BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LAFAYETTE COUNTY COURTHOUSE EMPLOYEES UNION LOCAL 678, WCCME, AFSCME, AFL-CIO

and

LAFAYETTE COUNTY

Case 69
No. 55002
MA-9864

(Robert Helm Discharge Grievance)

Appearances:

Mr. Michael J. Wilson, Representative at Large, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite B, Madison, Wisconsin 53717, appearing on behalf of the Union.

Brennan, Steil, Basting & MacDougall, S.C., by **Attorney Howard Goldberg**, 22 East Mifflin Street, Suite 400, P.O. Box 990, Madison, Wisconsin 53701-0990, appearing on behalf of the County.

ARBITRATION AWARD

Pursuant to a request by Lafayette County Courthouse Employees Union Local 678, WCCME, AFSCME, AFL-CIO, herein "Union," and the subsequent concurrence by Lafayette County, herein "County," the undersigned was appointed Arbitrator by the Wisconsin Employment Relations Commission on November 21, 1997, pursuant to the procedure contained in the grievance-arbitration provisions of the parties' collective bargaining agreement, to hear and decide a dispute as specified below. On April 1, 1998, the Union filed a Motion that the discharge grievance of Robert Helm, herein "Grievant," should be sustained on procedural grounds. A hearing on said matter was conducted by the undersigned on April 28, 1998, at Darlington, Wisconsin. On July 20, 1998, the Arbitrator issued an Interim Arbitration Award in the matter, which stated:

. . .

Based on all of the above, and the record as a whole, the Arbitrator finds that the answer to the issue as stipulated to by the parties is YES, the County violated Article III of the collective bargaining agreement when it failed to provide a written notice of the Grievant's discharge within three (3) working days as required by the agreement. However, the Arbitrator will address the issue of appropriate remedy at the substantive stage of this arbitration proceeding.

. . .

INTERIM AWARD

That the Union's Motion to Sustain the grievance is denied. However, the grievance is sustained in part, and the parties are ordered to proceed to hearing on the merits.

. . .

A hearing on the merits of the grievance was held on November 17 and 18, 1998, at Darlington, Wisconsin. A transcript was issued on December 4, 1998. The parties completed their briefing schedule on February 1, 1999.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

After considering the entire record, I issue the following decision and Award.

STIPULATED ISSUES

Did the Employer have just cause to discharge the Grievant, Robert Helm? If not, what is the appropriate remedy?

FACTUAL BACKGROUND

General Background

Robert W. Helm, hereinafter "Grievant," was employed by the Lafayette County Commission on Aging as a Benefit Specialist for nineteen (19) years. He was supervised in the

County as to his non-benefit specialist duties by Carol Benson, Director of the Lafayette County Commission on Aging, hereinafter "Benson." His benefit specialist duties were supervised by an attorney assigned by the Elder Law Center, Coalition of Aging, hereinafter "ELC" or the "Center." The ELC assigned Attorney Mitchell Hagopian, hereinafter "Hagopian," to supervise the Grievant. Funding for this program came from the State and Federal governments. These funds were administered by a company known as AgeAdvantAge, which was headed by Lucille Baker, hereinafter "Baker."

On July 29, 1996, the County Commission on Aging disciplined the Grievant for events that took place earlier that year. Specifically, he was given a written warning for failure to provide his supervisor, Benson, with timely reports of his anticipated activities despite having been directed to do so. The Commission directed Benson to warn the Grievant "that he must provide timely reports in the future and that any further violation of this directive" could subject him to additional discipline including discharge.

The Commission also suspended the Grievant for three days without pay for events that took place during an intake with clients on March 19, 1996. In particular, the Commission found that the Grievant acted unprofessionally on that date by making miscalculations when computing a client's deductible, by making inappropriate comments about the interview to Hagopian after the clients left, and by writing on the client's papers.

In addition to imposing the above discipline, the Commission directed:

. . .

> 2. The Committee instructs Ms. Benson to inform Mr. Helm that he is required to comply with the tasks as outlined in the ELC letter dated July 16, 1996. Specifically, Mr. Helm is directed to take such tests, prepare and submit such reports and such articles as are required by the ELC. He is to be warned that failure to follow this directive may subject him to further discipline including possible discharge.

. . .

By memo dated July 30, 1996, from Betsy Abramson, Director ELC, hereinafter "Abramson," to the Grievant, Helm was advised:

. . .

> . . . we have not received the weekly work plan expected of you as directed in our memo of July 16, 1996. Item (2) of the (5) listed in this memo stated that you are to "prepare a weekly work plan for the subsequent week, to be completed and FAXed to the CWAG Elder Law Center by the preceding Friday noon each week. The contents of the weekly work plan was outlined in that same paragraph. You did not comply with this directive on Friday, June 19, 1996 or Friday, June 26, 1996.
>
> Additionally, item (3) of that same memo directed you to complete typed roundtable case discussion sheets for each opened case, and follow-up addendums as appropriate. To date we have received none of these either. It is thus not clear whether you have not opened *any* cases since you received this memo on July 16, 1996 or, alternatively, you are delinquent in submitting them to us.
>
> . . .
>
> We direct your attention again to this memo and its assigned tasks and clear deadlines. If further infractions occur, we will be forced to notify Lucy Baker, Executive Director of Age AdvantAge.

By letter dated August 6, 1996, Benson informed the Grievant of the aforesaid Commission's directive. At the same time, she provided the Grievant with a copy of a five point remedial program which included the following expectations:

> 1. The Grievant must complete, to the satisfaction of the assigned legal back-up attorney of the ELC, a Benefit Specialist Examination, developed by and proctored by Hagopian.
> 2. The Grievant must prepare a weekly work plan for the subsequent week and FAXed to the Center by the preceding Friday noon each week outlining his planned activities.
> 3. The Grievant must complete roundtable case discussion sheets for each opened case, and follow-up addendums showing updated activity, and provide same to the Center on a weekly basis.
> 4. The Grievant must prepare two written newsletter articles, suitable for publication in the COA newsletter on two named topics by two dates certain.
> 5. By a date certain, the Grievant must develop a typed outreach plan with specific activities and deadlines noted for increasing participation in three named programs.

Benson further warned the Grievant:

. . .

> You are expected to fully cooperate with the Elder Law Center and the Area Agency on Aging in all matters including supervision and monitoring of the Benefit Specialist Program. Failure to do so may result in further discipline including possible discharge.

. . .

The Union subsequently filed a grievance on both aspects of the discipline. Hearing in the matter was held on April 25, 1997, before Arbitrator Edmond J. Bielarczyk, Jr., who found:

. . .

> The County did not have just cause to suspend the grievant on August 13, 14 and 15, 1996. The County is directed to reduce the suspension to an oral warning and to make the grievant whole for all lost wages and benefits.
>
> The County did not have just cause to issue the August 8, 1996 written warning regarding the filing of quarterly reports. The County is directed to cleanse the grievant's record of the written warning and to place the grievant on notice that failure to file timely quarterly reports may result in discipline.

. . .

The County appealed the Bielarczyk Award to the Circuit Court, and Reserve Circuit Court Judge, the Honorable Daniel L. LaRocque affirmed on July 11, 1998, the Bielarczyk Award insofar as it found there was no just cause to impose a three-day suspension on the Grievant and he overturned the Bielarczyk Award insofar as it found there was no just cause for the written warning imposed on the Grievant. As a result, at the time of his discharge, the Grievant had only an oral warning and written reprimand in his personnel file.

Facts Giving Rise to the Instant Dispute

The Grievant was directed to prepare his first newsletter article on the MA Deductible Program, and the second newsletter article on "Increasing assets to generate more income under the MA Spousal Impoverishment Program."

According to Hagopian, the MA Deductible Program was "the topic that was the subject of the client interaction that triggered this whole review process." Hagopian wanted the article because: "it was exactly the subject upon which Bob had provided the misinformation to the clients, and so we felt the newsletter article would be a useful tool to determine if he understood the program." Hagopian also felt that the program was a "great program for people in Lafayette County," but underutilized. A newsletter article could bring people into the program who needed help.

