BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between PARK VIEW REHABILITATION PAVILION and PLEASANT ACRES EMPLOYEES UNION, LOCAL 1280, AFSCME, AFL-CIO and WINNEBAGO COUNTY (PARK VIEW REHABILITATION PAVILION and PLEASANT ACRES)	Case 205 No. 46324 MA-6949 (R. Haddock)

Appearances:

Wisconsin Council 40, AFSCME, AFL-CIO, 1121 Winnebago Avenue, Oshkosh WI 54901, by Mr. Gregory N. Spring, Staff Representative, appearing on behalf of the Union.

Mr. John Bodnar, Corporation Counsel, Winnebago County, Post Office Box 2808, Oshkosh WI 54903-2808, appearing on behalf of the County.

ARBITRATION AWARD

Pursuant to the provisions of Article VII of the collective bargaining agreement between the parties for the years 1990 and 1991, Local 1280, AFSCME, AFL-CIO (hereinafter referred to as the Union) and Winnebago County (hereinafter referred to as the County or the Employer) jointly requested that the Wisconsin Employment Relations Commission designate Daniel Nielsen of its staff to serve as arbitrator of a dispute over the discharge of Randy Haddock. The undersigned was designated. A hearing was held in Winnebago, Wisconsin on December 3, 1992, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant. The parties submitted post-hearing briefs and reply briefs, the last of which were exchanged through the arbitrator on February 16, 1992, whereupon 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 stipulated that the following issue was to be determined herein:

"Did the Employer have just cause to discharge the grievant, Randy Haddock? If not, what is the appropriate remedy?"

PERTINENT CONTRACT PROVISION

ARTICLE VI
DISCIPLINARY PROCEDURES

The following disciplinary procedure is intended as a legitimate management device to inform employees of work habits, etc., which are not consistent with the aims of the Employer's public function, and thereby to correct those deficiencies.

Any employee receiving disciplinary action shall receive notice of such discipline and the reasons for same within ten (10) calendar days of the date of the alleged infraction or the Employer's knowledge thereof except where unusual circumstances exist.
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Any employee may be suspended, discharged, or otherwise disciplined for just cause. As a general rule, the sequence of disciplinary action shall be oral reprimands, written reprimands, suspension, and discharge. Any written reprimands sustained in the grievance procedure or not contested within the first six (6) working days after the date of the reprimand shall be considered a valid reprimand. Except for patient care warnings, no valid warning shall be considered effective for longer than a twelve (12) month period.

The above sequence of disciplinary action shall not apply in cases which are cause for immediate suspension or discharge.
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BACKGROUND FACTS

The County is a municipal employer providing general governmental services to the people in Winnebago County, Wisconsin. Among the services provided is the operation of Park View Health Center, a nursing home for the aged and disabled. In operating the Center, the County employs, among others, Clerk/Receptionists who are represented by the Union. The grievant, Randy Haddock, had been a Clerk/ Receptionist working a 70% schedule on the 4:00 p.m. to 12:00 midnight shift at the Center from February 1, 1988 through his discharge on May 24, 1991. He had previously been suspended for one day for failing to report for work in December of 1990, and suspended for three days in March of 1991 for trying to persuade a co-worker to say that he had called in sick more than an hour and a half before his shift, when in fact he called less

than an hour prior to the shift.

May 22, 1991 was a scheduled off day for the grievant. During the day he was called and asked if he would work a portion of the 4:00 p.m. to 12:00 midnight shift as a replacement for an absent employee. He agreed, with the understanding that Dianne R*****g, the Clerk/Receptionist scheduled from midnight to 8:00 a.m., would come in early to cover a portion of the shift.

R*****g was known as an unusual personality, and a woman with a drinking problem. In August of 1990, she had been disciplined for reporting for work drunk. At the time, other employees, including the grievant, were told to keep an eye out for further evidence of intoxication by R*****g and to notify supervision if they felt she was impaired.

