

March 20, 2023

**TO:** County Personnel Policy Board Members

**SUBJECT:** Personnel Policy Board Meeting  
Wednesday, March 22, 2023  
**12:00 p.m.**, Commissioners Hearing Room  
County-City Building, Room 112

|                                         |
|-----------------------------------------|
| NOTE: Special<br>Meeting Date &<br>Time |
|-----------------------------------------|

## **A G E N D A**

- ITEM 1: Approve Minutes from the February 2, 2023 meeting.
- ITEM 2: Request for appointment of Sherri Wimes to Personnel Policy Board.
- ITEM 3: Request for grievance hearing - FOP32 - Caitlin Ostgaard - Matt Waggoner - Modified Duty - Corrections.
- ITEM 4: Request for grievance hearing - FOP32 – Madara Smith - Modified Duty - Corrections.
- ITEM 5: Request for grievance hearing - FOP32 – Lynn Kemper - Modified Duty - Corrections.
- ITEM 6: Miscellaneous Discussion

pc: Tom McCarty  
Ashley Bohnet  
Kristy Bauer  
Brad Johnson  
Caitlin Ostgaard  
Matthew Waggoner  
Madara Smith  
Lynn Kemper  
Sherri Wimes

# **COUNTY PERSONNEL POLICY BOARD**

## **February 2, 2023**

### **MEETING**

Meeting was held Thursday, February 2, 2023, Commissioners Hearing Room, County-City Building, Lincoln, Nebraska.

Members present: Hannah Schmidt, Steve Eicher, Jeanne Sayers and Tara Paulson. Member absent: Eric Brown. Human Resources Department resource staff attending: Malerie McNair.

The meeting was opened at 1:35 p.m. by Vice Chair Tara Paulson.

Agenda Item 1 was the approval of the minutes from the January 13, 2023 meeting. It was moved by Jeanne Sayers and seconded by Steve Eicher to approve the minutes as presented. Voting YES: Steve Eicher, Jeanne Sayers, and Hannah Schmidt. Abstaining: Tara Paulson. The minutes will show as approved.

Prior to continuing the meeting, Barb McIntyre of the Human Resources department took a few minutes to inform the Board about the emails she had sent regarding Steve Eicher's request to retire. Barb McIntyre shared that she does have some interested parties. Tara Paulson asked that Barb McIntyre submit the names and resumes to the Board for their review. Tara Paulson mentioned the Board had a discussion on if Mike Thew would come back to fill Steve Eicher's spot, so they will reach out to him, being a potential candidate.

Agenda Item 2 was the request to create the classification 7895 – Quality Assurance Coordinator – C13. Barb McIntyre of the Human Resources department explained the class is being created at Human Services' request. Barb McIntyre explained that Human Services received a grant to fund this position. Barb McIntyre stated there is currently an employee performing some of the work, but this would be an add to assist this individual. Steve Eicher asked what the Human Services Department does, and Barb McIntyre brought up Lesley Ahrens from Human Services to speak. Lesley Ahrens explained what Human Services does. Following discussion, it was moved by Steve Eicher and seconded by Tara Paulson to approve the creation as presented. Motion unanimously carried by roll call vote.

Agenda Item 3 was the request to revise classification 5756 – Corrections Sergeant – C19. Barb McIntyre of the Human Resources department explained this request is just clarification of expectations of the class, because it's a 24-hour facility, employees can be called upon to work any of the 3 shifts that they have, as well as the number of specialty positions. Following discussion, it was moved by Jeanne Sayers and seconded by Steve Eicher to approve the revision. Motion unanimously approved by roll call vote.

Agenda Item 4 was the request to change the pay range for the classification 7870 – Juvenile Detention Supervisor from C11 to C12. Barb McIntyre of the Human Resources department explained when the contract for Juvenile Detention Officers was negotiated, a Step 9 was added. By adding Step 9, they compressed the pay between the officers and the supervisors. Barb McIntyre said this would help the incentive to promote from within with higher responsibility. Tara Paulson asked if anyone was currently in the class it would affect. Nicole Gross from the Human Resources department added that there were 6 individuals. Following discussion, it was moved by Steve Eicher and seconded by Hannah Schmidt to approve the pay range change as presented. Motion unanimously carried by roll call vote.

# **PERSONNEL BOARD**

**February 2, 2023**

**Meeting**

**PAGE 2**

Agenda Item 5 was the request for appeal hearing from IBEW-G – Justin Plugge – Suspension - County Engineer. Rick DeBoer of IBEW represented the grievant. Ashley Bohnet of the County Attorney’s office represented the County Engineering department. The proceedings were recorded by Susan McKenzie and are on file with her. The County offered exhibits #1 through #5. Exhibits #6 through #8 were offered by Rick DeBoer, Ashley Bohnet objected to exhibit #7. Vice Chair Tara Paulson received exhibits #1 through #6 and #8. Vice Chair Tara Paulson sustained Ashley Bohnets objection to exhibit #7 and was not received. Witnesses: Justin Plugge and Pam Dingman. Following discussion, it was moved by Tara Paulson and seconded by Steve Eicher to deny the appeal. Motion unanimously carried by roll call vote.

Agenda Item 6 was the request for appeal hearing from IBEW-G – Rick Phillips – Suspension - County Engineer. Rick DeBoer of IBEW represented the grievant. Ashley Bohnet of the County Attorney’s office represented the County Engineering department. The proceedings were recorded by Susan McKenzie and are on file with her. The County offered exhibits #1 through #6. Exhibit #7 was offered by Rick DeBoer, Ashley Bohnet objected to exhibit #7. Vice Chair Tara Paulson received exhibits #1 through #6. Vice Chair Tara Paulson sustained Ashley Bohnets objection to exhibit #7 and was not received. Witnesses: Rick Phillips and Pam Dingman. Following discussion, it was moved by Jeanne Sayers and seconded by Steve Eicher to remove the appeal. Voting Yes: Jeanne Sayers and Steve Eicher. Voting No: Hannah Schmidt and Tara Paulson. Motion failed. It was moved by Tara Paulson and seconded by Hannah Schmidt to deny the appeal. Motion unanimously carried by roll call vote.

