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. Thomas Larsen, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1734 Arrowhead Drive, Beloit, Wisconsin 53511, 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.

SUPPLEMENTAL ARBITRATION AWARD

On April 21, 1999, by designation of the Wisconsin Employment Relations Commission ("Commission"), the Arbitrator issued an Arbitration Award in the matter which stated in pertinent part:

. . .

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.

. . .

By letter dated June 14, 1999, Attorney Howard Goldberg on behalf of the County made the following request:

. . .

> I note that you have expressly retained jurisdiction to "address any issues over remedy that the parties are unable to resolve." Based upon the information that we have received, we respectfully request that you set a date when testimony can be taken as to this unresolved issue. When we discussed this matter over the phone during the conference call that you, I and Mr. Larsen recently had, you stated that you had received no formal request for a hearing on this subject. Please consider this letter to be such a formal request.

. . .

Hearing on the above matter was conducted by the undersigned on October 14, 1999, at Darlington, Wisconsin. A transcript was received on October 26, 1999. The parties completed their briefing schedule on December 27, 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 Supplemental Award.

ISSUES

The Union frames the issues as follows:

Should the back pay award be mitigated, and if so, by what extent?

The County frames the issue in the following manner:

What is the appropriate remedy to be provided to the Grievant?

Having reviewed the entire record, the Arbitrator frames the issues as follows:

1. Should the make whole remedy by mitigated?

2. And if so, by what extent?

FACTUAL BACKGROUND

Robert Helm, hereinafter "Grievant," was discharged from his employment as a Benefit Specialist with the Lafayette County Commission on Aging on November 18, 1996. He resumed employment pursuant to the Arbitrator's reinstatement order noted above. No back pay or reimbursement for benefit costs incurred by the Grievant have been paid him to date.

Following his termination, the Grievant immediately filed for unemployment compensation, as well as for his benefits under the Wisconsin Retirement System ("WRS"). During the next twenty-six weeks, the Grievant contacted, without success, some twenty-six possible employers about work. At hearing, the Grievant was unable to name a single employer who he contacted during this period. The Grievant testified that he had a list, but he burned it when he cleaned out his house after his mother died.

The Grievant applied for work in the Wal-Mart store in Dodgeville, Wisconsin, in October, 1998. The Grievant also applied for work at Merkle-Korff Industries in Darlington, Wisconsin on April 5, 1999. The Grievant lives in Darlington.

The Grievant never applied for work at any employment agency; he never submitted his name to Job Service; he made no effort to apply for any jobs he saw in the newspaper; and he never prepared a job resume.

The Grievant was aware of his obligation to seek employment during the period of his discharge if he was going to try to collect back pay from the County. He hoped his friends in County government would tell him if there were any job vacancies. However, he never called any of his former co-workers to ask for assistance in finding a job. The Grievant also hoped that the Union would let him know if there were any job openings, but he never heard from the Union or called them to ask for assistance in any fashion.

During the period of his discharge, the Grievant primarily lived off of his retirement income from the State of Wisconsin as well as unemployment compensation, CD's and savings.

Also during the period of his discharge, the Grievant declared himself to be "retired" on his federal income tax return, and the only work he did was volunteer work. His records show that he assisted numerous people in applying for their homestead credit; he helped one woman in applying for disability benefits; and, he served as a volunteer guardian in a number of estates. He was unaware that he was entitled, by statute, to receive payment for his work as a court appointed guardian.

The Grievant has a college education with a degree in education. He graduated from the University of Wisconsin at Platteville ("UW-Platteville"), and he obtained a lifetime teaching license. The Grievant taught school before, during, and after college, for a total of 19 years. The Grievant's lifetime teaching license became inactive after he ceased active employment in the teaching profession.

