

December 14, 2022

**TO:** County Personnel Policy Board Members  
**SUBJECT:** Personnel Policy Board Meeting  
Wednesday, December 21, 2022  
**8:00am.**, Commissioners Hearing Room  
County-City Building, Room 112

NOTE: Special Meeting Date and Time
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**A G E N D A**

ITEM 1: Approve Minutes from December 1, 2022 meeting.

ITEM 2: Request to create the following classification:

<u>CLASS CODE</u>	<u>CLASS TITLE</u>	<u>PAY GRADE</u>
5768	Community Corrections Program Supervisor	C10 (\$51,097.28 – \$65,453.44)

ITEM 3: Request to amend County Rule 19.12 - Requirements as to Continuous Service.

ITEM 4: Request to amend the Workers' Compensation Human Resources Policy Bulletin.

ITEM 5: Request to create the Protected Family Leave Human Resources Policy Bulletin.

ITEM 6: Request for grievance hearing - FOP32 - Caitlin Ostgaard - Matt Waggoner - Modified Duty - Corrections.

ITEM 7: Miscellaneous Discussion

pc: Department Heads  
Ashley Bohnet  
Tom McCarty  
Caitlin Ostgaard  
Matthew Waggoner  
Kristy Bauer

LANCASTER COUNTY  
COMMUNITY CORRECTIONS PROGRAM SUPERVISOR

#### NATURE OF WORK

This is advanced human service work with direct responsibility for the supervision of an identified program area operating within the Department of Community Corrections.

Work involves monitoring the daily needs and activities of the program to provide continuity of services for clients, the department and other criminal justice partners. Work also involves organization of activities in other department areas of operation including participation and leadership in department committees. In addition, an employee in this class is responsible for maintaining records and monitoring quality improvement functions in accordance with best practice standards and evidence-based practices. Incumbents of this class are expected to carry a caseload in their area of expertise and participate in all program functions including multidisciplinary team activities and are subject to afterhours program support. Supervision is received from the Program Manager.

#### EXAMPLES OF WORK PERFORMED

Reviews daily activities of the specified program areas to provide continuity of services to clients, program staff, the department and other criminal justice partners.

Trains new staff in program area to ensure program guidelines and parameters and standard operating procedures are implemented.

Supports program staff to promote optimal team functioning in a dynamic criminal justice environment where change and accommodation is often necessary.

Develop and maintains a current, up to date policy and procedural guide for the daily operations of Community Corrections to remain in compliance with best practice and evidence-based standards.

Performs a leadership function on other identified Department Policy and Development Committees.

Work jointly with agency representatives to coordinate necessary client services.

Carries a case load in the program area of expertise and perform all duties as a Community Corrections Case Worker or Mental Health Specialist.

#### DESIRABLE KNOWLEDGE, ABILITIES, AND SKILLS

Considerable knowledge of sociological, behavioral and cultural factors influencing the behavior and attitudes of people.

Considerable knowledge of the laws, statutes and ordinances covering the requirements of persons served by Community Corrections.

Considerable knowledge of best practice standards and evidence-based practices in the field of Criminal Justice.

Considerable knowledge of functions and services of community organizations and agencies.

Ability to communicate effectively both orally and in writing.

Ability to establish and maintain effective working relationships with clients, staff and criminal justice systems personnel.

#### MINIMUM QUALIFICATIONS

Graduation from an accredited four-year college or university with major coursework in business, psychology, sociology or related field plus three years of experience case managing activities of individuals participating in a program under the administration of the Department of Community Corrections or any equivalent combination of training and experience that provides the desirable knowledge, abilities and skills.

12/22

PS5768

## **19.12 Requirements as to Continuous Service (~~Revised 11/02~~ Revised 12/22)**

Length of service requirements for increased vacation leave and for other purposes, as specified in these Rules, shall be based on the employee's continuous service with the County. Continuous service with the County means employment without a break or interruption; provided that any absence or authorized leave without pay or by reason of layoff for thirty (30) consecutive calendar days or less shall not affect the continuity of service. Leaves without pay and layoffs for a period in excess of thirty (30) consecutive calendar days shall be deducted in computing the total length of service with the County and the employee's eligibility date will be adjusted accordingly. Absences related to a protected leave event including, but not limited to, Family and Medical Leave Act leave, Nebraska Fair Employment Practice leave and Protected Family Leave shall not be deducted in computing total length of service.