There being no further business, the meeting adjourned at 3:50 p.m.

The next regularly scheduled meeting is tentatively set for Thursday, March 2, 2023.

Malerie McNair  
Human Resources Executive Assistant

PC: Kristy Bauer  
Steven Wesley  
Sara Hoyle  
Pamela Dingman  
Rick Deboer  
Ashley Bohnet  
Justin Plugge  
Rick Phillips  
Brad Johnson

# KEATING | O'GARA

Gary J. Nedved  
Paul J. Peter  
Anne E. Winner  
Jefferson Downing  
Gary L. Young  
Joel D. Nelson

Joel Bacon  
Thomas P. McCarty  
Tara L. Gardner-Williams  
Brenna M. Grasz  
Braden W. Storer

EMERITI:  
Con M. Keating  
Robert M. O'Gara

2022 SEP 18 9 PM

September 9, 2022

Barb McIntyre  
Lancaster County Human Resources Director  
555 South 10<sup>th</sup> Street  
Lincoln, NE 68508  
[bmcintyre@lincoln.ne.gov](mailto:bmcintyre@lincoln.ne.gov)

RE: FOP #32 Appeal of Grievance Denial

Dear Ms. McIntyre:

On August 15, 2022, FOP #32 filed a grievance on regarding the County's discriminatory and inconsistent modified duty practices at the Lancaster County Department of Corrections. A true and correct copy of the Grievance is attached hereto. On or about September 1, 2022, Director Brad Johnson denied the grievance. A true and correct copy of Director Johnson's Grievance denial is attached hereto.

FOP #32 hereby appeals Director Johnson's denial of said Grievance to the Lancaster County Personnel Policy Board in accordance with Step 2 of the grievance procedure set forth in the bargaining agreement between FOP #32 and Lancaster County and the Lancaster County Personnel Rules.

Very truly yours,

/s/Thomas P. McCarty

Thomas P. McCarty  
FOR THE FIRM

CC: Ashley Bohnet, Deputy Lancaster County Attorney

# Lancaster County

## Department of Corrections

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3801 West O Street  
Lincoln, NE 68528  
(402) 441-1900  
Fax: 441-8946

Brad Johnson, Director

September 1, 2022

Tom McCarty  
Keating, O'Gara, Nedved & Peter, P.C.  
200 S. 21<sup>st</sup> Street, Suite 400  
Lincoln, NE 68510

RE: GRIEVANCE OF FOP 32 ON BEHALF OF ALL MEMBERS IMPACTED, INCLUDING  
CAITLIN OSTGAARD, MATTHEW WAGGONER AND JOHN HUGHES

Dear Mr. McCarty:

This letter will serve as a response to the grievance received August 15, 2022, regarding an alleged violation of Article 7 and Lancaster County Personnel Rule 2.5.

### A. Caitlin Ostgaard Grievance

On July 28, 2021, Caitlin Ostgaard was working as a Corrections Officer at the Lancaster County Department of Corrections when she had a seizure. Based on that seizure, Officer Ostgaard was scheduled for a neurological test to determine if she was able to return to work. A fitness for duty evaluation was also scheduled with Dr. Durand at Company Care. Prior to that evaluation and/or test being completed, Officer Ostgaard had an additional seizure on September 1, 2021. Officer Ostgaard was not able to safely return to work and utilized sick leave, vacation leave, personal holidays, and leave without pay per the instructions of her doctor not to return to work until at least September 10, 2021.

Daisymae Brayton sent a letter to Dr. Whyte on September 9, 2021 stating that Officer Ostgaard needed to have a Fitness for Duty evaluation completed prior to returning to work. Officer Ostgaard emailed Director Johnson on October 28, 2021 and said that she would not be able to return to work in November as planned since her follow up appointment with her medical provider was scheduled for January 4, 2022. She requested additional time for leave without pay until January 8, 2022, which was approved by Director Johnson.

Dr. Durand completed an evaluation on January 19, 2022 of Officer Ostgaard stating that she could return to work but not have any safety sensitive work until evaluated by her personal physician. Dr. Chad Whyte, Officer Ostgaard's medical provider, completed a form on February 1, 2022, stating that Officer Ostgaard could perform 'safety sensitive work' in her job description. As such, Officer Ostgaard returned to work on February 1, 2022.

On June 9, 2022, Caitlin Ostgaard was working as a Corrections Officer at the Lancaster County Department of Corrections. At approximately 2100 hours, Officer Ostgaard had a seizure while

in Lt. Jane Voboril's office. Medical was called to assist Officer Ostgaard. Due to this medical episode, the Department of Corrections directed Officer Ostgaard to complete a fitness for duty evaluation on June 16, 2022. Her doctor, Dr. Chad Whyte, provided documentation on June 28, 2022, stating that Officer Ostgaard could return to work on July 5, 2022. Officer Ostgaard did return to work on July 5, 2022.

In this case, Officer Ostgaard did not work at the recommendation of her medical provider. She had seizures multiple times while working as a corrections officer. Having seizures at her place of employment could result in harm to her, to her coworkers, and to the inmates at the Department of Corrections. The Department of Corrections had a duty to ensure that Officer Ostgaard was able to work and followed the recommendations of her medical provider when she was able to work again. When her medical provider stated she could work, Officer Ostgaard returned to work in February of 2022 and in July of 2022.