Hagopian testified that the second article was on a topic "that we had just trained Bob on, in July." Hagopian stated: "So the purpose of this article was not to see if he understood it. We assumed that he did."

On August 14, 1996, Hagopian received a draft of the first required newsletter article.

By memo dated August 15, 1996, Hagopian instructed the Grievant to make additions to the first draft of the newsletter article by including "information which would make it relevant to Lafayette County citizens" and information on how to get in contact with the Grievant "should any potentially eligible recipient need assistance."

On August 19, 1996, Hagopian had a telephone conversation with the Grievant in which he instructed him to provide more detail in weekly work plans.

On August 23, 1996, Hagopian received a second draft of the first newsletter article.

By memo dated August 27, 1996, to Benson, Hagopian outlined problems with the newsletter article. These included: the lack of any original thought in the preparation of said article; the fact it was submitted late; and the fact it failed to contain any instructions on how to apply for the program discussed. Hagopian concluded:

> In summary, I believe that Bob has failed to meet the minimum requirements of submitting a newsletter article suitable for publication in the COA newsletter on the MA Deductible program as required by the memo of July 16, 1996 from the Elder Law Center. Bob had specific instructions and a reasonable opportunity to complete his second "draft" of the article and failed to avail himself of the opportunity. I recommend that appropriate disciplinary action be taken.

The Grievant took an exam as instructed on September 3, 1996. The exam was an open book exam consisting of mostly true and false questions. If an answer was false, then the Grievant was to explain why it was false. There were also two essay questions. The answers to all of the questions could be found in the materials that had been previously supplied to the Grievant and which were present in his office. There was no time limit imposed on the Grievant, and the only restriction was that he was not to call someone else to learn the answer. Hagopian proctored the exam as he was instructed to do in the Commission's July 29, 1996 minutes. The exam was prepared by Hagopian, but it was actually graded by another Center employe. Hagopian testified that the Grievant did not do well on the exam. According to Hagopian, his grade was 62 percent correct; but, if the grade was adjusted to reflect a technically correct answer by an incorrect explanation, then his grade dropped to only 52 percent. Hagopian stated this was a "terrible score" for someone with the Grievant's years of experience. Hagopian stated the Grievant was expected to score at least 70 percent or higher. Hagopian added that the Grievant never reviewed the examination with Hagopian "to find out what areas that he had done incorrectly" or to comment on the examination "one way or another." By memo dated September 12, 1996, Hagopian wrote to the Grievant and Benson expressing his disappointment in the results of the aforesaid examination.

By memo dated September 17, 1996, Hagopian informed the Grievant of certain deficiencies in the second newsletter article. In particular, Hagopian pointed out that the Grievant "did not address the topic which we had instructed you to cover." Hagopian also noted that if the Grievant "did not understand what the topic was that you were supposed to be writing the article on, you should have contacted me prior to September 15." Hagopian added: "I am becoming concerned about your apparent inability to follow simple instructions." Hagopian concluded: "I will be recommending appropriate disciplinary action be taken as a result of this clear failure to comply with an unequivocable directive."

The Grievant was asked to prepare a second draft. The Grievant's second draft did not accurately describe the subject, and did not present things in the right order. The Grievant was directed to prepare a third draft and submit it to Hagopian. Hagopian testified that the third draft was "worse" than the second draft. It did not contain an example on the subject matter; rather, the Grievant wrote something else and he got that example wrong.

By memo dated September 19, 1996, to Benson and the Commission on Aging Board, Hagopian recommended that a remedial training plan for the Grievant be developed "based on his performance on the examination." Hagopian recommended the following plan: one, Hagopian meet with the Grievant after the September 23 meeting to consolidate and organize resource materials; two, the Grievant attend a basic benefit specialist training at the end of October; three, the Grievant use a new case report form; and four, a follow-up substantive evaluation be scheduled "to measure Bob's progress in terms of his understanding."

The Grievant's job difficulties were discussed with him and Fran Fink, Union Steward, hereinafter "Fink," at an Executive Committee meeting of the Commission on Aging on September 23, 1996. At the meeting, the Grievant was advised as to deficiencies noted by his supervisors including problems with the newsletter articles, poor test results and failure to follow a remedial plan of action developed by Hagopian. Other deficiencies discussed included insubordination by the Grievant (On August 28, 1996, he told his boss to "shut up"). The Executive Committee decided "that at this time further disciplinary action would serve no positive purpose." Instead, the Committee passed a motion that if there was further problems with the Grievant's job performance, attitude or failure to comply with directives there "will be immediate disciplinary action of five days without pay or probable termination." The Grievant was instructed by the Committee to adhere to the remedial plan.

Hagopian met with the Grievant, also on September 23, 1996, to discuss not only the second newsletter article noted above, but also client cases and resource materials.

By memo dated October 10, 1996, Hagopian advised Benson, in material part, as follows:

. . .

> I am again recommending that the Committee take some disciplinary action against Bob for his failure to comply with my earlier directive that he write an article on the subject of "increasing assets to generate more income under the MA spousal impoverishment program." I have given him <u>two</u> additional opportunities to come up with an article that actually relates to this subject.
>
> It is my understanding from the conversation which occurred at the September 23 meeting that any additional contact from me regarding deficient performance by Bob Helm would result in his termination. Under the circumstances, I believe that termination would be appropriate.
>
> Please contact me as soon as possible regarding your plan of action with regard to my recommendations.

The Grievant, Fink and Union President Paul Godfrey were present at the next meeting of the Commission Executive Committee held on October 24, 1996. At that meeting, the Grievant was again advised of problems with his job performance. He was also given a copy of the letter written by Hagopian noted above which outlined the Grievant's continued work deficiencies and recommended his termination.

The Committee did not act on this matter at the time but instead adjourned to a later date because the Grievant wanted to have Union Representative Tom Larsen, hereinafter "Larsen," present. The Committee urged all parties concerned to explore the possibility of placing the Grievant in a different job by way of a job swap with another County employe, the possibility of moving the Benefit Specialist Program and position to the Human Services Agency or other possible options that might be available to resolve the dispute. The Committee voted to suspend taking any disciplinary action regarding the Grievant and to explore other solutions for the Grievant and the Commission of Aging until the next Commission on Aging Board meeting. Hagopian was asked "if it would be possible to have a different supervising attorney from the ELC," and Hagopian responded that he would forward the request to his supervisor.

By letter dated November 12, 1996, Abramson informed Byron Berg, Chair, Lafayette County Commission on Aging, that the Center would not replace Hagopian with a different ELC attorney for purposes of supervising the Grievant's benefit specialist work. Abramson noted that no allegation of unfairness by Hagopian had been brought to her attention directly, and even if it had, "it would not change my position." 1/ Abramson noted that she had attended a July meeting of the Commission on Aging where Baker "directed us to significantly increase the supervision of Mr. Helm. I believe Mitch has done so responsibly, conscientiously and most of all, fairly."

1/ Abramson gave no explanation whatsoever as to why she insisted on supporting Hagopian even if he had been unfair in his treatment of the Grievant. Abramson's inexplicable position, and her steadfast refusal to even consider replacing Hagopian as the Grievant's supervisor even though that was a reasonable solution to the conflict that developed between Hagopian and the Grievant, is partly responsible for the events that followed.

Also by letter dated November 12, 1996, Baker wrote to Berg expressing her concern over extending a contract for Benefit Specialist Services to the County. While noting Benson and the Commission had worked "diligently with the Elder Law Center and Bob Helm to allow Mr. Helm the support and opportunity to improve," Baker expressed disappointment over the outcome of such efforts and the Grievant's failure to grasp the benefits counseling necessary to have a viable Benefit Specialist Program. Baker concluded:

. . .

> The Lafayette County Commission on Aging, as is stated in State policies, has the responsibility for hiring and firing of benefit specialists. I understand that

> the Commission will be taking action on the issues raised in Mitch Hagopian's October 10th letter. Given the seriousness of the deficiencies outlined in that letter, I would expect decisive steps would be needed to assure the future quality of your program or I will be forced to look elsewhere for a service provider. I will review your action and inform you of your contract status by December 2, 1996.
>
> . . .

