

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

TEAMSTERS GENERAL UNION, LOCAL 662,
affiliated with the
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO

and

VILLAGE OF MILLTOWN

Case 3
No. 64919
MA-13054

Appearances:

YingTao Ho, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North RiverCenter Drive, Suite 202, P.O. Box 12993, Milwaukee, Wisconsin 53212, appearing for Teamsters General Union, Local 662, affiliated with the International Brotherhood of Teamsters, AFL-CIO, which is referred to below as the Union.

Mindy K. Dale, Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing for the Village of Milltown, which is referred to below as the Employer or as the Village.

ARBITRATION AWARD

The Employer and the Association are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint Richard B. McLaughlin as Arbitrator to resolve a grievance filed on behalf of Patricia Mitchell. Hearing on the matter was conducted on September 27, 2005, in Milltown, Wisconsin. The hearing was not transcribed. The parties filed briefs and reply briefs by November 28, 2005.

ISSUES

The parties stipulated the following issues for decision:

Is there just cause for the discharge of the Grievant?

If not, what shall be the remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 5

GRIEVANCE PROCEDURE

. . .

Step 1: The employee originating the grievance shall discuss the matter with the Village President, or he/she may submit the grievance to the steward who shall, in the presence of the employee, discuss the matter with the Village President. Such discussion shall take place within ten (10) working days of the time the grievance occurred or the Employee first became aware of the grievance. Any matter not presented to the Employer within said ten (10) working days shall be deemed waived and abandoned and shall not thereafter form a basis of a grievance between the parties hereto.

Step 2: If the issue is not resolved in Step 1 above, the employee shall reduce the grievance to writing and the employee or the steward shall present said grievance to the Village Board. . . .

All time limits may be extended by mutual agreement. . . .

ARTICLE 7

DISCIPLINARY AND DISCHARGE PROCEDURE

Section 1. Disciplinary Action. It is the Employer's responsibility to offer and provide reasonable training and supervision and to establish reasonable work rules. Disciplinary action may be imposed on an employee for failing to fulfill his/her responsibilities as an employee. Any disciplinary action or measure imposed upon an employee may be appealed through the regular Grievance Procedure. . . .

Section 2. Just Cause Notification. Employees shall not be disciplined or discharged without just cause. If the Employer feels there is just cause for suspension or discharge, the employee shall be notified in writing within twenty-four (24) hours following the discharge or suspension that the employee has been discharged or suspended and the reasons therefor.

Section 3. Procedure. The normal procedure for discipline and/or discharge may include only the following:

- A. Oral reprimand
- B. Written warning
- C. Suspension
- D. Demotion
- E. Discharge

The number of written warnings and the length of suspension shall be determined by the Employer in accordance with the gravity of the violation, misconduct, or dereliction involved, taking into consideration that such steps are intended as corrective measures. There may be incidents where discharge occurs without prior discipline depending on the severity of the employee's conduct.

Section 4. Personnel Records. Personnel records including remarks, warnings and disciplinary measures taken shall be dated. Employees may request to see their own personnel record and reasonable access to the same shall be made available. Notice of disciplinary action shall be removed from the employee's record after a one (1) year period, except that any notice shall remain on file if there is an active disciplinary measure for a like or similar offense. . . .

ARTICLE 9

WORK WEEK, OVERTIME, REPORTING PAY, REST PERIODS

Section 1 .Work Week. The regular work day for full time employees shall be **eight (8) hours** and the regular work week shall be **forty (40) hours**, Monday through Friday. . . .

Section 3. Compensatory Time. . . . All overtime must be pre-authorized by the Village President or his/her designee unless an emergency arises, in which event the overtime shall be reported by the employee to the Village President or his/her designee within twelve (12) hours of the overtime worked. . . .

ARTICLE 15

SICK LEAVE

Full time employees shall accrue one (1) sick day per month with a maximum accrual of 100 days. . . .

Upon voluntary termination, fifty (50%) percent of banked Sick Leave, under this Article, shall be paid to the employee at his/her current rate of pay. Employees terminated for just cause shall not be eligible for Sick Leave payout.

Upon retirement, eighty (80%) of banked Sick Leave, under this Article, shall be paid to the employee at his/her current rate of pay or, at the option of the employee, one hundred percent (100%) of banked sick leave shall be converted to dollars for the purpose of paying health insurance premiums. . . .

ARTICLE 17

HEALTH AND WELFARE

The Employer shall pay 100% of all premiums for all full time employees and their families for health insurance coverage. . . .

ARTICLE 20

FAITHFUL PERFORMANCE

All employees covered by this Agreement will perform and carry out the duties assigned to them, abide by any Employer policies and cooperate with the Employer in any way possible to maximize performance through individual initiative and output. . . .

ARTICLE 21

MANAGEMENT RIGHTS

Unless otherwise abridged by this agreement the Employer reserves the right to . . . demote, discipline, suspend or discharge for just cause . . . and establish reasonable work and production standards.

The foregoing enumeration of management rights shall not be deemed to exclude other inherent management rights. Any management right not specifically waived, limited, restricted or forfeited by written language of this Agreement is retained by the Employer.

BACKGROUND

The Village employed Mitchell as its Clerk/Treasurer from January 8, 1987 until her discharge on May 5, 2005 (references to dates are to 2005, unless otherwise noted). The Board determined to discharge her at a meeting held on May 5. Mitchell did not attend the meeting. In a letter dated May 5 and delivered to her by the Village Police Chief, the Board announced the termination decision thus:

It is the consensus of the Village Board of Milltown to terminate your employment as of May 5, 2005 at 4:50 p.m. You will be paid for your vacation time that you have coming, after you have returned the village credit card and the keys to all village properties. All the village paperwork and files must be returned also. We will make arrangements to return your personal items.

In letters to the Village dated May 9, Mitchell made an "open records request", seeking a number of documents including her "Personnel file" and her "payroll time cards for the period February 1, 2004 thru February 28, 2005". On May 10, the Village supplied what documents it could find in response to these requests.

Included among those documents was a summary of the Board's deliberations of May 5, which is referred to below as the May 5 Summary, and which reads thus:

It was decided in a closed session meeting of the Milltown Village Board that it was necessary to terminate the employment of Pat. Job performance in the last two years could no longer be tolerated. We saw a decline in production as well as a change in attitude. The accountants first brought this to our attention in 2004. In 2003 she hadn't balanced the village general fund checking account in a year's time. She hadn't provided any village minutes to be approved at board meetings in the same length of time. Pat did not balance the checkbook in 2004 until the present time either. Village receipts have not been entered in the computer since 2002. Pat was continually asked not to work overtime and continued to do so. She was asked to report her time on a time card like everyone else and continued to use a piece of paper. She was also asked not to work from home and continued to do so. She was told not to take village property home and she continued to do so. She was asked on April 13th 2005 to return all village property she had in her possession and hasn't done so. This being paperwork, keys, village credit card, a brand new computer keyboard, a lock box, a new calculator. Village mailbox closed for nonpayment. Library couldn't order supplies because of delinquent accounts. Emergency phones were shut off for nonpayment and too many late payments. A workman's comp claim filed for an accident not work related. Fines and penalties to be paid for by the village for forms not filed on time. Dated materials not given to other depts. until after due dates or not given to them at all. In going through her time cards we found that from Jan 1 2004 until March 1, 2005 she only took 13 hrs of sick time and we know this is not true. She paid

herself for 80 reg hrs of pay while working at home and when we asked her to account for her time she changed her time card to sick time and we paid her for a few hours of regular time. We have not finished our investigation there may be more to follow. We feel this is more than enough grounds to terminate at this time.

The reference to an "April 13th 2005" request to return Village property is to a letter from the "Milltown Village Board" to Mitchell, which states:

The village Board received your report from your doctor stating that you could return to work after April 15, 2005. The Village Board is requesting that your doctor write a letter stating that there are no restrictions for you when you return to work, before you can come back. The village doesn't want any liability with the chance you could get hurt again while performing your job duties.

There will be absolutely no paid time anymore for working at home. LuAnn informed you of this on April 8th. There will be absolutely no overtime unless it's to attend village board meetings or a board member approves it before the work is performed. Office hours for the village are 8:00 – 4:30 those are the hours you will work. There will be no reason to be there any other time.

