

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**WALWORTH COUNTY (County Clerk)  
(Wisconsin)**

and

**WALWORTH COUNTY COURTHOUSE EMPLOYEES LOCAL 1925B  
WISCONSIN COUNCIL OF COUNTY AND MUNICIPAL EMPLOYEES,  
AFSCME, AFL-CIO**

Case 147  
No. 56577  
MA-10333

(Grievance concerning discharge of F\_\_ D\_\_)

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Appearances:

von Briesen, Purtell & Roper, SC, by **Mr. James R. Korom**, appearing on behalf of the County.

**Mr. Laurence S. Rodenstein**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

**ARBITRATION AWARD**

At the joint request of the Union and County noted above, the Wisconsin Employment Relations Commission designated the undersigned Marshall L. Gratz as Arbitrator to hear and decide a dispute concerning the discharge of the Grievant. That dispute arose under the successor to the parties' 1994-96 agreement, which the parties agree was identical to the 1994-96 agreement in all respects material to this dispute. That successor agreement is referred to herein as the Agreement.

Pursuant to notice, the dispute was heard by the Arbitrator at the County Highway Department Office near Elkhorn, Wisconsin on August 6, 1998. The proceedings were not transcribed, however, the parties agreed that the Arbitrator could maintain a cassette tape recording of the testimony and arguments for the Arbitrator's exclusive use in award preparation.

Briefing was completed on September 15, 1998, marking the close of the record.

**STIPULATED ISSUES**

At the hearing, the parties authorized the Arbitrator to decide the following issues:

1. Did the Employer violate the contract when it terminated the Grievant F\_\_ D\_\_?
2. If so, what is the appropriate remedy?

At the hearing, the County offered to present certain evidence acquired by the County after the decision was made to discharge the Grievant. The Union objected to consideration of such after-acquired evidence as regards the Arbitrator's resolution of ISSUE 1, asserting if it was germane at all, it would only be so as regards ISSUE 2. The County then requested that the Arbitrator commit to reopening the hearing for the purpose of receiving that evidence in the event that the Arbitrator concludes that the discharge violated the Agreement. The Arbitrator reserved ruling on the County's request in that regard pending the Arbitrator's resolution of ISSUE 1.

**PORTIONS OF THE AGREEMENT**

ARTICLE VII - SENIORITY

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7.03 Probationary Employee.

- a. Probationary Period. New employees shall be on a probationary status for a period of six months, however, such period shall be extended by mutual agreement only, for an additional thirty calendar days for individual employees as the need arises. If still employed after such date, their seniority shall date from the first day of hiring and eligible employees shall receive sick leave and vacation benefits from their first day of hire.
- b. Termination. Probationary employees (new employees) may be terminated at any time at the discretion of the County. Discharges during the probationary period shall not be subject to the grievance procedure.

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ARTICLE XXVI - DISCHARGE AND DISCIPLINE

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26.01 Right of County. The County shall have the right to discipline or discharge any employee for just cause.

. . .

26.06 Work Rules - Discipline. Employees shall comply with all provisions of this Agreement and all reasonable work rules. Employees may be disciplined for violation thereof under the terms of this Agreement, but only for just cause and in a fair and impartial manner. . . .

### **BACKGROUND**

The Union represents a bargaining unit consisting of certain courthouse employees of the County. The County and Union have been parties to a series of collective bargaining agreements covering that unit, including the Agreement.

Prior to her April 15, 1998, discharge, the Grievant was employed as a Clerk III in the County Clerk's office. Grievant was encouraged to apply for that position and ultimately hired by her immediate supervisor, Kim Bushey, who first took office as elected County Clerk in January of 1997. Grievant began work as the Clerk III on August 25, 1997, and successfully completed her six-month probationary period on February 25, 1998.

Bushey's April 15, 1998, memorandum memorializing Grievant's discharge reads in pertinent part, as follows:

A meeting was held today with the following participants: Kim Bushey, Andrea E. Lazzeroni, F\_\_ D\_\_ - Clerk in the County Clerk's Office, Jeannine Palenshus - Union Representative.

