BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

ADAMS COUNTY

and

ADAMS COUNTY PROFESSIONAL EMPLOYEES UNION LOCAL 1168, AFSCME, AFL-CIO

Case 104
No. 63860
MA-12732

(M.G. Grievance)[1]

__Appearances:__

Mark F. Yokom, Davis & Kuelthau, S.C., P.O. Box 1278, 219 Washington Avenue, Oshkosh, Wisconsin 54903-1278, appearing on behalf of Adams County.

William Moberly, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite B, Madison, Wisconsin 53717-1903, appearing on behalf of Adams County Professional Employees Union Local 1168, AFSCME, AFL-CIO.

ARBITRATION AWARD

According to the terms of the 2003-04 Collective Bargaining Agreement between Adams County Professional Employees Union Local 1168, AFSCME, AFL-CIO (Union) and Adams County (County), the parties requested that the Wisconsin Employment Relations Commission appoint an impartial arbitrator to hear and resolve a dispute between them regarding the interpretation and application of certain provisions of the Agreement as they pertain to the discharge of M. G. (the Grievant) that took effect on April 19, 2004.

The Commission designated the undersigned, Commission Chair Judith Neumann, to hear and resolve the dispute. A hearing in the matter took place on Wednesday, November 3, 2004, at the Adams County Courthouse in Friendship, Wisconsin, which was transcribed by court reporter Cheryl J. Sisco. The parties filed written briefs on or before January 7, 2005 and the County filed a reply brief on January 19, 2005. On January 27, 2005, upon confirmation by the Union that it did not intend to file a reply brief, the record was closed.

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[1] To protect the Grievant's privacy, I will refer to her by her initials and/or by the term "Grievant."

ISSUES

At hearing, the arbitrator adopted the County's statement of the issues, as follows:

1. Is the grievance timely in accordance with Article 3, Section 3.04, of the Collective Bargaining Agreement?

2. If the grievance is timely, did the County have just cause to terminate the Grievant's employment under Article 2, Section 2.10 of the Collective Bargaining Agreement? If not, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

Article 2 – Probation and Seniority

* * *

2.10 The Employer shall not suspend, discharge, or otherwise discipline any employee without just cause.

* * *

Article 3 – Grievance Procedure

* * *

3.04 If a satisfactory settlement is not reached with the Personnel Committee, either party to this agreement may request the grievance be submitted to arbitration within ten (10) work days of receipt of the Personnel Committee's answer. The arbitrator shall be appointed by the WERC. The arbitrator appointed shall hear the dispute and his/her findings and decision shall be final and binding upon the parties. The arbitrator, in arriving at his/her final decision, shall be limited to those issues involving the interpretation and application of the provisions of this agreement. Costs of the arbitrator, if any, shall be borne equally by the Union and Employer. The arbitrator shall render his/her decision within thirty (30) days.

* * *

3.06 Time limits set forth above may be extended by mutual agreement of the designated parties. Those parties for the union being the union representative and for the county, the office of the corporation counsel.

* * *

Article 19 – Management Rights

> 19.01 It is recognized that, except as expressly stated herein, the Employer shall retain whatever rights and authority are necessary for it to operate and direct the affairs of the County in all its various aspects, including but not limited to the following: the right to direct working forces; to plan, direct and control all operations and services of the County; to determine the method, means, organization, and number of personnel of which such operations and services are to be conducted; to assign and transfer employees, to schedule working hours and assign overtime; to determine whether goods or services are to be made or purchased; to hire, promote, demote, suspend, discipline, discharge for just cause, or lay off employees; to make and enforce reasonable work rules and regulations; and to change or eliminate existing methods, equipment, service, or facilities.

* * *

FACTS

M. G. began her employment with the County in March 1989 as a clerical employee sharing her time between the Department of Economic Development and the Department of Veteran Services. In 1990, the County disbanded the Economic Development Department and the Grievant was transferred to the Emergency Government (a/k/a Emergency Management) Department as a clerk typist while continuing her similar role in Veteran Services. When first formed, the Emergency Management department was directed by a volunteer and non-bargaining unit member, Frank Zernia. Upon Mr. Zernia's death in approximately January 1995, the Grievant assumed the role of Emergency Management Coordinator. At relevant times, she worked 5.5 hours per day in that role, at a location in the County Courthouse, and 2.0 hours per day as a clerk typist in Veteran Services, located in the Social Services complex. She received a different rate of pay for the Emergency Management portion of her job than for the Veteran Services portion. Both aspects of her employment were governed by the collective bargaining agreement.

As Emergency Government Coordinator the Grievant was responsible for developing and implementing the County's structured emergency government plans, for obtaining state and federal grant funds for training local emergency personnel (largely police, firefighters, EMT's and other "first responders") and for public emergency response education, for determining local emergency personnel needs for supplies and equipment and obtaining and distributing such supplies and equipment, for conducting structured training exercises for local emergency response teams in accordance with the terms of the various grants, for speaking in various public forums in order to educate the citizenry about emergency government, and for

contacting the media and key government officials and otherwise coordinating the County's response during certain actual emergencies, such as the Big Flats tornado that occurred in approximately 2000. The Emergency Government Coordinator by and large acted in a resource capacity vis-à-vis local law enforcement/emergency response personnel and did not direct any such personnel at the scene of an emergency or otherwise.

The Department, comprising only the Grievant, was overseen by the County's Emergency Management Committee, comprised of three County Supervisors who also comprised the County's Personnel Committee. As Coordinator, the Grievant was responsible for developing the Department's budget, preparing vouchers for expenditures authorized under that budget and/or under state and federal grants, preparing monthly and annual financial reports, and preparing the payroll, each of which required approval by the oversight committee, as did the overall County emergency response plan itself. As an hourly employee, the Grievant was permitted overtime pay for certain purposes and included those amounts in the payroll documentation she submitted to the County oversight committee.[2] The Grievant's position did not place her in custody of any County funds, as expenditures were paid through vouchers allocated to the various grants and other funding sources and funding checks were written to the County Treasurer.

The Grievant's job in Veteran Services included meeting with veterans and their dependents and assisting them in applying for federal and state grants and benefits and certain related clerical duties.