# Human Resources Policy Bulletin

Number: 2023-2-2013-4

Lancaster County  
December, 2013

Date: February 2023,

Reference:	Title:
<del>Supersedes</del> <u>Supersedes</u> Personnel Policy Bulletin 2013-405-2	WORKERS' COMPENSATION POLICY

## WORKERS' COMPENSATION POLICY

**I. Purpose.** To insure fair, equitable and consistent treatment of all County employees, the Lancaster County Risk Management Division complies with the Nebraska Workers' Compensation Act, Union Bargaining Agreements, Lancaster County Personnel Policies, Nebraska Workers' Compensation Court Rules, Human Resources Policy Bulletins and other applicable policies.

**II. Workers' Compensation Defined.** Workers' Compensation benefits are provided to eligible employees who sustain injury by accident or occupational disease arising out of and in the course of their employment, and who are not willfully negligent at the time of the injury.

**III. Reporting Requirements.** Any job related injury or disease shall be immediately reported to the employee's department head or available supervisor as soon as possible. The department shall immediately report the incident to the County Risk Manager. A "First Report of Alleged Occupational Injury or Illness", completed by the employee and an "Employee Injury or Illness Report", completed by the injured employee and his/her supervisor, shall ~~be~~ forwarded to the County Risk Management Officer in all ~~cases.~~ cases. If the employee has a minor injury and did not seek medical treatment, then the "Report of Minor Employment Injury" form shall be completed by the employee and the supervisor and sent to the County Risk Management Office. (See attached sample forms). The employee will have the burden of proof to document the claim by submitting an injury report and medical evidence to support his or her ~~claim.~~ claim.

~~County Risk Management will investigate the claim to determine if it should be approved as a workers' compensation injury. During this investigation the employee may elect to use other leave options such as sick leave, vacation or personal holiday. If the claim is approved by Risk Management the injured employee's department will convert any sick leave, vacation or personal holiday hours paid to the employee, to injury leave, for hours missed during the first 10 working days. If sick leave, vacation, or holiday pay is paid during a period of Temporary Total Disability beyond 10 working days the employee will be credited for two-thirds (.6667) of all such hours used during the period of disability.~~

**IV. Medical Documentation.** Employees requesting time off work due to a work-related injury or disease must provide medical documentation that states he/she is unable to perform his/her normal work duties. All medical documentation must be provided to the Risk Manager. Prior to returning to duty, the employee must provide a ~~full~~ medical release from a medical provider which specifies all restrictions, if any, upon the employee's ability to perform his or her full range of duties. Modified Duty ~~may~~ will be allowed only as specified in Paragraph VIII herein.

**V. Injury Leave.** All probationary or status classified employees who are off of work for a compensable injury shall receive injury leave benefits pursuant to County Rule 19.4 - Injury Leave,

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Lancaster County  
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or the employee's applicable labor contract. Such injury leave shall not be deducted from vacation or sick leave credits and will be listed as injury leave on the employee paycheck.

Failure to immediately report an accident which resulted in an injury may cause forfeiture of injury leave ~~this additional benefit~~.

Unclassified employees, other than sheriff deputies, are not entitled to injury leave but are entitled to workers' compensation benefits provided in the Nebraska Workers' Compensation Act.

County Risk Management will investigate the claim to determine if it should be approved as a workers' compensation injury. During this investigation the employee may elect to use other leave options such as sick leave, vacation or personal holiday. If the claim is approved by Risk Management the injured employee's department will convert any sick leave, vacation or personal holiday hours paid to the employee, to injury leave, for hours missed during the first 10 working days. If sick leave, vacation, or holiday pay is paid during a period of Temporary Total Disability beyond 10 working days the employee will be credited for two-thirds (.6667) of all such hours used during the period of disability.

**V.VI. Temporary Total Disability Benefits.** If injury leave has expired and the employee still requires time off work, the employee is eligible to receive Temporary Total Disability workers' compensation benefits (TTD) administered by Risk Management. TTD is based on two-thirds (.6667) of the employee's Average Weekly Wage (AWW) at the time of the injury, with a maximum benefit set each year by the Nebraska Workers' Compensation Act. AWW is established from a wage history covering the time period 26 weeks prior to the date of the injury.

All employees have the option of supplementing the amount of TTD benefits received with sick, vacation or personal holiday hours so that the benefit equals the employee's normal salary for the pay period. It is the employee's responsibility to inform his/her department head that he/she intends to supplement workers' compensation benefits with paid leave. No employee shall receive a salary (workers' compensation plus regular pay or paid leave) in excess of his/her normal wage.