#### B. Matt Waggoner Grievance

Officer Matt Waggoner had a knee injury condition that began on December 31, 2021 according to his medical provider. He was set for surgery on August 8, 2022. Officer Waggoner's medical provider filled out a form stating that his anticipated leave from work under FMLA was August 7, 2022 and his expected date to return to work was September 20, 2022.

On July 26, 2022, Officer Waggoner emailed Elisha Havick, administrator with the Department of Corrections, inquiring about modified duty. Ms. Havick emailed back stating that each situation is different and it would depend on what his doctor said. She responded that the agency needed to know the restrictions Officer Waggoner would have.

Officer Waggoner did not provide additional medical documentation prior to the filing of this grievance regarding his ability to work. Officer Waggoner provided FMLA paperwork dated August 16, 2022, after the grievance was filed. At the time that the grievance was filed, the only documentation the Department of Corrections had for Officer Waggoner was that he was not able to return to work until September 20, 2022.

#### C. John Hughes Grievance

According to Dr. Byington, John Hughes had a medical condition that began January 2022. This medical condition was a knee injury. Based on this condition, Officer Hughes filed paperwork under both the American Disabilities Act and Family Medical Leave Act.

##### 1. American with Disabilities Act

On May 24, 2022, Officer Hughes provided a work status report stating that he had a left knee medial meniscus tear with a surgery date of September 1, 2022. It noted that he had no limitations, other than no mandatory overtime work.

On June 13, 2022, Dr. Byington completed an ADA form stating that Mr. Hughes could perform the essential functions of his position. Elisha Havick called and left a voicemail for Officer Hughes, informing him that he could report to work. That same day, Dr. Byington's office sent over the same paperwork with restrictions on Officer Hughes' ability to work. Specifically, it stated "No mandatory overtime. Voluntary overtime is okay." There were no other restrictions, accommodations or information regarding Officer Hughes' injury. There was no statements or information about how Officer Hughes had a physical or mental impairment that substantially limited one or more of his major life activities.

Officer Hughes was provided paperwork stating that there was not enough information to substantiate that ADA applies to his situation on June 16, 2022. On June 20, 2022, Dr. Byington provided a note that stated Officer Hughes not be required to work mandatory overtime. He stated that "Mr. Hughes may suffer from occasional swelling, discomfort, and debility when he is required to work 8 hours per day." There was no statements or information about how Officer Hughes had a physical or mental impairment that substantially limits one or more of his major life activities.

The ADA defines a disability as "a physical or mental impairment that substantially limits one or more of the major life activities." Working is one of these major life activities, according to the ADA regulations published by the Equal Employment Opportunity Commission (EEOC). Therefore, an inability to work is a protected disability, under the law. But the inability to work overtime is not generally considered a disability. Most federal appellate courts addressing this issue have found that an inability to work overtime is not a substantial limitation on the major life activity of working.

For example, in *Tardie v. Rehabilitation Hospital of Rhode Island*, 168 F.3d 538 (1st Cir. 1999), a human resources director claimed that excessive work hours caused her to experience debilitating symptoms from a heart ailment, necessitating a leave of absence. She asked to return to her job but to be excused from working more than 40 hours per week. Her superiors decided she could not perform the duties of her position with this limitation and refused to reinstate her. The court affirmed the employer's decision, ruling that a 40-hour-per-week limitation was not a disability. "There are vast employment opportunities available which require only 40-hour work weeks," the court opined. Thus, the employee's restriction was not a "substantial" enough limitation on the activity of working to trigger the law's protection. Another court adopted similar reasoning in *Berg v. Norand Corp.*, 169 F.3d 1140 (8th Cir. 1999), where a diabetic was fired from her position as a tax department manager after she asked that her hours be limited to between 40 and 50 per week. The court said she wasn't disabled, observing that it was "... hard to say that being limited to a 40- to 50-hour work week substantially limits one's ability to work." "Employee's request for an eight-hour work day as an accommodation for his disability would have made him unqualified to perform the essential job functions of his job as a package car driver, and thus, his employer, a parcel delivery company, did not violate the ADA or Iowa Civil Rights Act (ICRA) by refusing the request, since working overtime was an essential function of the job, given that daily package car workloads could increase unpredictably..." *Faidley v. United Parcel Serv. of Am., Inc.*, 889 F.3d 933 (8th Cir. 2018).

In this case, Officer Hughes did not have a disability that impacted his one or more major life activities.

## 2. Family Medical Leave Act

Officer Hughes provided FMLA on June 1, 2022. In that paperwork, Dr. Byington stated the expected date of return to work for Officer Hughes was 8-12 weeks after his post op and that his date of surgery was scheduled for September 1, 2022. Dr. Byington advised that Officer Hughes was able to do the essential functions of his job. The paperwork stated that Officer Hughes should avoid painful activity and not have any mandatory overtime.

Dr. Byington provided another FMLA form dated June 29, 2022. This form stated that Officer Hughes' expected date to return to work was 8-12 weeks post-op with the date of surgery being July 13, 2022. Once again, Dr. Byington stated that Officer Hughes could return to work but would need intermittent FMLA to manage pain. Officer Hughes was contacted by the Department of Corrections on June 30, 2022 and told that he could return to work as the form did not note any restrictions until his surgery scheduled for July 13, 2022. Officer Hughes did not return to work.

Finally, Dr. Byington filled out FMLA paperwork on July 1, 2022 stating that Officer Hughes had a serious health condition. Under the FMLA, a serious health condition 'means an illness, injury, impairment, or physical or mental condition that involves inpatient care... or continuing treatment by a health care provider...' Wage and Hour division, Labor 825.113.