The grievant reported at 4:51 p.m. During his shift, R*****g called him three times. During the first call, they agreed that she would relieve him between 9:30 and 10:00 p.m. She called back at 8:00 p.m. to ask if he could stay after 10:00 p.m., since her father was ill. He told her he could not. At approximately 9:55 p.m., R*****g called to say she was on her way. She punched in at 10:33 p.m. The grievant briefed her on the work to be done for the remainder of the shift, and left. His recollection was that he spent five to six minutes speaking to R*****g. He did not punch out, but later recalled that the clock in his car showed the time as 10:45 p.m. when he drove away.

Sometime prior to 11:00 p.m., RN Mary Werner called down to the switchboard and spoke with R*****g. She noted that R*****g's speech patterns were disjointed and illogical. Werner was aware that R*****g had previously been disciplined for reporting for work under the influence of intoxicants. She asked Mary Bahr, an LPN on her unit, to go down and evaluate R*****g's condition. Bahr told Heidi Greeninger, the R.N. Supervisor, about Werner's concerns, and Greeninger said she would investigate. Greeninger became busy with other matters, and did not go down to the switchboard to check R*****g.

At about 12:15, Julia Johnson, a nursing assistant, called Bahr and said she had had contact with R*****g and thought there was something wrong with her. Bahr went down to the switchboard, and saw R*****g with her feet up, speaking on the phone. She noticed the smell of intoxicants, and observed that R*****g "looked tough" -- her eyes were droopy and her speech was sluggish. While Bahr was not sure that R*****g was drunk, she did smell alcohol and mentioned this to her. In response, R*****g admitted she had been drinking. Bahr had R*****g page Greeninger. Greeninger called the switchboard, and Bahr told her there was a problem and that she should come down.

Greeninger arrived at the switchboard at about 12:30 a.m. She observed R*****g slumped in her chair, and noted that her pupils were dilated and her breath smelled of alcohol. R*****g told Greeninger "I goofed up; I was drinking." R*****g said that she had been

drinking all day prior to coming into work, but denied drinking anything after reporting for work. She also told Greeninger that she was on a medication prescribed by her doctor.

Greeninger determined that R*****g could not continue working, and telephoned Angeline Matsche, another Clerk/Receptionist, to work the midnight to 8:00 a.m. shift. She also notified Tom Geske, the Office Manager, who was the immediate supervisor of R*****g and the grievant. When Matsche reported at 12:57 a.m., the front door and side door were found to be unlocked. Locking the front and side doors at 9:00 p.m. is the responsibility of the Clerk/Receptionist working nights. R*****g's cousin was summoned to drive her home, and picked her up at the Center. Matsche worked the remainder of the shift without incident, other than three calls from R*****g. During the first two calls, at 2:00 a.m. and 2:30 a.m. she found R*****g unintelligible and declined to speak with her. On the third call, at between 4:00 and 4:30 a.m. R*****g was able to carry on a conversation and apologized for reporting drunk.

On May 24th a meeting was held with the grievant, Union representatives, Administrator Charlene Lowe and Geske. Geske presented the grievant with a letter of termination signed by Lowe:

> Dear Mr. Haddock:
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> You have been repeatedly disciplined for not following Park View rules, and for inappropriate conduct. On March 7, 1991 you were formally notified that the next step in your progression of discipline would be termination of your employment.
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> On Wednesday, May 22, 1991, on your shift, you neglected to lock the entrance doors to the building as per procedure on that shift. Consequently, the doors were unlocked until 1:05 a.m. when discovered by the nurse supervisor. Furthermore, when your replacement came in to relieve you in an unfit and unsafe condition, you did not report it to your nurse supervisor, and you simply left. As you have been told by your supervisor, specifically, if the situation arose where a switchboard employee reported for work unfit and unsafe for duty -it is to be reported immediately to the supervisor in charge. You did not do that. It is stated in the Safety Manual that each employee receives that "Every employee is expected to abide by safety regulations, to concern himself with his own safety and the safety of his fellow workers as well as the general public …. When a potential hazard does exist all employees shall take precautionary measures, and when in doubt regarding procedures, shall immediately consult with the supervisor …." In addition, your work performance that evening was poor. You completed very few tasks and the work was of poor quality.
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> The switchboard operator is an integral part of providing a safe environment for the patients and staff at Park View. You have again shown a disregard for that

> responsibility. You have been given many opportunities to correct your work performance and behavior, however you have shown that you can not fulfill the requirements of the position. Therefore, your employment is hereby terminated effective May 22, 1991.