Joyce will learn to pay the bills and do the payroll. Two people should know how to do these things. All access codes and passwords will be given to LuAnn for both computers with the exception of Joyce's police codes those should be given to the Chief of Police. A set of keys for anything locked should also be available somewhere. The board wants to see paying the bills and payroll to become Joyce's duties.

You must use an actual time card just like everyone else does. No one receives a pay check anymore without one. Time cards must be left at the village office you are missing at least the last two. Your paycheck stated you worked 80 hours for the last two weeks, most of those at home; we would like an accounting for what was done there. We are asking that all village property be returned to the village office, files and whatever else there is at your home.

Over the last couple months we have received multiple complaints about bills being overdue. This started before your accident. The village crew's cell phones were shut off for many days due to late payments this was in February. This was the first the board had heard about this. They had also threatened to turn off the cell phones for the police dept. The library box rent was overdue and they were unable to get their mail. Many of our bills carried past due amounts in February and even more in March. Joyce was instructed to pay those bills, but you took them home with you. This is absolutely unacceptable job performance. The board feels that this was all taking place before your accident. Last year the

auditor stated the checkbook hadn't been balanced in almost a year. Minutes hadn't been prepared for almost as long. This must change immediately or further action will be taken.

The references to "LuAnn" are to LuAnn White, the Board President. References to "Joyce" are to Joyce Stener, the Deputy Clerk. References to the "accident" are to Saturday, March 19, when Mitchell fell on a sidewalk, receiving injuries requiring her to be taken to a hospital by ambulance. A claim for Worker's Compensation benefits for the injuries sustained as a result of this accident was filed sometime in early April. Prior to the letter of April 13, the Village had not formally disciplined her.

The Union responded to the discharge by filing a grievance on May 10, alleging that she had been "unjustly terminated" in violation of Article 7, Section 2, and seeking that she be reinstated "and . . . be made whole."

Because little beyond the matter set forth above is undisputed, the balance of the background is best set forth as an overview of witness testimony.

LuAnn White

White has served as President of the Village Board for roughly eleven years. The Village is a small municipality and the Board has limited ability to oversee its employees. It relied on Mitchell for the day-to-day administration of Village business. Mitchell's job description describes her duties thus:

1. Prepare annual village budget.
2. Responsible for all accounting records of all village departments which include water, sewer, and general fund.
3. Handle all transactions of accounts payable and balance all city checkbooks.
4. Handle all records of accounts receivable and maintain receipt journals.
5. Responsibility for semi-monthly payroll for village employees and maintain record of earnings.
6. Prepare and collect yearly real estate and personal property taxes.
7. Work with auditors to prepare/complete yearly village audit.
8. Assist in preparation of Village Board meeting agenda. Attend meetings to record minutes and to keep Village Board informed of activities within the Municipal Clerk's office.
9. Administer W.D.F. Revolving Loan Fund as required.

Wisconsin Statutes, at Secs. 61.25 and 61.26, Stats., also govern the performance of her duties.

From the start of her employment until roughly 2002, Mitchell's job performance was "absolutely" satisfactory. Sometime in 2002, however, that performance started to deteriorate at

an increasing rate. White informally counseled Mitchell “many . . . times” on her deteriorating performance, which prompted the April 13 letter. After issuing this letter, White discovered a series of significant problems.

Those problems prompted the Board meeting of May 5. White mailed Mitchell a letter dated May 4, to notify her of the meeting. The letter states, “A special closed session board meeting will be held Thursday, May 5th at 4:30 pm to discuss your employment with the Village of Milltown.” She mailed it between 2:00 and 2:30 p.m. on May 4, from the Milltown Post Office. The postmark on the envelope is stamped “Eau Claire”, and White had no idea why this would be the case unless Milltown mail is routed through Eau Claire. While acknowledging that Mitchell’s absence kept the Board from getting her view of the allegations, White found the absence had no bearing on the discipline, since there was “nothing to investigate.”

The significance of the deterioration is exemplified by a report filed by the Village’s accountants in late February of 2004. The report, dated February 25, 2004, and referred to below as the 2004 Report, is based on the accountants’ 2003 audit of the Village. The Report analyzed at length the “internal control structure” over the Village’s finances, and specified any deficiency it considered “a reportable condition”, which the 2004 Report defined thus:

. . . matters . . . relating to significant deficiencies in the design or operation of the internal control structure that, in our judgment, could adversely affect the Village’s ability to record, process, summarize, and report financial data consistent with the assertions of management in the financial statements.

The reportable conditions include: segregation of duties; reconciliation of bank statements; minutes of board meetings; distribution of fringe benefits/administrative wages; recorded utility billings; payments on debt issues; collection of sales tax; and outstanding receivables. Under the “Segregation of Duties” heading, the report noted the Village’s size might preclude spreading financial duties and responsibilities among employees, but that the point needed monitoring. The reconciliation issue reflected that monthly bank reconciliations for 2003 were current only through February of 2003, with the balance being completed during the audit “by Village personnel”. The “Minutes” heading noted that 2003 Board meeting minutes were neither prepared nor approved until the end of the audit. 2003 fringe benefit/wage distributions were not calculated or distributed until after the audit started. The “Recorded Utility Billings” section reflected a software problem; a problem regarding how billings for “unmetered residential, public authorities and private fire protection services” were posted; and the failure to post billings “for commercial and industrial services”. Several debt payments in 2003 were made late, prompting the “Collection of Sales Tax” reportable condition. The “Collection of Sales Tax” heading noted that in 2003, as opposed to prior years, the Village made material sales to the public, and the reportable condition was a reminder for the Village to collect sales tax on such sales. The “Outstanding Receivables” heading noted the Village had failed to collect rents and other payments from various service organizations.

Of these reportable conditions, the audit found one “material weakness”, noted as “the delay in the reconciliation of bank statements”. The report also noted it “should not be construed that our review did not disclose commendable features in the present accounting and operating procedures of the Village.”

The May 5 Summary emphasizes the concerns prompted by the 2004 Report, and White’s involvement before and after the April 13 letter convinced her that Mitchell had not addressed those concerns. White could find no indication that the Village’s bank account had been reconciled since the 2004 Report. She did find hand-written notes used by Mitchell to track Village accounts. While Mitchell took notes of Board meetings following the 2004 Report and did prepare them for Board approval at the following meeting, she did not file them in the Board’s official minute book.

Similarly, White discovered that Mitchell had not entered Village receipts from December of 2004 into the computer system. Although White understood that Mitchell contended she was saving them to train Stener, White did not believe it was necessary to put off data entry of the receipts as long as Mitchell had. White also discovered that Mitchell had not entered budget data into the computer to show receipts and expenditures to date.

White and the Board had ongoing concerns with Mitchell’s use of overtime. In a memo to “All Village Employees” dated January 15, 2004, the Board noted:

. . . Due to the economy . . . there will be no overtime, or compensation time, with the exception of the Public Works Department. In the event of a Village emergency, overtime will be approved by the Board.

The hours for . . . the Village office is 8am to 4:30pm. After business hours, there should be no one in the Village office.

The Village computers are for business use only, only village employee’s are authorized to use these computers. All files and work done for the village will remain in the village Offices.

Time cards will be reviewed each month by the board. . . .

In spite of this, Mitchell continued to work overtime “just about every two weeks” in 2004 and 2005. Although White was aware that Mitchell was paid for overtime during this period, she would remind Mitchell that overtime needed to be approved before being worked. Prior to the April 13 letter, Mitchell ignored Board directives to use a time card, accounting for her time on tablet paper. Stener and a temporary employee have been able to cover Mitchell’s duties since the discharge with little use of overtime. Beyond this, Mitchell took files and other Village property home. She worked at home and in the Village office at other than business hours without prior approval.

Sometime in April of 2005, the Post Office closed the Village's mailbox for non-payment of rent. On April 12, payment was made to reopen the box for mail service. This typified a pattern of poor bill payment. Library bills came through Mitchell, yet White found the Library carried past due bills. Non-payment of a phone bill caused the Village to have its cell-phone usage shut off from February 3 through February 9.

