BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

WINNEBAGO COUNTY COURTHOUSE
EMPLOYEES' ASSOCIATION

and

WINNEBAGO COUNTY

Case 267
No. 53422
MA-9352

Appearances:

Mr. Frederick J. Mohr, Attorney at Law, 414 East Walnut Street, Suite 261, P. O. Box 1015, Green Bay, Wisconsin 54305, for the Winnebago County Courthouse Employees' Association, referred to below as the Association.

Mr. John A. Bodnar, Winnebago County Corporation Counsel, 448 Algoma Boulevard, P. O. Box 2808, Oshkosh, Wisconsin 54903-2808 for Winnebago County, referred to below as the County.

ARBITRATION AWARD

The Association and the County are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The Association requested, and the County agreed, that the Wisconsin Employment Relations Commission assign an Arbitrator to resolve a dispute reflected in a grievance filed on behalf of Patricia Felker. The Commission appointed Daniel J. Nielsen, a member of its staff. Hearing on the matter was set for October 3 and 4, 1996. Due to the unavailability of Arbitrator Nielsen, the Commission, with the consent of the parties, assigned Richard B. McLaughlin to serve as Arbitrator. Hearing was conducted on October 3 and 4, 1996, in Oshkosh, Wisconsin. The hearing was transcribed, and a copy of the transcript was supplied to the Commission on October 23, 1996. The parties filed briefs and reply briefs by December 18, 1996.

ISSUES

The parties stipulated the following issues for decision:

Was there just cause to discharge the Grievant?

If not, what is the appropriate remedy? 1/

1/ The parties stipulated that if remedy became an issue, I should retain jurisdiction to permit hearing on the point.

RELEVANT CONTRACT PROVISIONS

A G R E E M E N T

. . .

> It is the intention and purpose of the parties hereto to promote and improve the efficient administration of the County service and the well-being of the Courthouse employees in the unit; . . . and to provide the means for amicable discussion and adjustment of matters of mutual interest in the unit.

. . .

ARTICLE VI

DISCHARGE

> The County shall have the right to discharge any employee for just cause.

. . .

BACKGROUND

William H. Carver, Judge for Branch V of the County Circuit Court, issued an amended order to Julie Pagel, the County's elected Clerk of Courts, dated September 7, 1993, 2/ which states:

> Please be advised that my judicial assistant, Patricia Felker and I no longer have an effective working relationship and I therefore order you to remove her from her position in Circuit Court Branch 5, and provide me with a replacement from among your staff . . .

2/ References to dates are to 1993, unless otherwise noted.

Pagel responded by the following letter, dated September 8, to Felker:

> This letter will serve to advise you that Judge Carver has ordered me to remove you as his judicial assistant. Judge Carver has indicated to me that his order arises from a series of incidents that began in November of 1991 and which culminated in a breach of confidentiality that occurred on August 27, 1993. The history of these incidents is set forth in the chronology attached hereto.
>
> The allegations contained in the chronology may result in disciplinary action being taken against you. Prior to deciding if any action should be taken, I am providing you with an opportunity to respond to those allegations. You may respond . . . on or before . . . September 15, 1993. . . .

The "attached . . . chronology" reads thus:

> **QUESTIONABLE PAY PRACTICES**
>
> Patricia Felker's immediate supervisor, Judge William Carver questioned the seemingly large number of hours of comp time payout submitted for his approval. Upon investigation, it was determined that Ms. Felker had been using Judge Carver's signature stamp on her time cards. When this practice had been questioned by the Payroll Dept., they were told by Ms. Felker that she had authorization from Judge Carver. Judge Carver denies giving her that authority. As a result, a memo was issued from the Personnel Office requiring a personal signature on all time cards for verification and internal control.
>
> **FAILURE TO FOLLOW THROUGH WITH REQUIREMENTS OF JUDICIAL ASSISTANT POSITION**
>
> The first week of January, 1993, a deputization oath form was sent interoffice to Ms. Felker for her signature. This oath has never been returned to the Clerk of Courts office for recording, although Ms. Felker has been performing deputization-required tasks.
>
> **GROSS MISCONDUCT**

Ms. Felker has admitted to Judge Carver, William Wagner and Nancy Hockers that she was secretly recording conversations between herself and Judge Carver without Judge Carver's knowledge. Ms. Hockers was also told by Ms. Felker that Ms. Felker was going through Judge Carver's paperwork in his wastebasket in an effort to obtain information which could prove embarrassing to the Judge. Ms. Felker stated to Ms. Hockers that she was out to "trap" Judge Carver.

Ms. Felker also signed a statement on April 6, 1993 stating that she had communicated information to the District Attorney with regard to the Warren "Buzz" Wilcox case which was pending in Branch 5. Ms. Felker had contacted Judge Carver in Arizona while he was on vacation to inform him that he had been assigned to the Wilcox case. Judge Carver told her at that time not to do anything with the case until his return. Ms. Felker chose to relay to the District Attorney that she had knowledge of personal contact between Judge Carver and Mr. Wilcox four to six months prior to the charges being filed. This information was given before Ms. Felker knew of Judge Carver's decision to recuse himself. The information about the personal contact was acknowledged in an affidavit filed by the District Attorney during the hearing held upon Judge Carver's return.

FAILURE TO FOLLOW ORDERS FROM SUPERVISOR

Judge Carver has told Ms. Felker several times to bring in the recording equipment she used to tape their conversations. She has refused to produce this equipment.

MISUSE OF COUNTY POSITION

Ms. Felker threatened retaliation by Circuit Court Branch 5 if an employee of the County Treasurer's Office failed to withdraw fees or interest on her alleged late tax bill.

BREACH OF CONFIDENTIALITY

Ms. Felker relayed confidential information regarding Judge Carver's personal calendar to the District Attorney's Office without his knowledge and for no purpose related to the Court's operation,

contrary to orders expressly given to her by Judge Carver.

. . .

Felker's attorney responded in a five page letter.

In a letter dated September 19, Pagel responded thus:

> Please be advised that I have reviewed the response of Attorney Fredrick (sic) J. Mohr, dated September 15, 1993, to those allegations presented to you in my letter of September 8, 1993. After carefully reviewing your response to these allegations, please be advised that I am discharging you from your employment as a Deputy Clerk of Court and as a Judicial Assistant for Judge William H. Carver, effective immediately.
>
> In your attorney's response of September 15, 1993, you admitted that you have secretly taped oral conversations with Judge Carver in the past.
>
> A Judicial Assistant serves as Deputy Clerk of Court and, pursuant to Section 59.38, Wisconsin Statutes, such a Deputy has the duty to aid the Clerk in the discharge of the Clerk's duties. One of the general duties of the Clerk of Court is to keep Court papers, books, and records. The Clerk of Court and her Deputies, in effect, act as secretarial or clerical staff to those persons elected or appointed to the Office of Circuit Court Judge.
>
> Wisconsin Supreme Court Rule 60.01 (10), states, "A Judge shall always bear in mind the need of scrupulous adherence to the rules of fair play. A Judge should not permit private interviews, arguments, briefs, or communications designed to influence his or her decision."
>
> A Judge is an attorney and, as an attorney, has a responsibility, pursuant to Supreme Court Rule 20:5.3, to exercise supervisory authority over any non-lawyer, under his control, and to ensure that this person's conduct is compatible with the professional obligations of both a Judge and attorney. A Judge has an obligation to not only act as an impartial arbitrator, but also to ensure that his ability to

function impartially is not interfered with by those deputies who serve under his direction.

Your tape recording of conversations with Judge Carver, without the Judge's knowledge, is a severe breach of the confidence and trust placed in a Deputy by the Court. Neither Judge Carver, the Clerk of Courts, nor any other Circuit Court Judge, can continue to employ and continue to deputize a person with the knowledge that such a person has surreptitiously and secretly taped conversations of a Circuit Court Judge in the past, and that such tapes, in the future, may be utilized in such a way so as to attempt to influence a Judge, or to infringe upon that Judge's impartiality. Obviously, a person who acts in such in manner has lost the trust of the Courts which is essential to the capacity of an employee continuing to serve in a deputized position within the Clerk of Courts' Office.

If you believed that Judge Carver was improperly threatening you, then his actions should have been reported, immediately, to myself, the Director of Personnel, or the Judicial Ethics Board. Secretly taping the Judge's conversations, however, was not a proper way to deal with this alleged problem.

Your inability to act in a trustworthy and confidential manner is further evidenced by your statement to Nancy Hockers, a fellow Deputy Clerk of Courts, that you had been searching through Judge Carver's waste basket in an effort to obtain information which would prove to be embarrassing to Judge Carver in order to "trap" Judge Carver. Given your admission that you had secretly taped conversations between yourself and Judge Carver, and given the fact that I have no knowledge of any factor which would motivate Ms. Hockers to fabricate such a story, I find your denial of Ms. Hockers' statement to lack credibility.

On April 6, 1993, you signed a statement indicating that you had communicated information to the District Attorney with regard to the Wilcox case, which was pending before Judge Carver. You had contacted Judge Carver in Arizona, while he had been on vacation, to inform him that he had been assigned to hear the Wilcox case. Judge Carver had informed you, at that time, not to do anything with the case until his return. Instead, you chose to relate to the District Attorney that you had knowledge of personal contact between Judge Carver and Mr. Wilcox, four-to-six months prior to

the charges being filed. This information was provided by you to the District Attorney prior to any knowledge, on your part, that Judge Carver had decided to recuse himself from the case. The information as to the personal contact was acknowledged in an Affidavit filed by the District Attorney's Office during a hearing held subsequent to Judge Carver's return from Arizona. Moreover, you have admitted in your Attorney's statement of September 15, 1993, that you informed the District Attorney that Warren Wilcox had been in the Office of Branch V, and that Warren Wilcox had called the Office of Branch V requesting to speak to Judge Carver.