The grievant told Geske that he remembered locking the doors, and that he did not know R*****g was drunk. They stood by their decision to terminate him and the instant grievance was filed. At the third step grievance meeting, the grievant changed his recollection on the locking of the doors, stating then that he had asked a maintenance man to lock them, a common courtesy between employees.

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

POSITIONS OF THE PARTIES

The Employer's Brief

The Employer takes the position that the discharge was for just cause and should be sustained. It is undisputed that R*****g had a problem with alcohol, that the grievant had been made aware of this problem and had been instructed, along with other workers, to be alert to possible alcohol abuse by R*****g. He knew it to be his duty to notify the RN supervisor if he detected such abuse. He knew that he should not turn the reception desk over to R*****g if she had been drinking. Yet, on the night of May 22, 1991, when R*****g reported for work in a highly intoxicated state, the grievant allowed her to take over the reception desk, and left without notifying any other County personnel of the problem.

The Employer argues that grievant could not reasonably have missed the fact that R*****g was drunk. Within ten to twenty-five minutes of R*****g's reporting for work, Mary Werner spoke with her on the telephone and noted her disjointed speech and lack of logical thought patterns. Heidi Greeninger and Mary Bahr had contact with R*****g within 90 minutes of her start time, and her intoxication was obvious to both. Their accounts were confirmed by Angeline Matsche. Given the lack of any evidence that she had been drinking at the facility, it is clear that she must have arrived for work in much the same condition. The grievant admitted to being within three to four feet of her when she arrived. What was obvious to everyone else should have been obvious to him.

There are only two possible explanations for the grievant's failure to report R*****g's condition to his supervisor. Either he failed to notice her condition, despite the obvious physical signs and his prior knowledge of her alcohol abuse, or he noticed her condition and left anyway. The former is gross negligence in the performance of his duties, while the latter is deliberate disregard of orders and common sense. The clerk/receptionist handles all telephone traffic, a

particularly critical function at night in a health care facility. Furthermore, the clerk/receptionist is responsible for insuring that the doors are kept locked, so that intruders cannot have easy access to the facility. The importance of these duties and their impact on patient well-being demands a high level of care and responsibility on the part of the clerk/receptionist. The grievant clearly did not meet this standard.

The grievant's denials should be carefully reviewed in light of his suspect credibility. The grievant has twice been disciplined for asking another employee to falsify his time card. Further, part of this discipline flows from the grievant's failure to lock the doors before leaving. He initially denied not locking the doors, then claimed at the hearing that he had asked a night watchman to lock the doors. These instances of dishonesty and inconsistent testimony should undercut his claim that R*****g appeared normal to him.

The grievant allowed a seriously impaired person to assume responsibility for the safety and well-being of the facility's elderly residents. Whether this occurred through negligence or deliberate disregard of his duties, it justifies discharge. The seriousness of his offense is compounded by his failure to perform other duties -- specifically failing to lock the doors -- on the night of May 23rd. For all of these reasons, the Employer asks that the discharge be sustained.

The Union's Brief

The Union takes the position that there was not just cause to discipline, much less discharge, the grievant on May 23rd. Three allegations were made. First, the grievant is alleged to have accomplished few tasks on that night, and was cited for poor work performance. Second, the grievant is charged with failing to lock the doors at the front of the building. Finally, the grievant is accused of not reporting his replacement's unfit condition. None of these allegations are supported on the record.

The claim of poor work performance is, the Union claims, based upon a comparison of the grievant's time log for the 22nd and that of Angie Matsche who replaced him. These logs do not include work such as answering the phone, and do not account for the fact that the grievant had been held over for five hours. Since he was supposed to be splitting a shift with R*****g, it was reasonable for him to leave some of the work for her to perform during her shift. The quality of the grievant's work on May 22nd was consistent with his usual output, and with his "above average" evaluations for work performance.

Turning to the claim of failing to lock the doors, the Union acknowledges that the doors were open after R*****g came on duty. The grievant recalled asking a maintenance man to lock the doors, and afterwards having to open the door for several persons that evening. The Union speculates that that R*****g may have unlocked the door so that she could have access to her car. Even if the grievant left the doors unlocked, however, the grievant's supervisor testified that such an offense standing alone would never had resulted in termination. Thus even if the arbitrator

believes that the grievant is guilty of this minor transgression, he must find that it is not just cause for discharge.