At relevant times the County maintained a set of personnel policies that included, inter alia, the following grounds for discipline:

1. Dishonesty.

2. Falsification or unauthorized altering of records, employment applications, time sheets, time cards, etc.

3. Inability to perform assigned tasks.

4. Unlawful conduct defined as a violation of/or refusal to comply with pertinent laws and regulations.

5. Violation of any other commonly accepted, reasonable rule of conduct including departmental rules and procedures which are not in conflict with County policy.

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[2] At one time, the position also served as the "911" coordinator for the County, but this aspect of the job had been transferred elsewhere by the time of the hearing in this case, for reasons unrelated to the instant matter.

Prior to the events giving rise to this grievance, the Grievant received uniformly positive performance evaluations. County officials acknowledged that she was effective in writing grants and obtaining and distributing services and equipment for local emergency personnel. The County had no reason to doubt the accuracy and validity of her financial records and reports and annual County audits uncovered no flaws in her financial management. [3] She also received a "Letter of Commendation for Outstanding Services," dated March 23, 1998, from then County Board Chairman Theodore Albasini. He wrote in part:

> Your excellent leadership provides a critical role in helping Adams County cope with the Big Flats tornado. Also, you have provided outstanding services in insuring that emergency operations of State, County, and local government are able to meet their requirements, such as through the tabletop practical exercises.
>
> Further, you have displayed a tremendous role in your cooperation with the law enforcement agencies, fire agencies, medical services, and hazardous material teams.
>
> Again, I wish, on behalf of the Adams County Board of Supervisors and my office as the County Board Chairman, to commend you and congratulate you on a job well done.
>
> Other citizens and employees would be well advised to look to your performance model for their personal goals.

On May 31, 1999, a fire destroyed a home owned by the Grievant and her husband. After an investigation partially conducted by the Adams County Sheriff's Department, the Grievant was charged with felony insurance fraud in Adams County Circuit Court on October 14, 2002. The related criminal information alleged that the Grievant:

> Caused to be prepared a false claim exceeding $1,000, to be paid under a contract of homeowners insurance between the defendant and Pekin Insurance Company. Defendant did this by preparing a proof of loss she knew to be fraudulent, with the knowledge that the proof of loss may be, and in fact was,

[3] The County presented some evidence gathered after The Grievant had been suspended but before she had been discharged suggesting that she may have been negligent in her recordkeeping regarding the grant funds and/or in processing overtime pay for herself. Personnel Committee member Graumann testified that this information influenced his decision to terminate her employment by highlighting the trust problems related to her conviction. However, neither the County's termination notice nor its brief has asserted that this information contributed to or justified its decision to discharge The Grievant. While the Union had some opportunity at hearing to question witnesses regarding this information, the due process element of "just cause" would normally require the employer to give notice prior to hearing of the grounds upon which it intends to justify its termination decision. Lacking such prior notice, the Union cannot be said to have had a sufficient opportunity to challenge the accuracy of any such allegations. In any case, no evidence suggests that any such negligent recordkeeping, if it occurred, was intentional or led to any actual misuse or misdirection of funds. Accordingly, on this record, it is not appropriate to draw any conclusions about the accuracy or import of this evidence.

> presented for a claim for payment under an insurance policy with Pekin Insurance Company. This act violates Sections 939.05(2)(b) and 943.395(1)(b), Stats.

The fraud allegations involved approximately seven items on 39-page list of items that the Grievant claimed had been lost in the fire, as well as an allegation that she overstated the value of certain items in her claim. After a three-day jury trial beginning January 12, 2004, the Grievant was convicted of felony insurance fraud. She was sentenced on March 5, 2004 to 30 days in jail with work release privileges and 100 hours of community service.

The Grievant's criminal charges, conviction, and sentencing received substantial local press coverage, clearly identifying her position with the County. On Wednesday, October 16, 2002, the front page of the *Adams County Times* carried an article entitled "Emergency Government Coordinator is Charged with Felony Insurance Fraud." The first sentence in the article stated, "Adams County Emergency Government Coordinator, M. G., was charged Monday, October 14, with felony insurance fraud." The January 10, 2004, *Wisconsin Rapids Daily Tribune* carried an article on page 3A entitled "Couple Charged with Fraud Head to Trial." The article stated in part:

> A jury trial for the Adams County Emergency management coordinator and her husband, who both face charges connected to a 1999 fire at their town of Preston property, is scheduled to begin at 9 a.m. Monday.
>
> … M. G. has continued in her position as emergency management coordinator, as well as working for the county's Veteran's Service Office, said Dave Repinski, a member of the Emergency Management and Veteran's Services committees.
>
> Repinski has been approached by fire department personnel asking why M. G. continues to hold her position with Emergency Management. But the committee is taking the position that [M. G.] is innocent until she's convicted, Repinski said. The court case has not impacted M. G.'s ability to do her job, he said.
>
> "She writes a lot of grants and does a great job at it," Repinski said.

On January 16, 2004, the *Wisconsin Rapids Daily Tribune* ran an article entitled "Jury Convicts Couple of Insurance Fraud," the first sentence of which read, "After more than three days of testimony, an Adams County jury found the county's emergency management coordinator and her husband guilty of insurance fraud in connection with a fire at their town of Preston property."

On January 16, 2004, following her conviction, the County suspended the Grievant with pay pending further investigation. On January 20, 2004, the *Wisconsin Rapids Daily Tribune* contained an article under the caption, "[M. G.] Suspended Pending Inquiry." The article stated in part:

> Officials have suspended the Adams County emergency management coordinator pending an investigation into her activities.
>
> … [S]ome local residents don't believe the County should wait for the results of an investigation. "She was found guilty of a crime," said Brenda Johnson of the City of Adams. "I don't think she should keep her job within the County." Johnson thinks the conviction on a fire-related crime would make it difficult for her to continue working with fire departments in the area. …
>
> Adams County resident, Mike Seever, said he thinks the County should have suspended [M. G.] and should have done its investigation when charges where filed against her.
>
> "What's taking them so long to move on this?" Seever asked. "It should be a done deal now."

On January 21, 2004, the *Adams County Times* ran a story entitled "Jury Finds Couple Guilty in Insurance Fraud Case." The first sentence in this article stated, "After deliberating for about 2-1/2 hours, a jury found Adams County Emergency Government Coordinator [M. G.] and her husband, William, guilty of insurance fraud…" The last paragraph began, "[M. G.] has been Adams County's Emergency Government Coordinator since Jan. 19, 1995. She also works part-time in the County Veteran's Service office." On March 6, 2004, the *Wisconsin Rapids Daily Tribune* ran an article entitled "Adams County Official Faces Jail for Fraud." The first sentence of this article identifies the Grievant as the Adams County Emergency Management Coordinator and describes the jail sentence. On March 10, 2004, the *Adams County Times* ran an article entitled "Couple Sentenced in Insurance Fraud Case." That article also identified the Grievant as Adams County's Emergency Government Coordinator for the past nine years.