Mitchell's position is the Village's contact point for the processing of Worker's Compensation claims. On March 19, she was injured while walking on a sidewalk not far from the Village Hall. She did not file a first report of injury. Sometime around April 6, while at the Village Hall, White found on the fax machine a cover letter and a form issued by Aegis Corporation, the claims administrator for the Village's Worker's Compensation carrier. The documents noted that a claim had been filed for the March 19 injury and sought wage information regarding Mitchell. White decided to look into the matter, and called Aegis to determine what was happening. Aegis confirmed that a claim had been filed regarding Mitchell's accident. In a letter to Nicholas Dillon, a Claims Consultant for Aegis, White stated:

Enclosed you will find a copy of the police report, photo's of the accident scene, a copy of the 911 tape and a copy of her last pay stub. I'm unable to send a copy of her time card because there wasn't one turned in. Pat paid her self without me signing her time card. No one authorized her to be working on Saturday March 19th. When I went to the office there was a note on the door stating she had gone to Jeff's. Jeff is her son who lives up the street from the village office. Pat was not working when she fell she was walking her dog to her son's home. The village office hours are 8:00 – 4:30 Monday thru Friday. The village was not responsible for her accident; it did not happen while performing village duties and we strongly feel that this claim is unjustified. We feel she shouldn't have been able to file a claim on herself with the village having no knowledge of it. Since March 24th she has had permission to work from home so she has remained on the village payroll. The village is not responsible for this accident and we feel there is no claim warranted for it.

The police report referred to in the letter is dated March 21, and notes that the officer discussed the accident with Mitchell's husband, "who advised that his wife suffered injury to her wrist/thumb area, had severe trauma to her face, and had cracked teeth." The report notes Mitchell's husband "stated that he did not know at this time what caused her to fall." In a letter to Mitchell dated April 28, Aegis denied the Worker's Compensation claim. In White's view, the discharge did not allege dishonesty on Mitchell's part. Rather, Mitchell's lack of candor misled Dillon, since she implied she was authorized to work on Saturday and was on break rather than walking her dog to her son's house. But for White's pursuit of the matter, the claim might have been improperly granted.

In a letter to White dated April 21, Mitchell stated that "there are a number of payroll reports that need to be completed and filed either by phone or internet reporting." The letter noted one report was due April 25 and the others April 29. White was out-of-town, and did not

receive the letter until April 27, thus assuring that the Village would be fined for an untimely report. White felt this manifested a recurring theme she discovered in her review of Mitchell's conduct after the issuance of the April 13 letter. The theme was difficulty in performing routine duties on a timely basis. Her review convinced her that Mitchell consistently failed to secure budget data from the street crew in a timely fashion, failed to supply the crew necessary budget data in a timely fashion, and failed to advise them of budget deadlines.

The last payroll Mitchell prepared was for the two-week payroll period ending April 9. When White came to the Village Hall on April 13 to sign paychecks, she noted that Mitchell's pay stub listed eighty hours at regular pay, with no notation of sick leave or vacation use. This led White to demand an accounting for Mitchell's hours. Mitchell ultimately submitted a time card for this payroll period which lists sixteen regular hours and sixty-four sick leave hours. For the following pay period, after being questioned by the interim Clerk/Treasurer, Mitchell asked for eight hours of regular pay and seventy-two of sick leave.

Nicholas Dillon

Dillon learned of Mitchell's injury through an e-mail from the Village's insurance agent, Larry Passint, to Dillon's supervisor. The e-mail indicated Mitchell had tripped and fallen at work, had significant injuries, and wished to file a claim. Dillon did not know if Passint advised Mitchell to file the claim.

On April 6, Dillon phoned Mitchell at her home and took information on which he could file a first report of injury with the State. He asked her about the date of injury, and she responded that it occurred on March 19. She noted she normally works Monday through Friday, but was at the Village Hall on that Saturday to prepare for a Board meeting. She told him she was scheduled to work, and was in pay status when she left at roughly 3:00 p.m. to take her break to go for a walk. She tripped on the sidewalk on her way back to work and fell on her face. She could not recall if she had been knocked out, but was disoriented and was taken to a hospital by ambulance. She was hospitalized until March 21 and suffered a concussion, broken teeth, a broken nose and lacerations to her face and knees. She informed him that she was working part time, had surgery set for April 7 to repair her broken nose, and had not filed a claim because she was "trying to get better." Dillon advised her that he would file the first report and would fax a wage information request to the Village.

On April 7, White left a message for Dillon to contact her. Dillon returned the call on April 8. White informed Dillon that the Village had not authorized Mitchell to work on Saturday, and had approved the overtime payment without checking the underlying records. White asserted Mitchell had tripped over her dog while walking to her son's house, noting that White had observed a sign on the Village Hall door on the morning of March 21 saying "gone to Jeff's". Dillon informed White that Mitchell noted that there was a bump in the sidewalk where she fell. White faxed information, including photos of the sidewalk, to Dillon.

On the advice of his supervisor, Dillon called Mitchell on April 12. He taped the interview, informing Mitchell that the claim was in question, and informing her of the issues regarding whether she was authorized to work; whether she tripped over her dog; and whether her walk was in any way related to her work. Roughly one-half hour after this interview, Mitchell phoned Dillon and informed him she had thought about the accident and could only recall looking in a store window, adding she could not say that the dog was not involved in causing the accident. Dillon viewed her accounts of April 6 and 12 to manifest dishonesty because she had shielded information relevant to the claim's validity.

Joyce Stener

Stener has worked for the Village for ten years, was "not in the least" pleased to have to testify, and testified on White's direction that it was necessary. Stener did not work overtime without receiving prior authorization from White.

Stener found a note on the Village Hall door when she reported to work on March 21, which said "I went to Jeff's" or something to that effect. Mitchell prepared the payroll for the pay period between March 27 and April 9. Stener overheard the interim Clerk/Treasurer discuss the payroll following that of April 9 with Mitchell. The interim Clerk/Treasurer asked Mitchell how to account for Mitchell's hours over the eighty hour payroll period, and Stener watched the interim Clerk/Treasurer change the payroll records to reflect sick leave usage.

Patricia Mitchell

Mitchell noted that she and White discussed her job performance throughout her eighteen years as Clerk/Treasurer. She denied that White ever reprimanded her, even informally, prior to April 13. She has been complimented often on the quality of her work, including receiving a special certificate of commendation in 2000.

Sometime after receiving the January, 2004 memo ending overtime outside of emergency situations, Mitchell and White spoke about an elections board meeting in Madison that Mitchell needed to attend. Because it would require overtime, she discussed the matter with White. White approved the overtime, indicating to Mitchell that her job would require periodic overtime or odd hours and that Mitchell should accommodate her regular schedule to the hours, and resort to overtime if all else failed. She believed White essentially advised her that White would stand behind her if anyone questioned her hours, including overtime.

Throughout 2004 and 2005, Mitchell would present her time records to White, and the two of them would review the hours, including overtime, with White approving the hours. White typically deferred to Mitchell's decision to work overtime. White never told her that she could not work at home. Budget documents were not prepared on the Village's computer because the accountants had superior software and had informed Mitchell that there was no reason to enter the data twice. The accountants assumed control of the budget during the 2004 audit, and the Village had yet to implement a software upgrade to generate the reports that the

accountants could. That upgrade was to be completed in 2005. Prior to the receipt of the Board minutes concerning their discharge decision, Mitchell had no idea the Board questioned her performance. She was unaware of the shut-off of phone service mentioned in White's testimony.

Village auditors began their audit in late February or March. She had reconciled the bank statements, but the Village's software was always a little off. She kept handwritten records to assist in her ongoing reconciliation efforts and to assist in the eventual audit process.

Mitchell noted that the former Head Librarian "marched to the beat of a different drummer" and would turn bills in whenever she chose. There was no system in place, and Mitchell would process bills as she received them. She did not enter receipts onto the computer after January 1, because the Village's computer consultant told her to retain them until Stener was trained for the duty. The consultant did not appear for the training prior to her discharge. Mitchell preserved an eight hundred hour sick leave bank by using vacation to cover illnesses. She viewed sick leave accumulation as a disability policy, and was reluctant to use sick leave.