Again, Supreme Court Rule 60.01 (10), states that a Judge should not permit private interviews or communications designed to influence his or her decision. Again, the Judge, as an attorney, pursuant to Supreme Court Rule 20:5.3, has a duty to assure that non-lawyer assistants act in an ethical manner. Your contact with the District Attorney's Office as to the Wilcox case constituted a private communication between the Court and the District Attorney's Office as to a pending matter, in direct contravention of the specific instructions of Judge Carver. Again, the Courts cannot allow a non-lawyer assistant working under the Court's direction to utilize their office in such a way so as to infringe upon a Judge's impartiality.

The implicit trust between the Court and yourself, in the position of a Deputy Clerk of Court, was further breached by the provision of information to the District Attorney's Office prior to August 27, 1993, that Judge Carver had scheduled a meeting with Senator Michael Ellis during that week. Given the fact that you were the only person other than Judge Carver, himself, who had control and possession of Judge Carver's calendar, again, I find your statement that you did not communicate such information to the District Attorney's Office, without the Judge's knowledge, to lack credibility. This is especially so in light of your previous admissions that you had secretly taped Judge Carver and had communicated information to the District Attorney's Office against his instruction.

Finally, on or about August 11, 1993, you threatened retaliation against John Abendroth, an employee of the Winnebago County Treasurer's Office, if that employee failed to purge interest charges from your property tax bill which resulted from your delinquent payment of such bill. This threat of retaliation was witnessed by a

number of employees of the Winnebago County Treasurer's Office.

> Supreme Court Rule 60.11, provides that a Judge shall not directly, or indirectly, lend the influence of his or her name, or the prestige of his or her office, to aid or advance the welfare of any private business, or permit others to do so. In threatening Mr. Abendroth with retaliation if he ever appeared in Branch V of the Circuit Court for Winnebago County if he failed to exercise (sic) the interest charge from her tax bill, you used the influence of the Office of Judge Carver to aid or advance the welfare of your private business, specifically, attempting to exempt yourself from the payment of interest on your property taxes, which had been assessed. Neither a Judge nor the Clerk of Court can allow a Deputy to directly, or indirectly, utilize the influence of the Court for the purpose of advancing that Deputy's private business interest. Such action, on your part, constitutes gross misconduct.
>
> It is my determination that all of the incidents discussed above constitute gross misconduct on your part, and each incident, individually, and in composite with the other incidents, constitutes just cause for discharge from your employment as a Deputy Clerk and Judicial Assistant for gross misconduct.

The Association filed a grievance regarding the discharge. In a letter dated September 20, William J. Wagner, the County's Director of Personnel, denied the grievance and stated the County's refusal to arbitrate the matter:

> (I)t is the position of Winnebago County that the discharge . . . is not grievable under the collective bargaining agreement covering her position . . . It is the position of Winnebago County that the Clerk of Courts, being a constitutional officer . . . has the right to appoint and discharge her deputies as she sees fit and that such right cannot be abridged by the terms and conditions of a collective bargaining agreement. This position is based upon . . . Crawford County v. WERC, 177 WIS. 2d 66 (Ct. App. 1993) pet. For review denied . . .

The Association responded by filing a complaint of prohibited practices with the Commission. The County filed a complaint for Declaratory Judgment in Circuit Court before Judge Allen J.

Deehr. Deehr found the grievance was not substantively arbitrable. The Association appealed and succeeded in having the Order of the Circuit Court reversed. The County appealed this determination to the Supreme Court, which declined to review the matter, thus setting the stage for this arbitration.

As Pagel's chronology points out, the roots of the grievance are deep and tangled. After a preface, the background sketched below follows Pagel's chronology to the extent possible.

Felker's Employment History

The County hired Felker in 1956 as a Secretary in its Veteran's Service Office. That position became part-time, but she remained full-time by assuming a part-time position in Municipal Court. When she became pregnant, she ceased work for the Veteran's Service Office and remained a part-time Municipal Court employee. After roughly two years, she returned to full-time status, and worked at the Municipal Court until it became a Circuit Court. She worked for three Judges before becoming Carver's Judicial Assistant when he became a Judge roughly twenty-two years ago. At certain points in her tenure she performed as a lead worker, overseeing the work of a number of employees.

At the time of her discharge, Branch V consisted of Carver, Felker and one court reporter. Additional support was provided through Pagel's office.

Felker had not been formally disciplined prior to her discharge. There is no dispute her work product was satisfactory or better throughout her employment. It is also undisputed that Felker and Carver enjoyed a good working relationship at least until late in 1991, which is the starting point of Pagel's chronology.

The Alleged Questionable Pay Practices

Sometime late in 1991, Paul Stevenson, the County Executive, initiated a review of overtime usage in the courts. In a memo to Pagel dated December 16, 1991, he stated his concern thus:

> I have been reviewing our budget operations to this point and one glaring fact sticks out like a sore thumb -- that is the amount of overtime for clerks who work in the courts. I think it is excessive and am looking for an explanation from you or the judges as to why this is happening . . .

Stevenson's concern led to meetings with the Judges and with Wagner. In the course of his review of the matter, Wagner discovered in Branch V what he viewed as two areas of concern. One was a pattern of overtime use on Thursdays, and the other was the use of Carver's signature stamp for the approval of paid time. He brought this matter to Carver's attention. Wagner testified that Carver "was rather upset, I think, because I think he didn't realize what was happening there until I pointed it out to him." 3/ Ultimately, Wagner issued a memo directing that a signature stamp not be used for the approval of time cards, and authored a study of overtime and comp time usage in the County courts. The study was published in September of 1992, and concluded "(b)asically, the courts are operating efficiently, (and) are staffed by competent individuals." Felker's overtime usage "dropped dramatically" 4/ in 1992.

3/ Transcript, second day of hearing at 20 (Tr. II, 20).

4/ Ibid.

Carver testified that late in 1991, Felker "asked me to approve the payment of some overtime that had accumulated during the year and it was just a total number of hours . . . well over 200 hours." 5/ He noted he was apprehensive about this number of hours since "times whatever one might figure out for time and a half, it could have been in the neighborhood of $5,000 . . ." 6/ This led him to discuss the matter with Pagel, then with the other Judges. Pagel showed him computer records on overtime use. Once he learned Felker's request was not out of line with the requests of other Judicial Assistants, he signed her request. He stated, however, that his initial reticence to sign the request altered her working relationship with him.

Pagel dated this incident to late November or early December of 1991. County employees then worked a normal work week of thirty seven and one-half hours. Judicial Assistants worked forty hours per week on a regular basis. The difference between forty and thirty seven and one-half was compensated with comp time. Work over forty hours per week was paid as overtime. Judicial Assistants were expected to use the comp time if possible. Comp time which had not been used by the end of November could be submitted for monetary reimbursement at the end of the year, as Felker had done.

Pagel testified that Carver asked her where Felker's hours had originated. She responded that Carver, as the signer of her time cards, was expected to know that. Carver responded that he thought Pagel signed the cards. Pagel informed him that she did not and that the request was not for overtime. She then showed him Felker's record of overtime usage.

Felker acknowledged that Carver, in contrast to his practice of many years, refused to sign her request for reimbursement. She testified that she used Carver's signature stamp to authorize payment of time records, and that this practice started when she worked as a lead worker over a number of employees. Carver, who delegated as much clerical work as possible, instructed her to use his stamp rather than to bring the records to him to sign every payroll period. She did so for many years, continuing the practice after she no longer supervised any employees. His refusal to sign her reimbursement request in 1991 was the first indication she received that this practice was inappropriate. Carver never told her the use of his signature stamp was inappropriate. Rather, she learned this in a memo from Wagner. She did not, after receiving this memo, use Carver's signature stamp.

Felker stated that her receipt of overtime and comp time for 1991 spiked due to the computerization of the courts and to the creation of an additional circuit court branch. Because Carver did not want her to perform word processing while court was in session, her work backed up. Beyond this, she was asked to train a Judicial Assistant and a Support Clerk for the new

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5/ Tr. I, 35.

6/ Ibid.

branch. When this training was completed, and when word processing was better

coordinated with court sessions, her overtime fell. She acknowledged Carver's denial of her reimbursement request upset her. It did not, she testified, have any lasting impact on her working relationship with him.

The Alleged Failure to Follow Through With Requirements of Judicial Assistant Position

This allegation concerns a deputization form Pagel testified she sent to Felker via intra-departmental mail for Felker's signature. Pagel testified the form was sent in January, but was never returned. Felker testified she always signed such forms, but never received one in 1993.

The Alleged Gross Misconduct

This allegation rests on two broad areas of conduct. The first focuses on Felker's tape recording one of two conversations in Carver's chambers. The second concerns her conduct regarding an initial hearing in the prosecution of Warren Wilcox.