The Executive Committee next met on November 12, 1996, for the purpose of consulting with counsel. The Committee took no action at this meeting but discussed various options, including termination of the Grievant. The Grievant was not present at said meeting.

On November 14, 1996, the County's counsel, Attorney Howard Goldberg, faxed a copy of a Severance Agreement to both Larsen and Steven Pickett, hereinafter "Pickett," the County Clerk. There were discussions between Larsen and the County regarding the settlement of issues regarding the Grievant. Larsen informed the County that the Grievant rejected the proposed settlement agreement because he did not want to resign his employment with the County. Nevertheless, the County renewed its settlement offer several times and settlement discussions continued into December, 1996.

When the parties were unable to reach an agreement concerning the Grievant, the subject of the Grievant's job status was placed on the agenda of the November 18, 1996 meeting of the entire Commission on Aging Board. At that meeting, Hagopian "gave an overview of the background and history of the current issues regarding" the Grievant's work performance as Benefit Specialist for the County. Hagopian "then reviewed a summary of activities that the Elder Law Center, the COA and the Area Agency on Aging" had been involved in "since June of 1995, in an effort to improve the services of the Lafayette County Benefit Specialist program." (A summary of said activities was attached to the minutes of the Commission's meeting.) Hagopian also discussed the poor test results that the Grievant had received on the skills test and the problems with the newsletter articles that the Grievant had been required to prepare. Hagopian then reviewed for the Commission "how the Benefit Specialist Program works in the 11 other counties that he supervises."

Chairman Berg then read the letter dated November 12, 1996, from Baker, noted above, regarding the future of the contract for the Benefit Specialist Program. Berg next read the aforesaid letter from Abramson rejecting a change in supervisory staff for the Grievant.

The Grievant was then offered the opportunity to make a response. The Grievant stated that he had no clients complain about his work on the satisfaction surveys that had been done regarding his program.

Larsen commented: "it seemed that all of this was related to the incident of client services in March and that no one was getting wrong information and in fact there had been some improvement in client files and record keeping."

There was some discussion about client complaints and Benson responded that there had been a number of complaints over the past but that they did not come directly from clients. Benson indicated that those complaining were reluctant to proceed and did not want to formalize the complaint process.

Jerry Lynch asked to address the Commission and spoke on behalf of the Grievant.

Next Chairman Berg "asked the committee how they wanted to address the issue." After a motion, and second, the Commission voted to terminate the Grievant effective immediately.

By memo dated November 26, 1996, Fink advised Benson and Pickett as follows:

> Per Article IV of the Lafayette County Courthouse Employees Union Local 678 contract with Lafayette County, Step 1: Mr. Helm requests a meeting with you to discuss the action taken against him on November 18, 1996.
>
> Mr. Helm is filing a grievance based on the violation of Article III of the contract. He contends that he was discharged without just cause. In addition, no written notice of his discharge nor any reason for the action has been given to Mr. Helm or to the Union.
>
> Mr. Helm and the Union request copies of the minutes of the open and closed sessions of the Commission on Aging Executive Committee Meeting held in Madison on Tuesday, November 12, 1996.
>
> . . .

Both Benson and Pickett testified that they did not recall seeing the above memo prior to the hearing. Nancy Kilcoyne, an employe in the County's Human Services Department, testified that she typed said memo and had it delivered to their respective offices.

The Step 1 oral grievance meeting was held on December 4, 1996. Present were the Grievant, Union representatives Larsen and Fink, Benson and Pickett representing the County. Benson was asked to reconsider the Board's decision to terminate the Grievant and responded that she was not able to overturn a Board level decision. The Union representatives also raised an issue regarding the lack of a formal letter containing the specific reasons for the discharge

within the time limits set forth in the labor agreement. Pickett responded that this was the first time that such a letter had been requested and that a letter would be forthcoming as soon as possible.

By letter dated December 5, 1996, Benson denied Helm's grievance at the oral step as follows:

. . .

> In response to the issues raised in the oral grievance meeting held on Wednesday, December 4, 1996 the grievance has been denied.
>
> As you are aware, the decision to discharge you from your position as Benefit Specialist for Lafayette County was made by the Commission on Aging Board. As director of the agency I am not in a position to rescind a board level decision.
>
> As discussed, a formal notice of your discharge will be forthcoming and copies of the minutes requested will be made available as soon as they have been approved by the committee.

. . .

By letter dated December 13, 1996, Larsen filed a Step 2 written grievance on the matter. In said grievance, Larsen alleged that the County did not have just cause to discharge the Grievant within the meaning of Article III and other applicable provisions of the parties' collective bargaining agreement. Larsen also indicated that the matter "had been discussed pursuant to Step 1 of the grievance procedure with Carol Benson and the matter remains unresolved." For a remedy, the Union requested that the Grievant be reinstated, his work record be purged regarding the matter and that he be made whole for all lost wages and benefits.

By letter dated December 17, 1996, Pickett provided the Grievant a letter of discharge which provided as follows:

. . .

> As you know, your employment with Lafayette County was terminated on November 18, 1996. The Commission on Aging Committee at its meeting on a vote moved to terminate your employment with Lafayette County. The board

> and its executive committee have reviewed your work over the previous year and a half with the documentation that was presented. At the November 18th meeting, which was held in public session at your request, the board received information regarding your failure to perform your duties and activities as directed by Attorney Mitchell Hagopian. It was following Mr. Hagopian's recommendation and a review of the information, that the committee voted to terminate your employment with Lafayette County. Mr. Helm, you do have the right to appeal this decision as stated in your union contract.
>
> You will continue to be covered at your choice under the Lafayette County Health Insurance Program. You have Cobra rights which will be extended for 18 months.
>
> If you have any questions, please feel free to contact me.
>
> . . .

On January 14, 1997, the Lafayette County Grievance Committee denied the grievance and refused to consider the question of "timeliness and accuracy of the notice of your discharge . . . These issues were not specified on the grievance you filed and were not considered by the Grievance Committee."

On January 24, 1997, Larsen notified the County that the Union was appealing the Robert Helm Termination Grievance to Arbitration. Larsen's letter referenced the threshold issue regarding Article III notice. The letter stated as follows:

> . . .
>
> This letter will serve as written notice of the Union's intent to proceed to arbitration in the matter of the grievance concerning the termination of employment on Robert Helm.
>
> We note that the Grievance Committee did not address the issue concerning the County's failure to comply with the provisions of Article III regarding the notification in writing reasons (sic) for the termination. We consider this to be a threshold with regard to the determination if the County had just cause to terminate Robert Helm's employment. As you are aware the Union has raised this issue at each step of the grievance procedure.

> It is out (sic) understanding that the County would like to combine this grievance with the grievance currently pending arbitration regarding Helm's suspension.
>
> If you have any questions, please contact the writer.

. . .

PERTINENT CONTRACTUAL PROVISION

Article III – Employee Discipline

> Non-probationary employees shall not be disciplined, suspended, disciplinarily demoted or discharged without just cause. Written notice of the suspension, discipline, disciplinary demotion or discharge and the reason or reasons for the action shall be given to the employee with a copy to the local Union within three (3) working days after such disciplinary action is taken.

PARTIES' POSITIONS

Union's Position

The Union basically argues that the County lacked just cause to discharge the Grievant.

In support thereof, the Union first raises a number of procedural arguments. For example, the Union argues that the Grievant was discharged based on "a rehashing of old issues" previously addressed by management and that such action constitutes the classic form of "double jeopardy" which precludes discharge. The Union also argues that the County did not follow progressive discipline or even its own remedial plan before improperly discharging the Grievant. The Union complains that the County never could get its reasons straight for discharging the Grievant. The Union adds that the County's failure to specify clear charges against the Grievant has seriously prejudiced him in his attempt to defend against discharge.

Nor does the Union believe the reasons for the Grievant's discharge are valid. In this regard, the Union attacks the appropriateness of using both the newsletter articles and the test as bases for discharging the Grievant. The Union also attacks Hagopian's supervision of the Grievant. The Union claims that it was unfair for the County to employ and to pay the Grievant as a nonprofessional while discharging him for failure to perform his duties at the "professional" level. The Union points out that the County was unable to cite any client's case

or other example of the Grievant's actual work to establish that the Grievant was either incompetent or deserving of discipline. The Union adds that the record does not support a finding that the Grievant had a bad attitude.

