BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

SHEBOYGAN COUNTY INSTITUTION
EMPLOYEES, LOCAL 2427, AFSCME, AFL-CIO

and

SHEBOYGAN COUNTY

Lynn Vreeke Discharge Case
Case 174
No. 48197
MA-7593

Appearances:

Wisconsin Council 40, American Federation of State, County and Municipal Employees, by Ms. Helen Isferding, Staff Representative, 1207 Main Street, Sheboygan, WI 53083 appearing on behalf of Local 2427.

Ms. Louella Conway, Personnel Director, 615 North 6th Street, Sheboygan, WI 53081, appearing on behalf of Sheboygan County.

ARBITRATION AWARD

Pursuant to the provisions of their collective bargaining agreement, Sheboygan County (hereinafter referred to as the County) and Local 2427, AFSCME (hereinafter referred to as the Union) requested that the Wisconsin Employment Relations Commission designate a member of its staff to act as arbitrator of a dispute over hiring rates. The undersigned was so designated. A hearing was held on January 8, 1993 at the Courthouse in Sheboygan, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant to the dispute. Post hearing briefs were submitted, which were exchanged through the undersigned. On April 19, 1993, the record was closed.

Now, having considered the evidence, the arguments of the parties, and the record as a whole, the undersigned makes the following Award.

ISSUE

The parties agreed that the following issue was to be determined herein:

"Did the employer violate the contract when it terminated Lynne Vreeke on September 4, 1991? If so, what is the appropriate remedy?"

PERTINENT CONTRACT LANGUAGE

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ARTICLE 3
MANAGEMENT RIGHTS RESERVED

Unless otherwise herein provided, the management of the work and the direction of the working forces, including the right to hire, fire, promote, transfer, demote, or suspend, or otherwise discharge for proper cause, and the right to relieve employees because of lack of work or other legitimate reason is vested exclusively in the Employer. If any action taken by the Employer is proven not to be justified, the employee shall receive all wages and benefits due to him/her for such period of time involved in the matter.

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. . . The Union agrees at all times as far it has within its powers to preserve and maintain the best care and all humanitarian consideration of the patients at said institutions and otherwise further the public interests of Sheboygan County.

In keeping with the above, the Employer may adopt reasonable rules and amend the same from time to time, and the Employer and the Union will cooperate in the enforcement thereof.

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ARTICLE 8
WORK DAY/WEEK, SCHEDULES, SHIFT DIFFERENTIAL

I. WORK DAY/WORK WEEK

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Shift changes or changes of days off for the convenience of the employee will be accomplished by the employee seeking such change. Notification to the employee's immediate supervisor and/or staffing Coordinator must be made prior to the change.

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ARTICLE 14
CALL-IN PROCEDURES

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C. Mandatory Part-Time Employee Call-In

1. If sufficient staff is not available and the volunteer list has been exhausted for any particular day in which replacement employees are needed, mandatory call-in shall be used.

2. The least senior part-time employees shall be called and MUST report to work. This call-in will be done on a rotating basis starting with the least senior part-time employee and continuing with the next least senior part-time employee as the need arises, until all part-time employees on the seniority list have worked.

3. A part-time employee who has worked under the mandatory call-in shall not be called again until all other part-time employees on the seniority list have been called for mandatory call-in.

4. Employees who have worked voluntary hours will be exempted from the mandatory call-in list for one list rotation.

D. Mandatory Full-Time Employee Call-In

If on any given day there is (sic) not sufficient part-time employees available to be called in, then full-time employees shall be called in per the current labor agreement.
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BACKGROUND

The County provides general governmental services to the people of Sheboygan County in southeastern Wisconsin. Among the services provided is the operation of the Sheboygan County Comprehensive Health Care Center, a health care facility for developmentally disabled citizens. The Union is the exclusive bargaining representative for the non-professional employees of the facility. The grievant, Lynne Vreeke had worked for the County for over thirteen years through the date of her discharge in September of 1991. In that time, she had one incident of discipline, a verbal warning over attendance.

The Center suffered staffing problems in the early and mid-1980's. A system of mandating overtime was included in the contract but did not relieve the problem of complaints over the amount of mandatory overtime required of employees. In practice, the system for part-timers under Article 14 provided that if no volunteers could be found, a rotation list would be established for mandating part-time employees to cover, short staffing. Each part-time employee on a shift would have to volunteer or be mandated during each rotation, and another rotation would not begin until all part-time employees on the shift had worked. Article 14 provides, in part, that once this system is followed, "The least senior part-time employees shall be called and

MUST report to work." In 1987, morale problems, short staffing and a high number of grievances persuaded the parties that they should take steps to reduce the amount of mandated overtime. The parties negotiated a grievance settlement, which provided for the hiring of additional staff. Since that time, there has been little problem with the mandatory overtime system. By the time of this grievance, usage of the mandate system had dropped to 8 to 10 times a year.