The Tape Recording

Felker supported Pagel in Pagel's first successful campaign for Clerk of Courts. By late in 1992 or early in 1993 the County Courthouse rumor mill generated speculation that Felker planned to run against Pagel. This speculation reached Carver. Further background must turn on Carver's and Felker's conflicting testimony.

Carver's Testimony

Carver could not date the conversation, but believed it occurred within the year of her termination, prior to April. The conversation took place in his office, and Carver noted he may have initiated it. He detailed the substance of the conversation thus:

> I said, first of all, I'm not certainly enthused about you running for Clerk of Courts for a couple of reasons. One, I says, you're not going to be able to do that as a Judicial Assistant in Circuit Court Branch V. I said, secondly, you're picking out, I says, somebody that I know personally and she's in a sense, a friend of mine, Julie Pagel . . . I said, you cannot do it as a Judicial Assistant in a Circuit Court Office, run for a political position. I says, there's obvious conflicts in it and, I said, I won't permit it. And her response is,

> well, what are you going to do about it? Are you going to fire me? And I made it very clear . . . I'm a state employee, you're a county employee . . . I am not in a position to fire you for anything. I said, what I would do is have you removed from this particular position in my office. You just won't be working for me and she says then where will I work? And I says I don't know. That's not my job to figure out. And I think that's almost verbatim how the discussion ended. 7/

Carver noted that this was the only conversation on this point because he received a letter from Felker's attorney that the conversation interfered with her constitutional rights. Felker never informed him she was taping the conversation.

Felker's Testimony

Felker testified that she and Carver had two conversations concerning her potential candidacy. The first occurred on Valentine's Day in Carver's office. She stated he summoned her into his office, closed the door and informed her that he had heard she was thinking about "running against his close personal friend, Julie Pagel." 8/ He then informed her she "could run for any other office -- elected office in Winnebago County except for the office of Clerk of Courts." 9/ The conversation closed thus: "I was told to go home, think about it, and we'll have another discussion." 10/

Upset that she might lose her job, she consulted an attorney. She asked the attorney if she could tape record a conversation with Carver if he refused to permit a third party to be present. Her attorney informed her such a recording would not be illegal.

The following week, Carver called her into his office. She asked if another person could come with her. Carver responded that he would decide who could be present, and that he had decided it would be only them. She went into his office, carrying her purse. Inside her purse was a tape recorder, which she set to record the conversation.

7/ Tr. I, 41-42.

8/ Tr. II, 75.

9/ Ibid.

10/ Ibid.

She described the second conversation thus:

> (H)e started off again of, again, I have heard the rumor that you're going to be running against . . . my close personal friend. You are not to do that. And he wanted me to answer him whether I was going to do it or not. And I said, "I don't think I have to answer that question." I said, "Maybe I don't even have my mind made up, what my intentions are," and I think that's -- And, I said, "I think that's my right." 11/

She ultimately put the tape in a safety deposit box. This was the only conversation she taped. She did not play this tape for anyone.

The Initial Hearing and Its Aftermath

These events require some preface. Warren (Buzz) Wilcox was one of a number of individuals who became suspects in an inter-County investigation into commercial gambling. Wilcox was a long-time acquaintance of Carver's. The office of the County District Attorney, Joseph Paulus, was involved in this investigation and in the prosecutions which resulted from it. Paulus delegated the prosecution of Wilcox to one of his staff. Felker and Paulus live in the same neighborhood, and are friends.

Late in 1992 or early in 1993, Wilcox was arrested. He was held in custody, then released. No charge was filed against him until mid-March. In the interim, the investigation continued. Rumors concerning the investigation circulated throughout the courthouse. The investigation was, for example, rumored to be honing in on several public officials including the County Executive, the Mayor of Oshkosh, an Oshkosh City Council member and two Judges.

Carver was one of those Judges. He learned from various sources that the suspects, including Wilcox, were being offered favorable consideration if they assisted in linking the gambling investigation to public officials.

In mid-March, Wilcox and others were charged. The Wilcox case was assigned to Judge Hawley for an initial appearance. After a substitution request, the matter was reassigned to Branch V. Carver was then in Arizona on vacation.

Felker telephoned Carver in Arizona to inform him of his assignment to the Wilcox matter. Carver recalled the conversation thus:

11/ Tr. II, 76-77.

> (Felker) (s)aid we'd been assigned the Wilcox case. What do you want to do about it . . . I said I'll handle it when I come back. I said schedule it for an initial. I asked what the status of the case was . . . She informed me it was an initial appearance, summons had been issued . . . I says schedule it for the day that I come back. And, I says, I'll take care of it then. 12/

Carver stated he "never intended to remain on the case," rather "my thought was to recuse myself on the record in court at the first available appearance." 13/

Felker knew Wilcox was a personal friend of Carver's. She phoned him in Arizona, expecting him to inform her to prepare a request for substitution. Instead, the following conversation followed:

> . . . I said, "Well, we're assigned the case." He says, "Yes, I already know that." And . . . I said, "Well, what do you want me to do with it?" And he said, "Well, what's the big problem?" He said, "Just schedule it for a hearing like you would any other case," which is exactly what I did. 14/

She was surprised at Carver's response, but set the matter for hearing.

Sometime after this conversation, the District Attorney's office requested a postponement of the hearing. She then called Wilcox' attorney to determine if he objected. On learning that the rescheduling was agreeable to both parties, she rescheduled the hearing to the week following Carver's return. This was, in her opinion, no different than any other postponement. She stated

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12/ Tr. I, 51.

13/ Tr. I, 52.

14/ Tr. II, 81-82.

she had often rescheduled cases without first getting Carver's permission if the request was mutually agreeable to the parties.

Carver returned from vacation expecting to conduct the initial appearance on Tuesday, March 30. 15/ The matter had, however, been rescheduled for the following week. Carver asked Felker why the matter had been rescheduled, and she responded, without elaboration, that the District Attorney's office had so requested.

15/ The dates set forth above surrounding the initial appearance are based on witness testimony.

On Friday, April 2 the District Attorney's office filed a motion seeking that Carver recuse himself. Carver testified that Felker advised him of the motion "on Friday after 3:30, after I had left the office." 16/ Carver advised her that he would take the matter up at the hearing set for Monday, April 5 at 9:00 a.m.

Felker testified that on April 2, sometime before noon, Paulus called her to his private office. While there, Paulus asked her two "yes or no" questions. Paulus did not subpoena her, nor did he expressly compel her to answer the questions. She answered the questions, then returned to Branch V. She discovered that Carver had left for the day. She did not inform him of the meeting with Paulus.

On the weekend before the initial appearance, a letter was delivered to Carver from Wilcox. Included with the letter was a handwritten note, signed "Buzz," which states:

> Your name was mentioned to almost everyone who got busted. They brought your name up to me a lot . . .

This letter confirmed other rumors which had reached Carver. He had, for example, heard from a Deputy District Attorney that the District Attorney's Office was out to get him.

Shortly before entering the courtroom to conduct the initial appearance for Wilcox, Carver learned that an affidavit had been filed by the District Attorney's Office in support of its motion for recusal. Information from the affidavit had apparently been provided to various media outlets, because the initial appearance was attended by reporters from local print and broadcast media. Included among the ten separately numbered paragraphs of the affidavit were the following:

> 1. That your affiant is a detective with the City of Oshkosh Police Department.
>
> 2. That in 1992 and the first three months of 1993, I was involved in an investigation of illegal gambling activity in the City of Oshkosh, Winnebago County, Wisconsin.
>
> 3. That on January 22, 1993, your affiant had an opportunity to speak with Warren Wilcox regarding his gambling activities. During the course of that conversation, Warren Wilcox

16/ Tr. I, 54.

admitted to having known Judge William H. Carver for thirty years and they are friends. Warren Wilcox further admitted that Judge William H. Carver knows he is a bookie. Warren Wilcox further admits that he has golfed with Judge William H. Carver occasionally.

4. That as a result of a pen register placed on the phone of Warren Wilcox, it was determined that a call was placed from the line that Warren Wilcox uses to receive his bets, to the chambers of Judge William H. Carver on September 18, 1992, at approximately 10:17 a.m. These records further indicate that that conversation lasted approximately nine minutes and six seconds.

5. Your affiant further states that the illegal gambling organization in the City of Oshkosh closely links both Warren W. Wilcox and Eugene Dadas.

6. Your affiant is further informed by the reports of Sergeant Jewell of the City of Oshkosh Police Department that on January 10, 1993, while Sergeant Jewell was executing a search warrant on Eugene Dadas for commercial gambling, Eugene Dadas had an opportunity to speak with his brother. During the beginning of this conversation, Eugene Dadas told his brother to contact his attorney and tell him what happened. Eugene Dadas told his brother to call Bill Carver and tell him what happened.

7. Your affiant further states that during the summer, fall and winter months of 1992, he pulled the garbage of Warren W. Wilcox to examine its contents.

8. That during two such garbage pulls, your affiant did discover a letter addressed to Buzz Wilcox from William H. Carver . . . Further, in the same garbage, your affiant did discover several documents relating to the 1992 11th Annual Carver Classic Golf Tournament . . . Your affiant further states that one of the documents recovered did give a list of tee-off times for the golf tournament as well as a betting line for the participants . . . Your affiant further states that in the same garbage he did also discover an entry form to the Carver Classic as well as two small sheets of paper

> explaining "Calcutta Rules" for betting in the golf tournament. These rules explained how one would place a bet on the golf tournament . . .
>
> 9. Your affiant further states that based upon information and belief Eugene Dadas admits that he was invited to the Carver Golf Classic the previous two years.
>
> 10. That based on information and belief, on one occasion in August or September of 1992, Warren W. Wilcox personally visited Judge Carver in his chambers.