The discussion began by reviewing various work related accuracy problems that Ms. D\_\_ was having during her employment in the County Clerk's Office. A review was conducted of what had transpired to correct these issues. A summary of these problems, prepared by Kim Bushey, is attached. These problems have been taking place the entire period of employment of Ms. D\_\_ within the department. The discussion then focussed on the fact that Ms. D\_\_ had lied to Ms. Bushey.

Ms. Bushey reminded Ms. D\_\_ that she had been repeatedly instructed that if there were any problems, Ms. Bushey was to be made aware of them immediately. Ms. Bushey also indicated that she had spent many hours reviewing the work completed by Ms. D\_\_ because of the on-going problems i.e. corrections to County Board Payroll. Ms. Bushey asked Ms. D\_\_, "Why did you lie to me when I inquired many times whether the DNR Account had

reconciled each month?" Ms. D\_\_ indicated that she lied by indicating that they had reconciled because she did not want to admit anything to the contrary. A. Lazzeroni asked Ms. D\_\_ if she received the support she needed when there had been other problems in the past and Ms. D\_\_ indicated that she had. A. Lazzeroni told Ms. D\_\_ that lying to Ms. Bushey constituted Misconduct and Insubordination.

At that time Ms. D\_\_ was informed that the employee/employer relationship had been irrevocably broken and that her employment was terminated. She was informed who to contact to discuss her benefits and any other questions that she may have regarding the termination. She was offered the opportunity to tender her resignation. Ms. D\_\_ indicated she would consider it and let Ms. Bushey know whether she would resign and when she would pick up her personal belongings.

The January 19, 1998, grievance giving rise to this proceeding reads, in pertinent part, as follows:

On 4-15-98 Grievant was discharged for alleged inadequate performance. Of the alleged performance issues none had been made known to grievant through established rules of progressive discipline. Additionally, the absence of training appears to be a factor for successful performance. Alleged misconduct and insubordination were reasons given for discharge when the above listed allegations are the core of the need for this formal action.

. . . (Article or Section of contract which was violated if any) Articles 1.01, 2.01, 26.01, 26.06, and any and all other articles, sections and statutes that may apply.

. . . (corrective action desired): (1) Make the Grievant whole; (2) restore grievant to full-time position; (3) restore to Grievant any and all lost wages and benefits; (4) compensate Grievant for any and all economic damages; (5) remove any and all references to this discharge action from any and all files; (6) cease and desist from further violations as stated above; (7) provide Grievant with a written apology.

At the hearing the County presented testimony by Bushey and rested. The Union presented testimony by County Human Relations Department Assistant Director Andrea Lazzeroni, Union officer and Courthouse employe, Dian Struck, and the Grievant and rested. The County briefly recalled Lazzeroni and Bushey on rebuttal, and the evidentiary hearing was concluded.

It is undisputed that Grievant's duties included monthly reconciliation of the "DNR account" through which some \$600,000 flows annually in receipts from sales of State Department of Natural Resources hunting and fishing licenses to recreational sportspersons. Some of the licenses are sold by the County directly, but most are sold through agents such as K-Mart who are credited with a sales commission for each license sold. The County Clerk's office receives licenses from the DNR, allocates them to agents for sale, receives payments and sales figures from the agents, and sends funds and reports to the DNR. The County Clerk's office is responsible for making sure that the payments and sales information received from the agents properly accounts for the licenses previously allocated to them for sale. If errors are made in the performance of that function, the Clerk's office must later effect corrections by issuing refunds or requests for additional payments to the agents involved and the DNR.

It is also undisputed that Grievant was trained by Bushey in how to perform the DNR reconciliation, stressing the importance of the reconciliation balancing to avoid the need for corrections to be issued later. The two of them performed Grievant's first reconciliation together. The next month Grievant performed it herself with Bushey closely observing. Both of those reconciliations balanced exactly. Each month thereafter Grievant performed that task on her own with Bushey inquiring whether the DNR account had balanced. On each of those occasions, Grievant told Bushey that it was "okay" or that "it had reconciled okay." However, it is undisputed that Grievant had successfully balanced the monthly DNR account reconciliation only once during the period from November 1997-March 1998, such that several of the reconciliations during that time had not balanced.