In August of 1991, the grievant was working as a part-time attendant on the third shift. The Center found itself short-staffed on the 11:00 p.m. to 7:00 a.m. shift on the 29th. The grievant was scheduled to be off work that evening. The Center's scheduling coordinator, Judy Meerdink, called the grievant's phone number and got her answering machine. She left a message on the machine, asking the grievant to call her back. When the grievant returned the call, she was told that the Center was short staff for the third shift, and that she would have to report for work that night. The grievant explained that she and her husband had plans to attend the fair that evening. Meerdink told her that she could delay coming in until midnight, but would have to report. The grievant responded that she guessed she had no choice, and the conversation ended.

Shortly after speaking with Meerdink, the grievant called her Union steward and asked what the County could do to her if she failed to report for work. Her steward told her that she would probably get a reprimand or get written up. The grievant then called Joan Handke, the Assistant Director of Nursing. She complained that she was not the least senior part-time employee, and that she should not be mandated. She asked what would happen if she failed to report. and Handke said she didn't\ know and would check. Handke called her back, said she had checked into the grievant's complaints and found that she was in line to be mandated for work that night. The grievant complained that she had company in town, but Handke told her again that she must work. She also advised her that the County would initiate discipline against her if she failed to report. The grievant told her that she would not be coming in to work that night. She did not report for work. A full-time employee called in the afternoon volunteering for extra hours and was assigned to the third shift that night. Shortly later, another vacancy developed on third shift. The shift went forward short staffed that night.

The next day, the grievant received a call from Jacqueline Frank, the Director of Nursing, asking her if she could come to the facility. The grievant knew that she was going to be disciplined, and told Frank that she could not come in because she had to take her son to physical therapy. Frank told her that she should come in on the following Tuesday. Due to the unavailability of a Union representative, the meeting was postponed until Wednesday, September 4th. At the meeting on the 4th, the grievant was handed a discharge notice, advising her that her employment was terminated "because of your insubordination in refusal to come to work. This is in accordance with the Disciplinary Procedure and the Sheboygan Personnel Policies. Effective date of termination 9/4/91." The grievant said that she had not realized that refusing to come in would lead to such severe discipline. The Union steward chastised the County for not warning the grievant in the message on her answering machine that the purpose of the call was a mandate. Then the grievant could have refused to return the call, and would have received a much lighter punishment. The County stood by its decision to terminate, and the instant

grievance was filed four days later, alleging that the termination was unjust.

Later in September, the grievant was contacted by her son's physical therapist, who told her that her insurance was no longer valid. She checked, and found that the insurance had been cancelled as of August 31st.

The matter was not resolved in the grievance procedure, and was referred to arbitration. Additional facts, as necessary, will be set forth below.

THE POSITIONS OF THE PARTIES

The Position of the County

The County takes the position that the grievant was guilty of gross insubordination. The grievant was absolutely obligated to report for work, not only by County policies but by the collective bargaining agreement. Article 14, §C(2) provides that:

> The least senior part-time employees shall be called and MUST report to work. This call-in will be done on a rotating basis starting with the least senior part-time employee and continuing with the next least senior part-time employee as the need arises, until all part-time employees on the seniority list have worked.

The grievant was the least senior part-time employee who had neither been mandated nor volunteered to work during that rotation. She knew the procedure in the contract, and knew that she would be disciplined if she failed to report. Her Union representative had warned her of this as had the Assistant Director of Nursing. In spite of this knowledge, the grievant made a conscious decision not to report for work. She was obviously guilty of insubordination.

The County asserts that its decision to fire the grievant was entirely consistent with the contract. There was another instance of discharge for insubordination under this contract in 1991. The personnel policies indicate that the penalty for insubordination depends upon the severity of the particular case. As noted, the insubordination here was very serious. There is nothing about the fact situation that mitigates the seriousness of the offense. The grievant indicated at the hearing that she gave no thought to the inconvenience she was causing her co-workers, her employer or the residents. In first agreeing to report, and then deciding against it, she obviously thought the matter over and decided to pursue her interests over those of her employer. In light of this, and since an arbitrator should not disturb penalties unless they are "excessive, unreasonable or … [an] … abuse of discretion", the County urges that the discharge be upheld.