Carver conducted the hearing, during which he recused himself from the Wilcox case.

Carver was angered by a number of points raised in the affidavit and by the fashion in which it had been processed. He felt Section 10 of the affidavit stated information which could only have been provided by Felker. After the hearing was completed, he went directly to Felker and confronted her regarding her relationship with the District Attorney's Office. He repeatedly demanded she put into writing whatever she had communicated to Paulus.

In response to Carver's demands, she issued the following memo, dated April 6:

> TO JUDGE WILLIAM H. CARVER:
>
> On Friday, April 2, 1993, Mr. Paulus requested to speak to me.
>
> He asked the following two questions: Has Warren "Buzz" Wilcox been in the office of Circuit Court, Branch 5 and has Warren "Buzz" Wilcox called the office of Circuit Court, Branch 5, requesting to speak to Judge Carver. To both questions I answered "Yes."

At some point before or shortly after the initial appearance, Nancy Hockers, a Deputy Clerk of Courts, informed Pagel that Felker had disclosed to Hockers that she had tape recorded a conversation between herself and Carver. Pagel asked Hockers to put this in writing. Hockers did so, in a memo dated April 12, which states:

> . . . On or about October 1, 1992, Pat Felker called me into her

> office for two reasons, One was to try and talk me into filing a greivence (sic) against my boss Julie Pagel which I had not even considered. The second reason was to share with me her ongoing disbute (sic) with her boss Judge Carver. She stated to me that Judge Carver had threatened her if she would run against Julie Pagel in the upcomming (sic) election. She had tryed (sic) a greivence (sic) through our Association but had failed due to not enough evidence. She then talked to an Attorney who gave her some advice on how to more or less trap the Judge. She was now carrying a small tape recorder with her when ever she had a conversation with the Judge. She was also looking through all paper work in his waste basket for anything she could use. In other words she was doing anything she could do to get the Judge. She also offered any help she could give me if I wanted to get Julie Pagel. I was very upset about this whole thing and at the time talked it over with a fellow employee and came to the conclusion to just let it die. I still do not know why she told me all this. At this time it is the right time to let the proper people know.

Upon learning of the existence of the tape, Pagel informed Carver. She did not, however, contact Felker.

Felker acknowledged that she disclosed the existence of the tape to Hockers. She denied the remaining allegations made by Hockers. She noted that she had approached Hockers because she was Vice-President of the Association and had become aware of problems between Pagel and Hockers. She stated that she advised Hockers of the right to file a grievance, and discussed her own problems with supervisors in the course of their conversation.

Felker summarized Carver's conduct following the initial appearance thus:

> He had gone down to Julie Pagel and she typed up the blank request for removal and he showed me he had that. And he said, "I'm going to put it right here in my desk drawer and we're going to talk about this from time to time, but for now it's right here and I'll just sign it any time I feel it's appropriate." And a couple times he'd pull it out and say, "See, I've still got this now." 17/

17/ Tr. II, 118-119.

The conflict between them led Felker to file a grievance. Mohr, in a letter to Wagner dated April 14, stated that Carver had, on April 5, twice threatened her employment if she did not give him a written statement concerning her contact with Paulus. The letter adds, among other points, the following:

> Because of this threat of termination, Pat did give Judge Carver a signed statement the following day. On Friday, April 9, Judge Carver (requested that Pat come) 18/ into his office and informed her that there was a state investigation into the gambling allegations and that she would probably be placed under oath. He immediately proceeded to inform her that her job with the County was not very secure because she was being investigated for "padding" her time cards and that her job . . . was very questionable.
>
> The Judge told Pat that she should not have any contact with the District Attorney.
>
> During the past 9 days, the Judge has threatened to fire Pat approximately 25 different times.
>
> I think it is reasonable that the Judge's threats can be construed as a form of discipline . . . I would welcome an opportunity to discuss some manner in which we can resolve Pat's incredibly uncomfortable situation. I understand that you may not have authority over the Judge to determine his mode of conduct. However, Pat is a County employee and for that reason we have nowhere else to turn but to the grievance procedure . . .

Wagner responded in a letter to Mohr dated May 6, which states:

> Following receipt of the grievance, I met with Judge Carver and the Clerk of Courts on two occasions to review the grievance. I also consulted with Union President, Rosemary Bucher on two

18/ The original letter of April 14 stated "pulled" at this point of the letter. Wagner, in a letter to Mohr dated May 12, informed Mohr that Carver objected to the implication of physical contact. In a letter dated May 14, Mohr agreed to substitute "requested" for "pulled."

> occasions, and I met with the grievant. Based upon my review of the matter, I have concluded that the incidents that you refer to in the grievance are part of a larger group of incidents between Ms. Felker and Judge Carver that have been ongoing for about a year and a half. Information provided to me by Judge Carver and the Clerk of Courts indicates that the actions of Judge Carver, in some cases were in response to incidents of improper conduct on the part of Ms. Felker.
>
> I believe that an effective working relationship has been reestablished between Judge Carver and Ms. Felker and that no further action is warranted at this time . . .

This did not, however, end the ongoing rift.

Mohr and Wagner continued to discuss the "improper conduct" referred to in Wagner's May 6 letter. Mohr was concerned that the reference implied an allegation from which she should defend herself. Since no discipline had been imposed, Mohr sought clarification on the point. These discussions prompted Wagner to issue a letter to Mohr dated June 15 which states:

> This letter will serve to confirm . . . that we have no current record of discipline against Patricia Felker, that there is no current investigation regarding Ms. Felker or her performance underway and that, to my knowledge, there is no disciplinary action pending . . .

Felker responded to this in a letter dated June 17, which sought "the basis" for the reference to "incidents of improper conduct on the part of Ms. Felker" in Wagner's May 6 letter. Wagner did not respond to this letter, and in a letter dated July 21, Felker stated:

> . . . While I realize this matter may not be very important to you; but when you make an accusation of improper conduct about an employee of thirty seven years, I certainly feel that an explanation of what the improper conduct consisted of, is in order.
>
> Therefore, I am again . . . requesting a clarification from you.

Wagner had hoped Carver and Felker would smooth over their differences, and did not believe the

ongoing exchange of letters would aid in that process. He viewed her letter of July 21 to leave him with no option but to respond. He did so in a letter dated July 28 which states:

> In response to your letter of July 21, 1993 requesting an explanation of your improper conduct mentioned in my letter of May 6, 1993, please be advised that I was referring to your admission that you had used a concealed tape recorder to record conversations between yourself and your supervisor, Judge Carver during the course of one or more work days.
>
> Such conduct is viewed as inappropriate and unethical in a normal business setting and is violative of the spirit of the collective bargaining agreement as set forth in the introduction of the agreement.
>
> The secretive taping of conversations between yourself and your supervisor during business hours is not sanctioned by the collective bargaining agreement, nor by County policy, nor by law, and is violative of the privacy rights of your supervisor as well as an act that grossly undermines the level of trust between a supervisor and subordinate that is critical to the effective functioning of the Court.
>
> In my opinion, such action in a business setting, constitutes gross misconduct, regardless of the reason for which it was done. I believe that you should consider yourself fortunate that Judge Carver did not insist on your transfer out of Branch 5, which is his right under the rules of the Supreme Court, or that he did not ask the Clerk of Courts to impose severe disciplinary action against you.
>
> I believe that at this point in time, it is in the best interests of all parties to let this matter rest, which I was prepared to do until you insisted in pursuing it further . . .

The Alleged Failure to Follow Orders From Supervisor

The parties do not dispute that Carver sought, without success, to compel Felker to produce the tape recorder she used to tape the "Valentine Day's" conversation.

The Alleged Misuse of County Position

In August of 1993, Felker went to the Office of the County Treasurer to discuss the imposition of a penalty for the late payment of a tax bill. Her payment for a City and a County property had been mailed on the same day. The City payment was timely, but the County notified her the payment had not been timely. Her check had been executed before the end of the month deadline, but the envelope with the County payment had been postmarked after the deadline. She went to the Treasurer's Office hoping to have the penalty waived. John Abendroth was then an Account Clerk in the Treasurer's Office. He handled the complaint. After listening to her account, he explained that the penalty was triggered by the postmark date. After she communicated her displeasure, Abendroth observed that the Treasurer's Office was bound by rules and those rules had to be followed. Abendroth described her response thus:

> And she then told me she hoped I would never end up in Branch V because they had rules that couldn't be bent either. 19/

Abendroth felt that her statement and the tone in which it was made communicated a threat. Two other Account Clerks heard this exchange and shared Abendroth's interpretation.

Felker did not deny that she was upset at the imposition of the penalty. She noted she entered the Treasurer's Office, introduced herself, then identified herself as a courthouse employee and as an employee of Branch V. She denied threatening Abendroth, but did not deny that she may have made the statement attributed to her by Abendroth. She felt that Abendroth was not attempting to understand her view that the delayed payment was not her responsibility.