Bushey did not discover that until mid-April of 1998, a few weeks after Grievant had completed her six-month probationary period. Bushey's testimony as to the circumstances of that discovery paralleled the following description thereof contained in a portion of County Exhibit 11:

On the morning of Tuesday, April 15, 1998, I asked F\_\_ for some information regarding a Conservation payment to the DNR and why a particular number did not match the numbers in the computer system. She indicated that she had, had a tough time with this. I inquired what specifically she was having trouble with. She then said she was going to admit something. F\_\_ then told me that some of the months DNR payments did not reconcile exactly. I explained that each month must reconcile exactly and asked if she had not previously understood this. F\_\_ indicated she had understood this. I reminded her that I have on a number of occasions inquired about the progress of the DNR payment and whether or not it reconciled. I also reminded her that each time I inquired she assured me that it had reconciled. She then told me that she had lied to me on those occasions when I inquired. I asked why she had lied she said she was

afraid that I would terminate her employment. I told her that lying was unacceptable. I told her that she had lost my trust. She indicated that she knew this. I met briefly with F\_\_ on the afternoon of April 14 in room 104. I told her that I was setting up a Predisciplinary Meeting for the next day and that we would be discuss[ing] disciplinary action up to and including termination of employment. I indicated I would get back to her once the meeting was scheduled. I told her that there would be one representative of the union and someone from Human Resources present for the meeting. She apologized for the trouble that this had caused. At some point in the conversation she indicated that the cause of this problem was that she did not know how to ask for help.

Bushey and her deputy spent considerable time checking and correcting the errors that resulted in Grievant's several monthly DNR account reconciliations not balancing. The correction process involved the issuance of several checks, one of which was for about \$2,000.

In her testimony, Grievant admitted that she had responded to Bushey's periodic inquiries about the DNR reconciliations in ways that would lead Bushey to believe that the DNR account had balanced when in several instances it had not. Grievant explained that by doing so she was trying to buy some time until she could work the problems out on her own. She denied that her responses to Bushey were focussed on enabling her to successfully complete probation, but she admitted that she had responded to Bushey as she did to avoid being fired. Grievant stated that she had expected Bushey to discover the problems Grievant was having with the DNR account earlier than she did. She pointed out that when Bushey asked her about the account on April 14, 1998, she forthrightly admitted that she had lied in response to Bushey's inquiries on the various occasions when she assured Bushey that the DNR reconciliation had balanced when in fact it had not.

Grievant further testified that she had been supervised by Bushey at a different employer several years earlier and that Bushey contacted her and encouraged her to apply for the Clerk III position. Grievant asserts, however, that from the beginning of her work as Clerk III, Bushey created a pressured work environment, telling Grievant from early on: that Bushey would be tougher on her than on anyone else; that Grievant would be terminated if she did not measure up; that if she didn't stop making so many mistakes typing marriage licenses she would be fired; that if things don't clear up I'm going to fire you; etc.

Grievant further testified that she was not claiming that Bushey's conduct had forced her to lie; that she had acknowledged at the pre-disciplinary meeting that Bushey had provided her with the support she needed when there had been other problems in the past; that Bushey had encouraged her to talk to Bushey about any questions or problems she had performing her duties; and that Bushey tried to answer her questions when she brought them to her. However, Grievant asserted that Bushey sometimes did not know the answers to Bushey's questions; that Bushey created a pressured work environment; and that -- contrary to her April 15 statement -- Grievant felt that Bushey had not provided her with the support she needed when there had been other problems in the past.

Additional background information is set forth in the summaries of the parties' positions and in the discussion, below.

### **POSITION OF THE EMPLOYER**

Grievant was discharged for repeatedly lying to her supervisor, not for the performance problems that she lied about. It is undisputed that over a period of several months, in response to inquiries from her supervisor, Grievant responded in ways that were intended to and successful in leading the supervisor to believe that the monthly DNR account reconciliations had balanced when in fact they had not. Because Grievant's Clerk III position handles significant amounts of public money, and because the County Clerk cannot recheck all aspects of the Clerk III's work, the County Clerk necessarily must have the highest level of trust in her employes. Grievant's conduct in this case destroyed that trust, making discharge an appropriate disciplinary response in the circumstances.