By all accounts, during the approximately four and half years in which the fraud investigation and criminal charges were pending against the Grievant, she performed her job well, including her interactions with the public and with County and local law enforcement and emergency services personnel. This period included her coordinating the Big Flats tornado emergency in or around the year 2000.

On March 10, 2004, the County met with the Grievant, along with her Union representatives and her private criminal defense attorney, as part of the County's continuing investigation into her employment situation. By letter dated April 19, 2004, the County informed the Grievant that she was discharged from her employment, "based upon your felony conviction under Wisconsin Statutes §943.395 and the resulting lack of trust, credibility, and inability to perform required job duties and responsibilities effective today."

On April 28, 2004, the Grievant filed a grievance challenging her discharge from employment. The grievance was denied at Step 1. By letter dated June 23, 2004, addressed to the Grievant's Union representative, William Moberly, the County informed the Union that it had denied the Grievant's grievance at Step 2 of the grievance procedure. On June 29, 2004, Mr. Moberly sent the County's personnel director, Cindy Haro, an electronic mail message in pertinent part as follows:

> Cindy,
>
> Did the County Personnel County [sic] issue answers to our last Third Step meeting ([M. G.] and Highway). I seem to recall you did but I can't find them and neither Karen Bays or Shirley received them? If you did can you please fax them to me at 608-836-4444. In case we're close to any deadlines you can also accept this as our official notice to advance the [M. G.] discharge to arbitration.

On July 1, 2004, Ms. Haro faxed Mr. Moberly a copy of the County's June 23, 2004 letter. On July 8, 2004, Mr. Moberly sent Ms. Haro an electronic mail message stating, in pertinent part, "This is intend [sic] to confirm that last week via e-mail the Union notified you that we intend to advance the [M. G.] to arbitration. I will be filing the Petition with the WERC tomorrow." On July 22, 2004, the Union filed a WERC "Request to Initiate Grievance Arbitration," which states on its face that it was mailed to the WERC on July 21, 2004.

The County did not discuss or question the timeliness of the submission to arbitration until County counsel's letter to Mr. Moberly dated October 28, 2004.

Union representative Sandy Davis testified, without rebuttal, that, during her five-year tenure as representative, the Union had always taken the position that the contract language required notice to the employer of an intent to arbitrate within ten days after receiving the Step 2 response, not submission of the matter to the WERC. For an example, the Union offered evidence regarding a 2002 discharge grievance. In that matter, the County's Personnel Committee had met on January 7, 2002 but the meeting apparently was disbanded when the County refused the Union's demand that the County put forward its evidence to justify the termination and the Union consequently left the meeting. By letter dated February 19, 2002,

the Union advised the County that, "Assuming the Personnel Committee is still unwilling to put its case before the Union and the grievant I would suggest that we proceed to arbitration. If you feel differently please contact me immediately. If I do not hear from you within the next week I will prepare the Request for Arbitration." On March 6, 2002, the Union sent a letter to the County stating, "The Union received, on February 25, 2002, the County's written response, from attorney James Macy, to the above referenced grievance. Please be advised that the Union does not accept the County's response as settlement of the grievance and pursuant to Article 3 – Grievance Procedure, 3.04, we are notifying you of our intention to file for arbitration." On that same date, March 6, the Union mailed to the WERC the Request to Initiate Grievance Arbitration regarding the 2002 discharge grievance. That grievance proceeded through arbitration without the County raising any question regarding timeliness.

County Deputy Fire Chief Alex Bebris, who is the County's first-responder liaison with the Emergency Government Coordinator, testified that he does not trust the Grievant as a result of her conviction, that he now would be reluctant to share "law enforcement sensitive information" with her (such as tactical or security information) or to follow her directions in an emergency situation, that her conviction for dishonesty made him unwilling to sign off on any paperwork she generated dealing with grants or equipment, and that he could not work with her unless compelled to do so by the Chief's directive. Bebris believed it would be difficult to explain to outside law enforcement agencies and/or funding agencies why the County's security coordinator was a felon. Bebris had held this position since approximately January 2003 and had worked with the Grievant a relatively short time and on a limited basis before her suspension and termination. The County had not consulted with him during its pre-discharge investigation.

Sheriff Department investigator Todd Laudert, who had been the County's lead investigator in connection with the charges against the Grievant and her husband, testified that he would not trust the Grievant as a result of her conviction, that he would not work with her unless compelled by the Sheriff's order, and that he could not follow her directions during an emergency (such as a Hazmat/clandestine "meth lab" crime scene) because he feared she might undermine his safety in retaliation for his role in her prosecution. He also testified that, during the several years the criminal investigation was ongoing, nothing untoward occurred between him and the Grievant and he had no reason to believe her work performance was impaired. In Laudert's view, no one convicted of a felony should be permitted to continue County employment.

Paul Brown, Assistant Fire Chief in the Quincy Volunteer Fire Department, testified that the Grievant's felony conviction undermined his trust in her and, because trust had to be implicit in life risking work such as firefighting, her conviction made it impossible for him to work with her. Prior to her conviction, he had viewed her as a "friend to the department" and effective in securing equipment and other assistance for emergency personnel. When pressed for examples as to how his lack of trust might actually impair his working relationship with the

Grievant, Brown said he would question her directions during practice exercises as well as any commands she might give during an actual emergency rescue scene. In these situations, "we can't have questions, and we have questions" as a result of her felony conviction. He acknowledged that it was the conviction in itself that created the problem: "for us, that's just an – it's a red flag on everything we do, unfortunately." (Tr. at 143). He also noted, "here you're asking the government to give you money based on the integrity of the people involved. And you have someone that has a felony conviction of fraud, it's kind of hard to stand up for the integrity of that person." (Tr. at 146). However, while Brown and the Grievant were acquainted with each other from training exercises, Brown was not the Grievant's local contact person in his sector and the Grievant had never worked directly with him in planning or funding local equipment or service needs.