Dr. Byington stated that Officer Hughes had a serious medical condition because he had a period of incapacity of more than three consecutive calendar day that also involved treatment two or more times by a health care provider within 30 days of the first day of incapacity or treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider. When detailing the dates for the treatment as required, Dr. Byington noted the dates of July 13, 2022 and July 18, 2022. Both dates are the date of surgery or after the date of surgery, indicating that the serious health condition starts on the date of surgery rather than the date the condition began in January of 2022.

Furthermore, Dr. Byington stated that Officer Hughes' condition was a chronic condition requiring treatment. Chronic conditions require at least two visits for treatment by a health care provider, continues over an extended period of time, and may cause episodic rather than continuing period of incapacity, such as asthma, diabetes, and epilepsy. Treatment means an examination to determine if a serious health condition exists, evaluations of the condition, and actual treatment by the health care provider to resolve or alleviate the condition. Officer Hughes did not have ongoing treatment for his knee injury. Rather, he had a surgery for that condition which would alleviate the injury.

There was nothing in the paperwork to state that Officer Hughes had a serious health condition prior to his date of surgery. FMLA was approved for Officer Hughes after his surgery as his

condition after surgery would be a serious health condition. Officer Hughes went out on FMLA on July 13, 2022.

On August 3, 2022, Tom McCarty inquired about modified duty for Officer Hughes. It was communicated to Mr. McCarty that the Department of Corrections needed additional documentation from a medical provider since the last documentation was that Officer Hughes could not work 8-12 weeks after his date of surgery on July 13, 2022. As of the filing of the grievance, no additional documentation was provided to the Department of Corrections regarding Officer Hughes' ability to work. Officer Hughes did email the Department of Corrections on August 29, 2022 stating that he was cleared for modified duty, but provided no documentation from his medical provider. At the time the grievance was filed, the only documentation the Department of Corrections had for Officer Hughes was that he was not able to return until 8-12 weeks after his surgery in July of 2022.

#### D. Ryan Lowe

Officer Ryan Lowe has not filed a grievance but is mentioned in the grievance as receiving preferential treatment. As such, the facts of his case are also outlined in this response:

Officer Lowe was injured on June 21, 2022 and had a work release form that stated he could return to work on June 23, 2022, but only could have desk work. Officer Lowe followed up with the Department of Corrections about working modified duty. With the documentation he initially provided, there was not enough information to determine if Officer Lowe had a disability. As such, additional follow up was requested. Officer Lowe's medical provider completed an additional form on July 15, 2022 stating that he was currently non-weight bearing. Further documentation from his medical provider on July 20, 2022 stated that Officer Lowe was not able to bend, squat, or climb.

The documentation provided by Officer Lowe's medical provider was that Officer Lowe had a physical or mental impairment that substantially limited one or more of his major life activities. Because Officer Lowe was not able to perform his current position because of his disability, he was able to perform a light duty job with or without accommodation, and the reassignment would not impose an undue hardship, Officer Lowe was provided modified duty. Officer Lowe began working modified duty on July 26, 2022, for an expected period of 3-4 months as outlined by the medical provider.

#### E. Conclusion

The Department did not seek out modified duty for Officer Lowe. Officer Lowe completed ADA paperwork indicating that he had a disability and was unable to perform his current position because of a disability. Unlike Officer Lowe, Officers Ostgaard, Waggoner and Hughes did not file ADA paperwork indicating that they had a disability and needed accommodations prior to the filing of this grievance.

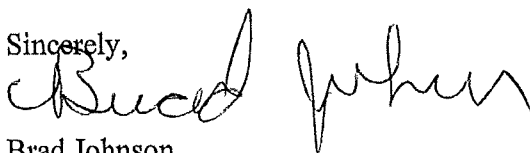
The Department has not violated the bargaining agreement. Specifically, the Department has not violated Article 7 of the FOP #32 bargaining agreement. The Department has treated all these

individuals the same. The difference is the individuals following up with the Department. When there was a need for additional information, some of the individuals followed up and provided that additional information. Others, such as Officer Hughes and Officer Waggoner, did not do so and have only attempted to do so after the filing of this grievance. As such, the Department could not give those individuals modified duty as it was not known whether those individuals could work; there was no information about the physical limitations of those individuals or how long those physical conditions may last. The Department of Corrections treated these individuals the same and has followed the bargaining agreement.

Furthermore, there has been no violation of Lancaster County Personnel Rule 2.5. As previously outlined, the Department of Corrections treated all these individuals the same. The difference was the documentation and follow up by the individuals.

There has been no violation of the bargaining agreement or the personnel rules and as such, the grievance is denied.

Sincerely,

A handwritten signature in black ink, appearing to read "Brad Johnson". The signature is fluid and cursive, with the first name "Brad" being more prominent than the last name "Johnson".

Brad Johnson,  
Director, Lancaster County Department of Corrections

cc: Barb McIntyre, Human Resources Director  
Ashley J. Bohnet, Deputy County Attorney

IN RE GRIEVANCE OF FOP 32 ON BEHALF ) August 15, 2022  
OF ALL MEMBERS IMPACTED, INCLUDING )  
CAITLIN OSTGAARD, MATTHEW WAGGONER )  
AND JOHN HUGHES )

TO: Bradley Johnson, Department Head, or his designated representative

FROM: Fraternal Order of Police Lodge #32, on behalf of all bargaining unit members impacted, including Caitlin Ostgaard, Matthew Waggoner and John Hughes.

COMES NOW Fraternal Order of Police Lodge #32 on behalf of all bargaining unit members affected, including Caitlin Ostgaard, Matthew Waggoner, and John Hughes, for their grievance state as follows:

NATURE OF GRIEVANCE AND ACTS OF COMMISSION OR OMISSION GRIEVED:

Beginning September 1, 2018, the Department implemented its modified duty program, whereby it permitted only employees who suffered work-related injuries to work modified duty.