The primary reason for the discharge is the allegation that the grievant allowed R*****g to take over the desk knowing that she was drunk. There is no proof of this. R*****g was an unusual personality, even when sober. A certain amount of strangeness in her conduct would not be unexpected. As a regular abuser of intoxicants, R*****g may well have been skilled at concealing her condition. While she may have been more obviously impaired somewhat later, it is also possible that she used additional drugs or alcohol after reporting for work. The Union notes that the grievant had no training in spotting or dealing with alcohol and drug use, and that even Mary Warner and Mary Bahr, two licensed health professionals, were not sure that R*****g was drunk after having contact with her.

The only evidence that tends to support the Employer's claim that the R*****g's condition could not have escaped the grievant's attention was Heidi Greeninger's testimony to that effect. Yet Greeninger was the supervisor on duty, and ignored Warner's concerns about R*****g for nearly two hours. Her conjecture that the grievant must have known R*****g was drunk at 10:30 p.m. is a self-serving attempt to shift blame for her own inaction until 12:30.

For all of the foregoing reasons, the Union argues that the Employer has failed to meet its burden of proof and that the grievant should be reinstated.

The Employer's Reply Brief

The Employer argues that its burden is to show, by a preponderance of the evidence, that a reasonably prudent person in the grievant's position would have known or discovered that R*****g was impaired. Each of the other employees who had contact with her immediately noticed her impairment. Only the grievant claims she was able to conceal her condition, and his credibility is questionable. He has an obvious motive to lie, since it his job which is at stake, has been previously disciplined for dishonesty and has changed his story at least once regarding locking the doors.

The Union's Reply Brief

The Union argues that the Employer, having given the grievant no training in detecting substance abuse, is engaging in "Monday morning quarterbacking" by attempting to discipline him for failing to detect R*****g's intoxication. Bahr, Werner and Matsche were not certain that R*****g was intoxicated, and the Employer cannot therefore show that the grievant should have known of her condition. Moreover, almost two hours elapsed between the time the grievant left and another employee actually saw R*****g. During that time she could well have ingested additional alcohol or drugs, which would have made her intoxication more obvious. On the record evidence, there is no basis for concluding that the grievant should have known R*****g

was unfit for duty when she relieved him. As for the other charges, the County did not bother to argue the work performance issue in its brief, and is using the failure to lock the doors as a throw-in charge to give the arbitrator a basis for sustaining the discipline.

DISCUSSION

While the Employer cites three reasons for terminating the grievant, it is clear that the discharge in this case stands or falls on the allegation that the grievant knew or should have known that Diane R*****g was unfit for duty when she reported on May 22, 1991. The Employer's witnesses candidly acknowledged that the measure of discipline would have been at most a suspension for the grievant's failure to ensure that the doors were locked had that occurred in isolation from R*****g's incapacity. The additional allegation of poor work performance on the evening of the 22nd is neither supported on the record nor even argued by the Employer in its post-hearing brief.

The grievant was aware that R*****g had a drinking problem, and that he was not to allow her to work the switchboard if she reported for work drunk. The Employer asserts that he either knew she was drunk on the 22nd, or should have known that she was drunk. The Employer bears the burden of proof on these points. The only two witnesses to R*****g's condition at the time she reported were the grievant and R*****g. He vehemently denies knowing she was drunk and R*****g did not testify. Absent an admission from the grievant or testimony from R*****g, it is effectively impossible to establish his actual knowledge of her condition.

The impossibility of determining the grievant's actual knowledge does not terminate the inquiry. There is no question that R*****g was drunk on the evening of the 22nd, and very little question that she was already drunk when she reported for work. The Employer is correct in asserting that if R*****g's physical condition was such that no reasonable person could have missed her drunkenness, the grievant would still have failed in his duty to the County and the Center's residents.