Jack Sauer, a member of the Darlington Board of Education, testified that if the Grievant had chosen to become a teacher again, he could have obtained a one year non-renewable license, and could have immediately began teaching, while at the same time he could have enrolled in the six credit hours of classes needed so that his license would become permanent. Sauer added that during his term on the Board (since 1995) there has been a great need for teachers and substitute teachers in his district as well as other school districts in LaFayette County. Substitute teachers are paid $70.00 per day in Darlington, and $120.00 per day in Dodgeville and Iowa-Grant. In some cases, substitute teachers are hired on a long-term basis.

Ads for substitute teachers were placed in the Dodgeville Chronicle for the Dodgeville School District and the River Valley School District. Numerous other teaching opportunities were advertised in the Monroe Times. They included jobs in the Albany School District, Argyle School District, Monroe School District, Brodhead School District, and Darlington School District. All of these ads ran during the time of the Grievant's discharge.

There were also jobs available with LaFayette County. These included: an Economic Support position and eight Social Worker positions. The Grievant was eligible to work as a social worker. In addition, there were four Economic Support Specialist positions available in Grant County which were filled from outside. Green County had an opening for a Benefit Specialist in its Adult/Aging Services Unit "to provide advocacy services for persons 60 years of age and older related to public benefits and health care financing." Furthermore, the Green County District Attorney had a Victim Witness Coordinator position open which was suitable for the Grievant's qualifications.

In addition, there were numerous jobs listed with Job Service during the time in question which paid more than $22,000.00 per year or where the wages were negotiable. Jobs listed included: AODA Counselor, Case Manager/CAN Investigator, Job Service Specialist, Program Director, QA Coordinator, Social Worker, Teacher, Activity Director, Benefits Administrator, Case Manager, Community Service Aide, Coordinator, Mental Health

Coordinator, New Account Counselor, Patient Services/Accounts, Outreach Coordinator, Program Coordinator, Resident Services, Program Mentor, Resource Director, School to Work Coordinator, Teaching Assistant and W-2 Financial Planner. These were jobs that the Grievant possessed at least some qualifications for and by definition of job title, might have had similar duties to those held by the Grievant prior to his discharge.

UW-Platteville has an office of career planning and placement division. UW-Platteville graduates are entitled to career counseling and placement services. The Grievant testified that he has stayed in touch "in some ways" with the UW-Platteville following graduation by taking classes or noncredit workshops in the evenings, but he never went to the college placement office following his discharge for assistance in finding a new job. The University held its 32nd Annual Employer Fair on September 23, 1997, which was attended by numerous employers. The Grievant did not attend.

Gary Paul Green, University of Wisconsin-Madison/Extension, prepared a report on labor market conditions in Lafayette County for the Lafayette County Economic Development Corporation dated March 15, 1999. In said report Green reported: "More than 70% of the firms report difficulty in recruiting workers." The author also noted that the labor market is "tight" and that "the most difficult workers to recruit are those working either in skilled, professional positions, or service workers." The report further noted: "Most of the Lafayette County business establishments surveyed offer a fairly generous package of benefits to their employees." 76.7 percent of the employers offer health insurance.

A Workforce Profile for Lafayette County was prepared by the Wisconsin Department of Workforce Development dated July 1999. The Workforce Profile showed that there was very little unemployment (2.5%) in the County. It also indicated that the unemployment rate had been steadily dropping since the time that the Grievant was terminated. The Profile further indicated that a large number of LaFayette County residents commuted for jobs to other places outside of the County including Iowa.

Finally, an article was published on the front page of the local newspaper, the Republican Journal, on October 2, 1997, entitled, "Job Center Offers Many Opportunities." The article stated in pertinent part:

. . .

> The Job Center, located in the Lafayette County Courthouse annex, in Darlington, is set up to assist Lafayette County residents in finding and obtaining jobs of all types.

. . .

The aforesaid newspaper also ran an article on October 23, 1997, entitled "Job Center offers experience for those age 55 and older" which informed persons age 55 or older that they could

learn skills "through paid work experience right at the Job Center." The article stated: "Using modern office equipment, providing reception services and working with the public are among the skills gained while working 20 hours a week for up to a year. . . ."