The first offense of lying to one's supervisor about work-related matters has long been recognized by arbitrators as a dischargeable offense. Citing published awards including CLARIDGE PRODUCTS & EQUIPMENT, 94 LA 1083 (GOODSTEIN, 1990)(upholding discharge of 16-year employe for tape recorder eavesdropping on supervisor's office and then subsequently lying about why he placed the recorder there) and FURR'S, INC., 88 LA 1975, (BLUM, 1986)(upholding discharge where grievant's breaking of glass door did not justify discharge, but repeatedly lying to manager about it did.)

The seriousness of Grievant's lying is aggravated by the facts that it occurred during and shortly after her probationary period; that she completed her probation on false pretenses by hiding her errors from her supervisor; that she lied on a number of occasions spanning several months; and that hers was a position of public trust with responsibility for hundreds of thousands of dollars of public funds.

There are no mitigating factors that would warrant a penalty less than discharge. While Grievant ultimately admitted to Bushey that she had repeatedly lied and apologized for doing so, she did so only after Bushey asked her for copies of documents that would have clearly revealed Grievant's earlier lies. The Union has failed to establish that Grievant was inappropriately abused and threatened by Bushey; on the contrary, the evidence shows that Grievant was appropriately trained and informed of the importance of the DNR compilation balancing and of asking for help when she needed it, and that Bushey provided her with help each time she asked for it. The Union has also failed to establish that Grievant was punished more severely than other employes committing the same misconduct; the two correctional officer cases cited by the Union materially differ from Grievant's case because neither involved: an employe responsible for handling large amounts of public monies; repeated lies to the supervisor over several months; a grievant with only seven months of seniority; a grievant whose lies enabled her to complete probation under false pretenses; and significant harm to the County in the forms of substantial time and embarrassment required to unravel several months

of errors retroactively. Finally, the Union has failed to establish that the decision to discharge was reached in haste, anger or ignorance; after Grievant admitted to Bushey that she had been lying to her, Bushey consulted Lazzeroni (who had substantial personal experience with just cause issues) at length, received Lazzeroni's opinion (concurred in later by the County's Director of Human Relations, Janice St. John) that termination would be an appropriate penalty in the circumstances, briefly considered a suspension, struggled with what she said was a "difficult decision" on a personal level, and ultimately concluded that discharge was necessary because she could no longer trust Grievant to represent her in dealing with public funds for which Bushey was ultimately responsible.

For those reasons, the Arbitrator should conclude that the discharge was for just cause and should deny the grievance in all respects. If the Arbitrator concludes that the discharge violated the contract, the County renews its request for an additional hearing and briefing of the County's contention that the after-acquired evidence rule of *MCKENNON V. NASHVILLE BANNER PUBLISHING CO.*, 513 U.S. 352 (1995) (notwithstanding determination that employer has violated ADEA, court must consider how after-acquired evidence of the employee's wrongdoing bears on the specific remedy ordered) should be applied to the instant arbitration proceeding.

#### **POSITION OF THE UNION**

Just cause requires equal treatment. Progressive discipline is widely accepted as the most effective and most equitable means for correcting an employe whose performance is less than satisfactory. The object of any penalty should be to correct employe performance so that the employer may benefit through improved performance.

The Grievant was discharged for lying to her supervisor about the status of her reconciling of the DNR conservation account. Grievant's admission of lying formed the singular basis for the peremptory discharge. However, neither the supervisor nor County human resources management considered what penalties had been imposed by the County in the past for the same offense of lying to a supervisor. Rather, the determination that discharge was the appropriate penalty was made by the inexperienced Bushey based on her feelings of personal betrayal rather than on an objective consideration of applicable just cause principles.

Had Bushey and Lazzeroni looked into the County's prior experience with cases of employes accused of lying to a supervisor, they would have learned that R\_\_ O\_\_, a Correctional Officer with less than two years of seniority, was initially issued a two-day suspension for lying to supervision about an action taken by a correctional guard; and that Correctional Officer V\_\_ O\_\_ was initially issued a three-day suspension for lying to supervision to cover up an action involving prison inmates taken by the employe. Both of those employes have law enforcement positions requiring a high degree of trust associated with maintaining facility security. Yet the County imposed discipline significantly less harsh than discharge in connection with its charges that those employes lied to their supervisors.