Mark Thibodeau, an assistant state prosecutor in Adams County, testified that the Emergency Government Coordinator could be in a position to testify in criminal trials as outgrowths of bomb scares or other local emergency situations. As a result of her felony conviction, she would make a vulnerable witness. However, he had limited understanding of the actual role of the Emergency Government Coordinator and, other than one training session he may have attended, he had never worked with the Grievant as a witness or otherwise.

Bill Graumann, former County Supervisor and member of the Personnel Committee at the time of the Grievant's discharge, testified that the Grievant was unable to perform her duties because her felony fraud conviction had cost her credibility with the Sheriff and local fire departments, with whom she would have work on a continual basis. He stated that the publicity had been very damaging to the County and to the public confidence in the Grievant. He testified that the Emergency Government oversight committee relied upon the Coordinator to give them accurate information about funding, grants, budget issues, equipment purchases, and payroll, and that the Grievant's conviction for a dishonesty-related felony "casts a shadow" over the committee's comfort with her representations in these respects. Moreover, according to Graumann, the County was concerned that grant funding agencies might hesitate to work freely with a County agent who was a convicted felon.

County Supervisor Dean Morgan, former long-time member of the County's Emergency Government oversight committee, testified that he disagreed with the County's decision to discharge her because she had always done an excellent job managing the office and during his tenure the committee had no reason to lack confidence in her financial representations or recordkeeping.

Upon suspending the Grievant in January 2004, the County contracted with an outside vendor to perform the basic emergency government coordinating activities. That individual was hired as the part time Emergency Government Coordinator in September 2004 in a position that has been designated managerial and excluded from the bargaining unit. The County has eliminated the Veteran Services portion of the Grievant's position.

POSITIONS OF THE PARTIES

For the County

Regarding procedural arbitrability, the County argues that contract language that is clear and unambiguous should be applied in conformance with its literal terms even if to do so may seem harsh. In this case, according to the County, the contract language in Section 3.04 clearly required the Union to request arbitration within ten work days of receiving the personnel committee's response to the grievance. Since the personnel committee denied the grievance by letters dated June 23 and July 1, 2004, the contract required the Union to submit its request to initiate grievance arbitration or before July 16, 2004. As the Union's request to the WERC was not submitted until July 21, 2004, it is untimely and should be dismissed for that reason.

As to the merits of the grievance, the County contends that it has authority to discipline M. G. because of her conviction for felony insurance fraud, although the misconduct took place off-duty, because there was a nexus between her felony conviction and her employment. The County, relying upon the criteria articulated by Hill and Kahn, in "Discipline and Discharge for Off-Duty Misconduct: What are the Arbitral Standards," in Arbitration 1986: Current and Expanding Roles, Proceedings of the 39th Annual Meeting of the National Academy of Arbitrators, 121-154 (BNA Books 1987), argues that the Grievant's felony insurance fraud damaged the County's reputation because of the crime-related publicity expressly identifying her as a "high profile" County official. The conviction also impaired her ability to perform her job because the nature of the crime would make it difficult for County officials and state grant administrators to trust her representations regarding expenditures, payroll, and equipment needs/distribution, would cause County emergency response personnel to distrust and refuse to share security information or work with her, and otherwise rendered her unsuitable to continue as County Emergency Government Coordinator. The County also argues that the Grievant offended at least five of the County's employment policies, including dishonesty, falsification of records, inability to perform tasks, unlawful conduct, and failing to adhere to commonly acceptable rules of conduct.

The County also argues that, having established a nexus between the Grievant's off-duty misconduct and her job, the County's judgment as to the degree of discipline (i.e., in this case, discharge) is not an issue as to which the arbitrator may substitute her judgment for that of the County.

For the Union

Regarding the timeliness issue, the Union contends that "the requirement of 3.04 is for the Union to notify the Employer within ten (10) working days of its intent to proceed to arbitration. There is no requirement for how long either party has to actually file the Request to Initiate Grievance Arbitration with the ... (WERC)." (U. Br. at 15). Since the Union

notified the County by e-mail on June 29, 2004, that it intended to advance the grievance to arbitration, the Union complied with the contractual time frame. Further, the Union steward testified that, during her five years of such service, the contractual provision "has always been interpreted" to mean the Union will notify the County of an intent to proceed, and the Union pointed out that the Union had followed that practice in a termination grievance shortly before the Grievant's grievance arose, without protest or comment by the County.

Regarding the merits, the Union argues that the County has not met its burden to establish that the Grievant's conviction for falsely claiming and/or overstating the value of seven of the numerous items on a 39-page home insurance claim carries a sufficient nexus with her employment to constitute just cause for termination. According to the Union, such a nexus would require proof that (1) the behavior harmed the reputation or credibility of the Emergency Management Department or the Veterans Services departments, (2) the Grievant was unable to perform her duties or appear at work, and/or (3) other employees are refusing, reluctant, or unable to work with the Grievant as a result of the conviction. On the first element, the Union pointed out that, despite the publicity, County officials continued to confirm the Grievant's commendable on-the-job performance during the years following the criminal indictment. The Union contends that the second element is not at issue in this case, since the Grievant continued to perform her duties and was available for work despite the criminal proceedings. Regarding the third element, the Union argues that the County's witnesses offered only "speculative" testimony to support their claim that the Grievant's conviction rendered it impossible to trust her. The Union specifically disputed Sheriff's Department Investigator Laudert's assertion that the Grievant would be in a position to put him in harm's way, in retaliation for his having handled the investigation leading to her conviction. The Union cites evidence that the Grievant's responsibilities do not include directing personnel at the scene of any actual disaster or emergency and that the Grievant performed her duties for five years after Laudert's investigation without any acrimony or harm toward him. The Union also notes that Quincy volunteer fireman Paul Brown had little direct interaction with the Grievant, seemed to believe mistakenly that the Grievant would play a directing role at the scene of an emergency, and had had a positive experience with her in connection with the one emergency in which they interacted, i.e., the Big Flats tornado, which occurred after she had been indicted. Finally, as to the County's contention that its oversight committee could not trust the Grievant's handling of grant writing, grant funds, or emergency expenditures, the Union states that "[The Grievant] had no direct control or access to money," (U. Br. at 13), that County officials acknowledged the Grievant had handled her job well even after the indictment and had found no discrepancies, and that all County audits of her department had been positive. Accordingly, the Union argues that the County has adduced no evidence of an actual nexus and therefore terminated the Grievant without just cause.