In 2021, Corrections Officer Caitlin Ostgaard suffered from seizures. CO Ostgaard was forced off work until she was cleared to return for full duty, and she was never offered a modified duty assignment. As a result, CO Ostgaard depleted her FMLA and paid leave banks. She ultimately returned to full duty in 2022 after a significant time off duty without any pay.

In 2022, Corrections Officer John Hughes suffered a knee injury off duty. CO Hughes' physician approved Hughes to work his regular hours—but not mandatory overtime—pending his surgery. Despite this clearance, the Department forced CO Hughes off work because of the MOT restriction and never offered him a modified duty assignment. As a result, CO Hughes depleted his FMLA and paid leave banks, and went into a without pay status.

In 2022, Officer Matt Waggoner suffered a knee injury off duty. Officer Waggoner requested to work light duty on January 24, 2022, but was informed by Elisha Havick that "Modified duty is only available to folks who are on work comp." As a result, Officer Waggoner depleted his FMLA and paid leave banks.

In or about August 2, 2022, FOP #32 became aware that Officer Ryan Lowe suffered a non-work related knee injury. Despite barring other employees—including Officers Ostgaard, Hughes, and Waggoner—from returning to work on a modified duty status, the Department offered and permitted Officer Lowe to return to work on modified duty status on August 2, 2022. As a result, Officer Lowe was *not* required to deplete his FMLA or paid leave banks like the other officers.

On August 4, 2022, FOP #32 counsel inquired about the process for Officer Hughes—who remains on FMLA leave following his knee surgery—to return to work on a modified duty status, given Officer Lowe’s return to work on modified duty despite suffering a non-work-related injury. Assistant Lancaster County Attorney Ashley Bohnet responded: “These situations are different. Officer Lowe was not out on FMLA leave and requested to come back to a modified or lite duty. Officer Hughes is out of FMLA and is wanting to come back. As such, there is no process [for returning to work on modified duty].” Ms. Bohnet stated she would “follow up regarding what would be the impact of being out on FMLA and coming back to a modified situation.” Ms. Bohnet has failed to follow up and Officer Hughes has remained out on FMLA leave despite requesting to return to a modified duty assignment like Officer Lowe.

Under Article 7 of the FOP #32 bargaining agreement, the County agreed not to discriminate against any employees on the basis of “disability.” Similarly, Lancaster County Personnel Rule 2.5 states “Discrimination against any person in . . . compensation and benefits . . . or any other aspect of employment or personnel administration because of . . . disability . . . is prohibited.” Article 8 of the bargaining agreement also permits employees to grieve the lack of “uniform enforcement of express provisions of this Agreement, the Rules, and any and all conditions of employment.”

The Department’s granting of modified duty to Officer Lowe, but refusal to offer or permit Officers Hughes, Osgtaard, Waggoner, and others, is a violation of Article 7 of the FOP #32 bargaining agreement and Lancaster County Personnel Rule 2.5, and represents a failure to apply “uniform enforcement of express provisions of this Agreement the Rules, and any and all conditions of employment” within the meaning of Article 8 of the bargaining agreement.

DATE OF ACTION GRIEVED: FOP #32 became aware of this violation on August 2, 2022.

IDENTITY OF GRIEVING PARTIES: FOP #32 on behalf of all affected unit members, including Officers Ostgaard, Hughes, and Waggoner.

IDENTITY OF PERSONS ALLEGED

TO HAVE CAUSED GRIEVANCE: Director Brad Johnson, Ashley Bohnet, Elisha Havick and other unknown parties.

PROVISIONS OF AGREEMENT

THAT WERE VIOLATED: Articles 7 and 8 of the bargaining agreement and Personnel Policy Bulletin 2013-4, Lancaster County Personnel Rule 2.5.

REMEDY SOUGHT: The Department shall cease and desist from failing to uniformly apply its modified duty program, and to cease and desist barring employees who suffer non-work-related injuries from working modified duty. The Department shall make modified duty available to non-work-related injuries, as it has done with

Officer Lowe, and shall specify the process for doing so. The Department shall stop discriminating against Corrections Officers who have suffered non-work-related injuries and barring them from working modified duty on the basis that their injury was non-work related or FMLA-qualifying.

The Department should restore the leave and FMLA banks of Officers Ostgaard, Hughes, and Waggoner due to the Department's refusal to permit such officers to work modified duty, in violation of Article 7 and Lancaster County Personnel Rule 2.5, and should pay them back for any time they went into a without pay status.

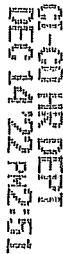
Respectfully submitted this 15<sup>th</sup> day of August, 2022.

FOP #32, on behalf of its members, including  
Officers Ostgaard, Hughes, and Waggoner

BY: /s/Thomas P. McCarty  
Thomas P. McCarty, Esq. (#24171)  
*Keating, O'Gara, Nedved & Peter, P.C.*  
200 South 21<sup>st</sup> Street, Suite 400  
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Fax: (402) 475-8328

Attorney for the Grievant

# KEATING | O'GARA



Gary J. Nedved  
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Gary L. Young  
Joel D. Nelson

Joel Bacon  
Thomas P. McCarty  
Tara L. Gardner-Williams  
Brenna M. Grasz  
Braden W. Storer

EMERITI:  
Con M. Keating  
Robert M. O'Gara

December 14, 2022

Barb McIntyre  
Lancaster County Human Resources Director  
555 South 10<sup>th</sup> Street  
Lincoln, NE 68508  
[bmcintyre@lincoln.ne.gov](mailto:bmcintyre@lincoln.ne.gov)

RE: FOP #32 Appeal of Grievance Denial

Dear Ms. McIntyre:

On or about November 22, 2022, FOP #32 filed a grievance on behalf of all bargaining unit members, including Madara Smith, regarding the County's violation of Personnel Policy Bulletin 2013-4, as negotiated and agreed upon by the County and FOP #32. On or about December 13, 2022, Director Johnson denied the Grievance but did not challenge the underlying facts set forth in the Grievance. A true and correct copy of the Grievance and Grievance Denial are attached hereto.