There are several other factors that mitigate the severity of the penalty appropriate for Grievant's conduct, as well. First, Grievant "testified that it was her intent to reconcile the conservation license account but that she was afraid that the volatile Bushey would carry out her insinuation of firing D\_\_." Union brief at 6. Second, Grievant's lying is best characterized as a lack of candor resulting from a penchant for telling authority figures what she believes they want to hear, rather than lying or deception for the purpose of personal financial gain. Third, Grievant's responses to Bushey related to acts of omission rather than acts of commission on her part, i.e., to whether she had failed to balance the DNR account rather than to the more serious matter of whether a correctional officer had affirmatively committed specific actions involving the security of jail inmates.

Discharge is too severe a penalty for Grievant's lying about her job performance. Citing, ASSOCIATED CLEANING CONSULTANTS, 94 LA 1246, 1248 (LUBOW, 1990)(a lie or denial of an act, which results in punishment is not the equivalent of intoxication on the job or physical violence under a discharge clause where only "cardinal sins" form the basis for bypassing the progressive disciplinary system); and VILLAGE OF STURTEVANT, WERC grievance award MA-8837 at 16 (Houlihan, 1995) (under a peremptory discharge clause where only "job-connected dishonesty" and other listed offenses form the basis for bypassing progressive discipline, while ". . . the evidence supports a finding that B\_\_ did a poor job inspecting and cleaning the sewer lines. This employer has tried to convert a performance case into a dishonesty case by asking the employe if the job was done. When the employe said yes, the employer characterized his answer as dishonest, and discharged him. . . . The grievance is sustained.")

Grievant lied because she was afraid that her inexperienced and volatile boss would fire her if she learned that Grievant's accounts were not in balance. When Bushey asked her how things were going, Grievant's response was to fudge the truth while fully intending to balance the books ultimately. Bushey testified that discharge was necessary because Bushey could thereafter never trust Grievant or work effectively with her in the future. However, the evidence undercuts Bushey's emotionally overreactive conclusion in that respect. Grievant demonstrated sincere remorse for her conduct by admitting to Bushey that her previous statements regarding the reconciliation of the conservation account were untrue, by apologizing to Bushey, and by her obviously remorseful demeanor at the arbitration hearing. The numerous favorable job references which Grievant brought to her position also indicate that she remains a salvageable employe despite this lapse. Given Grievant's obvious overall strengths as an employment candidate, it follows that her problems with Bushey are attributable at least in part to Bushey's weaknesses as outlined in the testimony of Dian Strunk and the Grievant: Bushey's inexperience and unfamiliarity with the Clerk's job when she won election; her anxiety and insecurity in her position; her proneness to overreact to anything askew in the office; and her abrasive personal style.

With regard to requested remedy, the Union concludes its brief as follows:

The Union believes that Ms. D\_\_'s statements warrant discipline. We agree that Employers must rely on truthful statements. Lack of candor, even under mitigating circumstances, is inappropriate behavior in the workplace. However, both the contextual environment of D\_\_'s statement(s), and the lack of equal treatment under similar circumstances, warrants a significant reduction in the penalty. We suggest a penalty similar to those given R\_\_ O\_\_ and V\_\_ O\_\_. We ask the Arbitrator to sustain the grievance consistent with the discussion set forth above.

### DISCUSSION

In light of the positions taken by the parties, the issue is not whether any discipline is warranted in the circumstances, but whether discharge is too harsh a penalty.

Although management's judgment regarding penalty is ordinarily accorded a degree of deference, no such deference is accorded in this case because management failed to inform itself about the County's prior disciplinary cases involving charges of lying to a supervisor before it imposed the discharge in this case.

As the Union argues, just cause requires that the County's application of discipline be even-handed. The County cannot, consistent with just cause, impose a substantially heavier penalty on one employee than on another for the same offense.