The Position of the Union

The Union takes the position that the discipline was not supported by proper cause, and even if it were, that the penalty of discharge is plainly excessive. Citing the familiar seven questions test-of Arbitrator Carroll Daugherty, the Union charges that the grievant had no notice

of the consequences of her conduct, that no fair investigation was conducted, that the rules regarding refusals to report for work have been applied in an uneven and discriminatory manner, and that the penalty is not reasonably related to either the seriousness of the offense or the grievant's past record.

First addressing the issue of a fair investigation, the Union notes that the County prepared the discharge notice and cancelled the grievant's insurance before the meeting on September 4th. Clearly the County had no interest in hearing the grievant's side of the story before imposing discipline, a denial of basic due process rights.

The Union also argues that the grievant had no prior warning that she could be discharged for refusing to report. All of the witnesses agreed that discharge was never raised as a possibility when the grievant asked what would happen if she failed to report for work. The grievant herself had refused mandated overtime once in 1986, and received a mild scolding. Even if one considers this previous incident a verbal warning, the most the grievant could reasonably have expected was a written reprimand.

The Union maintains that the penalty of discharge is wildly out of line with other cases in which employees have refused to work mandated overtime. In March of 1987, Wendy Cadena refused to work a mandate and received a 5 day suspension. In February of that year, Sue Reinert refused, telling the employer "I don't care -- write me up." She received a 5 day suspension. On Christmas Day in 1984, Susan Woelful refused to work, saying "I'll take the consequences." She received a one day suspension. The prior disciplinary record of these employees is unknown, but could not have been better than the grievant's, which was completely clean. The Union notes that an inservice on call-in was held in October of 1983, at which time employees were told that refusing mandated overtime would lead to a one day suspension.
There is no evidence of a case in which a refusal to work mandated time led to discharge. The single case cited by the County involved someone who was already at work, disliked an assignment and left. The County took the position that the employee had voluntarily quit. The County acknowledged in this case that had the grievant simply failed to report for work without calling beforehand, it would have applied progressive discipline. Here, the County had advance warning of its staffing needs. A discharge penalty is completely illogical under the circumstances.

Finally, the Union notes that the County staffed the shift on August 29th, albeit at overtime rates. The staffing shortage was the result of the County's own shortsightedness, since it had allowed a part-time employee to transfer to another position without first obtaining a replacement. Furthermore, the other available part-time employee testified that she received no phone call on the 29th. Thus the County failed to seek the least senior part-time employee. and failed to seek volunteers. Given the lack of any harm and the County's own culpability in creating the short-staffing, discharge is an unfair penalty. For all of these reasons. the Union asks that the grievant be reinstated and made whole for her losses.

DISCUSSION

The Union's theory of this case has two prongs. The first is that there was not proper cause for discipline because the employee could not have known the consequences of her actions, and because the employer failed to conduct a fair and thorough investigation before imposing discipline. The second is that the penalty is excessive in light of past acts of discipline for similar cases, and simply out of proportion to the offense. Each of these arguments is addressed in turn.

Proper Cause for Discipline

The Union is vigorously pursuing its responsibilities in challenging the existence of proper cause for discipline in this case, but I cannot imagine a clearer, stronger or more compelling fact situation in support of discipline. The grievant was directly ordered to report for work. The order was not issued under some unilateral employer policy or rule. Instead, the County was required to select the grievant by the clear, specific, negotiated terms of its own collective bargaining agreement, and the grievant was required to report by that same agreement. The grievant agreed to report, then called her Union representative to find out if she would be disciplined for not reporting. She was told that she would be. She called the Assistant Director of Nursing and complained that she was not the one who should be mandated. She also asked what would happen if she did not report. The Assistant Director said she would check on the grievant's complaint and the likely consequences of not reporting. She checked, and called the grievant back. She confirmed that the grievant was next on the mandate list and that she would be disciplined if she did not show up for work. The grievant then said she 'Would not show up, and true to her word did not show up. The reasons she gave management for not reporting were that she wanted to go to the fair, and had company visiting her. Any employer would have disciplined a worker who engaged in this conduct.