Mitchell went into work on March 19, because she knew she could not get all of her work done on the following Monday. She did not have a regular schedule and saw nothing unusual about doing some weekend work. The fall caused her considerable pain. In addition to the injuries noted to Dillon, she dislocated her thumb. She required sutures around her face and inside of her mouth. She received antibiotics as well as medication for pain and to calm her. She was sleepy and somewhat disoriented during her recuperation.

On March 30, Passint came into the Village Hall and, noting the extent of her injuries, asked what had happened. She responded that she had been working, and took her dog with her to walk to her son's house. She left the office computer on, with the screen still showing a data entry screen. Passint asked if she had filed a Worker's Compensation claim, noting that she should file "for (her) protection". She ultimately indicated to Passint that she considered the matter worth pursuing, and Passint indicated he would contact Aegis.

Dillon phoned her in April. The two conversations were indistinguishable to her, and she was not sure she could recall the April 6 conversation at all. She could not recall if she mentioned the dog or going to her son's house. She had no idea what impact either would have on a Worker's Compensation claim. She did tell Dillon that she was at work and was in pay status on March 19. She informed Dillon during either the April 6 or the April 12 phone conversation that she could determine the need for overtime on her own and set her own schedule. She had no idea why anyone would consider her dishonest regarding the claim. The Village has a fully paid health insurance plan with limited co-pays, and she had no need to have Worker's Compensation pay the bills.

On April 8, Stener asked Mitchell how to prepare a Board agenda for a closed session. Stener was unsure of the appropriate statute to cite. Mitchell phoned White to determine the reason for the closed session, and White stated she was "not at liberty to say." Mitchell noted it would be difficult to prepare the agenda without some reason for the closed session. Mitchell

later discussed the matter with White at White's office. White informed her that the Village Board was angry with her regarding the Worker's Compensation claim, adding "you're going to cost them a lot of money."

Mitchell did not receive the April 13 letter until April 16. She did not turn in any vacation or sick leave for the payroll period ending April 9, because she was unclear of the impact of the Worker's Compensation claim on her pay status. She had phoned Dillon regarding the matter and was awaiting a return call. At this time, her injuries made it difficult to fill out time records. She decided to claim sick leave on the payroll period following April 9 in spite of Dillon's failure to return her call. She noted she felt overwhelmed during this period of time. On April 13, she left a dentist's appointment to come to the Village Hall to assist in getting back pay included on employee pay checks. She never told White or anyone else that she worked eighty hours in the payroll period that ended on April 9. The software used to generate pay checks assumes an eighty hour work week, and she never even implied to anyone that she had worked the entire pay period.

Mitchell did not receive the May 4 notice of the Board's special session until May 6. She lives roughly two blocks from the Village Hall and less than that from the Post Office.

Lester Sloper

Sloper, a member of the Village Board, noted that throughout 2004 and 2005, the Board would review paychecks to determine if any overtime was being paid. Mitchell would periodically note that overtime had to be put in to keep up with the work. The Board routinely responded that there was "no more overtime".

LuAnn White

On redirect testimony, White denied even implying that Mitchell could authorize her own overtime. She denied that she and Mitchell would review Mitchell's time records as a routine matter. Rather, they would review the records only if Mitchell requested. In fact, White and other Board members told Mitchell "many, many times" that overtime without prior authorization was improper. Payment of her overtime was either an oversight or reflected White's desire not to treat Mitchell punitively. She denied ever telling Mitchell that the Board feared that the Worker's Compensation claim would cost it a lot of money. Rather, she told Mitchell the meeting was to discuss the claim.

White reviewed the library bills with the current Head Librarian, who felt the Library routinely passed bills on to the Village in a timely fashion. White never considered using progressive discipline with Mitchell, who as a responsible adult should have been able to obey a directive. That White was unaware of the extent of Mitchell's non-compliance with Board directives until the Spring of 2005 cannot excuse the non-compliance.

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

THE PARTIES' POSITIONS

The Employer's Brief

After a review of the evidence, the Employer notes that the Grievant was the “highest ranking public official for the Village” and that the Board had to rely on her “to conduct the day-to-day business for the Village.” Trust was essential to her position, and her conduct “(o)ver the course of two years” showed a decline in “job performance and attitude” which made it impossible for the Board to trust her. The audit letter “documented a number of serious performance deficiencies” which continued unaddressed throughout 2004 and 2005 until the Board’s April 13 warning letter. When “additional items were discovered” discharge became necessary.

The agreement does not demand progressive discipline, and the circumstances indicate it would have served no purpose. The April 13 letter highlights that the general fund had not been balanced on an ongoing basis from 2003 through 2005; that no Board minutes had been prepared; that the Board had not authorized the Grievant’s overtime; that the Grievant’s time had not been properly documented; that the Grievant worked at home without authorization; that the Grievant had taken Village property home; and that the Grievant had not timely paid bills. After April 13, the Employer discovered that Village receipts and the Village budget had not been entered onto the computer; that she had filed a worker’s comp claim for a non-work related injury; that she had failed to file payroll reports that caused the Village to be fined; that she had failed to incorporate the street crew into the budget process; and that she claimed regular time and paid leave improperly.

Her claim to have been injured on-the-job is egregious. She was not authorized to work and the accident occurred while she was walking to her son’s home with her dog. She misled the insurer to have the claim honored initially, and falsified payroll records. Arbitral precedent establishes that the discharge is warranted for this misconduct standing alone. Nor will Article 7, Section 4 afford support for the Union. She had no history of discipline which had been dated and put into her personnel file. That the record contains evidence of verbal counseling establishes that Mitchell knew of the pattern of behavior her discharge rests on, rather than that the Board was obligated to document and date the counseling. Nor does the contract require “the employer take disciplinary action within a certain time frame.” The Village is small and the Board cannot be expected to constantly monitor her performance. The conduct at issue here establishes a fundamental breach of trust.

The Grievant failed to credibly justify her actions. Her testimony rests more on self-interest than on fact. Although the just cause standard has been stated in various ways by arbitrators, the review of discipline turns essentially on whether the discipline reflects arbitrary, discriminatory or punitive action. A review of the evidence, including the Grievant’s attempt to portray her own performance as flawless and the Union’s attempt to portray the Village’s imposition of discipline as flawed, will not justify the continued employment of “an individual with the Grievant’s work record.”

Nor will the record establish that the discharge was procedurally deficient. White made a good faith attempt to notify the Grievant of the May 5 meeting. Her presence was, in any event, not contractually required, since the agreement permits notice of discharge within twenty-four hours. In any event, the discharge rests on ample proof. Beyond this, the Grievant was permitted to tell her story to the Board during the processing of the grievance.

Even if the Village violated the Grievant's due process rights in a way warranting sustaining the discharge, "it is appropriate for the Arbitrator to hold a second hearing to consider additional evidence acquired by the Village subsequent to the Grievant's termination." The May 5 Summary notes that the investigation was not complete even though it had revealed sufficient evidence to demand discharge. Arbitral precedent establishes that post-discharge evidence is appropriate when, as here, it is directly related to the original grounds for discharge. Article 7, Section 2 confirms that the reasons offered for a discharge need not be restricted to those given at the time of discharge. Beyond this, the evidence bears directly on the propriety of reinstatement as a remedy.

Viewed as a whole, however, the evidence warrants the denial of the grievance.

The Union's Brief

After an extensive review of the evidence, the Union contends that the Village "lacked just cause to increase the penalty from the April 13 written warning." That warning asserts a series of performance deficiencies and directs the Grievant "to not work from home, and not work overtime." The evidence affords no reason to believe the Employer was unaware, as of April 13, of the alleged performance deficiencies it cites in the discharge letter. Under arbitral precedent, it follows that the discipline "cannot be increased" after the April 13 letter "without a new triggering violation", yet the Grievant committed no offenses "on or after April 13." The alleged falsification of the time card is unproven. There is no evidence to rebut her testimony that she worked sixteen hours between March 27 and April 9. She left the remaining sixty-four hours blank on her time card, thus acknowledging that she had not worked. There is no reliable evidence of the intent to deceive the Village. Nor is there any evidence she violated any Village policy in waiting to fill out her time card.