She then returned to her office and detailed the incident to Carver. She informed Carver "if Ruth Bradley ever asks me for a favor, she's going to jump through all the hoops just like I have to do." 20/ Bradley is the County Treasurer. Felker noted that Carver laughed at the incident. She later made an appointment to see Bradley. At the appointment, Bradley explained that a letter from the Postmaster linking the postmark to delay by the Postal Service could lead to a waiver of the late fee. Felker secured such a letter and the situation was resolved. She did not apologize to any employee in Bradley's office.

After she had detailed the incident to Carver, the Courthouse grapevine brought the matter back to Carver. Convinced that there was more to the incident than he had originally thought, he went to Bradley's office and discussed the matter. Carver apologized for the incident. He then

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19/ Tr. I, 128.

20/ Tr. II, 92.

returned to his office and did not further discuss the matter with Felker.

The Alleged Breach of Confidentiality

Within a week or so of the incident at the Treasurer's Office, Carver was in the process of setting up a meeting with State Senator Michael Ellis. They had met in passing at a public function, and had decided to get together. Arrangements following that function had, however, devolved to a game of phone tag. Carver had, during this period, received at least one message, taken by Felker, indicating that Ellis' office had called while Carver was unavailable. Carver ultimately succeeded in reaching Ellis, and the two of them agreed to meet.

The balance of the background to this point can only be sketched as an overview of witness testimony.

Carver's Testimony

Shortly after making arrangements to meet with Ellis, Carver received a phone call from Ellis. Carver detailed the call thus:

> He was irate, to put the least. Very upset. And, basically, said what the hell is going on in your office? And suggested you might -- He even used the spy word. And says somebody -- there's a spy in your office, he says. That's how he started it off. That was the start of his conversation. And he was, like it was, he was upset with me. He said, "What are you doing," so to speak . . . I almost didn't have to ask, I said, but I did, "What's the problem?" And he related to me that he had just got a telephone call from Mr. Paulus, the District Attorney, wanting to know why he was meeting with me and for what reason he had to meet with me. And he proceeded to tell me what he told Mr. Paulus. 21/

Felker had been the only other employee in the office when the meeting with Ellis had been set. The meeting was not put on Carver's calendar. Carver concluded that she had passed information on the meeting to Paulus. He then confronted her with his conclusion.

21/ Tr. I, 79.

She denied Carver's allegations, and would not speak on the matter any further. Carver noted his disgust over the incident and left the office. He would not speak to Felker again as his Judicial Assistant. He went to Pagel's office and informed her that he wanted Felker removed from Branch V.

Ellis' Testimony

Ellis noted that after he and Carver had made arrangements to meet, he left to give a speech. On his return to the office he learned from his Secretary "that she had been in contact with the District Attorney's office and they were privy to the fact that I was going to meet with the Judge." 22/ Ellis detailed his response thus:

> I called Carver by phone and I told him, "How does the DA's office know that you and I are going to have a meeting?" And I suggested that he's got a leak somewhere in his office. 23/

22/ Tr. I, 98.

23/ Tr. I, 99.

Ellis noted he was concerned regarding the leak, but concluded that "it's no big deal." 24/

When asked about his conversation with Paulus, Ellis testified: "No, I didn't have any conversation with Joe Paulus." 25/ He did not know the source of Paulus' information, and stated his knowledge on the point thus:

> I know that my secretary told me that she had a conversation with the District Attorney and that he had knowledge that I was meeting with Judge Carver. Now, I do not know . . . whether the District Attorney called my secretary or my secretary talked to the District Attorney . . . All I know is that the District Attorney knew that I was meeting with Judge Carver. 26/

Paulus' Testimony

Paulus testified that Ellis' secretary, Kate Reetz, is a close personal and family friend. He noted he spoke with her regularly in the summer of 1993. He could not recall whether he initiated the call, but he remembered learning from her by phone that Carver and Ellis had planned a meeting. He did not find it unusual that Reetz would bring the matter to his attention, since Carver was not a frequent caller to Ellis and since Carver's daughter was rumored to be planning to run for the post of District Attorney against him.

Paulus made an appointment to see Ellis concerning his potential support for the position of District Attorney. On the day he spoke with Reetz, Paulus neither sought nor received information from Ellis regarding why he and Carver were meeting.

Felker's Testimony

Felker acknowledged she knew Ellis and Carver were calling each other, but denied disclosing to anyone any information on Carver's meeting with Ellis.

Further facts will be set forth in the DISCUSSION section below.

24/ Tr. I, 100.

25/ Tr. I, 98.

26/ Tr. I, 99.

THE PARTIES' POSITIONS

The County's Initial Brief

After an extensive review of the evidence, the County notes that the "majority of the facts in this case are not truly in dispute," and contends that those facts, "when pieced together, justify the County's actions." Those facts turn not on the good faith of either party to the labor agreement, but on "bitter continuing conflict between . . . two personalities." The conflict between Felker and Carver is the focal point of the controversy, with Paulus lending some insight into the underlying basis for the conflict. As background to this conflict, the County notes that the position of Judicial Assistant affords considerable perquisites. Felker's tenure assured her that she could enjoy the position as long as she "performed her job well in the eyes of her supervising Judge" and "did nothing to embarrass the Judge." She was, the County argues, unable to do this.

In late 1991, she brought embarrassment to Carver by claiming "overtime hours . . . disproportionate to that of other Judicial Assistants." Noting that, "for the purpose of this hearing," the County does not "take any position as to whether such overtime hours were improper," and that "it is obvious that such overtime was not a reason for Ms. Felker's termination," the County argues that the scrutiny of the County Executive caused Carver considerable embarrassment. This led to a confrontation between Felker and Carver which marked the start of a deterioration in their relationship.

Roughly two months later, the relationship further deteriorated when Carver informed Felker that she could not continue as his Judicial Assistant if she ran for Clerk of Courts against Carver's good friend. Carver's concern regarding a partisan campaign was, the County notes, well rooted under SCR 60.14. An examination of the record establishes, according to the County, that Felker's claim to have been threatened by this conversation is difficult to square with her purported indecision to enter the race. No easier to explain is her decision not to grieve Carver's alleged threat. Her decision to seek legal advice and then tape at least one conversation with Carver "makes absolutely no sense." Inexplicably, she then casually informed a co-worker of the tapes and of her "rifling through his wastebasket and his mail."

Under arbitral precedent, this violation of privacy is disciplinable. The County argues that the relationship of Judge to Judicial Assistant demands maintenance of confidentiality and trust. Felker's conduct is, against this background, egregious. The County contends the conduct violates "the spirit of the Collective Bargaining Agreement as is set forth in the Preamble," and establishes bad faith sufficient to be considered insubordinate.

By mid-March of 1993, Felker viewed herself as "a woman scorned," and Carver was caught in a maelstrom surrounding an acquaintance charged with illegal book-making. Through random assignment, the criminal trial was assigned to Carver. Felker advised him of his

assignment while he was vacationing in Arizona. Carver instructed her to schedule a hearing on the matter for the day of his return, so that he could recuse himself. When Carver returned, he found the hearing rescheduled on the motion of the District Attorney's office. Within days, she voluntarily answered certain questions regarding contacts between Carver and Wilcox. This conduct, the County urges, allowed "a party to a lawsuit to have a private interview with a member of the court with regard to a matter of substance in relationship to a proceeding which was pending before the court." Such conduct, the County argues, is violative of Supreme Court Rules. Felker's experience in her position should have, according to the County, alerted her to the impropriety of her conduct. That she would reschedule the hearing without Carver's knowledge was also insubordinate. The rescheduling was, the County urges, part of a political stratagem by Paulus to assure Carver's embarrassment and removal from the Wilcox case. Felker was a willing participant in that stratagem.

Carver and Wagner issued her a series of warnings concerning the improper nature of her conduct and concerning the potential disciplinary significance of that conduct. This background makes her conduct in the Treasurer's Office particularly egregious. Her use of the court's authority to intimidate another employee is, the County urges, outrageous and petty. At roughly the same time, Carver discovered that notice of his meeting with Ellis had been leaked to Paulus. In spite of after-the-fact testimony by Paulus, Felker and Ellis, it is apparent, the County argues, that Carver reasonably perceived her to be the source of the leak.

Without regard to the source of this leak, the County argues that when Carver instructed Pagel to remove Felker from her position, the Judge/Judicial Assistant relationship had completely broken down. It is, the County notes, undisputed that Carver had the authority to request this removal. The County concludes that Pagel's determination that there was just cause to discharge Felker was appropriate. Even if one of the other branches would have accepted her as an employee, the County argues that her "misconduct, specifically, breach of confidentiality and undermining the authority of her supervisor," precluded such a transfer.

The County summarizes the basis for the discharge thus:

> Clearly, she had been insubordinate to her supervisor, and breached his right to privacy, and had used the influence of the Court to advance her private business affairs.

Felker's "stubborn and vindictive attitude towards this matter" is, the County argues, underscored by her refusal to consider reinstatement to any position other than Judicial Assistant or one of equal or better pay. Viewing the record as a whole, the County asks that the grievance be dismissed.

The Association's Initial Brief

After a review of the evidence, the Association notes it "is easier to apply a just cause standard than it is to define one." Relevant arbitral precedent, however, focuses on "whether the conduct of the discharged employee was defensible and the disciplinary penalty just." 27/ After noting that the quality of her work record is not in doubt and that she has no disciplinary history, the Association concludes that the cause determination must turn on the five incidents set out in Pagel's discharge letter.