PARTIES' POSITIONS

The Union argues that the Grievant met his duty to mitigate losses by making a reasonable effort to find alternative employment, that there is no basis to determine that the Grievant's back pay award should be reduced due to any delays in the instant proceedings caused by the Union or Grievant, and that the original order should be upheld and the County ordered to make the Grievant whole for all lost wages and benefits.

The County, on the other hand, argues that the Grievant is not entitled to any back pay because: (1) the Grievant failed to meet his legal obligation to seek other employment in order to mitigate back pay owed him; and (2) there were enormous delays in the instant case caused solely by the Union which resulted in a significant inflation of the size of the back pay award. The County thus requests that the Arbitrator issue a supplementary award holding that the Grievant is not entitled to receive any back pay or benefits.

DISCUSSION

At issue is whether the make whole remedy ordered by the undersigned on April 21, 1999, should be mitigated by: (1) the Grievant's failure to take reasonable steps to find and keep suitable alternate employment during the period between his discharge and reinstatement; and/or, (2) the Union's delays in holding hearings.

Mitigation

In Elkouri and Elkouri, How Arbitration Works, 5th Edition, 1999 Supplement, p. 92, the authors state:

> As with any breach of contract the employee who has been suspended or discharged has an obligation to mitigate damages. (Case cited). In a discharge or discipline case, where the issue is raised, arbitrators reduce the employer's liability by the amount of unemployment compensation and other compensation received by the employee during the period of his/her absence, (cases cited) provided that such compensation was not a normal part of the employee's income prior to the suspension or discharge. (Cases cited). Many arbitrators will deny back pay where it is clear that the employee failed to take advantage of available reasonable employment opportunities. (Cases cited).

In The Common Law of the Workplace, The Views of Arbitrators, National Academy of Arbitrators, Theodore J. St. Antoine, Editor, s. 10.17 Remedies in Arbitration, pp. 344-345 (1998), the authors reiterate the general rule:

> Failure by the employee to search for alternative work or a refusal to accept substantially equivalent employment will result in a corresponding reduction in a back pay award. Only "reasonable exertions" on the part of the employee are required, and not the highest standard of diligence.

Finally, in Labor and Employment Arbitration, Volume 2, Tim Bornstein, Ann Gosline and Marc Greenbaum General Editors, Chapter 39, Remedies, by Marcia L. Greenbaum, s. 39.03[1][b], 39-19 (1999), the authors state that while there had been some debate over the matter, "the majority view is that an employee has an obligation to mitigate the damages payable by the employer." Thus, if an employe fails to look for work with reasonable diligence he may not have fulfilled his obligation to mitigate damages. Labor and Employment Arbitration, supra, at 39-20.

In Wisconsin, arbitrators also follow this general rule:

> It is well recognized in grievance arbitration that an employe has a duty to mitigate his economic loss by taking reasonable steps to find and keep suitable alternate employment during the period between his discharge and reinstatement, BROWN COUNTY, CASE 412, NO. 43062, MA-5885, P. 5 (GRATZ, MAY 23, 1991).

Likewise, Arbitrator Daniel J. Nielsen found:

> An award of back pay is generally understood to carry with it a duty to mitigate economic loss. A person who is discharged is not entitled to simply sit back and let damages accumulate without taking reasonable steps to find and keep suitable alternate employment. LLOYD TRANSPORTATION, CASE 2, NO. 54286, A-9611, P. 6 (JUNE 9, 1997)

Arbitrator Nielsen added:

> Whether an individual has made a reasonably diligent effort to mitigate his damages is an issue of fact, and it turns on the circumstances of each individual case. LLOYD TRANSPORTATION, SUPRA, P. 7.

The Arbitrator will apply the above standard to the facts of this case. In doing so, the Arbitrator finds that the County bears the burden of proving that there were substantially equivalent jobs available for which the Grievant was qualified, and that he failed to make reasonably diligent efforts to find employment. LLOYD TRANSPORTATION, SUPRA, P. 6.