**V.VII. Temporary Partial Disability Benefits.** If the employee can return to work on a part-time basis and provides the department head written permission from his/her medical provider to do so, the employee will receive injury leave, if not yet expired, or Temporary Partial Disability (TPD) if all injury leave has expired, for the amount of time still spent away from work. TPD is calculated as the Average Weekly Wage at the time of the injury minus salary earned for the week(s) in question

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and then multiplied by .6667. Again, employees may opt to supplement their TPD benefits with eligible paid leave benefits in order to equal a full paycheck in the manner described in Paragraph V., above.

**VII.VIII. Modified Duty and Recovery Time.** 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. Prior to modified duty being approved, the employee must provide medical documentation from his/her treating physician which states the employee is unable to perform the essential duties of his/her current position but is able to work a modified duty assignment. Modified duty is considered temporary and will be reviewed three months after the assignment to determine whether it will be extended beyond the initial three-month period.

The maximum amount of recovery time, including modified duty, should not exceed 6 calendar months from the date of injury. If the employee is unable to cannot return to full duty after 6 months from the date of injury, the employee may be separated from employment. However, if the employee provides medical documentation indicating a strong likelihood that the employee can return to full duty within a reasonable time period, the department head may extend the recovery time depending upon business needs and pursuant to the Americans with Disabilities Act (ADA), if applicable. Likewise, if the employee can perform the essential functions of his/her position with some modifications, the department will make reasonable efforts to accommodate the employee. If the employee cannot return to full duty and there are no reasonable accommodations available, the employee may be eligible for workers' compensation benefits such as retraining or vocational rehabilitation.

**VIII.IX. Insurance Premiums And Other Benefits.** Health insurance, dental insurance and other applicable insurance benefits will continue with the appropriate employer contribution. Employees must continue to pay the employee share of the insurance premiums and are responsible for coordinating payment of said premiums with the County Clerk's Office.

In order to continue accruing vacation and sick leave hours, and to qualify for holiday pay, an employee must be in a pay status. Vacation and sick leave hours will accrue based upon the number of hours the employee is in a pay status. To be in a pay status the employee must request that his/her workers' compensation benefits be supplemented with available paid leave benefits in order to equal a full paycheck in the manner described in Paragraph V. If the employee is not supplementing his workers' compensation benefits with available paid leaves, the employee is in a ~~non-paynon-pay~~ status.

In order to qualify for holiday pay an employee must be in pay status on his/her regular ~~work~~ dayworkday immediately before and after the holiday. If a holiday occurs during the time period

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injury leave is paid, holiday hours are paid in lieu of injury leave hours. If a holiday occurs after injury leave has expired and the employee is receiving workers' compensation benefits, the employee

will receive holiday pay only if the employee is in a pay status on his/her regular ~~work day~~ workday immediately before and immediately after the holiday. An employee in pay status shall receive enough holiday hours to a figure equivalent to a full ~~work day~~ workday for that day. The employee should not receive the full eight hours of holiday pay. An employee on workers' compensation leave who is not supplementing his/her leave with paid benefits, is not in a pay status and therefore does not qualify for holiday pay.

Pursuant to County Personnel Rule 19.7, the Personnel Officer must be notified in writing when an employee's leave without pay status exceeds thirty (30) calendar days. Additionally, any employee on leave without pay status exceeding thirty (30) calendar days will have their eligibility date adjusted pursuant to County Personnel Rule 19.12.

**IX.X. Other Provisions.** This policy should be read in conjunction and coordinated with all applicable contract provisions, personnel rules and all state and federal laws including, but not limited to, the Nebraska Workers' Compensation Act, the Americans With Disabilities Act (ADA) and the Family and Medical Leave Act (FMLA).

## **XI. Family and Medical Leave Act Benefits**

~~Employees are required to use all accrued paid leave in the event of an FMLA qualifying leave. The unpaid FMLA leave will run concurrently with other paid leaves including injury leave and workers' compensation. Unpaid FMLA leave will run concurrently with paid leaves (sick leave, personal holidays, vacation (accrued and banked), injury leave, holiday, and workers' compensation leave.~~

\_\_\_\_\_  
Barb McIntyre  
Human Resources Director

\_\_\_\_\_  
Date

\_\_\_\_\_  
Chair  
Board of County Commissioners

\_\_\_\_\_  
Date



# Human Resources Policy Bulletin

Lancaster County

Number: 2023-3

Date: February 1, 2023

Reference:	Title:
	Protected Family Leave

## I. PURPOSE

This purpose of this policy is to provide unpaid job protected leave time for spouses employed by Lancaster County who exhaust Family Medical Leave for the birth, placement, care or bonding of a child within the first year of the child's birth or placement.