The Union's claim that the grievant did not know of the possible consequences of her act is completely misplaced. She was told by the Union and the County that she would be disciplined. The real focus of the Union's complaint is that she could not have known that she would be discharged based upon what she had been told and the discipline imposed in previous cases. There are two responses to this. The first is this argument goes to the proportionality and fairness of the penalty, not to whether there was proper cause for some sort of discipline. The second is that the grievant was not entitled to rely on the opinion of her Union representative and the Assistant Director of Nursing about the level of discipline she would receive. The Union can guess at disciplinary measures based upon past practice, but is not involved in determining them in the first instance. As for the Assistant Director, she is not the final word on discipline in these cases, and moreover, she did not specify a particular level of discipline. She simply said discipline would be imposed.

As for the County's failure to adequately investigate. as evidenced by the fact that they had the discharge notice waiting for the grievant when she came in for the disciplinary meeting on September 4th, I am at a loss to understand what the County was supposed to investigate. They knew that grievant had flatly refused a direct order, which she knew to be valid, after being warned that she would be disciplined. They knew that she had given her reasons for refusing to two representatives of management. They knew that the reasons -- wanting to go to the fair and

entertaining guests -- were completely frivolous. If such reasons excused responding to mandated overtime, the negotiated mandate system would quickly become useless. The only person relevant to the matter who had not been interviewed by the County's representatives was the grievant.

It would have been much better practice for the County to meet with the grievant before fully committing to discharge in this case. Standing alone, however, that flaw is not fatal to the County's position. The seven tests enunciated by Daugherty are not iron-clad rules. They are a framework for analysis. The importance of a given factor depends upon the facts of the case in which it is applied. The requirement of a thorough investigation is particularly important where there is some reason to believe that the employer might have some hidden reason for the discipline and may be using the alleged infraction as a pretext to support a preconceived scheme to punish the employee. There is no suggestion of any such thing on this record. Here the County had overwhelming and convincing evidence that the grievant had been insubordinate. The grievant does not deny the truth of any of the County's factual conclusions. The Union does not identify a single fact which might have changed the County's decision had they first spoken with the grievant. Given the lack of any substantive impact from the County's failure to meet with the grievant before deciding on the discipline, the overwhelming independent proof of the grievant's guilt and the lack of any evidence suggesting a hidden motive on the County's part for imposing the discipline, I conclude that the investigation was sufficient, despite its flaws.

For all of the reasons discussed, I have concluded that the County had proper cause to impose discipline on the grievant. There remains the question of whether the discipline imposed was inappropriate.

The Appropriateness of the Penalty

As easy a case as this is on the subject of just cause for discipline, it is a far closer question on the appropriateness of the penalty imposed. The grievant was a thirteen year employee with a clean disciplinary record 1/ and an apparently adequate work history. The discharge was imposed for a first offense of insubordination, and the Union correctly notes that the grievant would have received no more than a reprimand had she simply not reported, rather than announcing that she would not report. Balanced against this is the fact that the offense here is insubordination, not absenteeism, and the insubordination here was as blatant and premeditated as it could possibly have been. The discussion above makes it clear that the grievant knew beyond question that the order was valid. had no justification at all for refusing to obey, and consciously chose discipline above compliance.

While the Employer has the right in the first instance to determine the severity of a penalty,

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1/ The grievant had received a reprimand many years before this. That reprimand expired after twelve months under the provisions of this contract. Even in the absence of specific contract language, the reprimand would be considered stale, and thus irrelevant in determining the appropriate level of discipline in this case.

it is commonly accepted that an arbitrator has the inherent authority to modify the penalty if circumstances warrant and the contract does not forbid such modifications. 2/ A decision to modify the penalty is not an act of leniency, since leniency is within the province of an employer. Instead it turns on mitigating factors and such fundamental notions of fairness as equality of treatment and proportionality. 3/

The mere fact that an arbitrator may reduce penalties does not lead to the conclusion that he should automatically do so. An arbitrator is not free to substitute his judgment for the Employer's simply because he would have made a somewhat different decision had it originally been his to make. There is a range of permissible discipline in nearly every case, and the fact that an employer has reached the margin does not strip it of its discretion. Absent evidence of a violation of established disciplinary norms (as in a claim of disparate treatment), or the presence of factors traditionally considered to mitigate a penalty, the discipline imposed may be reduced only where it is grossly out of proportion to the grievant's offense.