The Grievant testified, unrebutted by the County, that each week for the twenty-six (26) weeks that he was on unemployment compensation he applied for work as required by the State of Wisconsin. Tr. 20-25. He applied for unemployment compensation in November or December of 1996 and it ran out in June or July of 1997. Tr. 23. The Grievant stated that he contacted twenty-six (26) potential employers during this period of time. Tr. 28. Since the Grievant could not qualify for continued unemployment compensation unless he made weekly efforts to find a job, I credit the Grievant's statement that he, indeed, made such a job search. Therefore, based on same, and applying the above standard, the undersigned finds that the Grievant made a reasonable effort to find alternative employment following his date of discharge and while he was on unemployment compensation.

The record also indicates that the Grievant applied for work in a Wal-Mart store in October of 1998, Tr. 60, and that he applied for work at Merkle-Korff in April, 1999. Employer Exhibit No. 7. Based on the above finding, wherein the Arbitrator credited the Grievant's effort to find work while he was on unemployment compensation, the Arbitrator will credit the Grievant for two extra weeks during which the Arbitrator finds that the Grievant made a reasonable effort to find alternate employment.

However, the record indicates that the Grievant made no other real effort to seek employment. He never applied for work at any employment agency; Tr. 30, he never submitted his name to Job Service; Tr. 30, he didn't go to the placement office at his college; Tr. 30, and he did not prepare a job resume. Tr. 29. The Grievant admits that he can only recall applying at the two places noted above after his unemployment compensation ran out. Tr. 22-28.

The Grievant was aware of his obligation to seek employment during the period of his discharge if he was going to try to collect back pay from the County. Tr. 40-41. The Grievant admitted that he was informed "right from the beginning" he was "supposed to seek employment." Tr. 40. He hoped that his friends in Human Services would tell him if there were any job vacancies. Tr. 38. Consequently, he never called anyone in County government or the Union to ask for assistance in finding employment. Tr. 38-39. He also made no effort to apply for any jobs he saw in the newspaper; Tr. 25-26, he did not go out of town to apply for a job except in Dodgeville (the Grievant had a car and a driver's license); Tr. 27, he did not apply for any of the numerous available substitute teaching jobs (the Grievant was under the mistaken impression that his lifetime teaching license was no longer valid, so he would not have been eligible to apply for that type of work); Tr. 30-33, 73-75, he did not contact the State of Wisconsin to see if there were any employment opportunities in the Bureau of Aging because that would "have meant relocating again," Tr. 41, despite working with the elderly as a Benefit Specialist with the County; he never gave any thought to working for the insurance industry helping people clarify problems with hospital billings and similar problems although he had been "amply trained to do that kind of work;" Tr. 44, and, finally, he did not contact the Social Security Administration in nearby Lancaster to see if they had any job openings that he might be considered for. Tr. 44.

At the same time, there were a number of other reasonable employment opportunities which the Grievant could have applied for during the period of his discharge. These included: substitute teaching jobs, Tr. 73, 78 and Employer Exhibit Nos. 16, 27 and 30; Economic Support Specialist positions available in Grant County which were filled from the outside; Employer Exhibit No. 19, and numerous positions listed with the State of Wisconsin Job Center that paid more than $22,000.00 per year or where the wages were negotiable which, by definition of job title, might have had similar duties to those held by the Grievant prior to discharge. Employer Exhibit No. 31.

Examples of other work potentially available to the Grievant included a Benefit Specialist position with Trilog, an insurance company in Dubuque, Iowa. Tr. 93.

Area newspapers like the Grant County Herald Independent carried a directory of professionals which set forth the hospitals, medical care and long-term health services available in that county along with addresses and telephone numbers. Tr. 91. There is no evidence in the record that the Grievant ever made an attempt to contact some of these potential employers about job opportunities.