## II. ELIGIBILITY

Employees who have been employed for at least 12-months and have worked at least 1,250 hours during the preceding 12-month leave period.

## III. PROTECTED FAMILY LEAVE

- A. Protected Family Leave. If spouses both work for Lancaster County and request leave for the birth, placement, care or bonding of a child within the first year after birth or placement, each spouse will be eligible for up to 12 workweeks of unpaid job protected leave in a 12-month period. The 12 workweeks will include a combination of approved Family Medical Leave and Protected Family Leave. Family Medical Leave must be exhausted prior to using Protected Family Leave.
- B. Effect on Paid Leaves. Protected Family Leave will run concurrently with paid leaves (sick leave, personal holidays, and vacation, accrued and banked). Following the exhaustion of applicable paid leave, any remaining Protected Family Leave will be unpaid.
- C. Application and Eligibility. The FMLA application each employee submits to the Human Resources Leave Manager will be used to request Protected Family Leave. If each spouse qualifies for FMLA leave, the spouses qualify for Protected Family Leave.
- D. Types and Duration of Leave. Protected Family Leave may be taken on a continual leave schedule or an intermittent/reduced leave schedule, based on the qualifying employees' family need.
- E. Benefits During Leave. During a period of Protected Family Leave, an employee will be retained on the employer's health and dental care plans under the same conditions

# Human Resources Policy Bulletin

Lancaster County

Number: 2023-3

Date: February 1, 2023

Reference:	Title:
	Protected Family Leave

that applied before leave was commenced. To continue health and dental coverage, the employee must continue to make any contributions the employee made to the plan before taking leave. Failure of the employee to pay the employee share of the health or dental care monthly cost may result in loss of coverage.

If the employee fails to return to work after the expiration of the leave, the employee will be required to reimburse Lancaster County for payment of health/dental care monthly costs incurred during the Protected Family Leave, unless the reason the employee fails to return is the presence of the serious health condition which prevents the employee from performing his or her job, or other circumstances beyond the control of the employee.

F. Return to Work. Upon an employee's return to work, an employee may be required to complete a "Notice of Intention to Return to Work" form before the employee can be returned to active status. This form may be obtained from Human Resources. Notification must be given to the Human Resources Leave Manager as well as notice to the Department Head least 2 working days prior to the employee's planned return.

G. Failure to Return From Leave. The failure of an employee to return to work upon the expiration of Protected Family Leave will be considered a resignation unless an extension is granted, other leave is required by applicable law, or other paid leave is available and approved for use. In no circumstances will an extension beyond the 12-week period authorized be granted, unless other leave is required by applicable law or other paid leave is available and approved for use.

#### IV. CONTINUOUS SERVICE

Any employee on leave without pay status exceeding thirty (30) calendar days will have their eligibility date adjusted pursuant to County Personnel Rule 19.12.

#### V. DURATION OF POLICY

This policy is effective beginning February 1, 2023 and can be terminated by the County Board of Commissioners at any time.

# Human Resources Policy Bulletin

**Lancaster County**

Number: 2023-3

Date: February 1, 2023

<b>Reference:</b>	<b>Title:</b>
	Protected Family Leave

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Barb McIntyre  
Human Resources Director

\_\_\_\_\_  
Date

\_\_\_\_\_  
Chair  
Board of County Commissioners

\_\_\_\_\_  
Date

# KEATING | O'GARA

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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 19 9 PM 1:11

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

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

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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.

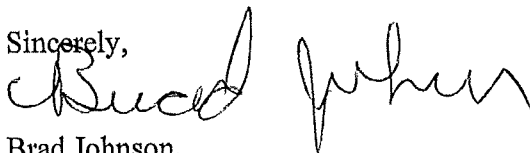
The Department has not violated the bargaining agreement. Specifically, the Department has not violated Article 7 of the FOP #32 bargaining agreement. The Department has treated all these

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 cursive script that reads "Brad Johnson". The signature is written in black ink and is positioned to the right of the word "Sincerely,".

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  
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Attorney for the Grievant