The County's Reply

On the timeliness issue, the County responds that the Union's interpretation of the contract language (as requiring only notice of intent) is at odds with the explicit language, which "requires a request … not simply a notification …." (County Reply Br. at 2). Moreover, argues the County, the Union's interpretation is inconsistent with the "swift

resolution of disputes," because that interpretation would permit the Union to delay initiating WERC arbitration "indefinitely." (Id.). Nor has the County waived its right to assert this defense, even though it may have refrained from asserting it in prior arbitration cases.

On the merits, the County responds that the Union's focus in reviewing evidence of damage to the County's reputation is overly in examining solely the effect on departments in which the Grievant works. Several newspaper articles regarding the Grievant's indictment and conviction specifically identified her as a County official, which is sufficient to establish damage to reputation. In addition, argues the County, the Union, in arguing that the County presented no reputation evidence beyond the newspaper articles, has disregarded the testimony from County Personnel Committee member Bill Graumann, who testified that the County was aware of the articles when it made the decision to terminate the Grievant and that the negative publicity had damaged her credibility with the public. The County states that the Union has not addressed (1) the Grievant's breach of public trust, given her high profile position with the County, and (2) the Grievant's inability to perform her duties, arguing that "the Union has now waived that argument." The Union's effort to disparage the testimony of witnesses who indicated they would refuse to work with the Grievant "misses the point," i.e., "[i]f co-workers and others will not work with [the Grievant], that fact remains – regardless of whether or not their reasons are plausible." The County reiterates the testimony of Paul Brown, Chief Deputy Alex Bebris, D.A. Mark Thibodeau, and Bill Graumann, who each "specifically stated that they could not and would not work with the Grievant after her felony conviction." The County further notes that the Union did not produce any witnesses who stated that they would be willing to work with her, and argues that the Union's reliance on former Emergency Management Committee member Dean Morgan's support for The Grievant as not persuasive. Indeed, the County suggests that Morgan's testimony demonstrated how much the Committee relied upon the Grievant for trustworthy information, an ability that has now "vanished."

DISCUSSION

Procedural Arbitrability

The County is correct that contractual time limits ought to be construed in a manner that is consistent with the underlying purpose of arbitration, i.e., a relatively quick and inexpensive means for resolving disputes, and that purpose would be defeated if the contract were interpreted to permit the Union to delay initiating WERC arbitration processes "indefinitely." The County is also correct that arbitrators will give effect to clear contractual language even if the result seems harsh, because arbitral authority derives solely from the agreement. However, as an affirmative defense, the burden is upon the employer to produce persuasive evidence that the contract requires dismissal for untimeliness under the circumstances present here. For the reasons that follow, the County did not meet that burden. Neither the contract language on its face, past practice, nor arbitration policy compels the conclusion that the parties intended the harsh result urged by the County.

First, even where a time limit is clearly expressed in a grievance procedure, arbitrators are unlikely to infer that the parties intended that the consequence of a missed time limit is *waiver* of the grievance, absent the contract stating such consequence. The cases cited by the County themselves support this principle. In both BALDWINSVILLE CENTER SCHOOL DISTRICT, 100 LA 1076 (WESSMAN, 1993), and SIOUX CITY SCHOOL DISTRICT, 95 LA 1084 (GALLAGHER, 1990), the contractual language clearly stated that a grievance filed outside the stated time limits would be waived. The contractual grievance procedure in the instant case states no such clear consequence.

Second, the contract language on its face contains sufficient ambiguity to permit resort to other evidence of the parties' intent. The provision in question does not state, for example, that parties may request arbitration "by submitting a Request to Initiate Arbitration with the WERC" within ten (10) working days. The contract refers to the WERC only in the next sentence, when denoting the arbitral forum. This creates ambiguity about whether the parties intended the request for arbitration to mean filing the actual WERC form with the WERC or whether instead an arbitration request directed to the employer would suffice. Thus, while the County's interpretation is reasonable and plausible, the language is susceptible of other reasonable and plausible interpretations and hence is not clear and unambiguous.

The record supplies little extrinsic evidence of the parties' mutual understanding of this language. The Union apparently acted consistently in this case with its own longstanding view of the contractual requirement: even assuming the Union received the Personnel Committee's June 23 response immediately, the Union notified the employer very clearly on June 29 (within ten work days) that it wished to proceed to arbitration. The Union confirmed that intent on July 8 – still within ten days, even if one assumes that the Union received the June 23 letter on June 24.[4] The County bears the burden of production and persuasion, both because timeliness is an affirmative defense and because a heavy burden traditionally falls upon a party seeking a forfeiture or waiver, even in grievance arbitration. In this case, the County did not present evidence of prior practice or bargaining history to support its position regarding this language.

More importantly, in response to the Union's assertion on June 29 that, "In case we're close to any deadlines you can also accept this as our official notice to advance the [M. G.] discharge to arbitration," the County was silent as to any concern about timeliness for several months, while the parties proceeded to schedule and process the matter in due course. Such conduct is inconsistent with any choate view that the Union had violated the contractual time limits. The County argues, with some merit, that any prior failure to raise this defense should not preclude its assertion here – but that would be true only if the contract language were clear and unambiguous. Given the ambiguity, the County needs to show some prior affirmative indication that it would advance this interpretation.

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[4] On this point, the events surrounding the 2002 (TB) grievance, which the Union proffers as evidence that the County has previously acquiesced in the Union's interpretation of the language, are not necessarily sufficiently parallel as to convey any such County acquiescence. Indeed, it appears at least arguable, from the chronology of that grievance that the Union initiated the formal WERC process within ten days of receiving a clear response from the Personnel Committee.

Nor does the Union's proposed interpretation necessarily imply that the Union could notify the County within ten days and then delay initiating the formal process "indefinitely." In grievance arbitration, as in other forums, unreasonable or prejudicial delays are not tolerated unless sanctioned by explicit contract language. SEE GENERALLY, ELKOURI & ELKOURI, HOW ARBITRATION WORKS (6TH ED.2003) at 220. By the same token, without showing culpable delay by the Union or prejudice to its own interests, an employer will have difficulty preventing an arbitrator from proceeding to the merits of a grievance, where the contract language is ambiguous. Thus in NATIONAL LINEN SERVICE, 95 LA 829 (ABRAMS, 1990), a case the County has cited, the arbitrator rejected the employer's timeliness defense where, although the Union did not file a formal grievance within the ten day contractual time limit, the employer "certainly was not surprised or prejudiced by the fact that a formal grievance was not filed [for several months],"since the Union had protested the employer's action immediately and the parties had engaged in lengthy discussions about the issue in the interim. ID. at 833.