The first incident turns on Felker's taping of one of two conversations with Carver. Carver had, however, come "dangerously close to committing a criminal act" by threatening her employment. The Association bases this contention on Sec. 12.07, Stats., and concludes Felker "rightfully feared for her employment." Her understandable desire "to memorialize the potentially illegal threats of the Judge in order to protect her employment" was, according to the Association, legally permissible. Even if improper, the tape recording "can not be used as a ground for discipline," since she had no warning of the disciplinary significance of her conduct and since the County "failed to take any timely action against her." The County has no policy "prohibiting the tape recording of conversations," she had obtained legal counsel prior to taping the conversations, and retained the tape "as insurance that the Judge would not take job action against her if she ran for Clerk of Courts." The Association argues that her conduct cannot be characterized as a breach of confidence and trust "placed in a Deputy by the Court," since "the taped conversation had absolutely nothing to do with the court's functions." Pagel waited almost one year to impose discipline and did so long after Wagner had assured her no discipline was "pending against her." The Association concludes the discharge was egregious and arguably constitutes double jeopardy.

The second asserted basis for the discharge concerns Felker's alleged admission to Hockers that she had searched Carver's waste basket. Noting that Felker "adamantly denies this," the Association argues that the statement, even if made, has no disciplinary significance. Because Felker approached Hockers as a union representative, the Association concludes the alleged statement must be considered confidential. This precludes basing discipline on it, for she could not have known of the potential disciplinary consequence of a confidential statement. That neither Pagel, Wagner or Carver took timely action based on the incident similarly precludes a conclusion the statement can constitute cause for discipline.

Regarding the third incident cited by Pagel, the Association argues that Paulus was both a Department Head and "the chief investigative officer of the County." For Felker to refuse to answer his two questions "could easily be construed as insubordination to a reasonable request of a department head," or "as obstruction of justice." The Association adds that she could not reasonably have foreseen the disciplinary consequences of her conduct or reasonably be assumed

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27/ Citing Elkouri & Elkouri, How Arbitration Works, (Fourth Edition, BNA, 1985) at 666.

to "have knowledge of any Supreme Court rule cited by Pagel."

The fourth incident cited by Pagel would never have seen the light of day if "Pagel (had) asked a few questions herself before imposing discipline." Pagel's evident interest in the matter was, the Association argues, apparent in her refusal to investigate Felker's denial of the incident. It follows that the "inadequacy of such an investigation shows a strong bias which taints all of the accusations made." The Association notes that Carver initiated the discharge process by ordering Felker's removal based on an incident which never occurred. It must follow, the Association argues, that "a discharge is obviously inappropriate."

The fifth incident involves her conduct in the Treasurer's Office. Acknowledging that her comments were "ill-advised," the Association argues that "discipline for the comment would be inappropriate." Noting that she promptly reported the incident to Carver, and that he laughed at it, the Association urges that the significance of the underlying incident is questionable. That Carver took no action based on his later investigation "displays the insignificance of Ms. Felker's comment." That Pagel acknowledged that it is not unusual in her office for "employees . . . to fight, bicker, and refuse to speak to each other" also establishes that disciplining Felker would expose "her to unfair, disparate treatment."

Even if the proof underlying the asserted bases for discipline was stronger, the Association argues that the evidence establishes a series of factors mitigating against discharge. Initially, the Association argues that her "work history has been exemplary." Her "length of service to the County" is, according to the Association, "(p)erhaps the most significant mitigating factor in Ms. Felker's favor." A review of the record would indicate, the Association contends, that her discharge is less a function of her conduct than of "legal maneuverings in support of a state-wide issue." Beyond this, the Association notes that the County's failure to forewarn her of the disciplinary consequence of any of her conduct mitigates against finding just cause for the discharge. That Pagel has treated employees "guilty of far more egregious actions" further mitigates against discharge. Such disparity of treatment "proves the injustice of Ms. Felker's discharge."

Viewing the record as a whole, the Association concludes that "(t)o uphold a discharge in this matter would be a gross miscarriage of justice."

The County's Reply Brief

The County disputes the contention that Wagner learned of the taped conversations in October of 1992. Rather, he did not learn of the secret taping of the conversations with Carver until April of 1993. Whether Carver illegally threatened Felker "is irrelevant to the case before the Arbitrator." Even if Carver acted illegally, her resort to self-help was improper. This should not, however, obscure that Sec. 12.07(4), Stats., does not clearly establish any wrong-doing on

Carver's part.

Beyond this, the County emphasizes that Carver "had the right to remove her from (her) position . . . at his pleasure at any time and did not need a reason to do so." Had her removal been effected without just cause, it "would not necessarily (have) jeopardized her employment with the County." The County contends, however, that her removal was for just cause. The contention that she could not be expected to understand the impropriety of secretly taping a conversation with a Judge in chambers without forewarning elevates form over substance and presumes she lacked "any degree of common sense." That she obtained prior advice that her action was legal cannot, the County contends, eliminate its disciplinary interest in her lack of judgment. The County also underscores that Carver did promptly warn her, after learning of the secret tape, that her breach of his trust put her job at risk. Her testimony acknowledges that Carver often reminded her that he would exercise his power to remove her whenever he believed it appropriate to do so.

Hockers' statement establishes that Felker "(s)ecretly taped Judge Carver for vindictive reasons." To contend her statement to Hockers is "confidential" is, the County argues, a "laughable . . . case of the pot calling the kettle black." Even if a sort of privilege exists for Felker's conversation with Hockers, it would be Hockers' privilege to claim, not Felker's. Beyond this, the County notes that although it is not clear when Hockers spoke to Pagel about her conversation with Felker, the conversation probably occurred in mid-April of 1993.

The Association's claim of disparate treatment cannot, according to the County, be accepted. That employees may bicker does not grant Felker a license to use the Circuit Court as a lever to work around a $150.00 fine. The assertion that Pagel lightly disciplined an employee accused of embezzlement ignores that the employee was ultimately discharged. Beyond this, the contention of disparate treatment overlooks the leniency shown Felker.

The County argues that Wagner's testimony cannot be read to imply the discharge lacked cause. Rather, any County offer of other positions "actually illustrates the uncertainty provided by the labor arbitration process, especially in light of the fact that the County's experience has been that many arbitrators are unwilling to uphold terminations . . . regardless of the grievousness of the offense." That the County would hedge this potential risk or would consider her for a position not requiring the confidentiality expected of a Judicial Assistant cannot be seen as anything less than reasonable.

The Union's Reply Brief

Noting that the County's brief paints "an interesting political landscape," and that the County grounds the discharge on four acts, the Association concludes that none of these acts warrant discharge and three fail to "justify discipline at all." Turning to the tape recording, the

Association contends that Felker did tell Carver, prior to the conversations, that she was considering running for Clerk; that she did consult Wagner and the Association's Attorney promptly after the threat to her job; and that "there was nothing the County could do to curtail the judge's threats." Her "self help" was, against this background, proper.

Beyond this, the Association contends the taping was legal and distinguishable from the "invasion of privacy" cases cited by the County. Nor can the taping be considered insubordinate. As a labor relations matter, "insubordination" connotes "disobedience," according to the Association. She did not disobey any order, and any expectation Carver had of keeping the threat confidential was mere "hope" rooted only on unethical behavior.

Felker's answering of Paulus' two questions cannot be considered disciplinable under SCR 60.01(10). There is no evidence to establish she was aware of the rule, and if any violation of the rule occurred, it was Carver's. Any discipline would put Felker in a "catch 22 position," caught between a potential violation of SCR 60.01(10) for answering Paulus' questions and a potential violation of SCR 60.01(3) and (6) for refusing to. To discipline her for answering the questions would "encourage unethical behavior" and would punish her for "praiseworthy" conduct.

Nor can rescheduling the Wilcox hearing be considered disciplinable. Scheduling was her responsibility and Carver never issued her a direct order not to reschedule the matter. Her conduct is not, therefore, insubordinate. As a Judicial Assistant, she had rescheduled many hearings without obtaining Carver's advance approval. The Wilcox matter was no different: "she was merely doing her job."

Although her conduct in the Treasurer's office was "inappropriate," it has not been shown to fall within SCR 60.11. Whether the conduct was disciplinable "must be considered in light of the County's disciplinary history" and Pagel's "lax" discipline of other employees.

Viewing the record as a whole, the Association concludes:

> None of the actions cited by the County come close to a level which would justify termination. Pat Felker got caught in the unsavory politics of Winnebago County. She worked for a manipulative Judge whose own ethics must be questioned. Pat Felker's actions were ethical and honest.

DISCUSSION

The stipulated issue requires the application of the just cause provision to Felker's discharge. Arbitrators have stated the standards defining just cause in many ways. 28/

28/ Cf., for example, Enterprise Wire Co., 46 LA 359, 362-365 (Daugherty, 1966) with Riley Stoker Corp., 7 LA 764, 767 (Platt, 1947).

Where parties have not stipulated the standards defining just cause, the analysis must, in my opinion, address two elements. First, the employer must establish employee behavior in which it has a disciplinary interest. Second, the employer must establish that the sanction imposed on the employee reasonably reflects its disciplinary interest. This states a skeletal outline of the elements to be addressed and relies on the parties' arguments to flesh out the outline.

The employer/employee relationship posed here is complex. The complexity turns on the relationship between the County, as Felker's employer, with the independent authority of a Clerk of Courts and a Judge. Carver served as Felker's immediate supervisor. Pagel shared supervisory authority over her. Neither was, however, her employer in a traditional sense. Her wages and benefits were set and paid by the County. The County exercises, however, indirect control, if any, over Carver and Pagel.