FOP #32 hereby appeals Director Johnson's denial of said Grievance to the Lancaster County Personnel Policy Board in accordance with Step 2 of the grievance procedure set forth in the bargaining agreement between FOP #32 and Lancaster County and the Lancaster County Personnel Rules.

Very truly yours,

/s/Thomas P. McCarty

Thomas P. McCarty  
FOR THE FIRM

cc: Ashley Bohnet, Deputy Lancaster County Attorney

IN RE GRIEVANCE OF FOP 32 ON BEHALF  
OF ALL MEMBERS IMPACTED, INCLUDING  
MADARA SMITH

)  
) November 22, 2022  
)

TO: Bradley Johnson, Department Head, or his designated representative

FROM: Fraternal Order of Police Lodge #32, on behalf of all bargaining unit members impacted, including Madara Smith.

COMES NOW Fraternal Order of Police Lodge #32 on behalf of all bargaining unit members affected, including Madara Smith, and for their grievance state as follows:

NATURE OF GRIEVANCE AND ACTS OF COMMISSION OR OMISSION  
GRIEVED:

During negotiations for the 2018 bargaining agreement between FOP #32 and the County, the County requested, for the first time, to implement a modified duty policy at the Lancaster County Department of Corrections. Those present at the bargaining table for the County included Doug McDaniel, Kristy Bauer, Brad Johnson, and Ken Prey. The County's proposal was to implement Personnel Policy Bulletin 2013-4 at the jail. Personnel Policy Bulletin 2013-4, which was provided to the Union during negotiations, is a Worker's Compensation Policy that expressly applies solely to injuries "arising out of and in the course of . . . employment." Under Paragraph III of the Bulletin, "Modified Duty will be allowed *only as specified in Paragraph VII herein.*" (emphasis added). Paragraph VII then states, "A department . . . may offer modified duty to status and probationary employees *who have suffered a work related injury.*" (emphasis added). Thus, the Bulletin expressly limits modified duty assignments to work-related injuries.

During negotiations, the County rejected the Union's requests to reference or place the Bulletin in the bargaining agreement. When counsel for the Union expressed concern about this, Mr. McDaniel explained the County simply did not want to make the contract unnecessarily lengthy. When the Union expressed concern that the County would later attempt to unilaterally change the policy without bargaining, both Director Johnson and Ms. Bauer dismissed those concerns, asserting that the Director Johnson was willing to work with the Union if any changes needed to be made to the policy (through LMC meetings or otherwise). Later, Mr. McDaniel reassured that any changes to the Bulletin would also need to be presented to the Personnel Policy Board because the Bulletin is a Personnel Policy Bulletin. Based on these repeated assurances, the Union took the County, Director Johnson, Ms. Bauer, and Mr. McDaniel at their word. After that date, the bargaining agreement was ratified and the modified duty program was implemented at the Department of Corrections. Until sometime in 2022, the Department, in accordance with the Bulletin, reserved modified duty positions solely for work-related injuries. The County has never attempted to negotiate any changes to the Bulletin—during LMC meetings or at negotiations for the most recent bargaining agreement—and it has never attempted to petition the Personnel Policy Board to change the language of the Bulletin.

In or about November 2022, Corrections Officer Madara Smith suffered a work-related injury. Officer Smith was cleared to work modified duty by her treating physician and presented Elisha Havick with her physician's certification on or about November 21, 2022. At that time, Havick informed Officer Smith that there were no modified duty

posts available for Officer Smith to work. Upon information and belief, the Department has recently—without consulting, negotiating, or speaking with the Union or Personnel Policy Board—limited modified-duty assignments to a total of 3 officers across shifts, and has also allowed employees who have suffered *non-work-related* injuries to take those assignments. Upon information and belief, Officer Smith's work-related injury has been given less priority than a non-work-related injury despite the agreed-upon provisions of Personnel Policy Bulletin 2013-4. As a result, Officer Smith will be required to use injury leave, other leave, and may suffer loss of leave accrual and/or pay or other benefits that she would not lose if she was permitted to work modified duty.

DATE OF ACTION GRIEVED: FOP #32 became aware of this violation on November 21, 2022.

IDENTITY OF GRIEVING PARTIES: FOP #32 on behalf of all affected unit members, including Officer Smith.

IDENTITY OF PERSONS ALLEGED

TO HAVE CAUSED GRIEVANCE: Director Brad Johnson, Elisha Havick and other unknown parties.

PROVISIONS OF AGREEMENT

THAT WERE VIOLATED: Personnel Policy Bulletin 2013-4, as negotiated and agreed upon by the County and FOP #32.

REMEDY SOUGHT: The Department shall not afford employees who suffer non-work-related injuries priority when granting modified duty positions. The Department shall honor its promise of negotiating any changes to Personnel Policy Bulletin 2013-4 with the Union, and allowing the Personnel Policy Board to consider any changes to the Bulletin. The Department and County shall place Officer Madara Smith in the same position she would have been in had she been permitted to work light duty as of November 21, 2022, which shall include but shall not be limited to back pay, restored leave banks, and restored leave accruals.

Respectfully submitted this 22<sup>nd</sup> day of November, 2022.

FOP #32, on behalf of its members, including  
Officer Madara Smith.