The Grievant "cannot be disciplined for her conduct during the investigation of the workers' compensation claim." Her right to file cannot be challenged, and the attempt to link the discipline to her lying to Dillon has no support in the record. The discharge notice asserts the discipline is based "for filing a false workers' compensation claim" and the Village should not be permitted to recharacterize its intent after-the-fact. The agreement permits the Village twenty-four hours to establish its reasons in writing, but this falls short of permitting the Village to alter its reasons at the arbitration hearing. More significantly, she "never lied to Dillon." She assumed she was scheduled to work because she was working. Dillon's assumptions regarding being "scheduled to work" do not constitute a basis to infer she sought to deceive him. Beyond this, Sec. 102.03, Stats., makes worker's compensation available "whenever an employee is performing services for the employer." She was paid for working on March 19, and "was not disciplined for working overtime on that Saturday."

That she did not mention the dog or going to her son's house to Dillon has no bearing on Dillon's investigation. She may have forgotten the details or found them unimportant, but there is no reason to believe she attempted to defraud Dillon.

An examination of each of the asserted bases for discipline in the April 13 letter establishes that none of them are supported by credible evidence. She was never instructed to return the property the Village implies she stole. That she used vacation rather than sick leave has no bearing on anything other than her desire to conserve sick leave. Since she did not work on or after April 13, she could not have committed any offense warranting discharge.

The alleged performance deficiencies cannot support the discharge. She never received discipline for them and the agreement demands progressive discipline. That some of the deficiencies are more than one year old precludes their use to support the discharge, since the labor agreement drops such discipline from the file. Arbitral precedent demands the alleged performance deficiencies preceding the discharge by more than one year be either ignored or given no weight. The existence of "informal warnings, rather than formal progressive discipline exacerbates, rather than cures (the) failure to apply progressive discipline." A contrary conclusion renders meaningless agreement provisions demanding that discipline be dated or that an employee be permitted to view their personnel file.

Even if some evidence supporting discipline can be considered credible, it fails to support discharge. Discharge is "grossly disproportionate" viewed in light of the evidence or of arbitral precedent. The performance deficiencies the Village cites demand progressive discipline. Even if the April 13 letter is considered a warning, and evidence of post-discipline conduct is considered, discharge is inappropriate. Even White stopped short of claiming the discharge is based on dishonesty. Thus, any post April 13 conduct is minor and warrants "the use of progressive discipline." Evidence will support no sanction greater than suspension.

There is no reason for further hearing. The Village failed to give the Union proper notice of post-discharge evidence and the Grievant committed no misconduct to trigger consideration of such evidence. A contrary conclusion flies in the face of arbitral precedent. Under Article 7, Section 2, the Village should not be allowed more than twenty-four hours to document new evidence for further discipline. Viewed as a whole, the evidence warrants the Grievant's reinstatement "with full backpay and benefits, and without a second hearing on the issue of reinstatement."

The Employer's Reply Brief

The Union's arguments fail for the fundamental reason that the Employer "cannot be forced to ignore the issues that it discovered after April 13, 2005 and take no action on them." That the Grievant had yet to be formally disciplined for performance deficiencies by April 13, 2005 "did not justify her continued misconduct when she was repeatedly directed to correct her behavior." Arbitral precedent confirms that she "could not reasonably have believed her conduct would be tolerated." In any event, the agreement does not obligate the Village "to use progressive discipline in all cases."

The Union's arguments concerning the Grievant's documentation of her time ignores that White discovered the problem at the time she was to sign paychecks. She discovered that the "Grievant had paid herself for 80 hours of regular pay without making any deductions from her sick leave bank." The Grievant's testimony to account for this "is not credible".

No more persuasive is the Union's account of the Grievant's conduct in claiming Worker's Compensation, "Lying to an investigator is filing a false worker's compensation claim." The Union ignores that the Grievant told Dillon that she fell on a sidewalk break, rather than telling him she tripped over her dog on her way to her son's house. The Union also ignores that she told Dillon two different stories after her initial omissions had been discovered. That the Grievant is the Village's contact person for Worker's Compensation puts the lie to the Union's contention that her story was "a case of simple omission."

The Union's citation of Sec. 102.03, Stats., ignores that Subsection (c)1 limits compensation to cases where the services grow out of or are incidental to employment. Her conduct sought to blunt Dillon's necessary inquiry into her eligibility. Nor do semantics concerning "scheduled for work" do anything to make her testimony credible. Beyond this, the appropriate standard of proof for the intent to deceive is "preponderance of the evidence." The proof more than amply meets this standard, which is well founded in arbitral precedent.

Nor can the Union justify the assertion that the Village should not be permitted to present evidence acquired after the discharge which bears directly on her reinstatement. That the Union was unaware of the evidence is of limited significance given that arbitration does not permit pre-hearing discovery. In any event, the Union's view has no bearing on additional hearing, since the additional hearing provides the Union the opportunity for rebuttal that it claims it was denied in the first hearing.

These alternative arguments should not obscure that the evidence warrants the denial of the grievance without further hearing. The Village acted as soon as it could be expected to, and did so based on evidence amply warranting discharge.

The Union's Reply Brief

The evidence establishes the Grievant "is not guilty of dishonesty." Arbitral precedent demands that allegations of dishonesty demand proof of the "intent to defraud". It is not possible to meet the burden of proof by implying the Grievant testified from self-interest. An examination of the evidence establishes that the Grievant delayed in documenting her time due to uncertainty on her part regarding the impact of the worker's compensation claim. No evidence shows the Grievant told anyone that she had worked a full eighty hours. That she did not explain her actions to the interim clerk has no bearing on whether she acted to defraud.

Nor can such intent be found regarding her conduct toward Dillon. The Grievant has never been charged with lying to Dillon. The discharge letter does not do so, and the Employer should not be permitted to do so well after twenty-four hours from issuing that

letter. That the Grievant told Dillon she was scheduled to work shows no more than that she did not have a formal work schedule. That she was paid for working that day shows that she “legally correct” regarding being scheduled to work. At the worst, she acted consistently with her belief that she was permitted to work the Saturday. That belief is rooted in fact and in the labor agreement.

The discrepancies between the Grievant’s two accounts of the accident are fully explained by her own uncertainty on how exactly she had been injured. This falls short of the intent to deceive.

Since the Village acknowledges the April 13 letter was a warning, it follows that the Village had no basis to discipline after April 13, since there was no triggering conduct on the Grievant’s part. That she failed to enter certain receipts on the computer following April 13 shows no more than that she was saving them to train a Deputy Clerk. The assertion that she need not have saved them all is uncorroborated.

No evidence supports the allegation that she failed to pay certain bills or that she failed in certain budget related duties. Fines the Village points to are rooted in reporting dates beyond April 13, when the Village ordered the Grievant not to work. In any event, allegations of poor performance are belied by the Village’s failure to use progressive discipline.

Further hearing is inappropriate. The Village did not timely notify the Union of new grounds for discharge under Article 7, Section 2. In any event, the April 13 warning letter disciplined the Grievant, thus offering her a “clean slate” concerning conduct preceding that date. The Grievant should be reinstated and made whole.

DISCUSSION

The issues for decision are stipulated, but little else is. Articles 7 and 21 set forth the “just cause” standard, which governs the issues. More specifically, the dispute is whether the “normal procedure for . . . discharge” under Subsections A through E of Section 3 of Article 7 should have been applied progressively to the offenses noted in the May 5 Summary, or whether the “gravity of the . . . misconduct . . . involved” warrants a summary termination.