Nor is there any evidence in the record that the Grievant attended the 1997 and 1998 job fairs at the UW-Platteville. Numerous companies attended these job fairs. Employer Exhibit Nos. 22 and 23.

Web sites provided additional opportunities for the Grievant to seek employment during the period of time in question. Tr. 96, Employer Exhibit No. 28. Again, there is no evidence in the record that the Grievant even attempted to find a job using these resources.

Based on the above, and the record as a whole, the Arbitrator finds that the Grievant did not take reasonable steps to find and keep suitable alternate employment, except as noted above, despite the fact that there were substantially equivalent jobs available for which the Grievant was potentially qualified.

In reaching the above conclusion, the Arbitrator rejects the following arguments put forward by the Union in support of the Grievant's position.

The Union first argues the Grievant's work search during the period of time he received unemployment compensation from the State of Wisconsin as well as his making application at the Wal-Mart Store in Dodgeville and Merkle-Korff Corporation in Darlington constitutes "reasonable diligence" in seeking alternative employment following his discharge. The Arbitrator agrees with the Union that the Grievant satisfied his duty to search for alternative work while he was receiving unemployment compensation and when he applied for work at the two business noted above. However, the record indicates that the Grievant made no effort at finding alternative work at any other time material herein. Therefore, the Arbitrator rejects

the Union's argument that the Grievant's minimal efforts at finding alternate work following his discharge noted above satisfies any obligation by the Grievant to mitigate damages by looking for other suitable work except for the limited time period noted previously.

The Arbitrator also rejects the Union's argument that the Grievant did not have to apply for substitute teaching jobs. It is true that the Grievant left the teaching field and took the position as the Benefit Specialist with the County in approximately 1978. However, as pointed out by the County, the Grievant could have returned to teaching for a period of one year, and then earned additional credits to continue teaching. Tr. 73-75. The Grievant is not entitled to rely on the erroneous advice of a friend to justify his failure to seek a teaching job. Tr. 30.

The Union further argues that the Grievant is not obligated to seek employment in locations outside of Darlington. Specifically, the Union objects to consideration of employment opportunities in Madison or Milwaukee. The Arbitrator agrees that Milwaukee is geographically distant from the Grievant's home in Darlington and there certainly is no obligation in the instant case for the Grievant to relocate to Milwaukee in order to find work. Madison, however, is about an hour's drive from Darlington and since the Grievant has both a car and a driver's license the Arbitrator believes that it would have been reasonable for him to make some effort to find suitable work in Madison.

The County argues, in the alternative, that it was reasonable for the Grievant to have considered job openings in Dodgeville, Platteville, Dubuque and Monroe. Since the Grievant applied for work in Dodgeville, which is 22 miles from Darlington, the Arbitrator is of the opinion that he could have applied for jobs in the other cities noted above as well. In this regard, the Arbitrator notes that Platteville is just twenty miles away, Tr. 84, while Monroe is 31 miles away, Tr. 84, and Dubuque is in the mid-30's, Tr. 84, just a few miles further away than Platteville.

The Arbitrator agrees with the Union that it is not reasonable to expect the Grievant to apply for positions with Lafayette County or for other Benefit Specialist positions supervised in whole, or in part, by Mitch Hagopian. Notwithstanding the County's efforts to find the Greivant another job in lieu of terminating him, the record indicates that all other actions by the County and Hagopian evidenced a strong intent and firm commitment to end their employment relationship with the Grievant. The Arbitrator is not persuaded that the Grievant would have been doing anything but wasting his time in applying for any other jobs with the aforesaid parties.

Based on all of the above, and absent any persuasive evidence to the contrary, the Arbitrator finds that the Grievant did not satisfy his duty to mitigate damages, except for the period of time from the date of his discharge (November 18, 1996) extending through the entire time period that he received unemployment compensation from the State of Wisconsin until he no longer received unemployment compensation in June or July of 1997. In addition, the Arbitrator finds that the Grievant also satisfied his duty to mitigate damages for two additional weeks when he applied for employment at Wal-Mart and Merkle-Korff.