Accordingly, the grievance is arbitrable.

Merits

As to whether the County had just cause to discharge the Grievant, the standard substantive inquiry is whether the alleged misconduct occurred and, if it did occur, whether the penalty is commensurate with the misconduct in light of all the circumstances, including the Grievant's prior employment record.[5]

Regarding the second prong of that inquiry, the County presents arbitral authority to the effect that an arbitrator, upon determining that the misconduct occurred, should not overturn the employer's judgment as to the penalty unless it is "discriminatory, unfair or arbitrary and capricious." (County Br. at 42). The undersigned arbitrator acknowledges this line of thinking, but believes the better weight of authority and the better practice would permit the arbitrator to weigh the reasonableness of the penalty, absent a contractual restriction. SEE GENERALLY, ELKOURI AND ELKOURI at 958 – 962. However, this issue is not crucial here, because at root the case turns on the Grievant's suitability for continued employment in light of the public trust implications of her off-duty conviction. It is not a situation where corrective or progressive discipline would come into play or where other just cause considerations have been advanced, such as disparate treatment or lack of due process. In this situation, if the Grievant's felony conviction has rendered her unsuitable for continued employment, then she cannot appropriately be reinstated with or without a lesser penalty.

Accordingly, the sole issue is whether the Grievant's felony insurance fraud conviction has impaired her effectiveness as the County's Emergency Government Coordinator and/or as a clerk-typist in the Veterans Services Department. While simple to state, this issue is

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[5] This case does not present any issues regarding procedural deficiencies or lack of due process in the County's action.

exceedingly difficult to decide. The competing circumstances are very evenly balanced, as set forth in more detail below. The case demands a black or white response (discharge or reinstatement), yet the factual context presents a choice between close shades of gray.

It is important to note at the outset that the parties have not attempted to question the factual determinations underlying the Grievant's conviction. On the record as it exists, therefore, it is a fact that the Grievant along with her husband intentionally tried to defraud their home insurance company as to whether certain property was lost in a residential fire and as to the value of certain other property. There is no question that this conduct occurred, but rather whether this conduct was "misconduct" such as to give the County just cause to discharge.

Coloring all considerations in cases involving off-duty conduct is the strong line arbitrators have traditionally drawn between the employee's job, where an employer has obvious and presumed interests, and the employee's life away from the job, where the employer is presumed to have no legitimate interest. This strong policy is rooted in turn in American society's traditional respect for the right of privacy. However, sometimes employees engage in conduct in their personal lives that so undermines the employer's interests as to constitute job-related misconduct for which the employer may impose discipline. The County's central argument in this case is the nexus it proffers between the Grievant's off-duty misconduct and her employment.

Before addressing that nexus, the County also argues that the Grievant's off-duty conduct violated several work rules set forth in the County's policies. The latter argument is relatively easy to handle. Unless a work rule, such as "dishonesty" or "falsification of records," states on its face that it applies in a non-work setting, or the employer has in some other manner publicized its intent to apply the rule to specific off-duty conduct, it is not appropriate to assume that the rule exceeds the boundaries of the work site. To conclude otherwise would make it unnecessary to consider any other nexus between off-duty conduct and the job, as the work rules alone would be sufficient to justify discipline. Suffice to note that an employer has no legitimate per se interest in whether an employee was dishonest in dealings with his family or friends or falsified a loan application. Accordingly, I do not find that the Grievant violated these work rules by engaging in the instant insurance fraud, nor do these work rules, standing alone, establish a nexus between the Grievant's off-duty misconduct and her job.

The most commonly-cited criteria for evaluating evidence of the nexus between off-duty misconduct and the job are those articulated by Arbitrator Kesselman, in W.E. CALDWELL CO., 28 LA 434, 436-37 (1957): (1) harm to the employer's business or reputation; (2) the employee's inability to perform the job; and (3) refusal of other employees

to work with the grievant. I prefer the somewhat more discrete formulation set forth in HILL AND WRIGHT, EMPLOYEE LIFESTYLE AND OFF-DUTY CONDUCT REGULATION (BNA 1993) at 171:

1. Injury to the employer's business (which encompasses reputation).

2. Inability to report for work.

3. Unsuitability for continued employment.

4. Co-employee refusal to work with the employee or danger to other employees.

The County has adduced evidence regarding all but the second of these criteria. As the Grievant was suspended with pay shortly after her conviction, and as she was incarcerated with work-release privileges, she remained available for work and the County does not claim otherwise. As to the third element, as noted earlier, I view "unsuitability" as encompassing both the first and the fourth element, as well as additional factors pertinent to performing the job itself. It makes sense, therefore, to review the third element largely with reference to job performance issues.

Addressing first the element of job performance, the County contends with some merit that a conviction for felony insurance fraud, a crime involving dishonesty and falsifying records, renders it impossible for the Board's oversight committee to rely upon the budgetary documents, expense vouchers, state and federal funding requests and receipts, and other financial data that the Grievant would generate for Board approval in her role as Emergency Government Coordinator. On the surface, that nexus is appealing. An oversight committee comprised of part-time elected officials cannot be expected to acquaint itself in detail with every element of financial data pertinent to emergency government; In Mr. Graumann's words, "That's why we hire what we think [are] qualified people." (Tr. at 181). The Grievant's situation as the solitary employee in the emergency government department exacerbates the legitimacy of the County's concern. The County also questioned whether the Grievant could continue to succeed in obtaining grants and otherwise working with state and federal officials, given her status as a convicted felon.

However, in the instant situation some of these legitimate County concerns are too speculative in light of nine years of objective evidence that the Grievant performed her job, including its financial elements, in a manner that met the County's auditing requirements as well as oversight by the grant funding agencies. Pressed for examples of any actual on-the-job financial misconduct by the Grievant, Mr. Graumann adverted only to the possibility that she may have submitted inaccurate overtime requests – a suggestion that the County has neither

relied upon nor attempted to prove on this record, and that appears to have been based upon her successor's misunderstanding that the Grievant was an hourly employee. Accordingly, in this situation, the County lacks a substantial foundation for what otherwise might be legitimate concerns about its ability to rely upon the Grievant's financial management.