Finally, the Union argues that the County's characterization of the award of Arbitrator Bielarczyk as "both grievances were sustained on technical grounds" is erroneous; rather, according to the Union, both that prior case and the instant dispute demonstrate the County's inability to properly administer discipline.

Based upon the entire record, the Union requests that the Arbitrator sustain the grievance, reinstate the Grievant and make him whole for all losses suffered as a result of the County's action.

County's Position

The County makes the following principal arguments in support of its position that it acted appropriately when it discharged the Grievant.

One, the County is not obligated to keep an employe on the job when that employe is found to be incapable of performing the work. The County has the right to test the competence of its employes including the Grievant.

Two, the County is entitled to consider bad attitude, as well as poor work performance, when deciding to discharge, and may take action against a deficient employe like the Grievant even though none of his clients ever complained about his work.

Three, the County gave the Grievant adequate warning prior to discharge.

Four, the Grievant was incompetent, his incompetence placed the County's funding of the benefit specialist program in jeopardy, and the County should not be required to put its operations in jeopardy by keeping an incompetent employe on the payroll.

Five, the Grievant did not accept responsibility for his shortcomings but instead blamed others like Hagopian and Benson for his problems. His attitude regarding his job, the public that he served and his supervisors was extremely negative.

Regarding the Union's arguments, the County makes the following rebuttal. One, the doctrine of double jeopardy does not apply and/or preclude discharge. Two, the County did not act prematurely in discharging the Grievant because he had no vested right to his job pending the planned December evaluation and because he was specifically warned to fully

cooperate with Hagopian and comply with his directives or face possible "immediate" termination of his employment. Three, the Union's arguments are procedural in nature and are intended to divert attention away from the undisputed facts raised by the County establishing the Grievant's incompetence, insubordination and bad attitude.

Regarding remedy, the County argues that any sanction that might be imposed for the County's failure to give timely notice of discharge be minimal in nature. The County reaches this conclusion for the following reasons: one, the Grievant did not suffer any type of prejudice over the delay in giving the notice; two, the contract does not provide for a remedy if the three-day notice is not given as required by Article III; and three, the County has not complied with the three-day requirement in the past without objection from the Union.

The County also argues that under no circumstances should any remedy include reinstatement of the Grievant. The County concludes that it handled the matter appropriately herein and had no other choice but to discharge the Grievant since it was clear that any other form of discipline would do no good.

The County requests that the grievance be denied and the matter be dismissed.

DISCUSSION

At issue is whether there was just cause to discharge the Grievant.

The County argues that there was just cause for the discharge while the Union takes the opposite position.

Standard

There are two fundamental, but separate, questions in any case involving just cause. 2/ The first is whether the employe is guilty of the actions complained of which the County herein has the duty of so proving by clear and satisfactory preponderance of the evidence. If the answer to the first question is affirmative, the second question is whether the punishment is contractually appropriate, given the offense.

2/ Each disciplinary action involves two issues: whether there was just cause for the imposition of discipline for the particular wrongdoing, and whether there was just cause for the penalty – the quantum of discipline – imposed on the Grievant. Labor and Employment Arbitration, Volume I, Tim Bornstein, Ann Gosline and Marc Greenbaum General Editors, Chapter 14, Just Cause and Progressive Discipline by Arnold Zack, s. 14.03[1], 14-5 (1998).

Basis for Discipline

Applying the above standard to the instant case, the Arbitrator first turns his attention to the question of whether the Grievant is guilty of the actions complained of.

According to the December 17, 1996 discharge letter, the County terminated the Grievant for the following reasons:

. . .

> The board and its executive committee have reviewed your work over the previous year and a half with the documentation that was presented. At the November 18th meeting, which was held in public session at your request, the board received information regarding your failure to perform your duties and activities as directed by Attorney Mitchell Hagopian. It was following Mr. Hagopian's recommendation and a review of the information, that the committee voted to terminate your employment with Lafayette County.

. . .

At the November 18, 1996 Commission on Aging meeting, Hagopian "reviewed a summary of activities that the Elder Law Center, the COA and the Area Agency on Aging had been involved in since June of 1995, in an effort to improve the services of the Lafayette County Benefit Specialist program." According to the COA minutes of the November 18, 1996 meeting and the attached Summary, the following incidents constitute the bases for the County's decision to terminate the Grievant: a letter to Benson on June 21, 1995, regarding the Grievant's "repeated failure to follow instructions on a client's case and including personal information about himself in a letter to an adverse party"; an incident which occurred on March 19, 1996, involving the Grievant providing incorrect information to clients, "defacing client documents," and in a conversation after the clients left displaying "an attitude which was extremely insensitive to his client's interests"; a memo to the Grievant regarding "his failure to submit weekly work plans and client case summaries as required by 7/16/96 supervisory plan"; notice of a written reprimand to the Grievant for failing to provide his supervisor with timely reports of his anticipated activities despite having been directed to do so; the problems the Grievant had in preparing two newsletter articles and the Grievant's poor exam results. 3/

3/ Benson testified that the Commission considered a wider range of issues before deciding to terminate the Grievant at its November 18, 1996 meeting. (Tr. pp. 413-415). However, in making the above findings, the Examiner relies on the official minutes of the November 18, 1996 Commission meeting. (Joint Exhibit No. 27). These findings are supported by the sometimes contradictory testimony of Hagopian. (Tr. pp. 300-301, 303, 336 and 359-360).

The County argues that it is entitled to consider the Grievant's bad attitude, as well as his poor work performance, when reaching the decision to discharge him. The County also argues that the Grievant was insubordinate and incompetent.

The Arbitrator does not agree with the County's contention that it is entitled to consider the Grievant's insubordinate behavior as a basis for the discharge. The Arbitrator reaches this conclusion for the following reasons. In its brief the County lists a number of examples of the Grievant's insubordination. Assuming arguendo that all these examples are examples of insubordinate behavior, 4/ the County's argument still must fail. There is no persuasive evidence in the record that the Commission considered any of the examples of the Grievant's insubordination noted in the County's brief when it decided to discharge the Grievant on November 18, 1996. It is true that the Executive Committee of the Commission on Aging at a meeting on September 23, 1996, reviewed the Grievant's insubordinate behavior toward his supervisor when he told her "to shut up." However, the Committee took no action to discipline the Grievant for his behavior at that time. Arbitrator Bielarczyk criticized the County for suspending the Grievant months after the events of March 19, 1996. LAFAYETTE COUNTY, CASE 66, NO. 54726, MA-9770, P. 17 (OCTOBER 15, 1997). The Honorable Daniel L. LaRocque, Reserve Circuit Court Judge agreed "that just cause as that term is used in the union contract carries with it at least some connotation of timely punishment." WISCONSIN COUNCIL 40, LOCAL 678, AFSCME, AFL-CIO VS. LAFAYETTE COUNTY, CASE NO. 97-CV-95, P. 14, (JULY 2, 1998). Well-established arbitral standards also require the imposition of discipline be prompt. Labor and Employment Arbitration, supra, s. 14.03[2][a], 14-10. Applying the aforesaid timeliness standard herein, the Arbitrator finds that it would be inappropriate for the County to rely on the "shut up" incident as a basis for his discharge because said incident occurred almost three months earlier (August 28, 1996) and because the County had already considered and rejected discipline for the incident.

4/ The record establishes otherwise. For example, the County's allegation that the Grievant's attorney while responding to allegations made against the Grievant "embarked on a diatribe against Hagopian in which he challenged Hagopian's fairness and competence" is not supported by the record. While it is true that the Grievant's attorney challenged Hagopian's fairness and competence, an examination of the letter which is reprinted in the Bielarczyk Award reveals that he did so in a reasonable manner easily within the bounds of his duty in legally representing the Grievant.