In reaching the above conclusions, the Arbitrator has addressed the major arguments of the parties related to this issue. All other arguments, although not specifically discussed above, have been considered in reaching the Arbitrator's decision.

Delays in the Proceedings

The County argues that the delays in hearing this grievance were caused by the Union and that it would be unfair to require the County to pay large amounts of back pay which were inflated by the delaying tactics taken by the Union. The Union, on the other hand, argues that the delays in this matter were attributable to a number of factors, including the County's actions. Therefore, according to the Union, there is no basis in the record to provide for a reduction in the remedy ordered by the Arbitrator based on any relatively minor delays attributable to the Union.

It is true, as pointed out by the County, that an employer's liability for back pay may be reduced by reason of delay in the arbitration process caused or contributed to by the employe or union. Elkouri and Elkouri, How Arbitration Works, 5th Edition, p. 596 (1997). It is also true that in BLUE CROSS & BLUE SHIELD UNITED OF WISCONSIN, CASE 2, NO. 51816, A-5310 (1995), MARSHALL L. GRATZ, ARBITRATION BOARD CHAIRMAN, noted that there were a number of delays in the proceedings that were not caused by the grievant. Arbitrator Gratz also noted that these delays caused the grievant material harm, and he took this factor into consideration when he awarded full back pay. BLUE CROSS & BLUE SHIELD UNITED OF WISCONSIN, SUPRA.

The record indicates, as pointed out by the County, that there was a long period of time between the date of discharge and the date of reinstatement. The record also indicates that there were a number of different reasons for the delay in processing this dispute to resolution. For example, the County correctly points out that the Grievant's discharge grievance could have been heard at the same time as his three day suspension grievance, but that the Union asked that the discharge grievance be delayed until the suspension grievance heard by Arbitrator Bielarczyk was decided. The County also correctly notes that the original date for the hearing on the discharge was postponed at the request of the Union for personal reasons. Other delays included: a Union motion to sustain the discharge grievance on procedural grounds which was ultimately decided prior to hearing on the merits and a hearing postponement in September, 1998, because the Union representative stated that the Grievant had "lost faith" in his representation and wished to have an Attorney involved.

The County makes no persuasive arguments, nor does the record support a finding, that the delays requested by the Union were not for good cause. In fact, the County usually agreed to or did not object to the delays in the hearing process. See for example Attorney Goldberg's letter dated January 8, 1998, confirming rescheduling of hearing due to the fact that he would be out of the State "commencing January 28, 1998 and will not return until April." It was not until September 18, 1998, that the County for the first time objected to a Union request to

postpone the hearing and requested "that the Arbitrator hold none of the delays and postponements, to date, were caused by the County, and that it should not be prejudiced, monetarily, for any delays arising from requests made by the Union." However, at the same time, the County also stated: "This letter will reflect the fact that the County cannot reasonably expect the WERC to compel Mr. Wilson to represent Mr. Helm if Mr. Helm is unsatisfied with his representation." Hearing in the matter was held less than two months later.

Based on the above and on this record, the Arbitrator finds that the Union did not act inappropriately when it caused delays in the arbitration process and that there is no basis for reducing the County's liability for back pay any further than noted above in the Mitigation section of this Award by reason of the aforesaid delays in the arbitration process caused or contributed to by the Union. Therefore, the Arbitrator rejects this argument of the County.

Medical Expenses

The Union, prior to hearing on remedy issues, requested by letter dated June 27, 1999, (Joint Exhibit No. 5), reimbursement by the County of certain medical expenses and insurance premiums that the Grievant paid following his discharge. The Union made no mention of these items in its brief.

The County argues against reimbursement of medical expenses on the grounds "that there is ample evidence in the record to show that Grievant could have obtained employment which would have provided employer-paid health insurance benefits."