The grievant testified that he spent approximately 5 or 6 minutes with R*****g, showing her the work that had to be finished. He said that he was angry with her for being late, and had little conversation with her. He claimed not to have noticed anything out of the ordinary with her, and did not smell liquor on her. The evidence on which the Employer bases its belief that the grievant should have recognized his co-worker's condition is:

1. That R*****g had difficulty conversing with Werner between 10:45 p.m. and 11:00 p.m, with her speech patterns being disjointed and illogical.;

2. That R*****g apparently had some sort of difficulty in a conversation with Julia Johnson at about 12:15 a.m.;

3. That R*****g "looked tough" to Mary Bahr, with droopy eyes, sluggish speech and an odor of alcohol about her at 12:30 a.m. Bahr had been told that something was wrong with R*****g before she went down to check on her;

4. That R*****g's eyes looked strange, her speech was slurred and she had an odor of alcohol about her when Greeninger saw her shortly after 12:30 a.m. Greeninger had been told twice that there was something wrong with R*****g before she went down to the switchboard;

5. That R*****g was weaving, and her eyes were red and glassy when Angeline Matche saw her at 1:00 a.m. Matche had been told there was a problem and that R*****g was not capable of handling the switchboard.

The difficulty faced by the County in demonstrating what the grievant should have known at 10:30 p.m. is that no one else saw R*****g for two hours after that. It is largely these observations, distant in time and made by persons who already knew that something was wrong with her, that formed the basis of the County's conclusion that the grievant must have been aware of R*****g's intoxication. The persuasive value of this evidence is dependent on whether one might infer that she could not have hidden her condition sufficiently well two hours earlier to avoid alerting a person who was not already aware of some problem.

R*****g did not testify and there is no way of knowing what her pattern of alcohol consumption had been during the day before she reported for work. She may have drunk a pint of vodka in her car right before walking through the doors, or she might have stopped drinking an hour before. There is no way to know whether she consciously attempted to conceal her condition from the grievant, although it is a reasonable inference given her prior discipline for reporting for work drunk. No doctor examined or talked to R*****g, and no expert testimony was presented regarding the possibility that she could have concealed her condition at 10:30 p.m. No evidence was presented regarding the nature of the medication she was taking, when she took it, or its likely effects when combined with alcohol. Common experience would not preclude the possibility that an intoxicated person might be better able to appear normal for a brief period when coming in from a period of activity in the fresh air than she could after sitting still at a desk inside for two hours. Persons differ in their reaction to alcohol. 1/ Further the likelihood of intoxication being

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1/ In this regard, the undersigned notes that R*****g was not incoherent when Bahr, Greeninger and Matche spoke with her between 12:30 and 1:00 a.m. However, Matche testified that R*****g called at 2:00 a.m. and 2:30 a.m. and was incoherent. She called again at 4:00 a.m. and was able to carry on a conversation. Her condition cannot be characterized as stable over time.

noticed by a co-worker who has no reason to believe a person is drunk is obviously less than that for those whose observations are initiated because they've been told something is wrong with the person.

The most persuasive evidence against the grievant is R*****g's illogical speech patterns and inappropriate laughter during the conversation she had with Werner within 15 to 30 minutes after the grievant left. This at least is close enough in time to the grievant's contact with R*****g that one might reasonably assume her condition to have been relatively unchanged. The question then is whether her speech patterns should have alerted the grievant to her intoxication. It is unclear, however, how much conversation he and R*****g had when she arrived.

The grievant spent between 5 and 12 minutes with her. 2/ He was irritated that she was late, he was in a hurry to leave and it appears that their conversation was limited to him telling her what remained to be done. Even assuming that R*****g was not capable of concealing her impaired speech patterns 3/, the record strongly suggests that the grievant had little opportunity to analyze her conversational skills. Thus the undersigned cannot conclude, based upon R*****g's conversation with Werner, that the grievant should have known she was intoxicated.

In expressing these doubts, the undersigned is not concluding that the grievant could not or should not have noticed R*****g's impairment. Lacking testimony by R*****g or expert testimony establishing her likely ability to conceal her condition at 10:33 p.m., the undersigned is left with the grievant's version of events and a layman's knowledge of the effects of alcohol. As discussed above, there are differences in an individual's ability to muster a normal appearance when drunk, in the progress of intoxication, and in the effect of mixing alcohol with prescription medications. The record leaves so much room for speculation that the undersigned cannot say that the preponderance of the evidence in this case shows that the grievant knew or should have known that Diane R*****g was unfit for duty when she reported on May 22, 1991. Inasmuch as the Employer bears the burden of proof, just cause has not been established and the grievance is sustained on this point.