At a minimum, this clouds the exercise of disciplinary authority in this case. Carver ordered Pagel to remove Felker as his Judicial Assistant, then Pagel discharged her as a Judicial Assistant and as a Deputy Clerk of Court. The County, deferring to Pagel's and Carver's independent authority, treated Pagel's decision as a termination of Felker's employment. However, not until the Supreme Court declined to review the Court of Appeals' decision did the County assert an independent disciplinary interest in Felker's discharge. The subtlety of this assertion of an employer's disciplinary interest has a direct impact on the second element of the cause determination, and serves as preface to the first.

Pagel's September 8 chronology asserts six areas of conduct in which the County can claim a disciplinary interest in Felker's behavior. The evidence establishes a disciplinary interest in only two. At hearing, the County acknowledged that it claims no disciplinary interest in the first two areas of conduct.

The record supports this acknowledgment and fails to support a disciplinary interest in the fourth or sixth allegations. The fourth is that Felker's refusal to give her tape recorder to Carver is insubordination. Pagel characterized the unauthorized taping as "gross misconduct" and distinguished it from Felker's refusal to provide the tape recorder. The allegations must, then, be addressed separately.

"Insubordination," is a "deliberate defiance of . . . supervisory authority." 29/ This broad definition can be broken into five elements. To establish "insubordination," the County must demonstrate that (1) Carver had authority to issue Felker a direct order; (2) the order was clearly

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29/ Bornstein and Gosline, Labor and Employment Arbitration, (Matthew Bender, 1996) at Sec. 20.04.

stated by Carver and understood by Felker; (3) the order was work-related; (4) Felker understood the consequences of defiance; and (5) Felker had sufficient time to comply with the order. 30/

The evidence supports only the first and fifth elements. Carver's authority over Felker is undisputed. It is also undisputed that Felker had the opportunity to supply the tape recorder.

The evidence will not, however, support any of the remaining elements. Carver never issued a clear order to which he tied any consequence. Rather, he was concerned with whether Paulus was using Felker as a source for information. His requests were not a direct order. Rather, they indirectly communicated his aggravation and his desire to learn about her relationship with Paulus. In either event, his requests would not have been answered had Felker supplied the tape recorder. He had no interest in it, but sought to determine whether it was a type which might be an investigative tool used in the gambling investigation. Beyond this, the order, if meaningful, can be considered work-related only to the degree Carver's individual interest in the investigation is considered that of his position. Even if this deference is afforded Carver, it is unclear what work, in any sense meaningful to the County, Felker would be doing by supplying the tape recorder.

The record fails to establish insubordination. There is, then, no established disciplinary interest in the fourth area of conduct noted in Pagel's chronology.

Nor does the record establish any disciplinary interest in the sixth allegation. That Felker functioned in a confidential capacity is established. The asserted breach of confidentiality is not.

The evidence establishes that neither Carver nor Pagel meaningfully investigated, much less established, the alleged breach of confidentiality. Carver confronted Felker after his conversation with Ellis. This confrontation is something less than an investigation. His response to her denial was to order Pagel to remove her as his Judicial Assistant. Pagel's investigation was diligent in comparison to Carver's, but cannot be considered meaningful. She consulted Ellis and Carver's court reporter, but did not consult Felker, Paulus or Reetz. Pagel candidly acknowledged her strained relationship to Paulus. Her candor cannot, however, obscure that her investigation did not attempt to test Carver's assumption that only Felker knew of the meeting.

Evidence produced at hearing makes that assumption untenable. Carver asserted he may have asked Felker to phone Ellis, or she may have overheard him making the arrangements. He offered no detail for either assertion, and they would appear contradictory. Presumably, only one of them made the arrangements. The sole objective basis he offered for her knowledge of the meeting was a phone message she left on his desk. Even in the absence of rebuttal, the message fails to support a conclusion that she knew of the meeting, much less that she supplied meeting arrangements to Paulus. The message was not put in evidence, and there is no way to determine if

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30/ Ibid., cf. with Roberts' Dictionary of Industrial Relations, (Third Edition, BNA, 1986).

it indicated that the meeting had been set or that Ellis' office wanted Carver to call back. That Carver's testimony affords no specifics on the message is not insignificant. He alleges Ellis told him that Paulus wanted to know the reason for the meeting. If, however, Felker received a call-back message from Ellis' office, there is no basis for her asserted knowledge of the meeting. She would have transmitted to Paulus at most an indication that Ellis and Carver were phoning each other. Assumptions can be made to account for the substance of the conversation Carver alleges Ellis had with Paulus. None, however, has persuasive evidentiary support.

More significantly, unrebutted evidence links Paulus' knowledge of the meeting to a source other than Felker. Ellis' testimony does not corroborate Carver's. He denied talking to Paulus. It is not necessary to resolve this conflict to address the issues posed by the grievance. Ellis' and Paulus' testimony demonstrate how Paulus became aware of the meeting without Felker. There is no persuasive evidence to link her to Paulus on this point. Against this background, Carver's and Pagel's allegation is unproven at best. This is sufficient to preclude finding any disciplinary interest in the alleged breach of confidentiality.

The record will, however, support the County's assertion that it has a disciplinary interest in the third and fifth allegations of Pagel's chronology. The Association's contention that the County lacks a disciplinary interest in Felker's confrontation with Abendroth is unpersuasive. Abendroth's account is unrebutted. However, Felker's testimony standing alone establishes behavior in which the County has a disciplinary interest. Under her account, she identified herself to Abendroth as Carver's Judicial Assistant. She later informed Carver that Bradley's failure to extend her a favor meant Bradley could expect no favor in return. It is apparent from this that she tried to use her public position for personal gain. This cannot be dismissed as inconsequential. Even if the legal system fails in the attempt to make all equal in the eyes of the law, the County's desire to enforce its interest in the attempt cannot be ignored. Felker's conduct set the Courthouse grapevine to work, and offended three Account Clerks in Bradley's office. This broad sense of affront is more than a tempest in a teapot. It reflects legitimate concern with the abuse of public office, and is traceable to Felker's conduct.

This leaves the most significant of Pagel's allegations. The allegation of "Gross Misconduct" rests on the unauthorized tape recording and Felker's April 2 contact with Paulus.

The County's contention that it has a disciplinary interest in deterring the unauthorized tape recording of office conversations is persuasive. At the most general level, it can be noted that arbitral precedent has recognized such an interest. 31/ More significantly, the first element of the cause analysis focuses on the existence of a disciplinary interest, not on its magnitude. Here, the dispute is whether the County has an interest in enforcing standards of conduct more exacting than criminal law and whether it has an interest in deterring employee eavesdropping. That the tape recording may have been legal does not address its propriety as an employment relations matter. Wagner persuasively asserted this point.

31/ See Claridge Products & Equipment, 94 LA 1083 (Goodstein, 1990), and Prescription Health Services, 98 LA 16 (Darrow, 1991).

The degree to which Felker's response may have been provoked by Carver is irrelevant to this element of the cause analysis. It is undisputed that the tape recording was unauthorized. The County has demonstrated a disciplinary interest in this behavior.

The County's disciplinary interest is limited to the unauthorized tape recording. Pagel's chronology alleges that Felker rifled Carver's wastebasket and office papers. This allegation rests on Hockers' written statement, which dates Felker's admission to early October of 1992. No other evidence would place the conversation between Carver and Felker regarding Pagel's position to that time. It is not necessary to discredit Hockers' statement entirely to conclude the allegation that Felker rifled Carver's wastebasket is unproven. If Felker attempted to secure evidence against Carver as assiduously as Pagel asserts, it is difficult to understand why she never attempted to use it. There is no persuasive evidence to rebut her credible denial of this accusation.

Felker's contact with Paulus on April 2 raises troublesome issues, but the County has established a disciplinary interest in it. To clarify this conclusion, it is necessary to isolate what behavior will not support the interest. That she supplied information to Paulus cannot, standing alone, establish the disciplinary interest. There is no contention the information is privileged. The County asserts the nature of her position makes the communication a breach of confidentiality. This presumes that Carver's interest in avoiding a conflict of interest or the gambling investigation is synonymous with the County's interest in the conduct of an employee. Paulus is a department head and the County's lead prosecutor. His questions put Felker in a difficult position, unless it is assumed a Judicial Assistant can have no obligation to anyone but a Judge.

Nor can Felker's communication with Paulus be considered insubordination. Carver had not issued any order for her to disobey. It may be that Paulus put Felker in a difficult position by not compelling her appearance through a subpoena or other means. Discipline of Felker is not, however, a defensible response to Paulus' tactical choices.

With this as background, the County's disciplinary interest focuses on the ex parte nature of the conversation. Under any view of the testimony, Felker did not inform Carver of the conversation until after the April 5 hearing. She informed him of the motion on April 2, but did not inform him of her conversation with Paulus. As noted above, it is difficult to fault her for responding to Paulus. The same cannot be said for her failure to notify Carver of the conversation. There is no evidence Paulus directed her not to respond. Her failure to do so is her responsibility. That she would communicate fact relevant to pending litigation to a party to the litigation without informing the Judge is a breach of her confidential status. It is not a defense to this conduct to assert Carver provoked it. The duty of a Judicial Assistant to a Judge does not turn on their personal relationship or the specific merit of a Judge's decision. Nor is it a defense to assert Paulus put her in a difficult position. Had she relayed the conversation to Carver, she would have brought the tension between Carver and Paulus into the open and focused the tension where it belonged. In sum, her response to Paulus is not, standing alone, behavior in which the

County has a disciplinary interest. However, her failure to disclose the conversation to Carver drew her into an improper ex parte type of contact. This neglect, whether an act of omission or commission, establishes the County's assertion of a disciplinary interest in her behavior.