Disparate Treatment

The Union argues that prior acts of discipline for insubordinate refusals of overtime have led to short suspensions, rather than discharges. However, the cases cited all pre-date the County's decision in 1987 to increase the staffing at the facility. Two of them were in fact the vehicles for the grievance settlement that led to the increased staffing. Since that increase in staffing, the record does not show a single instance of refusing a call-in. A claim of disparate treatment requires similarly situated employees, and it appears from the record that the current system of mandating overtime does not abuse employees in the same manner as did the system in effect prior to the summer of 1987. The increase in staffing greatly reduced the amount of mandated overtime for each employee, and thus reduced the frustration of employees over the constant and unpredictable demands on their free time and, in effect, the level of provocation for insubordinate refusals of the mandates. I believe that this change in circumstances substantially reduces the significance of these prior acts of discipline as a guide to the appropriate penalty in this case.

The County cites a case in which employee Linda Raether was discharged for a first offense of insubordination in 1991, when she refused, a work assignment and left work. The Union distinguishes this case as having been a voluntary quit. The notice of discharge says nothing about a voluntary quit. Instead, it cites as the reason for discharge "insubordination,

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2/ City of Detroit, 76 LA 213 (Roumell, 1981) at page 220; Fairweather, PRACTICE AND PROCEDURE IN ARBITRATION, 2nd Ed. (BNA 1983), hereinafter cited as "Fairweather", at pages 501-503; Elkouri, HOW ARBITRATION WORKS, 4th Ed. (BNA, 1985), hereinafter cited as "Elkouri", at pages 667-688; Hill & Sinicropi, REMEDIES IN ARBITRATION, (BNA 1981), Chapter 4, pages 97-105.

3/ City of Detroit, 76 LA 213 (Roumell, 1981) at page 220; Elkouri. at pages 669-670.

including refusal to perform the work assignment." This reason is repeated almost word-for-word on the County's Answer to the grievance in that matter, and I cannot credit the notion of a voluntary quit as a distinguishing feature between these two cases.

The Union also notes that the Raether was already at work and left during her shift. That is an aggravating circumstance when compared with the case at hand. Insubordination is a disciplinary offense because of the need for an employer to be able to maintain control of its operations. This has two aspects to it. The first is the need to have individual employees obey direct orders. That applies in both the Raether cases and in this case. The second reason for discipline in an insubordination case is a cautionary effect for other employees. In Raether's case, the insubordination took place at the work-site, and required an immediate, strong response to preserve the authority of the supervisor. Here the insubordination was not in the presence of other workers, and the threat to management's authority was not as acute. In this sense, the Raether case presents a more serious form of insubordination. 4/

In another sense, however, the grievant's insubordination is more serious than Raether's. The Raether case involved a spur of the moment emotional response to an undesirable work assignment. By contrast, the grievant in this case made a considered judgment that she would prefer to be disciplined rather than give up her plans to attend the fair. By any measure, that is an aggravating circumstance when compared to Raether. The degree of disrespect for management's right to schedule and direct the work force is substantially greater when the refusal comes as the result of a considered decision to disobey, rather than an emotional outburst. No two cases are ever precisely the same, but the Raether case, as the only insubordination case reasonably close in time to this one, stands for the proposition that discharge is within the range of penalties that have been imposed by the County. 5/

Based upon the evidence of other acts of discipline, I cannot conclude that the grievant has been the victim of disparate treatment in this case.

Proportionality

The penalty here is the most severe that can be imposed in a work relationship. The offense of insubordination may be minor or egregious, depending upon the circumstances. As

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4/ Raether's conduct in abandoning her duties during a shift also constitutes an aggravating circumstance, since it left the County short-staffed with no warning whatsoever.

5/ The "Sheboygan County Institutions Personnel Policies" lists examples of improper conduct, and penalties for 1st, 2nd, 3rd, 4tb and 5th offenses. While many offenses, such as absenteeism, call for a progression of discipline from a verbal warning to a written reprimand to a one day suspension to a five day suspension to a discharge, the Insubordination section states that "Discipline may be in varying degrees according to the severity."

the discussion has made clear, the County did not overstate the matter in deciding that the grievant's insubordination was blatant and inexcusable. Discharge is a common response to serious acts of insubordination, and has been employed in this relationship at nearly the same time as this case. Given this, termination cannot, in the abstract, be said to be a grossly disproportionate response to the grievant's conduct. The decision here was not, of course, simply an abstract exercise. It involved a serious offense. but it also involved a specific employee in a specific set of circumstances. It remains to be determined whether the individual characteristics of this grievant and the circumstances surrounding the case sufficiently mitigate her insubordination to warrant a finding that the County abused its discretion in deciding on discharge as the proper penalty.