2/ He recalled that they had spent 5 to 6 minutes together. However, R*****g punched in at 10:33 p.m. and the grievant believed the clock in his car showed 10:45 p.m. when he drove away. Given his hurry to leave and the small amount of information that passed between them, the shorter estimate appears more likely. However, there is no way to reliably determine how long the two were together that evening.

3/ Complicating this analysis is the testimony of virtually every witness that R*****g was an unusual personality, given to odd speech patterns and seemingly inappropriate laughter even when sober.

There remains the question of the grievant's failure to lock the doors on his shift. He wavered on whether he had locked the doors or had asked the maintenance man to lock the doors for him. Resolving this discrepancy is unimportant. The grievant was aware that locking the front door and the side wheelchair door at 9:00 p.m. was his responsibility. Even if he had asked another employee to perform this task, it remained his duty to see that it was done. The doors were not locked at 1:05 a.m. and absolutely nothing in the record suggests that these doors were initially locked, either by the grievant or by the maintenance man, and later unlocked by some other party.

Failure to perform assigned duties is an offense that may lead to discipline. The Union acknowledges this point, even while arguing that the offense is very minor and calls for little or no disciplinary response. For the Employer's part, Geske candidly admitted that a suspension, rather than discharge, would have been appropriate for this offense in isolation from the other charges. The undersigned agrees that the offense is relatively minor. An employee with a clean disciplinary record could certainly expect a modest disciplinary response to a failure to lock the doors. However progressive discipline allows for a stronger disciplinary response for employees with prior offenses. In the grievant's case, there had been two disciplinary suspensions within the preceding year. The County is therefore within its rights in seeking a more severe measure of discipline for the grievant, even though his offense is not heinous.

As a general rule, arbitrators should be reluctant to modify discipline. The issue is whether the County had just cause for discharge. Routinely reducing discipline at the arbitration step encourages employers to impose more serious discipline that they might believe is appropriate, in anticipation of the arbitrator's reduction. Likewise, a practice of reducing discipline may lead labor organizations to feel that challenging even legitimate disciplinary acts is likely to benefit their members. In this case, however, the discipline had three bases. The most minor allegation -- poor work product on May 22nd -- and the most serious -- knowingly allowing a co-worker to report for work while drunk -- have been found to be unproven. There remains a single offense for which the Union admits discipline may be imposed and for which the Employer admits discharge is too severe. In these circumstances, the undersigned believes that there is a legitimate exception to the general rule against modifying discipline.

The record evidence does not establish that the grievant was guilty of two of the three charges against him, including the most serious charge. Thus the discharge must be set aside. He was guilty of the third offense, failing in his duty to see to it that the doors were locked at 9:00 p.m. Given the prior suspensions, the undersigned finds that the appropriate remedy in this case is to modify the discipline to a three day suspension without pay.

On the basis of the foregoing, and the record as a whole, the undersigned makes the following

AWARD

The Employer did not have just cause to discharge the grievant, Randy Haddock. The Employer did have just cause to suspend the grievant for three days for his failure to insure that the doors to the Health Center were locked during his shift on May 22, 1991. The appropriate remedy is to immediately reinstate the grievant to his position, and to make him whole for his losses from the date of his discharge, less the amount of pay he would have lost during a three day suspension, any interim earnings he received which he would not have received but for his discharge, and the amount of any unemployment compensation payments he received. The Employer is directed to repay the amount of unemployment compensation deducted from the monetary portion of this Award to the grievant's account with the Department of Industry, Labor and Human Relations. Should it prove impossible to recredit the grievant's unemployment compensation account, the make whole relief ordered herein shall not be reduced by the amount of unemployment compensation benefits received.

The undersigned will retain jurisdiction over this case for a period of thirty days solely for the purpose of clarifying the remedy ordered herein.

Signed this 20th day of May, 1992 at Racine, Wisconsin:

Daniel Nielsen /s/
Daniel Nielsen, Arbitrator