While the question of the Grievant's bad attitude is a little closer, the Arbitrator also rejects, for the reasons discussed below, this claim of the County. For example, the Arbitrator strongly disagrees with the County's contention that it was inappropriate for the Grievant's attorney to challenge "Hagopian's fairness and competence" regarding the events of March 19, 1996. (Emphasis added). Arbitrator Bielarczyk also questioned the ELC's and Hagopian's

conduct while finding that the County's three (3) day suspension of the Grievant for the incident of March 19, 1996, was not for cause. Judge LaRocque affirmed Arbitrator Bielarczyk's decision to overturn the three-day suspension. WISCONSIN COUNCIL 40, LOCAL 678, AFSCME, AFL-CIO, VS. LAFAYETTE COUNTY, SUPRA, P. 20.

The Arbitrator also can find no persuasive evidence in the record that the Grievant generally had a bad attitude toward the public that he served. It is true that the Grievant was disciplined for his inappropriate comments about clients after they left on March 19, 1996. However, in his lengthy service with the County, there has not been one instance of a complaint from a client regarding his attitude or his service. (Joint Exhibit No. 27). Nor have there been any formal complaints by others. (Joint Exhibit No. 27). At least one member of the public, Jerry Lynch, spoke on behalf of the Grievant at his termination hearing. (Joint Exhibit No. 27).

It is true that the Grievant often inappropriately blamed his supervisors for his shortcomings; that he was reluctant to contact Hagopian for any assistance either in his work or in writing the newsletter articles; (Given the discussion of the Center's and Hagopian's shortcomings in supervising the Grievant contained in Arbitrator Bielarczyk's decision, Judge LaRocque's decision and the instant decision, the Grievant's position is readily understandable.); and that he did not attend the appropriate seminars for benefit specialists as directed. (Although the Grievant apparently did attend some classes related to his work. Tr. p. 333). However, the record does not support a finding that these matters were considered by the Commission when it decided to terminate the Grievant on November 18th. (Joint Exhibit No. 27, Tr. p. 334). Therefore, the Arbitrator rejects these claims of the County.

Finally, the Arbitrator agrees with the County's contention that an employer is entitled to consider bad attitude, as well as poor work performance, when reaching the decision to discharge. SINTERMET CORP., 99 LA 600 (BELL, 1992). However, the County may not rely on SINTERMET CORP. to support its arguments in the instant case. The Arbitrator reaches this conclusion because the employe in SINTERMET CORP., unlike the Grievant, was on probationary status and essentially had one last chance to improve his work performance or be terminated. Supra, p. 605.

The record does contain some examples of the Grievant's poor work performance. However, the Grievant was previously disciplined for the March 19, 1996 incident as well as his failure to provide timely reports of his work activities. Consequently, the Arbitrator is of the opinion that said incidents carry little weight as new bases for the Grievant's discharge.

The record indicates that the Grievant did not prepare two newsletter articles to Hagopian's satisfaction. However, as noted above, it is also true that the County did not receive any prior formal complaints about the Grievant's actual work performance. (Exhibit No. 27). The Grievant also stated, unrebutted by the County, that "he had no clients

complain about his work on the satisfaction surveys that have been done regarding his program." In addition, prior to the instant dispute the Grievant performed his duties as a Benefit Specialist in a satisfactory manner. (Tr. at 431 and 353). In fact, prior to the March 19, 1996 incident, the Honorable Daniel LaRocque, Presiding Reserve Judge found that the Grievant had a good work record and "was an exemplary employee to some degree." WISCONSIN COUNCIL 40, LOCAL 678, AFSCME, AFL-CIO VS. LAFAYETTE COUNTY, SUPRA, P. 19.

The evidence is mixed on the question of whether the Grievant is incompetent. It is true that the Grievant did not perform program services and did not assist clients in the manner envisioned by Hagopian. (Joint Exhibit No. 27). However, it is also true that the Grievant performed his job in a satisfactory manner for many years prior to Hagopian's intervention.

The record indicates that the Grievant did poorly on a test administered by the Center. However, the problems with an exam developed and administered by Hagopian and the Center were discussed by Arbitrator Bielarczyk in his Award. Thus, while Arbitrator Bielarczyk's opinion of the adequacy of Hagopian's testing of the Grievant may only be dicta, as pointed out by the County, it is relevant to the question of whether the test may be used as persuasive evidence of the Grievant's incompetence.

Arbitrator Bielarczyk found:

> The record also demonstrates the following. Hagopian is not a testing expert nor is testing a field he has any expertise in. There is no evidence he would know how to validate a testing device, would know how to determine its reliability or know how to properly administer any testing device. It is the undersigned's opinion any measurement device developed and administered by him would be highly suspect as a device which could accurately determine the grievant's job knowledge. Particularly if Hagopian is approaching the matter with a predisposed opinion as to the grievant's capabilities. Needless to say, any results of such a measurement would be relatively useless. This is further complicated by the fact that the Elder Law Center's recommended job description for a Benefit Specialist and the job description the County has hired the grievant to perform are distinguishable from each other and Hagopian was unaware of this. This does not mean the County can not (sic) give the grievant an examination to determine if he is capable of performing the duties for which he was hired. However, such an examination, to have any real merit, would need to be developed and administered by individuals who have the knowledge to develop and administer a measuring device which is valid, reliable and pertinent to the job description the County hired the grievant to fill. LAFAYETTE COUNTY, SUPRA, P. 16.

Based on Arbitrator Bielarczyk's reasoning in his aforesaid decision, the Arbitrator finds it reasonable to conclude that the County may not rely on the results of the aforesaid test to conclude that the Grievant was incompetent.

Based on the foregoing, the Arbitrator finds that the County did not sustain its burden of proof on its claim that the Grievant was incompetent.

Therefore, based on all of the above, the Arbitrator finds that there is some factual basis on which to discipline the Grievant, although not as much as claimed by the County. In particular, the County may rely on the June 21, 1995 letter to Benson and the Grievant's failure to complete his newsletter articles as directed as bases for its disciplinary action. This is not a sufficient factual basis upon which to discharge the Grievant. A question remains as to whether the punishment is contractually appropriate.

Appropriateness of the Disciplinary Action

A review of this question may be undertaken within the context of the issues raised by the Union in arguing against discharge as well as the other arguments by the County supporting termination.

The Union argues that the Grievant was discharged based on a rehashing of old issues and that as a result the Grievant was subjected to a classic form of "double jeopardy." Double jeopardy is defined as "the act of putting a person through a second trial for an offense for which he has already been prosecuted." The American Heritage Dictionary of the English Language, New College Edition, (10th Ed. 1981) p. 419. In the instant case, there is no persuasive evidence that the County has put the Grievant through a second trial for the events that occurred on March 19, 1996, or for his failure to provide Benson with timely reports of his activities both of which led to discipline. It is true that the Commission considered the imposition of prior discipline when deciding to terminate the Grievant. However, it is not clear what weight the County gave these incidents when it decided to terminate the Grievant. Furthermore, arbitrators have rejected the claim that consideration of prior offenses in determining the propriety of the penalty assessed for a later offense constitutes double jeopardy. Elkouri and Elkouri, How Arbitration Works, 5th Edition, p. 925 (1997). Therefore, the Arbitrator rejects the Union's argument.

The Union also argues that the County did not follow progressive discipline when it discharged the Grievant. For the reasons discussed below, the Arbitrator agrees.

Progressive discipline is generally considered a component of just cause where the issue is one that would not call for discharge on the first offense but for some milder penalty aimed at correction. Elkouri and Elkouri, supra, p. 916. Here, the County itself recognized the nature of the Grievant's offense when it responded to the Grievant's performance problems by

adopting a remedial plan which was communicated to the Grievant by letter in early August, 1996. Progressive discipline normally includes oral reprimand, written warning, suspension and discharge. 5/ At the time of his discharge, however, and as a result of the Bielarczyk Award and Judge LaRocque's ruling, the Grievant's record only contained an oral and written reprimand. Since the event which precipitated Hagopian's recommendation that the Grievant be terminated was continued poor performance (his failure to adequately prepare the second newsletter) for which a corrective remedial plan was in place and/or being proposed, the Arbitrator finds that suspension, not discharge, would be the more appropriate next disciplinary step in the County's effort to impress upon the Grievant his need to improve his work performance.

