tablet and reported it to Nursing Supervisor [REDACTED] and Supervisor [REDACTED]. Yet, she was directed by Ms. [REDACTED] to keep using it. By the end of her shift, the data revealed that 41% of her checks were late, which was significantly higher than the 10% average rate for late checks. The fact that the Grievant had not had any PAMM checks flagged in the prior nine months makes the reporting of 41% late checks on that one shift even less credible.

What makes the circumstances of January 10, 2023 more disturbing is the lack of evidence that PAMM checks were being continuously monitored by the Nursing Supervisor [REDACTED] and Supervisor [REDACTED]. Section 5.3.9 requires licensed nurses and the Nursing Supervisor, or designated lead, to continuously monitor compliance of PAMM checks throughout their shift. On January 10, 2023, night shift supervisors should have been seeing that the Grievant's PAMM checks were repeatedly late. Yet, there is no evidence to indicate that anyone in management approached her to determine what was wrong before the Grievant reported the issue to Ms. [REDACTED]. Compounding the problem was Ms. [REDACTED] failure to institute emergency measures,

including providing the Grievant with a replacement tablet or paper forms for performing paper checks, as required under Policy 500-14, Section 5.3.5 through 5.3.10. Instead, she directed the Grievant to simply keep using the same device.

It is unrefuted that at no point was there an investigation of whether the Grievant's tablet was defective. The only evidence of an investigation submitted by the Employer was a statement in the Step 1 Grievance response, after the Grievant was discharged, indicating that there was no basis to the Grievant's claim that she reported the issue to any supervisor. This is insufficient given the unrebutted testimony of the Grievant that she reported the technical problems to two different supervisors, Nursing Supervisor [REDACTED] and Supervisor [REDACTED]. Furthermore, the Employer's Human Resources Manager was the only witness who testified about the decision to discipline and discharge the Grievant. She stated that she relied upon the data presented to her indicating that the Grievant's PAMM checks were late 41% of the time on January 10, 2023. She acknowledged that no additional information was provided to her and no further investigation was performed to determine whether the Grievant's tablet was defective or other employees' tablets were experiencing problems on that shift.

I find that without an investigation as to why the Grievant's tablet had registered such a high percentage of late checks, there can be no definitive explanation for what occurred. As such, I find the evidence used by the Employer to be woefully insufficient to determine that there was just cause for discipline and discharge of the Grievant.

The Employer's argument that it was the Grievant who failed to obtain paper reporting forms if her tablet was malfunctioning was never raised as a reason for her discharge and or at the arbitration hearing. Policy 500-14, Section 5.3.5 specifically states that forms are readily available to nursing supervisors 24/7. It is apparent from the Grievant's testimony that she was never provided with paper forms after reporting to both Nursing Supervisor Mosley and Supervisor Tia that her tablet was malfunctioning.

Based upon the above, I find that there was insufficient evidence that the Grievant violated Policy 500-14, Section 5, on January 10, 2023. Furthermore, just cause requires a due

process component wherein the Employer must investigate an alleged violation before it issues discipline in order to determine if the conduct actually occurred. That did not happen in this case. Therefore I find that the Employer did not have just cause to discipline, and in turn, discharge the Grievant.

VII. AWARD

1. The grievance is GRANTED.
2. The Grievant's discharge shall be rescinded and she shall be reinstated.
3. The Grievant shall be made whole for all lost wages, seniority, and other benefits, less interim earnings, if any.

A handwritten signature in cursive script, reading "Sheila Mayberry", is written over a horizontal line.

Sheila Mayberry, Arbitrator

February 5, 2024