The County's concern that the Grievant's conviction may damage its credibility with grant funding agencies and/or outside law enforcement agencies is more persuasive. For purposes of interacting with these entities, the County's official and singular representative would be the Grievant. It is not unreasonable or unduly speculative for the County to conclude that the blemish on her integrity following her conviction could affect these outside entities' judgment about the validity of the representations set forth in the County's proposals, the willingness of these entities to trust that funds will be properly handled, and their willingness to confer scarce resources on the County rather than other requestors. Although the Grievant's effectiveness in this regard evidently was not undermined while the fraud was being investigated and prosecuted and when the Grievant was entitled to a presumption of innocence, a felony conviction is significantly different from an indictment. The Grievant's personal integrity has now been found deficient "beyond a reasonable doubt." Unlike the County officials themselves, who know the Grievant well and have objective grounds to trust her handling of financial matters, as discussed in the preceding paragraph, it is not unreasonable for the County to be concerned that state and federal emergency funding agents have not developed the same level of familiarity or trust, such that her felony fraud conviction could negatively impact the County's reputation and other interests in relation to those agents. Hence, I conclude that the Grievant's conviction undermined her ability to perform that part of her job that depends upon the trust of outside emergency funding entities. Since this nexus still rests largely upon hypothesis rather than actual evidence, however, I would have trouble sustaining her discharge if this were the only nexus established by the County.

The County also produced several individuals who testified that they could not work cooperatively with the Grievant after her felony conviction. Each witness cited his loss of the requisite trust or confidence. The County's chief law enforcement liaison with the emergency government department said he would not share "law enforcement sensitive information" with the Grievant, which she might need in order to coordinate emergencies, and that he would not trust any documentation she might submit to him for signature. The deputy sheriff who investigated the [M. G.] incident stated that he would not follow directives from the Grievant in an emergency situation because he feared she might endanger him in retaliation for his role in her conviction. A local volunteer deputy fire chief testified with compelling emotional honesty that he could not continue to work with the Grievant on training projects or at the scene of an emergency, once she had been convicted. A local assistant state prosecutor voiced the Grievant's impairment as a potential witness in any trial stemming from an emergency situation.

The testimony of these colleagues touches on an important element. An emergency government coordinator works closely with law enforcement and safety officials at the County and local community level. If they distrust her and their distrust leads to withholding significant information, refusal to co-sign documents, and/or refusal to follow her directions, the Grievant cannot do her job. On close scrutiny, however, the record does not supply a sufficiently substantial link between these officials' distrust (which I found genuine) and any actual work that the Grievant would be expected to perform. In nine years, the Grievant has never needed to testify in an emergency government-related legal proceeding, and the assistant prosecutor was barely acquainted with her. The Grievant's coordinating role in an actual emergency would be to maintain contact among the various public safety officials, public officials, and the media; police and firefighters would not have to follow her directives or fear that she would direct them into danger, because public safety officers, not the Grievant, would be in charge at the scene. While the Grievant plans, obtains funds for, and implements training exercises, even during such exercises she would not be the individual issuing orders to police or firefighters in handling a dangerous scene. As to withholding sensitive information or refusing to co-sign documents, the record is vague about any actual situations in which this might occur, any actual information that might be necessary but nonetheless withheld, and any actual documents that might require a deputy sheriff or firefighter signature based upon trust. Indeed, each witness testified, some with considerable experience in working with the Grievant, that she had done a very good job as emergency government coordinator even after her indictment had given them concern about retaliation or concern about her integrity. More importantly, as responsible law enforcement and public safety officials, these individuals presumably would follow the orders they were given as to working with the Grievant, irrespective of their personal antipathy, as they themselves forthrightly acknowledged.

When pressed, the basis each of these individuals ultimately cited for his unwillingness to work with the Grievant was her felony conviction as such. Antipathy toward a colleague because she has been convicted of a felony is understandable, but it cannot satisfy the just cause standard without some objective link between the felony and the ability of either the Grievant or her colleagues to perform their jobs. "[B]eauty is in the eyes of the beholder; a person should not necessarily lose his job because other people don't like him or judge his offense more seriously than his employer might or even the courts might." "OFF-DUTY MISCONDUCT," IN LABOR LAW & LABOR ARBITRATION, OCTOBER 28, 2004, at 72 (LABOR ARBITRATION INSTITUTE, 2004). Thus the County's concern about how employees will react to the Grievant, while reasonable, is not sufficiently borne out by the actual circumstances to justify her discharge.[6]

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[6] It is apparent that I do not agree with the County's assertion in its reply brief that, whether or not a co-worker's antipathy is reasonable, it is sufficient that co-workers are reluctant to work with a grievant. "Just cause" would require an employer to look beyond the possibly irrational feelings of co-workers to determine whether some objective basis exists for their fears or reluctance.

Turning last, then, to the first element, i.e., injury to business or reputation, the County does not claim any actual injury to County functions, either in general or in the Emergency Government department. Rather, the County's evidence centers upon the substantial newspaper publicity that attended the charges, the conviction, and the sentencing. "When it is argued that a company's reputation is injured, arbitrators look at the source and degree of adverse publicity, the type of misconduct, and the position held by the employee in determining the extent of 'injured reputation.'" HILL AND WRIGHT at 176-77 (citations omitted). In this case, the degree of publicity and the extent to which it noted the Grievant's County employment fall well within the injury-to-reputation standards that arbitrators have cited as sufficient cause for discipline. ID. and cases cited therein. The newspaper reports frequently and prominently identified the Grievant as the County's Emergency Government Coordinator. Some of the coverage cited citizen questions about the propriety of the Grievant continuing County employment.

However, reputational harm generated by publicity is an inherently speculative and even somewhat arbitrary basis for discharge and hence should be approached with caution. Injury to an employer's business generally requires "actual harm, not mere speculative harm… in order to support discipline," DISCIPLINE AND DISCHARGE IN ARBITRATION at 308. SEE ALSO, HILL AND WRIGHT at 198-99. Since harm to the employer's reputation by its nature carries merely the potential for undermining the employer's business, arbitrators often seek some overt evidence that loss of business is probable, such as the particularly heinous or unforgettable nature of the crime, which would linger in association with the company's name, or evidence that salesmen or other individuals doing business with the company have been influenced by the matter. In this case the crime is not unusually repulsive, nor does a body politic such as the County have "business" that it can lose in the same sense as a private company does. Moreover, the degree of publicity often relates less to the nature of the crime or the employee's position than to happenstance that is outside the employee's control, such as the nature and size of the community or the magnitude of the competing news stories of the day. "Just cause" in many contexts would be inconsistent with hinging an employee's discharge on vagaries outside his or her control.