5/ Elkouri and Elkouri, supra, pp. 917 and 918. Also see Labor and Employment Arbitration, supra, s. 14.03[3] 14-13, footnote 26.

Such a penalty is consistent with the seriousness of the Grievant's offense. It is said to be "axiomatic that the degree of penalty should be in keeping with the seriousness of the offense." CAPITAL AIRLINES, 25 LA 13, 16 (STOWE, 1955). While it is true that in cases of extremely serious offenses arbitrators are more than willing to recognize the need for enforcing penalties that meet the seriousness of the offense, arbitrators in less serious cases prefer to apply progressive discipline, exercise leniency and modify disciplinary penalties imposed by management when there are mitigating circumstances that lead arbitrators to conclude that the penalty is too severe and the employer has failed to follow progressive discipline. Elkouri and Elkouri, supra, pp. 916-917. Applying the aforesaid standard herein, the Arbitrator finds that the County by its action ignored not only the nature of the Grievant's offense, but well-accepted principles of progressive discipline which call not for discharge for the first offense of the aforesaid nature (and usually not even for the second or third offense) but for some milder penalty aimed at correction. (Emphasis added). See Elkouri and Elkouri, supra, p. 916 and cases cited therein.

The County also ignored the Grievant's basically good work record prior to his ongoing problems with Hagopian, et al. when it decided to terminate the Grievant. The Arbitrator is of the opinion that all of the above factors mitigate in favor of suspension rather than discharge. The Courts have upheld an arbitrator's consideration of mitigating factors in determining whether there is just cause for discharge unless the collective bargaining agreement clearly and unambiguously prohibits the arbitrator from doing so. Elkouri and Elkouri, supra, p. 917. There is no such express prohibition in the parties' agreement herein.

The conclusions noted above are also appropriate given the County's own lack of consistency in its response to the Grievant's work performance or lack thereof. In this regard, the Arbitrator points out that as late as September 19, 1996, Hagopian recommended to Benson and the Commission on Aging that a remedial plan be developed for the Grievant "based on his performance on the examination." Yet, less than a month later Hagopian was recommending the Grievant's termination based on the Grievant's failure to write an acceptable article on "increasing assets to generate more income under the MA spousal impoverishment program." The Union complains that the County did not even follow its own "remedial plan" before prematurely discharging the Grievant. The Arbitrator agrees. While it is true, as pointed out by the County, that the Grievant had no vested right to his job, it is also true that the County did not even give the aforesaid remedial plan a chance before discharging him. As pointed out in the County's reply brief, the Grievant was supposed to be evaluated by Hagopian in December, 1996. (Tr. p. 357). Except for the threat by AgeAdvantAge to cut off funds for the Benefit Specialist Program, the County can point to no other new offense by the Grievant warranting discharge except his failure to complete his second newsletter article in a satisfactory manner which, as noted above, is not the type of offense which would ordinarily justify immediate discharge. And, as noted above, at the time of his discharge the Grievant had nothing more than a written warning in his personnel file. Based on same, and all of the foregoing, the Arbitrator finds that the County acted unreasonably or unfairly by moving to discharge the Grievant shortly after it announced a remedial plan to address the Grievant's alleged shortcomings because such action violated the corrective nature of its own remedial efforts, and because such action was precipitated by AgeAdvantAge's threat to cut funding for the position. Fairness and reasonableness are basic components of just cause. HIRAM WALKER & SONS, INC., 75 LA 899, 900 (BELSHAW, 1980) (equating the term "just cause" with "the now-common expression, 'fair shake'"); BEATRICE FOODS CO., 74 LA 1008, 1011 (GRADWOHL, 1980) ("proper cause" means that management "must have a reasonable basis for its actions and follow fair procedures"). Even Hagopian agrees that due process includes treating people fairly. (Tr. p. 326).

Finally, the Union argues that the County's failure to specify the charges against the Grievant has seriously prejudiced the Grievant. The Arbitrator agrees. Article III requires written notice of the discharge including "the reason or reasons for the action shall be given to the employee with a copy to the local Union." On December 17, 1996, the County provided the Grievant with a discharge letter which stated in material part as follows:

. . .

> As you know, your employment with Lafayette County was terminated on November 18, 1996. The Commission on Aging Committee at its meeting on a vote moved to terminate your employment with Lafayette County. The board and its executive committee have reviewed your work over the previous year and a half with the documentation that was presented. At the November 18th

> meeting, which was held in public session at your request, the board received information regarding your failure to perform your duties and activities as directed by Attorney Mitchell Hagopian. It was following Mr. Hagopian's recommendation and a review of the information, that the committee voted to terminate your employment with Lafayette County. (Emphasis added)
>
> . . .

This is fairly general information and subject to differing interpretations.

It is also true, as pointed out by the Union, that there are some contradictions as to what was considered as the grounds for discharge. For example, in the County's opening statement Attorney Goldberg stated that the Grievant's non-attendance at certain workshops for benefit specialists was one of the factors in the County's decision to terminate the Grievant. (Tr. p. 191). However, Hagopian, who made the recommendation to terminate the Grievant, testified on cross-examination that the Grievant's failure to attend the appropriate workshops "was not one of the specific reasons in my mind that he was being terminated." (Tr. p. 333). In addition, there is no persuasive evidence in the record that the Commission on Aging considered this factor when it decided on November 18, 1996, to terminate the Grievant.

The County argues contrary to the above that the Grievant "and his union representatives knew all along the nature of Helm's work deficiencies and the reasons for his termination." However, the Union denies same and as early as November 26, 1996, only eight days after the Commission's decision to terminate the Grievant wrote the County requesting "written notice of his discharge" along with the reasons for said action. In addition, the Arbitrator pointed out above at least one example of confusion in this area (Was the Grievant's failure to attend certain workshops a basis for his discharge?). Furthermore, a review of the December 17, 1996 discharge letter indicates that it did not contain clear, specific and/or concise reasons for the discharge. (Tr. p. 327). Finally, in reviewing the entire record (see especially Tr. pp. 61-63, 74-75), and the minutes of the November 18, 1996 meeting at which the Grievant was terminated, the Arbitrator is of the opinion that there is at least some persuasive evidence in the record to support the Union's contention that the County's failure to specify the charges against the Grievant has made it difficult for the Union to defend against the Grievant's discharge. Therefore, the Arbitrator rejects this argument of the County.

The County also argues in support of its position that it is not obligated to keep an employe on the job when that employe is found to be incapable of performing the work. The

Arbitrator agrees. However, even if the Grievant is deficient in performing some of his duties, the County must still adhere to the principles of just cause, including progressive discipline, when terminating the Grievant. 6/ As noted above, it failed to do so in the instant case.

6/ The progressive discipline principle has been explained as follows:

> ***(2) The progressive discipline principle.***
>
> ***(a) Unless otherwise agreed, discipline for all but the most serious offenses must be imposed in gradually increasing levels. The primary object of discipline is to correct rather than to punish. Thus, for most offenses, employers should use one or more warnings before suspensions, and suspensions before discharge. (Emphasis added).***
> ***(The Common Law of the Workplace, The Views of Arbitrators, National Academy of Arbitrators, Theodore J. St. Antoine, Editor, s. 6.7 Discipline and Discharge, Magnitude of Discipline; Progressive Discipline, p. 172 (1998).***

The rationale for progressive discipline is:

> ***b. Progressive Discipline. Because industrial discipline is corrective rather than punitive, most arbitrators require use of progressive discipline, even when the collective agreement or employment contract is silent on the subject. In most cases, the principle of progressive discipline benefits employers as well as employees. With progressively increasing penalties, employees have an opportunity to conform their performance and conduct to the employer's reasonable expectations. Rehabilitating the employee is less expensive and less disruptive than hiring a replacement. (Emphasis added).***
> ***(The Common Law of the Workplace, supra, p. 173.)***

The rationale for progressive discipline has further been explained as follows:

> ***Arbitrators assume that the parties are committed to utilizing discipline progressively as a tool to bring about change in the behavior of employees, reserving termination for those guilty of serious offenses and those who have run the gamut of progressive discipline and have shown themselves to be incorrigible. For the employee, corrective discipline, through escalated penalties, opens the door to rehabilitation and the opportunity to restore his standing and continue his employment. For the employer, providing the opportunity for an employee to profit from discipline by reforming his behavior also brings benefits. The employer is able to recoup the cost invested in the training and skill development of such employees and to avoid the additional cost of hiring and training replacement personnel. Thus, there is a strong motivation to offer progressive discipline as a means of rehabilitating wayward employees before facing the often unavoidable conclusion that certain employees are incapable of taking advantage of such opportunity and must be removed from the workplace. (Emphasis added).***
> ***Labor and Employment Arbitration, supra, at s. 14.03[3], 14-13.***

Instead, faced with a threat of a cutoff of funding for the Benefit Specialist position, the County discharged the Grievant rather than impose the next logical level of discipline-suspension. If the County had suspended the Grievant as required by progressive discipline and the just cause standard, the County would probably have known a long time ago if the Grievant would have been able to conform his performance and conduct to reasonable expectations. Such an approach also would probably have resulted in less disruption and expense to the County over the long term as well as a more timely resolution of this dispute. However, the County failed to follow progressive discipline, and as a result, it now must pay the penalty for said failure.

The County argues contrary to the above that notwithstanding the just cause standard it does not have to retain an employe where there is little likelihood that the employe can overcome his incompetence, FLORSHEIM SHOE COMPANY, 74 LA 705 (ROBERTS, 1980), and where the employer has concluded that rehabilitation is impossible, even though all disciplinary steps had not been taken. PRATT AND WITNEY AIRCRAFT GROUP, 91 LA 1014 (CHANDLER, 1988). However, the aforesaid cases are distinguishable from the instant dispute. In FLORSHEIM SHOE COMPANY, the arbitrator upheld an employe's discharge where the chronic character of the grievant's failure to be reasonably productive and lack of significant improvement in her output impaired the employment relationship, where the employer did not discriminate against the employe, and where the employer consistently counseled the grievant concerning problems and gave her adequate warning that her failure to achieve desired output would result in her termination. FLORSHEIM SHOE COMPANY, SUPRA, P. 705. However, unlike the instant dispute FLORSHEIM SHOE COMPANY followed progressive discipline, supra, p.707, consistently counseled the grievant, supra, p. 709, and gave her adequate notice that termination would follow from her failure to improve her performance. Supra, p. 709. The arbitrator also concluded, which the Arbitrator herein is unable to do, that there was "no prognosis that within a reasonable period of time the cause that impairs the employment relationship can be or will be removed." Supra, p. 709. Therefore, the Arbitrator rejects the County's reliance on this case.

The Arbitrator also rejects the County's reliance on PRATT AND WITNEY AIRCRAFT GROUP. In that case, the arbitrator concluded that even though progressive discipline had not been followed in its truest form the Company could discharge the employe because it "presented evidence sufficient to conclude its decision on potential failure for rehabilitation to work is well founded." PRATT AND WITNEY AIRCRAFT GROUP, SUPRA, P. 1018. The County did not provide similar persuasive evidence in the instant dispute. PRATT AND WITNEY AIRCRAFT GROUP is also distinguishable on the following grounds: unlike the Grievant herein, the employe in PRATT AND WITNEY AIRCRAFT GROUP was discharged for failure to follow work rules which affected his work ethic, supra, p. 1017, unlike the Grievant herein, the aforesaid employe received five written reprimands and several counseling sessions before termination; supra, at p. 1014, and finally, other employes complained about the employe's work performance and its affect on their ability to work unlike the present situation, supra, p. 1015.

The County cites several other cases in support of its position that where the employer had previously warned or attempted to counsel a deficient employe prior to the act of discharge without avail the discharge has been upheld. However, those cases are also distinguishable from the instant dispute. In WEST CHEMICAL PRODUCTS, INC., 63 LA 610 (DYKSTRA, 1974), the County points out that the discharge for unsatisfactory job performance of an employe with twenty-five years on the job was affirmed. However, in WEST CHEMICAL PRODUCTS, INC., unlike the present dispute, the employe was given a written warning on six separate occasions that his performance was unsatisfactory and the union and employer had agreed at a grievance meeting that the grievant be given 60 to 70 days to correct his deficiencies or be terminated. Supra, pp. 610-611. (Emphasis added) Another important distinguishing factor is that in WEST CHEMICAL PRODUCTS, INC., "there were several customer complaints as to the manner in which the Grievant was performing his duties." Supra, p. 612. Complaints from clients and citizens were minimal to nonexistent herein. In CISCO FIRE PROTECTION, 91 LA 593 (KOVEN, 1988), the County notes discharge was upheld where the employe was found to have exhibited serious job deficiencies on several occasions, and even when they were pointed out, the employe failed to correct them. In reaching his decision, the arbitrator rejected the union's contention that "mitigating factors were present to show that a lengthier trial period was called for and that discharge was improper under such mitigating factors." CISCO FIRE PROTECTION, SUPRA, P. 595. The arbitrator rejected the primary factor relied upon by the Union; "the Grievant's satisfactory work performance for prior and subsequent employers." In the present case, the Grievant had a prior good work record with the County. Also unlike the employe in CISCO FIRE PROTECTION, the Grievant was not a new employe. His record of satisfactory service with the County includes almost 17 years.

The County did initially give the Grievant adequate notice to improve his job performance or face possible discipline, including discharge. However, the County violated other aspects of the just cause standard as discussed above. Therefore, the Arbitrator rejects this claim of the County as well.

In addition, the County argues that the Grievant's incompetence placed the County's funding of the benefit specialist program in jeopardy. The County adds that it should not be required to put its operations in jeopardy by keeping an incompetent employe on the payroll.

It is true that certain parties perceived that the Grievant was incompetent and this placed the County's funding of the benefit specialist program in jeopardy. And the Arbitrator agrees with the County's basic premise that it should not be required to put its operations in jeopardy by keeping an incompetent employe on the payroll. However, as pointed out by Reserve Judge Daniel LaRocque:

> Now I suppose that the county can take the position that when it learns that someone is going to withdraw their funding they can impose discipline under the contract, but my view would be that whatever the county does, even if

> funding is at stake here, because they have got a union contract, they have to, they have to place their discipline within the terms of the just cause provision of the union contract. (Emphasis added) WISCONSIN COUNCIL 40, LOCAL 678, AFSCME, AFL-CIO VS. LAFAYETTE COUNTY, SUPRA, PP. 15-16.

Therefore, the Arbitrator rejects any assertion from the County that the Grievant's termination should be upheld simply because the County's funding may be lost if the Grievant is reinstated.

Finally, citing WELCH FOODS, 96 LA 962 (FELDMAN, 1991), the County reiterates that an employe with lengthy seniority may be terminated for poor work performance where the employe after being warned that he could be fired if he continued without change failed to protect his job. Supra, p. 966. However, in WELCH FOODS the employe in question received four previous warnings and specific notice that the next violation would result in termination and failed to grieve any of them. Supra, pp. 962 and 964. The Grievant in the instant case grieved his prior disciplinary action and was successful in overturning the suspension. He also did not receive clear notice that the next incident would result in termination.

Based on all of the foregoing, the Arbitrator finds that the punishment is not contractually appropriate because the County failed to follow progressive discipline and its own remedial plan before discharging the Grievant.

Based on all of the above and in particular on the following: one, that the County did not have a sufficient factual basis upon which to terminate the Grievant; two, that the County did not follow progressive discipline; three, that the County failed to adequately consider the Grievant's prior good work record; and four, that the County did not complete its own remedial plan before prematurely discharging the Grievant, the Arbitrator finds that the answer to the issue as stipulated to by the parties is NO, the County did not have just cause to discharge the Grievant, Robert Helm. In reaching this conclusion, the Arbitrator has applied the standard noted above in Labor and Employment Arbitration, supra, at s. 14.03[1], 14-5, in finding that the County lacked just cause to discharge the Grievant both for the actions complained of and for the level of penalty imposed.