A number of procedural issues surround the stipulated issues. These first surfaced as evidentiary disputes and have become arguments on the merits. The Union questions whether Article 7, Section 4 precludes the Village from introducing evidence or entering argument on any alleged misconduct occurring more than one year before the discharge. Beyond this, the Union questions whether Article 7, Section 2 permits the Village to submit evidence or argument on items other than those of the May 5 Summary. More fundamentally, the Union questions whether the discharge can have merit under Article 7, Section 3 if the Village did not comply with the notice provisions of Article 7, Section 2. Similar considerations prompt the Union to question whether the Village can introduce evidence which was acquired after the issuance of the April 13 warning letter. Even assuming the merit of the discharge decision is properly posed for

determination, the Union questions whether the Village's failure to use progressive discipline dooms the discharge under Article 7, Section 3. The County questions whether Union failure to timely invoke Step 1 of Article 5, Section 5 means the grievance should be "deemed waived". Beyond this, the County asserts all of Mitchell's misconduct is at issue, either on the merits of the discharge decision or on the propriety of reinstatement as a remedy.

The evidentiary hearing proved long and contentious. To avoid unnecessary further hearing, the parties agreed to fold the procedural issues into the briefing schedule so that a decision on the merits could sort out if any issues remained for further hearing. In my view, the processing of the grievance demands that the parties' contentions be considered a function of the just cause analysis, rather than a threshold or a bar to it. As the County notes, the Board considered the merit of the grievance at Step 2 in spite of the absence of Step 1. The untimely submission of the reasons for the discharge under Article 7, Section 2 neither barred consideration of its merit in the grievance's processing prior to arbitration nor at the arbitration hearing. The stipulated issue on cause does not include a threshold issue. Thus, the various procedural considerations will be folded into the analysis of just cause under Articles 7 and 21.

In my view, the absence of specific standards set through the contract or through the stipulation of the parties means that a just cause analysis must address two elements. The first is a determination whether the employer has established employee conduct in which it has a disciplinary interest. The second is a determination whether the employer has established that the discipline imposed reasonably reflects its disciplinary interest.

As noted above, the parties disagree on what conduct the Village can claim a disciplinary interest in. The May 5 Summary sets forth the conduct the Board viewed as "more than enough grounds to terminate at this time", adding the investigation was ongoing and "there may be more to follow." What followed, however, was further specificity regarding the listed concerns rather than additional charges. Thus, the May 5 Summary is the statement of conduct defining the first element of the cause analysis.

Fundamental to the dispute concerning whether or not the Village properly followed the procedures specified in Article 7, Section 3, is the County's assertion that "the gravity" of Mitchell's misconduct warranted immediate termination. The County places the gravity of the misconduct on two grounds. One is willful misconduct, including Mitchell's submission of the Worker's Compensation claim and her attempt to claim pay for hours not worked. The other is the cumulative weight of a series of negligent or incompetent acts.

Willful misconduct, particularly dishonest conduct, is arguably not amenable to modification through progressive discipline. Thus, that basis is the strongest support for immediate discharge, and will be addressed first.

Review of this point focuses solely on the contract. At hearing, I informed the parties that in past cases I had stated that I would address statute only if contract language required it or the parties requested my opinion on an issue of law. In CITY OF MENASHA, MA-7361, MA-7362 & MA-7363 (McLaughlin As Panel Chair, 4/97) at 16, I put the point thus:

Arbitration can meaningfully be applied to statutory issues. To be meaningful, however, there must be some assurance that the exercise of contractual jurisdiction over a statutory issue can resolve a dispute. That assurance can come from language in a labor agreement requiring the application of statutory law, or from the bargaining parties' stipulation. In the absence of such assurances, an arbitral foray into external law can only add another level to a dispute.

This applies here, because the contract does not demand interpretation of statute and the parties' arguments do not mutually seek it, other than through brief reference to different sections of Chapter 102, Stats. It is not necessary to interpret statute to address whether Mitchell acted to deceive Aegis or the Village.

The record does not establish bad faith or the intent to deceive on Mitchell's part regarding the Worker's Compensation claim. The May 5 Summary is a troublesome preface to the County's disciplinary interest on this point. The reference to the claim is one line of an extended paragraph, referring only to a claim "filed for an accident not work related." As the Union points out, there is no disciplinary interest immediately apparent in this statement, since an employer and an employee can disagree in good faith on whether a claim is work related. However, the Board's response to the claim manifests a belief that Mitchell knew she was unauthorized to work on March 19 and acted to obscure this as well as the cause of the accident. Even though White testified that the Board did not consider Mitchell dishonest, it is apparent the Board treated her conduct as willful misconduct constituting deceit.

An examination of the evidence does not support the assertion that she acted to deceive or in bad faith. After the April 12 conversation, Dillon considered Mitchell's April 6 account an attempt to shield relevant facts. This assertion has a dubious basis. Under any view of the facts, she acknowledged that she was in the Village Hall on a Saturday. Her assertion that she was in pay status did no more than confirm Village payment of overtime. The overtime payment did not shield potential issues regarding Village authorization to work. The claim for overtime coupled with a claim for Worker's Compensation virtually assured that if there was a dispute regarding authorization, it would be aired. Even if White had not seen the April 6 fax, the day of reckoning could only be postponed and then only if Aegis uncritically accepted Mitchell's representations and no Village representative, including its auditors, became aware that she had received Worker's Compensation. These occurrences are most unlikely in a small office. There is no apparent basis to conclude her claim stated any more than her belief that she was authorized to work and was eligible for Worker's Compensation.

More significantly, the record does not offer a solid basis to question the good faith of her belief. If deceitful, Mitchell was inept. She left a sign on the Village Hall's front door stating "gone to Jeff's". This is not conduct easily reconciled to shielding facts relevant to a Worker's Compensation claim. She told Passint that she left the computer on before leaving on the walk. The statement would have been easy to corroborate or to disprove, and appears an improbable fabrication. She was moved from the scene in an ambulance and hospitalized through March 21, after others would have opened the Village Hall. She did not initiate the Worker's

Compensation claim, but responded to Passint's suggestion. Although Passint did not testify, it strains credulity to believe that her attempt to deceive Aegis was routed through the Village's insurance agent. Beyond this, the March 21 police report states that Mitchell's husband did not, at that date, know what caused the accident. This is difficult to reconcile to a plan to deceive Aegis. Nor do the purported discrepancies between Dillon's phone calls of April 6 and April 12 afford reliable indication of deceit. Under Dillon's testimony, Mitchell told him on April 6 that she was doing no more than trying to get better. Even under Dillon's view, she did not alter her account between the two conversations. She testified that the conversations were indistinguishable and that she was unable to recall precisely how she fell. That she thought she tripped on the sidewalk did not exclude the dog as part of the causal chain. Her calling Dillon back on April 12 to say that on reflection she could not say the dog did not cause the fall is more reconcilable to her testimony that the accident was a blur in her memory than to the assertion she acted to deceive. That she suffered a concussion, took post-accident pain medication and relaxing medication supports the view that her recall could be expected to be less than precise.

In sum, the evidence affirms Mitchell's credible testimony that she advanced the Worker's Compensation claim in the good faith belief that she was eligible. There is no Village disciplinary interest in the good faith assertion of a Worker's Compensation claim. Thus, the Village's disciplinary interest in her conduct on this point is limited to whether she acted contrary to Village policy by working on March 19. This is not willful misconduct, and must be addressed regarding other Village allegations of negligence or incompetence.

The other significant allegation of willful misconduct concerns falsification of time records while she worked at home. The fundamental difficulty with this allegation is that there is no evidence that she ever asserted she was working at home. White's testimony does not allege that she did. Rather, White assumed it. At most, the Village's assertion is that Mitchell failed to maintain time cards sufficiently timely to prevent the Village's software from presuming that she had put in eighty hours of work over the pay period and causing a check to issue without any leave deduction for unworked hours. When she submitted time cards for that and the following pay period, she sought twenty-four hours for work and the balance in sick leave. No Village official questioned Mitchell on the point, and it is speculative whether she sought or would have taken the benefit of a full paycheck without honestly accounting for the time. Mitchell's testimony that she was waiting for Dillon to clarify the status of her Worker's Compensation claim is dubious on this point. However, this cannot obscure that there is no persuasive evidence of the intent to deceive, and no persuasive evidence to rebut her testimony that she was overwhelmed during this period. What disciplinary interest the evidence supports is in her failure to timely submit time cards. This allegation falls short of willful misconduct and must be addressed regarding other Village allegations of negligence or incompetence.