BY: /s/Thomas P. McCarty  
Thomas P. McCarty, Esq. (#24171)  
*Keating, O'Gara, Nedved & Peter, P.C.*  
200 South 21<sup>st</sup> Street, Suite 400  
Lincoln, Nebraska 68501  
Ph: (402) 475-8230  
Fax: (402) 475-8328

Attorney for the Grievant

# Lancaster County

## Department of Corrections

3801 West O Street  
Lincoln, NE 68528  
(402) 441-1900  
Fax: 441-8946

Brad Johnson, Director

December 13, 2022

Tom McCarty  
Keating, O'Gara, Nedved & Peter, P.C.  
200 S. 21<sup>st</sup> Street, Suite 400  
Lincoln, NE 68510

RE: IN RE GRIEVANCE OF FOP 32, INCLUDING MADARA SMITH

Dear Mr. McCarty:

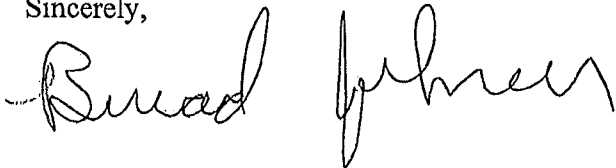
This letter will serve as a response to the grievance received November 22, 2022, regarding an alleged violation of Personnel Policy Bulletin 2013-4 by not giving her priority over non-work-related injuries to receive modified duty.

The grievance provides the facts as follows: On or about October 27, 2022, Correction Officer Madara Smith suffered a work-related injury. Officer Smith was cleared to work modified duty by her treating physician and presented Elisha Havick with her physician's certifications on or about November 21, 2022. At that time, Officer Smith was informed that there were no modified duty positions available.

Personnel Policy Bulletin 2013-4 states that a "department, based upon operational needs and at the department head's discretion, may offer modified duty to status and probationary employees who have suffered a work-related injury." The decision to offer or not offer modified duty is the sole decision of the department head and is based upon operational needs. There is no specific number of modified duty positions that must be available under the policy.

Officer Smith's work-related injury was not given less priority than a non-work-related injury. She was not given preferential treatment based on her work-related injury. Instead, Officer Smith was given the same treatment as individuals with non-work-related injuries and others with work-related injuries. As such, the Department did not violate Personnel Policy Bulletin 2013-4. For these reasons, the grievance is denied.

Sincerely,



Brad Johnson  
Corrections Director

cc: Barb McIntyre, Human Resources Director  
Ashley J. Bohnet, Deputy County Attorney

# KEATING | O'GARA

|                   |                          |                          |
|-------------------|--------------------------|--------------------------|
| Gary J. Nedved    | Joel D. Nelson           | Brenna M. Grasz          |
| Paul J. Peter     | Joel Bacon               | Alyssa R. Slama          |
| Anne E. Winner    | Thomas P. McCarty        | Remington S. Slama       |
| Jefferson Downing | Tara L. Gardner-Williams | Milissa D. Johnson-Wiles |
| Gary L. Young     |                          |                          |

RECEIVED  
FEB 23 2023

OF COUNSEL:  
Doug Peterson  
EMERITI:  
Con M. Keating  
Robert M. O'Gara

January 24, 2023

Barb McIntyre  
Lancaster County Human Resources Director  
555 South 10<sup>th</sup> Street  
Lincoln, NE 68508  
[bmcintyre@lincoln.ne.gov](mailto:bmcintyre@lincoln.ne.gov)

RE: FOP #32 Appeal of Grievance Denial

Dear Ms. McIntyre:

On January 19, 2023, FOP #32 filed a grievance on regarding the County's violations of Personnel Policy Bulletin 2013-4, as negotiated and agreed upon by the County and FOP #32. A true and correct copy of the Grievance is attached hereto. On or about January 24, 2023, Director Brad Johnson denied the grievance. A true and correct copy of Director Johnson's Grievance denial is attached hereto.

FOP #32 hereby appeals Director Johnson's denial of said Grievance to the Lancaster County Personnel Policy Board in accordance with Step 2 of the grievance procedure set forth in the bargaining agreement between FOP #32 and Lancaster County and the Lancaster County Personnel Rules.

Very truly yours,

/s/Thomas P. McCarty  
Thomas P. McCarty  
FOR THE FIRM

CC: Ashley Bohnet, Deputy Lancaster County Attorney

IN RE GRIEVANCE OF FOP 32 ON BEHALF )  
OF ALL MEMBERS IMPACTED, INCLUDING ) January 19, 2023  
LYNN KEMPER )

TO: Bradley Johnson, Department Head, or his designated representative

FROM: Fraternal Order of Police Lodge #32, on behalf of all bargaining unit members impacted, including Lynn Kemper.

COMES NOW Fraternal Order of Police Lodge #32 on behalf of all bargaining unit members affected, including Lynn Kemper, and for their grievance state as follows:

NATURE OF GRIEVANCE AND ACTS OF COMMISSION OR OMISSION  
GRIEVED:

During negotiations for the 2018 bargaining agreement between FOP #32 and the County, the County requested, for the first time, to implement a modified duty policy at the Lancaster County Department of Corrections. Those present at the bargaining table for the County included Doug McDaniel, Kristy Bauer, Brad Johnson, and Ken Prey. The County's proposal was to implement Personnel Policy Bulletin 2013-4 at the jail. Personnel Policy Bulletin 2013-4, which was provided to the Union during negotiations, is a Worker's Compensation Policy that expressly applies solely to injuries "arising out of and in the course of . . . employment." Under Paragraph III of the Bulletin, "Modified Duty will be allowed *only as specified in Paragraph VII herein.*" (emphasis added). Paragraph VII then states, "A department . . . may offer modified duty to status and probationary employees *who have suffered a work related injury.*" (emphasis added). Thus, the Bulletin expressly limits modified duty assignments to work-related injuries.