In reaching the above conclusion, the Arbitrator has addressed the major arguments of the parties relating to the Grievant's discharge. All other arguments, although not specifically discussed above, have been considered in reaching the Arbitrator's decision. 7/.

7/ For example, the County argues that it is not necessary that members of the public must first complain before the employer is entitled to take action against a deficient employe. KING'S DAUGHTERS' MEDICAL CENTER, 96 LA 609, 613 (CURRY, 1991). However, as noted above, the County has not established sufficient factual basis to support termination of the Grievant's employment. In addition, unlike the employe in KING'S DAUGHTERS' MEDICAL CENTER, the Grievant was not a probationary employe and had not agreed in settlement of a prior grievance that any further work violations would result in his termination. Supra, p. 609.

Remedy

A question remains as to the appropriate remedy.

On July 20, 1998, the Arbitrator issued an Interim Award sustaining the instant grievance in part while finding that "the County violated Article III of the collective bargaining agreement when it failed to provide a written notice of the Grievant's discharge within three (3) working days as required by the agreement." The Arbitrator stated that he would "address the issue of appropriate remedy at the substantive stage of this arbitration proceeding."

The County puts forward a number of arguments as to why "any sanction that might be imposed should be minimal in nature."

The County argues that it has "never" complied with the three-day timeline specified in the Agreement, and there has never been a grievance filed as to that past practice. (Emphasis in original). However, Pickett also acknowledged that the Union had never granted a waiver in the past on the three-day requirement. (Tr. p. 124). Pickett added that any extension of the three-day requirement was by mutual understanding. (Tr. p. 125). He also admitted that there was no such understanding with the Grievant. (Tr. pp. 125 and 138). He further stated that he could not recall any prior disciplinary actions against unit members that had been grieved. (Tr. p. 143). Finally, assuming arguendo that there is a past practice which supports the County's position, its argument still must fail. Clear contract language requires the County to provide a written notice of the Grievant's discharge with the reason or reasons to the Grievant with a copy to the local Union within three (3) working days after said disciplinary action is taken. Therefore, the Arbitrator rejects this claim of the County.

The County also points out that no remedy has been bargained in the agreement "which states what is to happen if the three day notice, described in Article III, is not given within that time period." However, there is nothing in the agreement which restricts the Arbitrator's authority in fashioning a remedy so long as the Arbitrator does not, as set out in Article IV, Section 4 "add to, detract from, alter, amend, or modify any provisions of this Agreement or impose on any party hereto a limitation or obligation not provided for in this Agreement." Any remedy imposed by the Arbitrator herein would simply be intended to reinforce the contract's requirement that the County provide written notice of disciplinary action, including discharge, within three (3) working days after such disciplinary action is taken. Such a remedy, therefore, would be in compliance with the aforesaid contract provision.

Finally the County argues since it made every effort to involve the Union as well as the Grievant in the process (which the record contains evidence in support of) that any sanction that might be imposed should be minimal in nature. The County requests that if the Arbitrator determines that a sanction should be imposed the Arbitrator direct the Employer to not violate this portion of the labor agreement in the future.

The Arbitrator agrees with the County that the sanction for violating the contractual three (3) day notice requirement should be a direction to the County that it not violate this portion of the labor agreement in the future. It is important that unit employes be provided timely notice of disciplinary action as required by the collective bargaining agreement. The Arbitrator is of the opinion this sanction for the County's aforesaid contractual violation will discourage future violations of said contract provision and is a sufficient remedy for violation of the Article III notice requirement, particularly in light of the reinstatement and make-whole remedy discussed below.

A question remains as to the appropriate remedy for the County's unjust discharge of the Grievant.

The County argues that it would be inappropriate to reinstate the Grievant because there have been "massive" changes in the laws that benefit specialists deal with since the Grievant was terminated and the Grievant has not kept up with these changes. However, there are courses and materials that the Grievant could take to refresh his understanding of current rules and practices for benefit specialists so the Arbitrator rejects this argument of the County. (Tr. pp. 294-295, 328 and 331).

The County also argues that reinstating the Grievant would not benefit the County or its citizens because of his approach to the job. In particular, the County criticizes the Grievant's attitude that "all he needed to do was read the newspaper and newsletter articles to keep up" and that he had "no need to attend classes on these subjects because he would forget what he learned before he needed it." There is some validity to the County's concerns. However, reading the newsletter would help the Grievant keep up to date with changes in the benefit specialist program. And, if you don't have the right information, a call to Social Security would provide answers to your questions as well as "the latest update." (Tr. p. 472).

The County concludes by noting that the Grievant's "approach may have been appropriate in 1980, but is certainly not acceptable in 1999." Based on the entire record, the Arbitrator believes that this may be the crux of the problem. For many years, the Grievant performed his job in a satisfactory manner. However, the County wants the Grievant to perform his job differently today. The County now wants the Grievant to move away from just handling basic cases and to try to make his program "more accessible to the people who had more complicated problems." (Tr. p. 221). The County wants the Grievant to do "all sorts of [new] things"; (Tr. p. 223), to be more proactive and reach out to people that need to be reached; (Tr. p. 222), and to publicize programs that have been under utilized by older people in the County. (Tr. p. 266). Yet the County sent mixed messages in this area. It adopted remedial and corrective programs to assist the Grievant in meeting these expectations and then turned around and disciplined the Grievant almost at the same time as he failed to meet management's expectations. The County failed to follow through in a clear, consistent manner in support of its own remedial program to assist the Grievant to perform at a level

now expected. Hagopian, the Elder Law Center and AgeAdvantAge also share in this failure although it is the County, because of the contractual just cause standard, which bears the burden of this failure.

The Arbitrator believes that the Grievant should share some responsibility for his failure to adopt to the new approach. Although Hagopian, the Center, AgeAdvantAge and the County may have acted in a manner that would cause the Grievant to act defensively toward efforts designed to improve his performance, the Arbitrator hereby puts the Grievant on express notice that he needs to comply with directives and reasonable work performance standards in the future if he hopes to continue as Benefit Specialist for the County. However, the Arbitrator will also reinstate the Grievant and give him another chance to perform his duties as Benefit Specialist for the County based on the County's failure to have just cause for his termination.

The authority of the Arbitrator to modify penalties deemed improper is addressed in Elkouri and Elkouri, supra, p. 913:

> Where the agreement fails to deal with the matter, the right of the arbitrator to change or modify penalties found to be improper or too severe may be deemed to be inherent in the arbitrator's power to decide the sufficiency of cause, as elaborated by Arbitrator Harry H. Platt:
>
> > In many disciplinary cases, the reasonableness of the penalty imposed on an employee rather than the existence of proper cause for disciplining him is the question an arbitrator must decide. This is not so under contracts or submission agreements which expressly prohibit an arbitrator from modifying or reducing a penalty if he finds that disciplinary action was justified, but most current labor agreements do not contain such limiting clause. In disciplinary cases generally, therefore, most arbitrators exercise the right to change or modify a penalty if it is found to be improper or too severe, under all the circumstances of the situation. This right is deemed to be inherent in the arbitrator's power to discipline and in his authority to finally settle and adjust the dispute before him. (footnote omitted)

Based on all of the above and the record as a whole, it is my

AWARD

The grievance is sustained and the County is ordered to: (1) reduce the Grievant's discharge to a three-day suspension; and (2) immediately reinstate the Grievant to his former position with all seniority and rights he had under the collective bargaining agreement and make the Grievant whole for all wages and benefits lost as a result of the discharge, minus the three-day suspension and all wages the Grievant earned in the interim that he would not have received except for his discharge and any benefits he may have received from unemployment compensation. The County is also ordered to post a notice for thirty (30) days acknowledging that it violated Article III of the parties' collective bargaining agreement when it failed to provide a written notice of the Grievant's discharge within three (3) working days as required by the agreement and stating that it will not violate the three (3) day notice requirement of Article III in the future.

The Arbitrator will retain jurisdiction over the application of the remedy portion of the Award for at least sixty (60) days to address any issues over remedy that the parties are unable to resolve.

Dated at Madison, Wisconsin, this 21st day of April, 1999.

Dennis P. McGilligan /s/
Dennis P. McGilligan, Arbitrator

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