The negligent or incompetent conduct in which the May 5 Summary asserts a disciplinary interest starts with "a decline in production as well as a change in attitude" first brought up by the 2004 Report. Even ignoring the impact of Article 7, Section 4 on this allegation, it is supported by the 2004 Report only to a limited extent. The 2004 Report does not address Mitchell's attitude, but notes the delay in reconciliation of bank statements as a "material

weakness". The evidence indicates that function remained a problem in 2005, and thus supports the existence of a disciplinary interest on the Village's part.

Examination of the balance of the report, however, affords limited factual support for the allegation of misconduct. The 2004 Report focused on the Village's "internal control structure", which is a Village Board policy issue before it becomes a matter of employee job performance. The internal control structure has obvious implications on employee job performance. However, neither the May 5 Summary nor witness testimony indicates the Village considered the distinction. This undercuts its allegations of misconduct. The "Segregation of Duties" section is a policy matter over which Mitchell has no evident control. The "Recorded Utility Billings" section points in significant part to software based problems, which have less than an evident bearing on Mitchell. The "Collection of Sales Tax" and "Outstanding Receivables" sections may reflect performance problems on Mitchell's part or may reflect Board decisions regarding collection practices. The May 5 Summary and witness testimony afford no clarification.

As noted above, the section regarding "Reconciliation of Bank Statements" isolates conduct by Mitchell in which the Board can assert a disciplinary interest. The sections headed "Minutes of Board Meetings", "Distribution of Fringe Benefits/Administrative Wages" and "Payments on Debt Issues" focus on matters within Mitchell's control and thus matters over which the Board can assert a disciplinary interest. The nature of the interest is, however, debatable. The record is unclear on whether the concerns of the "Distribution" section were addressed by either the Board or Mitchell. The "Minutes" section indicates Mitchell put duties off until the audit process began. White's testimony affords no basis to conclude that Mitchell failed to attend to the Report's concerns. White acknowledged that Mitchell prepared notes of each meeting for approval at the next, but asserted Mitchell had not filed them in the appropriate folder. Whatever is said of this assertion, it is not the problem noted in the 2004 Report. Thus, the 2004 Report isolates certain conduct in which the Board has a disciplinary interest. The scope of the misconduct is dubious.

After a series of assertions concerning the 2004 Report, the May 5 Summary asserts Mitchell failed to enter receipts since December of 2004 and failed to enter the budget "since 2002". These assertions are impossible to separate from the 2004 Report, and the latter assertion simply repeats the Report. Mitchell testified that she was retaining the receipts for the purposes of training Stener, as advised by the Village's computer consultant. She noted that the auditors maintained superior software for tracking the budget and did not see the need for Mitchell to duplicate those entries until the Village upgraded its software. Stener's training presumably results from the "Segregation of Duties" section of the 2004 Report, and the evidence indicates the Village was attempting to upgrade its computer systems to address a number of points raised by the 2004 Report. As noted above, changes to the internal control structure are a mixture of Board policy and employee implementation of the policy. The only clarity surrounding these allegations is that the Board viewed Mitchell as solely responsible for the process. The absence of clarity on these points cannot, however, be held against Mitchell. If she was failing to implement Board policy, the Board had only to identify the policy, then identify what conduct she had to modify and how to modify it. That is the essence of progressive discipline noted in

Article 7, Section 3. The Board's failure to address the point between the 2004 Report and the May 5 Summary undercuts the assertion of a disciplinary interest in these allegations. Similarly, the Board's assertion that Mitchell lacked the authority to modify her hours or to work outside of the office is difficult to reconcile with the assertion she bore sole responsibility for implementing the policy matters raised by the 2004 Report.

The next misconduct asserted by the May 5 Summary concerns Mitchell's working overtime and working at home, using Village property, without authorization. Her reporting other than on a time card notes a similar theme. Each assertion reflects that Mitchell viewed her authority expansively, and followed her own procedures. The testimony confirms this, and points to what became a fundamental conflict between White and Mitchell. From White's perspective, the Village trusted Mitchell's exercise of independent judgment, and Mitchell's performance following the 2004 Report betrayed that trust. The evidence supports this view to a limited degree. Sloper's and White's testimony, together with the January 15, 2004 memo and Article 9, Section 3, establish that Mitchell knew or should have known that she should not set her own overtime. The Village has a disciplinary interest in her failure to comply with Board directives on this point. That the Village did not expressly direct Mitchell to change her time recording records and continued to pay Mitchell throughout 2004 and 2005 based on her time records undercuts the assertion that it has a disciplinary interest in how she documented her time.

There is no reliable evidence that the Village objected to Mitchell's taking work home or to her possession of Village property outside of the Village Hall prior to the letter of April 13. The letter states no deadline for the return of property, and the testimony affords no reliable basis to conclude that she failed to comply. Thus, the assertion of a disciplinary interest in this conduct is unpersuasive.

How Mitchell was responsible for the closure of the Village Post Office Box, the shutting off of Village cell phones or the delayed payment of Library or other bills is less than clear in the record. Mitchell denied knowledge of the closing of the Post Office Box or of the non-payment of cell phone bills. She asserted the prior Head Librarian was untimely with her submission of bills. It is not clear when the Post Office Box was closed, or whether White was in work status or on sick leave when the payment should have been made. However, even though the Board's assertions are vague in the respects noted above, Mitchell's denial of any responsibility is unfounded and unpersuasive. It is evident that the Village had a number of accounts with "past due" balances that preceded the March 19 injury. Crediting Mitchell's testimony that the Head Librarian failed to timely submit bills cannot obscure that there is no evidence Mitchell attempted to correct her. The 2004 Report highlighted untimely payment of certain bills. Mitchell occupied a position of responsibility and trust in a small municipality with limited oversight resources. The assertion that she had no knowledge of these problems is not a persuasive defense, but an admission of negligent conduct in which the Village has a disciplinary interest.

The assertion of a disciplinary interest in Mitchell's failure to timely submit payroll reports has no solid evidentiary support. At most, the record shows Mitchell sent a letter to White dated April 21, warning of deadlines of April 25 and 29. White did not receive the letter

until April 27. The record is not clear on how the Village specifically attempted to cover for Mitchell's recuperation. The Village used the Clerk/Treasurer from Luck, on an interim basis, to assist Stener in handling Village business. Mitchell worked limited hours in mid to late April, claiming no hours of work time after April 13. The April 13 letter unequivocally denies paid time to White for working at home. The evidence is not sufficiently clear to establish that Mitchell could or should have attended to this matter prior to April 21. The lack of clarity on this point cannot be held against Mitchell and will not support the assertion of a Village disciplinary interest.

There is no reliable evidence to support the assertion that Mitchell failed to timely supply documents to other departments as alleged in the May 5 Summary. Nor is there any reliable evidence to support the assertion that Mitchell used less sick leave than she should have between January 1, 2004 and March. She testified that she used vacation to cover illnesses, since she regarded sick leave as disability insurance and a potential retirement benefit. This view is well-founded under Article 15, and more to the point, is credible, unrebutted testimony.

In sum, without regard to the procedural obligations of Article 7, the Village has demonstrated a disciplinary interest in Mitchell's failure to reconcile bank statements on an ongoing basis; in her failing to properly file Board minutes after their approval; in timely paying certain Village bills; in working overtime or at home without prior authorization; and in timely submitting her time records. The record does not establish willful misconduct on her part.

Application of the second element demands a determination whether the proven misconduct reasonably supports discharge or any lesser level of discipline. The determination of the extent of the Village's reasonable disciplinary interest under Article 7, Section 3 is complicated by the Village's failure to follow the procedures of Article 7. As the Employer points out, Article 7 does not require strict adherence to the steps of Section 3A through E. However, it demands that warnings and suspensions be determined "by the Employer in accordance with the gravity of the violation." The record shows that this determination never occurred, because the Village ignored the progressive discipline steps of Section 3, and did not document its concerns under Section 4.

Rather, after White found the April 6 fax, her relationship with Mitchell broke apart. Neither the April 13 letter nor the May 5 Summary states an attempt to isolate specific, inappropriate conduct. Rather, each is a general condemnation of Mitchell's job performance. The difficulty posed for the Village is that the absence of willful misconduct on Mitchell's part precludes finding sufficient "gravity" to the "misconduct or dereliction involved" to support a summary discharge.