Mitigation and Aggravation

The usual mitigating circumstances in insubordination cases, such as provocation or a failure to make clear the likelihood of discipline, are absent in this case. The only mitigating circumstances of note are the grievant's long service to the County and her clean disciplinary record. This is not a problem employee for whom this violation was the last straw. The aggravating circumstances are the premeditated nature of the insubordination and the complete lack of justification. This grievant essentially made a voluntary choice to be disciplined.

Judged from the County's perspective, the offense would be mitigated by the fact that the grievant gave them enough warning of her intended absence that alternate coverage could be sought. On the other hand, if alternate coverage had been readily available, a mandate would not have been necessary. In addition, the contract provides, in Article 8, that employees can arrange for substitute coverage if they want to change their schedules. The grievant made no effort to find someone to cover her shift. Instead, she simply put the burden on the County and her fellow employees to accommodate her absence. The aggravating circumstance from the Employer's perspective would have been the need to maintain the integrity of the mandated overtime system, which had in the past been a sore spot with employees. The County's sensitivity to this would have been heightened by the fact that it had made investments in additional staff to make the system more palatable to employees, and had apparently succeeded.
Weighing the mitigating circumstances against the aggravating circumstances, I believe that a strong argument can be made in favor of the grievant's past good record of service to the County. She has a very substantial investment in her career with the County. The County does have the right, however, to look beyond the corrective function of discipline to its cautionary function. Discharge is, by its nature, more of a warning to other employees than an effort to correct the disciplined employee. Even though I believe that discharge is an extreme response to misconduct by an employee with thirteen years of service, the fact remains that it has been employed in the only other case of insubordination in recent times.

An additional factor supporting the County's decision to use cautionary rather than corrective discipline is that the only thing the grievant did not understand in this case, and thus the only target for correction, was the probable penalty for her actions. Her calculating approach to the misconduct could reasonably cause the County to fear that a suspension would encourage the

grievant to apply the same sort of cost-benefit analysis to future decisions about obeying or disregarding direct orders, and that her example would encourage the same type of conduct by other employees.

On balance, I believe that the County's response to the grievant's misconduct undervalues her thirteen years of service. Randy Krenz, one of the senior administrators who made this decision, admitted that he did not know the grievant's seniority when he recommended discharge. Another employee, with a shorter tenure or a bad work record, could have been discharged for this conduct. The concept of just cause, however, requires consideration of an employee's past good conduct when deciding on the penalty for an act of bad conduct. The grievant was guilty of gross insubordination, but it is an isolated incident in a history of good service. The actual failure to report for work, absent the outright refusal, would have yielded a verbal reprimand under County policies. Given all of this, a summary discharge is simply too severe a penalty for this particular employee

Remedy

The County had just cause to discipline this grievant, but discharge is too severe in light of her years of service and clean record. Normally the appropriate remedy is an order of reinstatement and an award of backpay and benefits. Under the peculiar facts of this case, I find that a back pay order is inappropriate. An employee cannot do something that warrants a twenty-two month unpaid suspension that does not also justify a discharge, and if I were faced with such a suspension in the first instance, I would find it excessive. However, an order of backpay requires an apportionment of unfairness between the two parties. The employer is, in effect, paying a penalty when it pays wages to a reinstated employee which have already been paid to the replacement employee. 6/ The consensus in labor relations has been that the employer should bear the unfairness of this remedy because it is the moving party and is better able to absorb the loss than is the individual employee. Refusal to order backpay as a matter of course would also remove an incentive for employers to carefully consider their disciplinary acts beforehand. Here the grievant knowingly invited discipline, placing herself in the role of moving party. To the extent that the County overreacted, it was an overreaction provoked by the grievant's outrageous conduct. For these reasons, I find that this is the very rare case where the equities demand that the employee bear the greater share of the unfairness attendant to a reinstatement. The remedy is therefore limited to an order of reinstatement and credit for lost seniority.

On the basis of the foregoing, and the record as a whole, I have made the following

AWARD

6/ See Electrical Storage Battery Co., AAA Case No. 19-22 (A. Cox, 1960), cited in Fairweather at page 513. The County in this case will also presumably incur costs related to displacing the worker currently performing the grievant's job.

The County violated the contract when it terminated Lynne Vreeke on September 4, 1991. The appropriate remedy is for the County to reinstate the grievant to her former position within thirty days of the date of this Award, without back pay or economic benefits, but with seniority credit, for the period between the date of her discharge and the date of her reinstatement.

Signed this 21st day of June, 1993 at Racine, Wisconsin:

By Daniel Nielsen /s/
Daniel Nielsen, Arbitrator