Nonetheless, commentators increasingly have recognized that public employers have a reputational interest that is both distinct from and more substantial than that in the private sector. SEE GENERALLY, DISCIPLINE AND DISCHARGE IN ARBITRATION a 312-15. Commonly referred to as "the public trust" or "the public image," the concept can mean that "in the public sector, the 'notoriety' threshold can be very low." ID. at 314. Essentially, a governmental entity may be entitled to discharge individuals in certain positions simply in order to maintain or foster public respect, regardless of any substantial evidence that the individual will engage in job-related misconduct or otherwise be unable to perform the duties of the position. The vast majority of such cases involve law enforcement officers who have violated even minor drug laws while off-duty:

> The use of drugs accompanied by the slightest public notoriety by a person sworn to uphold and enforce the laws of the State appears to be generally excepted [sic] as grounds for discharge regardless of any effect on the employee's ability to perform his work or threat to the employer's property or personnel. This is based on the theory that the public will adversely react to a law enforcement officer who is a known drug user, thus destroying public confidence in the police, demoralizing the entire enforcement agency, and bringing discredit to his municipal employer.

CITY OF WILKES-BARRE, 74 LA 33, 35 (DUNN 1980) (overturning the discharge of a street sweeper for off-duty marijuana use). The same arbitrator went on to distinguish other categories of municipal employees and other categories of crimes:

> The City does have unique qualities which must be upheld in its public dealings, but the Grievant does not fit into the group in which these qualities rest. Police officers should be free of criminal taint. Firemen should be void of the tinge of pyromania. Controllers and treasurers should be free of the suspicion of embezzling tendencies. Although these examples are not exhaustive, those people not falling within these job classifications should not be required to show any greater virtues than anyone else not so employed. City service, in and of itself, does not deprive men of the normal inadequacies and failings to which all of human nature is entitled.

ID. at 36.

Accordingly, notwithstanding its seeming arbitrariness, I conclude that, in the public sector, there are situations in which notoriety, even if accompanied, as here, by somewhat muted effects on job performance, can render a public employee "unsuitable for continued employment" and subject to discharge for just cause. This difficult result stems from the nature of government in a democratic society, where legitimacy rests upon public acceptance and hence upon public "image." Especially in the current environment, where suspicion of government is on the rise and threatens to undermine the constitutional "consent of the governed," the County is entitled to rely heavily upon the notoriety a "high profile" employee's off-duty conduct has incurred and whether that has detracted from the County's image of integrity.

It is worth emphasizing that this is a very narrow principle. Not all forms of unpopular conduct or all grounds for notoriety give a public employer grounds for discharge. Sometimes public sentiment is itself illegitimate, as when it reflects racism or operates to suppress minority points of view. Nor does this concept necessarily apply to misconduct involving personal human frailties, such as substance abuse or sexual transgressions, where

governmental integrity is less clearly at stake. Similarly, the off-duty misconduct of employees whose positions lack high public profile is less likely to undermine public confidence in government. However, in situations where (1) off-duty misconduct has generated substantial publicity, (2) the misconduct involves criminal fraud or other crimes against integrity, and (3) the offender has a high profile public image that is associated with the County's image, the County is entitled to protect its legitimacy by discharging that employee.

It remains to decide whether the Grievant held the sort of "high profile" position that would implicate these principles. I conclude that she did in her capacity of Emergency Government Coordinator, but not in her work in the Veterans Services department. As Arbitrator Levitan wrote regarding this very emergency government position, "[I]n this age of terror, the position has assumed even greater responsibility and power than ever before now it's not just tornadoes and ice storms, but anthrax and explosions." ADAMS COUNTY, DEC. NO. MA-11767 (LEVITAN 2004) at 18. The enhanced status of emergency government post-9/11 is reflected quite visibly in the increased state and federal emergency response funding now available to local entities, including the County. By the same token, it is unlikely that newspaper accounts would have prominently identified the Grievant with her County position if she had only held the clerical position in Veterans Services and not the Emergency Government position.

While the County contends that the Grievant held a single unified position from which she was terminated, the facts do not support that contention. Her work location, rate of pay, and job duties were all distinct between the two positions. The County has not otherwise attempted to justify discharging the Grievant from her Veterans Services job. Accordingly I conclude the County lacked just cause for that action.

Remedy

The general remedial goal in arbitration is to restore the parties to the situation they would have been in had the violation not occurred. In discharge cases, that translates into a standard remedy of reinstatement with back pay and restoration of other lost benefits. However, the nature and extent of each of those conventional remedial elements can be affected by a showing that the affected employee would have been laid off at some point in time following the improper discharge. Because the County has been held to have violated the Agreement in this case, it is appropriate that the County that bear the burden of persuasion regarding any such exceptions to the conventional remedy.

Upon consideration of the record as a whole, the Arbitrator concludes that it is appropriate to reinstate the Grievant to the Veterans Services position effective April 19, 2004, with back pay, seniority, and/or any other lost benefits accruing to her position in Veterans Services. On the other hand, because of uncertainty as to how the County may choose to have the Veterans Services work performed now that it has been determined that the Grievant is not

entitled to reinstatement to perform her Emergency Government duties, it is not appropriate to address at this juncture what the County's obligations are henceforward, upon implementing this award. The most that properly can be stated in that regard at this time is that any action the County takes regarding the Grievant's continued employment must be consistent with the contract and the law. Since that formulation is not necessarily complete, I will retain jurisdiction for 90 days to permit the parties to submit any disputes that may arise regarding what the remainder of the remedy shall be, if anything, and how the overall remedy shall be implemented.

AWARD

For the foregoing reasons, the County had just cause to discharge the Grievant from her employment as Emergency Government Coordinator. The County did not have just cause to discharge her from her employment in the Veterans Services department. The remedy for this violation shall be as set forth above.

Dated at Madison, Wisconsin, this 20th day of May, 2005.

Judith Neumann /s/
Judith Neumann, Arbitrator

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