Nor will the cumulative weight of the proven misconduct over time support a summary discharge. The proper filing of Board minutes is not a concern raised in the 2004 Report, and is a minor matter involving correctable behavior. Her working at home, noting time records on lined paper rather than time cards or flexing her hours are long-term behaviors tolerated by the Board until the issuance of the September 13 letter. There is no evidence to support an assertion she

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could not have modified her behavior. To the contrary, Mitchell was an eighteen year employee whose record prior to the 2004 Report was viewed by the Village as "absolutely" satisfactory.

This affords solid reason to believe she was capable of modifying her conduct. Her failure to timely pay bills is a serious allegation for a Clerk/Treasurer. Here too, there is no evidence to support the assertion that she could not modify her behavior. The 2004 Report isolated problems implicating Board policy decisions as well as her conduct. Until the April 13 letter, the Board had not specified how, if at all, her procedures needed to change. Having told her to change in the April 13 letter, it permitted her no opportunity to modify her behavior. As noted above, there is no evidence to indicate she could not.

Thus, the evidence will not support an immediate discharge. This is not to say the Village has failed to establish any disciplinary interest in her conduct. The least persuasive portion of Mitchell's testimony is her unwillingness to acknowledge responsibility for the proven areas of concern. At a minimum, the testimony establishes the Board orally warned her not to work overtime without prior approval. This complies with Article 7, Section 3E. The punitive tone of the April 13 letter is evident, but as noted above, some of its concerns have been proven and the document roughly complies with Article 7, Section B.

Beyond this, however, the evidence will not support a Village disciplinary interest in Mitchell's conduct. The April 13 letter complies with Article 7, Section 3E only to the extent its assertions "are intended as corrective measures." The letter closes by stating her conduct "must change or further action will be taken." There is no persuasive evidence that the Board permitted her an opportunity to test this assertion. Without regard to where or how the May 4 notice of the May 5 meeting was mailed to Mitchell, it is evident that the Board had no interest in getting her side of the story. The assertion that the Board was conducting an "investigation" means only that it sought to further document her culpability. That the Board supplied the May 5 Summary in response to Mitchell's open records request of May 9 cannot obscure Village non-compliance with Article 7, Section 2. Under Article 7, the Board could have chosen to suspend Mitchell pending its investigation. Instead, it asserted that it had "more than enough grounds to terminate at this time." The evidence will not support this assertion, and the Board has proven no greater disciplinary interest in Mitchell's conduct than the written warning issued April 13.

The remedy stated below does not require extensive discussion, given the retention of jurisdiction over remedial issues. The Order requires the Village to expunge references to the discharge from Mitchell's personnel file. This permits the Village to retain the April 13 letter as a "Written warning" under Article 7, Section 3B. The Order includes a general statement of make-whole relief, including reinstatement.

As noted above, the issue of potential further hearing was discussed at the evidentiary hearing. The retention of jurisdiction noted below does not contemplate taking further evidence on the merits of the just cause decision. It is in a sense impossible to recreate the evidentiary dispute of the parties from the hearing. Arbitration does not include discovery, and the Village's assertions that Mitchell had engaged in deceitful conduct and that the extent of her misconduct was not apparent until after the April 13 letter must be judged against that background. These

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are significant points on the merits, and potentially regarding the remedy under the Village's argument that after-acquired evidence indicates reinstatement is not an appropriate option.

However, the evidence ultimately adduced at hearing makes this position stronger as a matter of argument than as a matter of fact. The proven violations of Article 7 establish that taking further evidence on the propriety of reinstatement would not be a response to newly discovered evidence but a grant of another opportunity for the Village to prove its case. The established violations of Article 7 are too fundamental to warrant this. The Village ignored the provisions of Article 7, Sections 2 and 3. It could have suspended Mitchell under Section 3C, if only long enough to determine if there was information contrary to that which it had in hand. Rather, the Board chose to act precipitously. The May 5 Summary asserts there was “more than enough grounds to terminate” without any involvement of the Union or Mitchell. Against this background, further hearing on the propriety of reinstatement as a remedy represents little more than a request to take back its precipitous action in order to undertake the deliberate action which Article 7 contemplates. If further hearing is required, it must relate solely to remedy and more specifically to the appropriate measure of make-whole relief. The effective date of the reinstatement is May 5, which assumes Mitchell was physically capable of working full-time from that date.

Before closing, it is appropriate to address in greater detail certain points raised by the parties. While the breach in the relationship between White and Mitchell is fundamental, resolution of the issues cannot be limited to a credibility determination. Mitchell’s refusal to acknowledge any validity to Board concerns is unpersuasive. White’s summary determination that Mitchell was being deceitful is no more persuasive. This does not make the testimony of either witness either inherently credible or incredible.

Nor is it persuasive to infer Mitchell’s testimony reflects no more than her self-interest in retaining her position. Self-interest inevitably colors perception, whether one is a Clerk/Treasurer, a Village President or a Claims Adjuster. Application of just cause demands that the interest of witnesses be weighed with other evidence. Dillon initially accepted Mitchell’s assertion that she was authorized to work on March 19, then reversed course on receiving White’s phone call and letter. White’s phone call and letter point to the denial of the claim, Mitchell’s phone call to granting it. Did White or Aegis have an interest in the denial of the claim? Did any such interest color White’s or Dillon’s willingness to conclude Mitchell acted deceitfully? Whatever general ethical or philosophic pull these general considerations may have, they offer little assistance to resolve the issues posed by the grievance. Whether or not White or Dillon had an interest in the claim’s denial, and whether or not Mitchell had an interest in its approval, their conclusions are no better than the evidence supporting them. If general constructs regarding self-interest are helpful, and even if it is assumed Mitchell had an interest in Aegis granting the claim, what did she gain from the alleged deceit that was so important that it warranted putting her job in jeopardy? Her testimony that her health insurance covered her injuries is unrebutted. There is no indication she lacked paid sick leave to cover her recuperation. The general appeal to self-interest on Mitchell’s part affords little guidance in resolving the issues posed by the grievance.

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On the broadest level, the evidence manifests a fundamental rupture in the working relationship of White and Mitchell. The rupture dates from White’s discovery of the April 6 fax. Her April 8 mailing to Dillon manifests certainty not just that the claim was unjustified, but that

Mitchell was acting in something other than good faith. The September 13 letter was less a warning than a preface to the May 5 Summary. Both documents read as general condemnations of Mitchell. Neither document shows doubt on any material fact, in spite of the absence of Mitchell's views. The investigation was less an attempt to determine fact than to prove Mitchell caused the breach between her and White, and that this justified summary discharge. As a result, its conclusions manifest little beyond the fundamental rupture in the working relationship. As noted above, the evidence presents a more complicated picture. It indicates that Mitchell regarded her position as something other than a unit position, and that White shared this view until she found the April 6 fax. She then lost confidence in Mitchell. It is unlikely Mitchell misrepresented conversations with White regarding her authority to work odd hours or overtime. It is more likely Mitchell took from those conversations what she wanted to hear based on her view of her position, and took Board admonitions regarding odd hours or overtime to be addressed to other unit employees. There is no indication in the record that she took or misused Village property. Rather, she treated her home as an extension of the Village Hall. Mitchell may well have entrenched work habits that need to be changed, but progressive discipline is the contractually specified means to make that change. The fundamental difficulty with the Village's position is the precipitous manner it took to address its concerns. The evidence will not support a conclusion that those concerns should have been addressed other than through the imposition of progressive discipline under Article 7, Section 3.

AWARD

There is not just cause for the discharge of the Grievant.

As the remedy to the County's violation of Articles 7 and 21, the Village shall make the Grievant whole by reinstating her to the Clerk/Treasurer position effective May 5, 2005, and by compensating her for the wages and benefits she would have earned but for her discharge.

To address any issue regarding the implementation of the remedy set forth in this Award, I will retain jurisdiction over the grievance for not less than forty-five days from the date of this Award.

Dated at Madison, Wisconsin, this 9th day of February, 2006.

Richard B. McLaughlin /s/

Richard B. McLaughlin, Arbitrator

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