However, the Arbitrator is satisfied that the Grievant's misconduct is more serious than that alleged in the Correction Officer cases relied on by the Union, such that the County is not limited in Grievant's case to the degree of discipline imposed in those two prior cases. Unlike the Correctional Officer cases, Grievant's misconduct involved repeated intentional lying about important job-related information requested by supervision, over an extended period of time, as compared with single isolated instances of alleged lying to a supervisor. Grievant's lying to Bushey caused significantly greater harm to the County than either of the other cases. That harm took the form not only of the time and potential embarrassment involved in unwinding the erroneous accounts and sending corrections, but also of the fact that the County was prevented from assessing Grievant's worthiness of completion of her probation free of the effects of her lying about the results of her work on the DNR account. Accordingly, the discharge imposed in this case has not been shown to be a harsher penalty than the County has imposed in the past for the same offense.

The Arbitrator is also satisfied that this is not a case in which the County is attempting to bootstrap itself to a dishonesty discharge from what is basically only a job performance problems case. In this case, unlike the VILLAGE OF STURTEVANT situation, the real harm done to the County's interests were due to the Grievant's lying to conceal the fact that the

reconciliations were not balancing, rather than from the fact that the reconciliations did not balance in the first place. The problems Grievant was having could have been corrected and the harm (in terms of the time and embarrassment of unwinding several months of erroneous payments/charges) entirely avoided had Grievant alerted Bushey that she needed help with balancing the account when the reconciliations did not balance. Similarly, had Grievant not concealed her difficulties with the DNR account by lying, her qualifications and suitability for completion of probation could have been assessed free of the effects of those lies.

The seriousness of the Grievant's misconduct is aggravated by the fact that she intentionally responded falsely to her supervisor's inquiries about the status of the DNR account reconciliations during her probationary period and for the admitted purpose of keeping her job which she feared she would lose if her supervisor learned of the problems she was experiencing. The evidence establishes that the problems Grievant was covering up were significant; Grievant knew that; they were problems that involved misallocation of funds as between the State DNR and various third parties; and they caused the County significant time, effort and potential embarrassment to unwind when they were ultimately discovered. Under Agreement Sec. 7.03, the County would have had the right to terminate Grievant without recourse to the grievance procedure. Grievant's intentionally and materially deceptive answers to Bushey's inquiries enabled her to complete her probation, in effect, on false pretenses.

The evidence also satisfies the Arbitrator that Grievant's lying to conceal her problems from Bushey is not rendered less serious by shortcomings on Bushey's part. Grievant knew the importance of balancing monthly DNR reconciliation. Grievant also knew that Bushey had directed her to let her know if she was having problems performing her job. Bushey had provided Grievant with documentation and hands-on training in the performance of the monthly DNR reconciliation. Bushey had also provided Grievant with help for other problems that Bushey learned of from Grievant or from other employees. In consideration of the record as a whole, the Arbitrator finds that Grievant's concern, that Bushey would fire her rather than help her to overcome promptly-disclosed DNR account reconciliation problems, was not reasonable in the circumstances.

Even if it had been reasonable for Grievant to believe that Bushey's temperament and inexperience would have led Bushey to unfairly discharge her before or after she completed probation had she responded truthfully to Bushey's inquiries, the Grievant did not have the right to expose the County's legitimate operational interests to significant harm in pursuit of her self-interest in staying employed. Here, Grievant's lying to her supervisor not only prevented Bushey from fully assessing Grievant's suitability for successful completion of probation and prevented the County from avoiding the difficulties it later experienced in unwinding several months of erroneous reconciliations. It also prevented Bushey from providing Grievant with the very assistance she needed to overcome the serious problems that Grievant alone knew she was experiencing.

For those reasons, the Arbitrator concludes that the County's discharge of the Grievant in the circumstances of this case was for just cause and within the County's rights under the Agreement.

**DECISION AND AWARD**

For the foregoing reasons and based on the record as a whole, it is the decision and award of the Arbitrator on the STIPULATED ISSUES noted above that

1. Yes. The County did have just cause to discharge the Grievant.
2. Accordingly, the grievance giving rise to this arbitration is denied. No consideration of ISSUE 2, above, regarding a remedy is necessary or appropriate; and no ruling is needed or rendered on the County's request to reopen the hearing as regards the County's after-acquired evidence.

Dated at Shorewood, Wisconsin this 17<sup>th</sup> day of May, 1999.

Marshall L. Gratz /s/

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Marshall L. Gratz, Arbitrator