During negotiations, the County rejected the Union's requests to reference or place the Bulletin in the bargaining agreement. When counsel for the Union expressed concern about this, Mr. McDaniel explained the County simply did not want to make the contract unnecessarily lengthy. When the Union expressed concern that the County would later attempt to unilaterally change the policy without bargaining, both Director Johnson and Ms. Bauer dismissed those concerns, asserting that the Director Johnson was willing to work with the Union if any changes needed to be made to the policy (through LMC meetings or otherwise). Later, Mr. McDaniel reassured that any changes to the Bulletin would also need to be presented to the Personnel Policy Board because the Bulletin is a Personnel Policy Bulletin. Based on these repeated assurances, the Union took the County, Director Johnson, Ms. Bauer, and Mr. McDaniel at their word. After that date, the bargaining agreement was ratified and the modified duty program was implemented at the Department of Corrections. Until sometime in 2022, the Department, in accordance with the Bulletin, reserved modified duty positions solely for work-related injuries. The County has never attempted to negotiate any changes to the Bulletin—during LMC meetings or at negotiations for the most recent bargaining agreement—and it has never attempted to petition the Personnel Policy Board to change the language of the Bulletin.

On or about January 14, 2023, Corrections Officer Lynn Kemper suffered a work-related injury. Officer Kemper was cleared to work modified duty by his treating physician and presented Elisha Havick with his physician's certification on or about January 18, 2023. At that time, Havick informed Officer Kemper that there were no modified duty posts available for Officer Kemper to work. Upon information and belief, the Department has

recently—without consulting, negotiating, or speaking with the Union or Personnel Policy Board—limited modified-duty assignments to a total of 3 officers across shifts, and has also allowed employees who have suffered *non-work-related* injuries to take those assignments. Upon information and belief, Officer Kemper's work-related injury has not been given greater priority for a modified duty position than a non-work-related injury despite the agreed-upon provisions of Personnel Policy Bulletin 2013-4. As a result, Officer Kemper will be required to use injury leave, other leave, and may suffer loss of leave accrual and/or pay or other benefits that he would not lose if he was permitted to work modified duty.

DATE OF ACTION GRIEVED: FOP #32 became aware of this violation on January 19, 2023.

IDENTITY OF GRIEVING PARTIES: FOP #32 on behalf of all affected unit members, including Officer Kemper.

IDENTITY OF PERSONS ALLEGED

TO HAVE CAUSED GRIEVANCE: Director Brad Johnson, Elisha Havick and other unknown parties.

PROVISIONS OF AGREEMENT

THAT WERE VIOLATED: Personnel Policy Bulletin 2013-4, as negotiated and agreed upon by the County and FOP #32.

REMEDY SOUGHT: The Department shall not afford employees who suffer non-work-related injuries priority when granting modified duty positions. The Department shall honor its promise of negotiating any changes to Personnel Policy Bulletin 2013-4 with the Union, and allowing the Personnel Policy Board to consider any changes to the Bulletin. The Department and County shall place Officer Lynn Kemper in the same position he would have been in had he been permitted to work light duty as of January 18, 2023, which shall include but shall not be limited to back pay, restored leave banks, and restored leave accruals.

Respectfully submitted this 19<sup>th</sup> day of January, 2023.

FOP #32, on behalf of its members, including  
Officer Lynn Kemper.

BY: /s/Thomas P. McCarty  
Thomas P. McCarty, Esq. (#24171)  
*Keating, O'Gara, Nedved & Peter, P.C.*  
200 South 21<sup>st</sup> Street, Suite 400  
Lincoln, Nebraska 68501  
Ph: (402) 475-8230  
Fax: (402) 475-8328

Attorney for the Grievant

# Lancaster County

## Department of Corrections

3801 West O Street  
Lincoln, NE 68528  
(402) 441-1900  
Fax: 441-8946

Brad Johnson, Director

January 24, 2023

Tom McCarty  
Keating, O'Gara, Nedved & Peter, P.C.  
200 S. 21<sup>st</sup> Street, Suite 400  
Lincoln, NE 68510

RE: IN RE GRIEVANCE OF FOP 32, INCLUDING LYNN KEMPER

Dear Mr. McCarty:

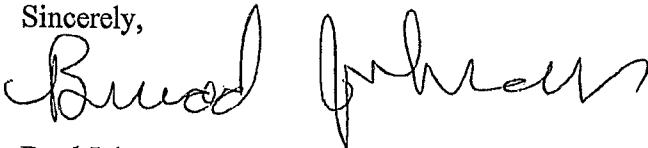
This letter will serve as a response to the grievance received January 19, 2023, regarding an alleged violation of Personnel Policy Bulletin 2013-4 by not giving him priority over non-work-related injuries to receive modified duty.

The grievance provides the facts as follows: On or about January 14, 2023, Corrections Officer Lynn Kemper suffered a work-related injury. Officer Kemper was cleared to work modified duty by his treating physician and presented Elisha Havick with his physician's certifications on or about January 18, 2023. At that time, Officer Kemper was informed that there were no modified duty positions available.

Personnel Policy Bulletin 2013-4 states that a "department, based upon operational needs and at the department head's discretion, may offer modified duty to status and probationary employees who have suffered a work-related injury." The decision to offer or not offer modified duty is the sole decision of the department head and is based upon operational needs. There is no specific number of modified duty positions that must be available under the policy.

Officer Kemper's work-related injury was not given less priority than a non-work-related injury. He was not given preferential treatment based on his work-related injury. Instead, Officer Kemper was given the same treatment as individuals with non-work-related injuries and others with work-related injuries. The Department did not violate Personnel Policy Bulletin 2013-4. For these reasons, the grievance is denied.

Sincerely,



Brad Johnson  
Corrections Director

cc: Barb McIntyre, Human Resources Director  
Ashley J. Bohnet, Deputy County Attorney