The County discharged the Grievant on November 18, 1996. However, the County did not provide the Grievant with written notice of his termination, as required by contract, until it sent him a letter dated December 17, 1996, informing him of same. The Grievant applied for unemployment compensation at or about this same time and it ran out in June or July of 1997. As noted above, the Arbitrator has already found that the Grievant satisfied his duty to mitigate damages from November 18, 1996, until June or July, 1997. It follows that he is entitled to reimbursement for any out-of-pocket medical expenses and health care premiums during the same period of time.

The Grievant satisfied his duty to mitigate damages by looking for alternative employment for only two weeks for the remainder of time, almost two years, that he was discharged prior to his reinstatement. At the same time, the record indicates there were numerous job openings that he could have applied to fill during this period of time. Based on the Grievant's failure to mitigate damages except for the limited time period noted above, the Arbitrator finds that the County has no obligation to pay for any out-of-pocket medical expenses or health care premiums incurred by the Grievant following the expiration of his unemployment compensation, in June or July, 1997, except for the two weeks noted above that he applied for work at Wal-Mart and Merkle-Korff.

WRS

The Union first argues that the Arbitrator should not deduct any of the retirement income that the Grievant received from the WRS from the back pay award. However, as pointed out by the County, in a discharge case, when the issue is raised, arbitrators reduce the employer's liability by the amount of unemployment compensation and other compensation received by the employe during the period of his absence from work, provided that such compensation was not a normal part of the employe's income prior to discharge. Elkouri and Elkouri, How Arbitration Works, 5th Edition, 1999 Supplement, p. 92. In the instant case, the Grievant acknowledged that he would not have been entitled to receive any WRS payments while working for the County. Tr. 16. (Emphasis in the original) It follows then, as noted by the County, that the compensation that the Grievant received from WRS is the type of compensation which would be applied to reduce any back pay amounts ordered to be paid by the Arbitrator.

The Union also argues that the Grievant was forced to receive less in retirement benefits than he would otherwise be entitled to as a result of his discharge. However, as pointed out by arbitrator William C. Houlihan in VILLAGE OF ALLOUEZ, CASE 37, NO. 52844, MA-9137 (1997), the emptying of a retirement account is not the inevitable consequence of a discharge but a voluntary act; and the employer should not be required to reimburse an employe for penalties incurred as a result of early withdrawals from WRS following his discharge. The record indicates that the Grievant herein voluntarily withdrew money from the WRS following his termination from the County. Tr. 12. Therefore, the Arbitrator likewise rejects the above claim of the Union.

Finally, the parties make a number of arguments as to whether it is the County's or the Grievant's responsibility to get back into the WRS. The record is not clear as to the Grievant's current status regarding WRS. Tr. 45-49. However, based on the above, it is not necessary to make any determinations regarding this matter.

Based on all of the above, and the record as a whole, the Arbitrator finds that the answer to the issue as framed by the undersigned is YES, the make whole remedy should be mitigated. Based on the foregoing discussion, and the record as a whole, I make the following

SUPPLEMENTAL AWARD

The **AWARD** in this matter dated April 21, 1999, shall be modified only as follows:

The County shall pay the following to the Grievant:

1. Make the Grievant whole for all wages he lost as a result of the discharge, minus a three-day suspension, and minus any payments/benefits he received from unemployment compensation and the WRS, for a period of time from the date of his discharge (November 18, 1996) to the date that he stopped receiving unemployment compensation, June or July, 1997.

2. Make the Grievant whole for all wages he lost as a result of the discharge for two additional weeks (the week in October, 1998, when he applied for a job at Wal-Mart, and the week of April 5, 1999, when he applied for work at Merkle-Korff) minus any WRS payments the Grievant received.

3. Reimburse the Grievant for any out-of-pocket medical expenses and/or health care premiums he made for the time period noted in "1" above, as well as the two additional weeks he looked for alternate employment, the week in October, 1998, when he applied for a job at Wal-Mart, and the week of April 5, 1999, when he applied for work at Merkle-Korff.

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 22nd day of March, 2000.

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

rb
6037