It is now necessary to apply the second element of the cause analysis. The issue posed is whether discharge reasonably reflects the disciplinary interest established above. The evidence demonstrates it does not.

This conclusion primarily rests on the factual basis of the disciplinary interest the County asserts. Central to that is the County's awkward relationship with the persons responsible for the discipline. At most, the County exercised indirect control over the discharge. Based on case law, it consistently deferred to Pagel's and to Carver's authority. Pagel consistently deferred oversight of Felker's behavior to Carver. This deference dictates that the factual basis for the discharge rests on Carver's conduct toward Felker.

Carver's and Pagel's conduct toward Felker precludes finding discharge a reasonable sanction for Felker's behavior. Even though Wagner's July 28 letter is the most effective supervisory statement of the County's disciplinary interest in this matter, the discharge is not based on that letter. The discharge must be assessed on how it was effected, not on how it could have been effected. The County can claim no greater disciplinary interest than Pagel did.

The precipitating event for the discharge was the alleged breach of confidentiality concerning Carver's meeting with Ellis. That breach was not meaningfully investigated and has not been proven. Standing alone, this precludes finding the discharge reasonable. Wagner's June 15 letter confirmed there was "no disciplinary action pending" against Felker. She had no prior discipline. This leaves the Treasurer's Office incident as the only proven behavior on which the discharge can rest. That incident can support discipline, but not discharge. Even ignoring that Carver did not reprimand Felker, her isolated lapse of judgment cannot erase thirty-seven years of service to the County.

Felker's long service must be considered in an assessment of the reasonableness of the discharge. 32/ Her service is not, however, the sole or even the predominate factor which precludes finding cause for the discharge. Even considering the offense which preceded the Treasurer's Office incident, the established disciplinary interest does not support discharge.

Ultimately, the weakness of the discharge is that it was a political act violative of

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32/ This has become a fundamental consideration in the application of just cause, see Elkouri & Elkouri, How Arbitration Works, (Fifth Edition, BNA, 1997) at 929-930; Hill & Sinicropi, Evidence in Arbitration, (BNA, 1981) at 34-35; and Schoonhoven, Fairweather's Practice and Procedure in Labor Arbitration, (Third Edition, BNA, 1991) at 258.

contractual due process. Just cause is the foundation of due process in the employment context. At root, the process presumes that an employer will investigate allegations of improper conduct and that an employee will be informed of inappropriate behavior which is amenable to modification. Discipline is applied to sanction improper behavior and to encourage the appropriate modification.

At no point in the unraveling of Carver's and Felker's employment relationship were the basic tenets of contractual due process or progressive discipline applied. This undercuts the disciplinary interest Carver passed to Pagel and to the County. The signature stamp issue exemplifies this. Carver never communicated to Felker that her use of the stamp was inappropriate. Wagner, after an investigation, did. When Felker learned the County did not wish her to use the stamp, she responded appropriately. This incident was not disciplinary, but manifests how contractual due process is intended to work. It also serves to preface the contrast between contractual due process and Pagel's and Carver's conduct. The signature stamp incident was never resolved for them. Their relationship to Felker reflected something other than contractual due process.

The political conflict between Carver and Felker is not, standing alone, significant. However, to the extent it prevented recourse to contractual due process, it undercuts each facet of the asserted disciplinary interest. Wagner's July 28 letter articulated the County's significant disciplinary interest in the unauthorized tape recording. The significance of that interest is, however, undercut by its assertion by Carver and Pagel.

Even under Carver's account, the "Valentine's Day" conversation was a veiled threat. His assertion of a conflict of interest came after he had informed Felker she could not run for office as his Judicial Assistant against his personal friend. Citation of relevant Supreme Court Rules would not follow until several months later in a letter of discharge. Carver's account points less to employment based instruction than to political intimidation. Felker's account of the conversation sketches an unveiled threat. In either event, her response was provoked. The impact of this provocation in assessing the degree of the County's disciplinary interest cannot be ignored. The County notes the veiled or unveiled threat can be considered rooted in SCR 60.14. If, however, Felker's challenge to Pagel was improperly partisan, how was it less partisan for Carver to use his authority to protect Pagel?

The contention that Felker had better means to defend her position has merit, but its merit should not be overemphasized. The strength of the contention turns on Felker's position in the Association. Why she did not use her labor organization to bring her difficulties into the open is unexplained. However, that she sought to bring a third party into her conversation with Carver mitigates the disciplinary significance of her use of the tape recorder. Beyond this, it is apparent that other effective means of recourse were limited. As Wagner's attempts to defuse the problems between Felker and Carver manifest, no County official exercised appreciable control over Carver. Pagel was not a viable source of aid. The existence of the tape recording was not known

until the gambling investigation had become a criminal prosecution. Pagel's husband was alleged to be one of Wilcox' customers. Felker's identification with Paulus made her relationship to Pagel no less strained than Pagel's to Paulus. Beyond this, her failure to objectively investigate any allegation made against Felker precludes concluding she was a meaningful source of assistance. In sum, the impropriety of the tape recording is tempered by the limited options Felker had to defend herself.

Similarly, the disciplinary significance of Felker's contact with Paulus is tempered by a view of the context. The letter of discharge asserts the contact was inherently improper and cites Supreme Court Rules to underscore the depth of the impropriety. However, Carver acknowledges that when a Deputy District Attorney advised Carver that his office "was out to get you . . . (t)hey're preparing some papers to do that," 33/ Carver responded by seeking to find out what the Deputy was referring to. It was the Deputy, not Carver, who cut off further response. It is not immediately apparent how this contact should place neither the Deputy nor Carver in violation of Supreme Court Rules, but Felker's should place her position in jeopardy.

The absence of basic tenets of progressive discipline in Carver's response to Felker also undercuts each aspect of the County's disciplinary interest. Under progressive discipline, prompt notice of inappropriate behavior should result in an investigation followed by prompt application of a sanction based on the investigation. Each sanction brings closure to each incident. Additional sanctions turn on repetition of the sanctioned behavior. If the improper behavior is not modified, the employment relationship can be terminated, with discharge standing as the culmination of progressively harsh sanctions imposed on discrete but recurring instances of improper conduct. Where Carver or Pagel investigated a claim, the investigation never included obtaining Felker's account. No prompt sanction followed their investigation, nor is any closure apparent in any of the alleged misconduct. Rather, Carver complained to Pagel, who would defer to his determination to handle Felker on his own. Purportedly, this was to reconcile their differences without the involvement of the County bureaucracy. On the facts, however, this meant Carver would periodically threaten Felker's employment, based on any or all of the conduct which upset him.

This conduct is reconcilable, perhaps, to political control. It is not reconcilable to contractual due process. More significantly here, it undercuts the assertion that the underlying conduct warrants discharge. If the tape recording violated Supreme Court Rules sufficiently to warrant discharge in September, why did it not warrant any discipline in April? If the April 2 conversation violated Supreme Court Rules sufficiently to warrant discharge in September, why did it not warrant any discipline in April? This is ultimately the weakness of the County's case for discharge, whether or not directly traceable to County conduct.

33/ Tr. I, 60.

In sum, the County's proven disciplinary interest in Felker's behavior is not reasonably reflected by the sanction of discharge. This precludes finding just cause for the discharge. This addresses the sole issue posed here. The Award stated below notes my retention of jurisdiction to address the issue of remedy. The Award does not compel further hearing. This is to encourage the parties to address the issue of remedy informally before resorting to the formal hearing process.

Before closing, it should be noted that the County posed an additional issue at hearing. The issue concerns the implications of this litigation on the County's relationship with its department heads or officials not subject to its direct control. This is a significant issue. The conclusion stated above makes the County the stakeholder for the actions of officials it did not control. The equity of this allocation of responsibility is questionable.

No further comment is appropriate regarding this issue at this point in the litigation. The legal source or significance of the allocation of responsibility between Carver, Pagel and the County has potential implications on the issue of remedy. Remedy remains to be determined, and the issue posed by the County must be reserved until the issue of remedy has been argued.

At this point in the litigation, it is apparent that Carver and Pagel occupy unique supervisory positions in a legal sense. However, it is also apparent that they exercised first line supervisory control over an employee entitled to the protection of just cause. That they failed to honor this obligation cannot obscure that the County is bound by it. To treat their unique status as front line supervisors as a defense to the duty of just cause would render the duty meaningless. On its merits, the grievance demands the application of the contract to fact. Implications surrounding the County's legal relationship to Felker or Pagel may impact the issue of remedy. They are thus secondary to the application of contract to fact undertaken here.

AWARD

There was not just cause to discharge the Grievant.

As requested by the parties, I will retain jurisdiction over the grievance. Jurisdiction will be retained for not less than forty five days from the date of this Award for the purpose of resolving any dispute between the parties on how to remedy the County's breach of Article VI.

Dated at Madison, Wisconsin, this 2nd day of May, 1997.

By Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator