

IN THE MATTER OF THE ARBITRATION BETWEEN
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American Federation of Government Employees,
AFL-CIO, Local 3669

Union

and

U.S. Department of Veterans Affairs,

Employer.

OPINION AND AWARD

Grievance of AFGE Local 3669
(Savage Removal)

FMCS Case No. 07-59368

ARBITRATOR:

Janice K. Frankman,
Attorney at Law

DATE OF AWARD:

March 10, 2008

HEARING SITE:

VA Medical Center
One Veterans Drive
Minneapolis MN 55417

HEARING DATE:

December 12, 2007

RECORD CLOSED:

March 5, 2008

REPRESENTING THE EMPLOYER:

Jason F. Rudie, Attorney
Office of Regional Counsel
U.S. Department of Veterans
Affairs, VA Medical Center
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Minneapolis MN 55417

REPRESENTING THE UNION:

Matthew Milledge
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JURISDICTION

The hearing in this matter was held on December 12, 2007. The Arbitrator was selected to serve pursuant to the parties' Master Agreement and the procedures of FMCS. Both parties were afforded a full and fair opportunity to present their cases. Witnesses were sworn and their testimony was subject to cross-examination. The parties submitted post-hearing briefs which were posted on February 29, and received on the same day and on March 5, from the Agency and the Union respectively. The record closed on March 5, 2008, when the matter was taken under advisement.

There was reference to a pending EEO matter at this hearing, and evidence and testimony was presented with regard to the suspension action which was also before the EEO for consideration. A hearing had been held eight days before this hearing, and a decision was expected within 60 days. The parties did not enter into a stipulation with regard to inclusion of the EEO Decision in this record. The Agency submitted, with its Post-hearing Brief, the January 8, 2008, EEO Decision denying the Grievant's charges. The Grievant was unrepresented at the EEO hearing, and there is no evidence that Counsel for the Union received the Decision prior to receiving the Agency's Post-hearing Brief in this case. There is no evidence that the Grievant has exercised her right to appeal or bring a civil action against the Agency following transmittal of the Department of Veterans Affairs Final Order on January 22, 2008.

Although the EEO Decision may be public record and, therefore, accessible by anyone, including the Arbitrator, it is included in this record for the limited purpose of providing procedural history. It is noted that the analysis as well as the burden of proof are distinct where charges of discrimination have been made.

ISSUE

The parties stipulated to the following statement of the issue:

Did the Agency have just and sufficient cause to remove Ms. Savage from her position and, if not, what is the remedy?

BACKGROUND AND SUMMARY OF THE EVIDENCE

Belinda Savage ("Grievant") was hired as a Registered Respiratory Therapist ("RRT") by the VA Medical Center ("Agency", "Center") on October 9, 2001. Ms. Savage had been a RRT since May of 1989. She received a letter proposing removal from her position on April 17, 2007. A May 9, 2007, Notice of Removal was replaced on May 16, 2007, because the original Notice was inaccurate with regard to notification of her rights. The Union filed a Grievance on behalf of Ms. Savage on May 11, 2007, and arbitration was requested on August 1, 2007. The effective date of the Grievant's removal was June 25, 2007.

Respiratory Care Department; RRT Job Description; Shift Responsibilities;
Clinical Practice Guidelines

The Center established a Respiratory Care Department (“RC Department”, “Department”) in 2000. It was the only hospital facility in the area that did not have a RC Department. Ms. Savage was hired in 2001, by Shelley Arjes who had been hired to set up the Department. Ms. Arjes is first line supervisor for Ms. Savage. She works days, and there is no supervisor on duty for the night shift when Ms. Savage works. When Ms. Savage was first hired, there was only one RRT on the night shift. It is unclear when a second RT was scheduled for that shift.

The night shift for RRTs begins at 11:00 p.m. and ends at 7:30 a.m. The busiest periods include report at the beginning of the shift followed by rounds to check all patients who may require their assistance and the last three hours of the shift when rounds are once again required and charting is completed to prepare for the next shift. The first rounds may take until 1:30 or 2:00 a.m. depending on the number of patients that must be seen. The period 2:00 to 4:00 a.m. is the slowest and is a time when RRTs are prone to dozing off for lack of much to do. It is a time for lunch and socializing with other hospital staff and for conducting computer research if needed to address a patient issue.

Before the Department was established, nurses performed the work the RRTs perform. There was discomfort among the nurses in accepting the new Department. Some nurses resisted calling the RTs for assistance. There is evidence that resistance still exists among tenured nurses.

The American Association for Respiratory Care (“AARC”) is a professional organization which RTs may belong to but are not required. All clinical areas of the VA Medical Center follow clinical guidelines for their profession, and best practice requires following policy. The hearing record includes a 15 page document captioned “AARC Clinical Practice Guideline; Management of Airway Emergencies (“MAE”) which describes and defines MAE:

Management of airway emergencies (MAE) for the purpose of this guideline encompasses all care necessary to deal with sudden and often life-threatening events affecting natural and artificial airways and involves the identification, assessment, and treatment of patients in danger of losing or not being able to maintain an adequate airway, including the newborn. Joint Exhibit 8 at page 1

The Guideline addresses conditions which require management including self-extubation and accidental extubation. It addresses problems with ETT tubes including inadvertent extubation and addresses the importance of timely intervention. It sets the needed time for response by personnel at “3 minutes, 24 hours/day, 7 days/week.” Joint Exhibit 8 at page 7. The Guideline identifies RRTs and RNs as potential Level I

and Level II health care personnel who are credentialed to either assist Level II primary members of the health care team or to serve as a Level I provider. The record does not reflect Ms. Savage's level of credentialing.

Shelley Arjes has 32 years of professional experience in respiratory care. She has worked in nine facilities. She took supervisory training in 2001 as well as refresher training offered by the Center Human Resource Department two to three years ago. She was advised that emails constitute written and signed statements for use in investigation of disciplinary matters as required by policy. She distinguishes performance related discipline from discipline for misconduct. The former deals with aspects of work that require training to improve and a performance plan for guidance. Misconduct occurs when an individual knows her job and does not do it.

Ms. Savage was uncomfortable with Ms. Arjes, and she refused to meet alone with her for performance evaluations. She requested that Dr. Rice be present for meetings with Ms. Arjes. She had requested mediation with Ms. Arjes which was refused.

Earlier Discipline; Performance Evaluation

Ms. Arjes counseled Ms. Savage in 2002, 2003 and 2004 for failing to respond timely to her pager. Ms. Savage has never been disciplined for failing to answer a page. RTs carry four pagers for different departments and are required to respond quickly.

Ms. Savage was counseled for sleeping on the job in 2003, and in 2005, with regard to a need to improve communication, interpersonal skills and customer service. She received an admonishment and a reprimand for failure to follow instructions on July 22, 2005, and December 29, 2005; and on September 7, 2006, she received a two day suspension for failure to follow instructions and procedure. The reasons for the discipline were determined to not involve a question of professional conduct or competence. There is no evidence that any of the discipline was grieved. Ms. Savage brought the suspension matter before the Equal Employment Opportunity Commission ("EEOC"). A hearing on her claims of race and sex discrimination and retaliation had been heard on December 4, 2007, eight days before this hearing. By EEO Decision dated January 8, 2008, the charges were denied. There is no evidence that the Grievant has taken further action with regard to the EEO matter.

The basis for the September 7, 2006, suspension was unreasonable delay in providing patient care. Ms. Savage had refused to see a patient as required and she delayed in responding to a call for assistance, completing routine work first. RTTs are charged with seeing all patients with tracheal tubes at the beginning of each shift. On the night in question, Ms. Savage was ill and refused to check on patients unless she was called. When she was paged to assess a patient with an ET tube, she delayed for more than ½ hour, choosing to perform routine tasks in the Intensive Care Unit. She advised the nurses who had called for help that she was sick and did not want to catch what the patients had and told them they should know how to do the work for which they

requested assistance. Nurse Manager, Lori Pawelski overheard the incident and reported it to her supervisor. Following her suspension for unacceptable conduct, Ms. Savage filed a claim with the EEOC against Ms. Pawelski based upon disparate treatment.

Ms. Savage has received positive performance evaluations during her tenure at the VA Medical Center. The most recent appraisal of her performance which she received on April 24, 2007, noted that her performance "(i)s considered Fully Successful or better". At Ms. Savage's request, Dr. Rice, Medical Director for the Respiratory Therapy Department, attends periodic performance review meetings with Ms. Savage and Ms. Arjes.

At this hearing, Dr. Rice reported receiving complaints from the nursing staff and attendance at meetings concerning the Grievant's resistance to calls for assistance from the nursing staff including those for which the Grievant was disciplined prior to the September, 2006, suspension. Dr. Rice does not participate in disciplinary decisions.

Incident on December 19, 2006

Ms. Savage has always worked the night shift at the Center. She currently has a .8 FTE position; she works eight shifts in a pay period. During the night of December 19, 2006, Anita Krehnke, Medical Intensive Care Unit ("MICU") Head Nurse called her to report that a patient's endo-tracheal tube ("ET") tube "was out quite a bit and there was an air leak and also could she please change the ties because they were really yucky." Agency Exhibit 1 and Union Exhibit 1. Ms. Savage called back to the MICU unit shortly after speaking with Ms. Krehnke. Ms. Krehnke had hung up on her before she had an opportunity to ask if she could wait until she had finished a cup of tea she had made because she was sick. Donna Emond, another MICU nurse on duty that evening, answered the phone. Ms. Savage told Ms. Emond that she had just prepared a cup of tea, that she would come to the patient's room as soon as she finished, and to tell Ms. Krehnke to call her back if she wanted her to come sooner. Ms. Emond passed the message on to Ms. Krehnke but did not request a reply from her. Ms. Krehnke was very upset. She returned to the patient's room with another nurse, Clark, and they repositioned the patient's ET tube. They left the ties for Ms. Savage to replace which she did when she came to the Unit 10 to 15 minutes later. Ms. Savage had checked the patient's ET tube at the beginning of the shift. The tube positioning had been an issue with the patient during the shift. Ms. Krehnke had reported to her that his pressures were OK.

Ms. Krehnke called her supervisor, Kay Clutter, to report the incident. Ms. Clutter told her to send her an email describing the incident. At 7:07 a.m. on December 19, 2006, Ms. Krehnke sent an email to Shelley Arjes, the Grievant's supervisor. She captioned the email "Concern". At 9:55 a.m., Ms. Arjes forwarded the email to her supervisor, Sharon Myllenbeck and to Kathryn Rice, Respiratory Care Medical Director. Dr. Rice responded minutes later by email to Ms. Arjes, Ms. Myllenbeck, Ms. Clutter and Ms. Krehnke. She wrote:

The note from Anita doesn't seem to indicate that she conveyed a sense of urgency about the tube to Belinda, to my mind. It seems like she was just asking her to re-tie it, and that the patient was OK. Anita, can you clarify whether this was a problem that was clearly communicated to Belinda? Union Exhibit 1

Ms. Krehnke replied to all of the addressees at 7:51 p.m. that she had not told Ms. Savage "this was stat at all but having her tea over taking care of a patient just doesn't seem like a good priority." Ms. Arjes responded the next morning at 8:35 a.m., "I agree, Anita. The standard of practice for respiratory care after receiving such a call is for the RT to go to the unit to assess the situation and to address the problem." Union Exhibit 1

Ms. Savage testified to having difficulty working with Ms. Krehnke. She described her as moody and difficult. Karen Rafter, R.N. is Treasurer of the Local and has worked at the VA for 19 years. She sees Ms. Krehnke as lazy and "the first one to send someone else to do her job". She testified that repositioning of an ET tube takes one minute. See, Rafter testimony.

Investigation of the Incident

Ms. Arjes met with Ms. Savage and her Union Representative, Bill McAmis, and Dr. Rice on January 8, 2007. Ms. Arjes' notes of the meeting, to which Dr. Rice noted her concurrence, reflect that Ms. Savage reported that Ms. Krehnke had agreed to her finishing her tea. Ms. Arjes also reported that Ms. Savage said that "the only reason Ms. Krehnke had initially called her was because 'if Anita has to get up and move/work she wants everyone to be working'. Agency Exhibit 4.

There also was discussion about timelines for responding to such a request. There are none set out in Center policy, however, Ms. Arjes pointed to airway care to be among the top priorities on the Department's priority list. Ms. Arjes expressed her concern that the request was not seen as urgent, and she referred to Professional Standards for Respiratory Therapists.

Mr. McAmis expressed concern that Ms. Arjes had pre-judged Ms. Savage's guilt and that the investigation was retaliation following Ms. Savage's filing of an EEO claim relative to her suspension in September, 2006. He and Ms. Savage expressed their belief that she should not be punished when the MICU staff had not said there was an emergency and had agreed to her finishing her tea. Mr. McAmis noted that Ms. Krehnke's shift notes did not refer to the airway issue.¹

Ms. Arjes advised Ms. Savage and Mr. McAmis that she would take up their concerns with the MICU nursing staff. In checking with a Metro Respiratory Managers group comprised of staff from ten area hospitals, she learned that none had policy

¹ The hearing record does not include nurse's shift notes.

setting response times and all expect their RTs to follow best practice, professional standards and American Association for Respiratory Care guidelines.

Ms. Arjes and Ms. Krehnke met on January 11, to discuss the matter. Ms. Krehnke emphatically denied agreeing to Ms. Savage's delay in getting to the nursing unit and she pointed to the inconsistency in Ms. Savage's statements that Ms. Krehnke should have called her back and her assertion that Ms. Krehnke had authorized the delay.

Ms. Arjes met with Donna Emond on February 6, who told her that she knew that Ms. Krehnke would be very angry with Ms. Savage. Ms. Emond said that Ms. Krehnke and another nurse, Clark, chose to reposition the tube rather than call Ms. Savage back.

Ms. Arjes was particularly concerned because Ms. Savage did not take responsibility for the incident or acknowledge the seriousness of failure to respond promptly to a request to adjust a trach tube. She concluded that it was probable that Ms. Savage would repeat her behavior which was unacceptable according to professional guidelines and practice. In addition to placing patients at risk, she believed that Ms. Savage's conduct was harming the relationship of the RTs with the nurses.

On February 15, 2007, Dr. Rice wrote an email to Ms. Arjes expressing her conclusions with regard to the matter:

In my response to Anita's first message of Dec 19, 2006, I asked her if she conveyed a sense of urgency to Belinda. Anita's reply and subsequent discussions I have had lead me to conclude that it is an expectation in this and other medical centers that respiratory therapists treat airway problems (such as the tube coming out quite a bit) as a top priority. This mean (sic) they should respond to an airway problem as an urgent situation, if not emergent, regardless of whether the notifying nurse conveys a sense of urgency when contacting the RT. (emphasis added) Agency Exhibit 10

Sleeping on the Job

Ms. Arjes had received information that RTs were sleeping on duty in the Fall of 2006. She had received emails from staff in the "bronch lab" reporting suspicion that someone was sleeping in the lab but no specifics had been reported. She asked that specific incident reports come to her.

On February 22, 2007, RT Andrea Camp reported to Ms. Arjes by email that a co-worker "regularly sleeps in the department and snores loudly every night." and that "often I will come to the department to take a break and all the lights are out!" Agency Exhibit 11. Ms. Camp and Ms. Arjes had been exchanging emails concerning payroll matters. Ms. Camp's comments concerning sleeping on duty closed the last of their exchanges.

Ms. Arjes met with Ms. Camp the next day. Ms. Camp identified Ms. Savage as the employee to whom she had referred. She told her that Ms. Savage sleeps every night for hours and that her sleeping is known to her co-workers. She said her snoring is annoying and she responds rudely to requests to sleep somewhere other than in the Department. She thought that Ms. Arjes knew about Ms. Savage's sleeping. Ms. Camp never witnessed Ms. Savage lying down sleeping; she saw her stretched out between two chairs, sometimes with a pillow and blanket. She believes that Ms. Savage comes to work to sleep because she does it regularly. In response to Ms. Arjes' request that she put her report in writing, Ms. Camp sent her an email dated March 1, 2007, as follows:

Per your request, I have told you in person about Belinda sleeping on duty every night that I work with her and persists even though I asked her not to and am following up in writing. I am sure Nat, Kurt or Paul would corroborate this. Agency Exhibit 12.

Ms. Arjes met with RT Paul Massaquoi on March 8. He concurred with Ms. Camp's report. He told Ms. Arjes that Ms. Savage had slept for at least an hour on the night shifts that he worked and that he had told her she should have a sleep study, referring to her loud snoring. He declined to provide a written statement, fearing retaliation from Ms. Savage. He did not testify at this hearing.

On April 10, Sean Meyer, former Sleep Program staff at the Center, reported that he had found Ms. Savage sleeping in the Sleep Program office twice. His shift hours were 6:00 a.m. to 4:30 p.m., and he found her when he came in early to pick up sleep studies. She was sleeping with a pillow and blanket with her head down on a desk with the lights off.

Mr. Meyers began his work at the Medical Center as an RT in 2001, and currently works as a computer specialist. Ms. Arjes continues to be his supervisor. He worked with Ms. Savage on the night shift for nine months to one year. He reported that Ms. Savage often slept during report before their shift. She customarily would check a computer for the information which had been given during report. There were two RTs on the night shift. They did not usually see each other during the shift. Mr. Meyers knew he had to cover for her, and he was called by other units when they could not reach her. He accepted Ms. Savage's behavior as he did not believe he could change her. He had never reported her to Ms. Arjes. He admitted that he had fallen asleep while on night shift duty which he recognized as unacceptable.

Ms. Camp, Mr. Meyer and Mr. Massaquoi did not generally work at the same time. They observed Ms. Savage sleeping on different shifts. They did not volunteer and were not asked to provide specific dates that Ms. Savage was observed sleeping.

Nat Blackstone refused to comment concerning the sleep issue; he did not want to be involved. Ms. Arjes did not talk with Kurt Anderson, the RT who most recently

worked the most shifts with Ms. Savage. She also did not speak with Michele Smith who works on occasion on the same shift with Ms. Savage.

Kurt Anderson has been an RTT at the Medical Center for more than three years. He has worked with Ms. Savage 6 of the 8 shifts she works in a pay period for nearly all of his tenure at the Center. He believes she is the best RT at the Facility and that the charges against her are unsupported. He has never seen her sleep on the job although she dozes as does everyone who works night shifts. He has seen two other RTs, Mike Bander and Andrea Camp, asleep on the job. He described Andrea Camp as the “meanest, most evil person (he) ever worked with”. He said she reads others’ charts so that she can report them and that nurses do not page her because they know she will not respond. Referring to Ms. Savage, Mr. Anderson said that Ms. Arjes “puts her down and is always after Belinda”, and when he and Michele refused to support Ms. Savage’s removal, Ms. Arjes “got after them.” See, Anderson testimony.

Kathleen Nelson is a pulmonary case manager who has worked at the VA for 9 and ½ years. She reported Mike Bander for sleeping one time in the past year and has never observed Ms. Savage sleeping. She had seen her wrapped in a blanket but not with her head on a pillow. She knew that Mike Bander had been counseled about his sleeping.

Ms. Arjes has counseled four employees concerning sleeping on duty including Ms. Camp. She had not received any complaint about Ms. Camp until after Ms. Camp reported Ms. Savage. Ms. Savage reported Ms. Camp two times. She reported that Ms. Camp had a blanket and pillows in her locker. Ms. Arjes did not check Ms. Camp’s locker. Supervisors are not allowed to open employee lockers.

Ms. Arjes has received positive feedback from staff concerning Ms. Camp. She had admitted to Ms. Arjes that she sometimes wrapped a blanket around her shoulders because she was cold on the night shift. She, like the others who have been counseled concerning sleeping on duty, are subject to removal.

Ms. Arjes first counseled Ms. Savage concerning sleeping on the job in 2003. She has consulted with the Human Resources Department concerning discipline for sleeping on duty and has been advised that she had not been following the Table of Penalties properly. She was told that the first offense requires discipline up to removal, i.e. counseling is not appropriate for that offense.

Discipline

Ms. Savage received a Proposed Removal Notice from Kristin Nichol, MD, Primary Care Chief, on April 17, 2007. The Notice cited “Unreasonable delay in reacting to patient care; Failure to follow procedures/instructions regarding patient care; and Sleeping on duty” as the basis for the proposed action. Dr. Nichol referred to earlier discipline in 2005 and 2006, and set out the Grievant’s right to respond to the Notice. Joint Exhibit 2.

Ms. Savage sent a four page response document dated May 1, 2007, to Steven Kleinglass, Director of the Medical Center. She raised several issues objecting to the proposed action. The issues included procedural and substantive matters including reference to the pending EEOC case relative to the September, 2006, suspension; and assertions that the Master Agreement had been violated for failure to conduct a complete investigation, failure to proceed in a timely manner and failure to permit Union representation. She challenged the credibility and support for the allegations made against her and she challenged the basis for concluding that she had failed to respond appropriately to a request or to follow instructions.

Ms. Savage asserted that she had been given permission to finish her tea before responding to a call for assistance in the MICU unit in December, 2006, and noted that the complaining nurse had not been told by another that she was drinking tea because she was sick. She asserted that she had not been told the request was urgent.

Ms. Savage denied the charge that she had slept on the job, claiming that the basis for the charge was “unsubstantiated rumor or gossip”. She stated that several individuals who supported her had not been interviewed or their statements had not been considered.

Ms. Savage wrote that Ms. Arjes only came in one time on her night shift. She referred to entitlement to a 30 minute unpaid lunch break when she should not be required to respond to calls. She referred to earlier incidents with other RNs and questioned Ms. Krehnke’s fear of her and need to clarify earlier statements. She stated that no one told her there was a problem on December 19, 2006, until January 8, 2007. See, Joint Exhibit 3.

At this hearing, Ms. Savage admitted that she dozed off but denied that she had ever slept while on duty. She said she had been counseled to return to her Department rather than staying on a station during slow periods. She said that she had seen Ms. Camp sleeping in the ‘bronch’ lab with a pillow and blanket and that she had seen a pillow and blanket in Ms. Camp’s locker. She stated that it was doubtful that Sean Meyers could have seen her sleeping because of his work schedule. She said that she and Ms. Camp had had disagreements about scheduling of shifts.

Rick Meier, Employee & Labor Relations Coordinator, prepared a file Memo dated May 1, captioned “Disciplinary Action Record of Determination for Belinda Savage”. He listed exhibits in support of the action, provided a background narrative of the basis for the proposed removal, summarized earlier discipline and provided his opinion that removal is appropriate based upon the Table of Offenses and penalties since this is the fourth offense. He addressed the twelve Douglas factors, concluding that the discipline met each test and that there were no mitigating circumstances. See, Agency Exhibit 14.

Titles 5 and 38 of the United States Code detail provisions applicable to federal employees. They are cited in the VA Handbook 5021, Part I, Chapter 1, which is included in this record as Joint Exhibit 9. Both Titles 38 and 5 apply to Ms. Savage. Title 38 applies for appointment and pay determinations while Title 5 applies to issues involving leave, discipline and performance. Conduct and work performance are considered separately. Mr. Meier was aware that Ms. Savage had received positive performance evaluations. Her conduct is in issue in this case. Discipline for misconduct results from knowing what is required and not doing it. Mr. Meier consulted with Ms. Arjes, and he met with Director Kleinglass and Anne Davidson, Human Resources Specialist concerning this matter. It is his opinion that Ms. Arjes' notes relative to disciplinary matters are always complete and helpful.

Mr. Meier prepared a May 9, 2007, Memo signed by Medical Center Director Kleinglass, notifying Ms. Savage of his decision to remove her from her employment effective May 24, 2007. He also prepared a replacement Memo dated May 16, 2007, to correct errors in the appeal rights notice provisions. The first Memo provided alternative appeal rights:

4. The sustained reasons cited above do not involve a question of professional conduct or competence. Therefore, you may appeal this action under the VA grievance procedure, or the negotiated grievance procedure, but not both. . . . Joint Exhibit 4, page 1

The second Memo provided different alternative appeal rights under a Statutory Appeal Procedure or the Contract grievance procedure. The Union had filed a Grievance on behalf of Ms. Savage on May 11, 2007, after receipt of the first Memo.

Director Kleinglass is the deciding official in all removal cases at the Medical Center. He spoke with Ms. Arjes and Ms. Myllenbach and Drs. Nichol and Rice about this case. He consulted with Mr. Meier and reviewed the file that had been developed. He did not review Ms. Savage's performance evaluations. He understood the case to be a "conduct case" and his focus was upon care of patients. The Notice of Removal Memo which he signed set out the reasons for the removal action as provided in the earlier Notice of Removal and advised the basis for his decision:

2. In reaching the decision to remove you from employment, consideration was given to any additional information that you were asked to provide as stated in the letter of proposed removal. You have presented this information both in writing and verbally to me. In regard to the delay in reacting to patient care you said that you did not consider that the patient was in imminent danger and other nurses are trained to perform the required task. This reaction is not in compliance with AARC clinical practice guidelines. You also refute the evidence relating to sleeping on duty by citing statements from others who will say that they have personally not witnessed that you sleep on the job.

This information does not refute the testimony of those who have witnessed to your sleeping while on duty.

3. In reviewing this case I have looked at and questioned the processes used to collect the evidence. I have also considered other factors including your years of service, your past work record, the seriousness of the offenses with which you have been charged, and whether there are any extenuating circumstances which would justify mitigation of the proposed penalty. I have concluded that the sustained charges against you are of such gravity that mitigation of the proposed penalty is not warranted, and that the penalty of discharge is appropriate and within the range of reasonableness.

Joint Exhibit 4, page 3

The Step III Grievance cited failure to honor agreements made in the parties' Master Agreement, specifically a failure to demonstrate just and sufficient cause for termination, citing Articles 13 and 16 and other articles which may be pertinent. It stated its grievance and demand for remedies with particularity:

The discipline that is being taken against Ms. Savage is based solely on unsubstantiated rumors if not gossip. Management has also failed to conduct a fair and impartial investigation of the matter specified in the Removal letter. Ms. Savage has consistently and routinely been denied her rights to Union representation. All of these actions are clear and blatant violations of the Master Agreement.

In addition Douglas factors were not considered: Ms. Savage has earned satisfactory performance evaluations from her start of employment in 2001 until present.

The AFGE Professional Local 3669 requests that the Union be made whole, and that the removal of Ms. Savage be held in abeyance until the grievance process has been concluded. We also demand that management be required to honor the commitments made in the Master Agreement and that in the future no employee be subjected to this type of intimidation, harassment or reprisal.

Joint Exhibit 5

The Agency agreed to extend the effective date of the removal to June 1, 2007. In fact, Ms. Savage's last paid day was June 24, 2007. The Union provided its notice invoking arbitration by Memo dated August 1, 2007.

Jane Nygard was President of the Local for 20 years. For the past 2 ½ years, she has been one of 12 AFGE National Vice Presidents. She worked for the federal government for 35 years, 32 of which were with the VA. She is a registered nurse. She met with Director Kleinglass regarding the proposed removal of Ms. Savage.

Ms. Nygard disagrees with the decision to remove Ms. Savage. She does not believe progressive discipline has been applied. She did not know that the Union had been notified with regard to the September, 2006, suspension. She believes there has been disparate treatment of Ms. Savage with regard to the sleeping on duty issue and that the discipline taken here was not timely as required by the parties' Master Agreement. She pointed to one employee who had been disciplined several times for sleeping on duty and was given a last chance agreement in lieu of removal. She contrasted Ms. Savage's case where "one employee said she was sleeping and they terminated her". See, Nygard testimony.

Referring to lunch and rest breaks provided by the Master Agreement, Ms. Nygard testified that Ms. Savage had worked two years without a lunch break, a circumstance she had never seen before.

Ms. Nygard believes that the Agency's action is contrary to its own performance plan noting that Ms. Savage was rated as fully successful in September, 2006.

Master Agreement and Handbook Provisions; Guidelines

ARTICLE 13 – DISCIPLINE AND ADVERSE ACTION

Section 1 – General

The Department and the Union recognize that the public interest requires the maintenance of high standards of conduct. No bargaining unit employees will be subject to disciplinary action except for just and sufficient cause. Disciplinary actions will be taken only for such cause as will promote the efficiency of the service. Actions based upon substantively unacceptable performance should be taken in accordance with Title 5, Chapter 43 and will be covered in Article 26 Performance Appraisal System.

* * *

Section 6 – Fairness and Timeliness

Disciplinary actions must be consistent with applicable laws, regulations, policy, and accepted practice within the Department. Discipline will be applied fairly and equitably and will not be used to harass employees. Disciplinary actions will be timely based upon the circumstances and complexity of each case.

* * *

Section 10 – Investigation of Disciplinary Actions

* * *

B. Disciplinary investigations will be conducted fairly and impartially, and a reasonable effort will be made to reconcile conflicting statements by developing additional evidence. In all cases, the information obtained will be documented. Supervisory notes may be used to support an action detrimental to an employee

only when the notes have been shown to the employee in a timely manner after the occurrence of the act and a copy provided to an employee as provided for in Article 23 official Records.

**VA HANDBOOK 5021
PART I**

PART I. DISCIPLINARY AND ADVERSE ACTIONS UNDER TITLE 5

CHAPTER 1. GENERAL

* * *

8. DETERMINING APPROPRIATE ACTION

a. **General.** After determining the facts in a case, the responsible official authorized to initiate action should consult the table of offenses and penalties contained in appendix A of this part. Any extenuating or mitigating circumstances or other contributing factors which may have some bearing on the situation, including past record, should be considered in determining the action to be taken. The initiating official will consult with the Human Resources management Officer regarding the propriety of the disciplinary or adverse action being considered.

* * *

g. **Progressive Discipline.** Using the least severe action which, in the supervisor's judgment, will most likely correct the employee's misconduct is a commonly recognized principle. It is most applicable in repeated infractions of a minor nature (e.g., brief tardiness). However, it does not prohibit issuance of a more severe penalty (e.g., suspension or removal) prior to issuance of each and every lesser penalty. For example, it is not always appropriate to issue an admonishment and/or a reprimand prior to issuance of a suspension or removal. Sound supervisory discretion and judgment must be applied in all cases fully considering any aggravating and/or mitigating circumstances. The concept of progressive discipline and the recommended guidance provided by the Table of Offenses and Penalties (se Appendix A of this part) is not intended to preclude the exercise of discretion in determining appropriate action, but rather to serve as an aid to maintaining consistency. The facts of the case, degree of willfulness of the employee's violation of VA conduct rules, the seriousness of the misconduct and its resultant impact on VA operations, may be examples of reasons for necessitating consideration of more severe discipline (e.g., suspension without prior admonishment or reprimand).

* * *

CHAPTER 3. ADVERSE ACTIONS

* * *

5. TYPES OF ADVERSE ACTIONS

c. **Removal for Disciplinary Reasons.** Removal for disciplinary reasons is an involuntary separation taken for serious misconduct or for continued or repeated acts of misconduct of a less serious nature.

* * *

6. BURDEN OF PROOF DURING APPEAL PROCESS

* * *

c. The agency has the burden of proof on the following 3 elements of its decision on all adverse actions taken under 5 U.S.C. 75:

(1) **Proof of Charges.** The agency must prove the factual basis of the misconduct relied on in taking the action by a 'preponderance of the evidence.' Preponderance of the evidence means that degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient evidence to support a conclusion that the reasons for taking action are more likely to be true than not true. This standard of proof is used by the MSPB and arbitrators in deciding appeals and grievances.

(2) **Nexus.** Nexus is the element in an adverse action which requires proof of an adequate relationship between the act of misconduct and the efficiency of the service.

(3) **Appropriateness of Penalty.** The agency must establish that the penalty selected is within the tolerable limits of reasonableness (see Douglas v. Veterans Administration, 5 M.S. P.R. 280 (1981), for a discussion of the Board's authority to review penalties, and appendix A of this part, which lists the 'Douglas factors and contains the Table of Offenses and Penalties).

Joint Exhibit 9

VA HANDBOOK 5021 PART I APPENDIX A

APPENDIX A. TITLE 5 – TABLE OF EXAMPLES OF OFFENSES AND PENALTIES

1. INSTRUCTIONS FOR USE OF TABLE

a. The range of penalties indicated in this table is to be used as a guide in administering discipline to help assure that like disciplinary action is taken for like offense.

* * *

c. In using this table, consideration will be given to the following:

(3) Offenses need not be identical in order to support progressively more severe disciplinary/adverse action against an employee. For example, an employee who has received an admonishment for AWOL can receive a reprimand for sleeping on duty, and possibly be suspended or removed for a third offense unrelated to the two previous infractions.

(4) When an employee has committed a combination or series of offenses, a greater penalty than is listed for a single offense is appropriate.

(7) The following are the twelve (12) Douglas factors:

* * *

(l) The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

(7) (sic) Removal action will be taken whenever required by law or regulation or whenever warranted by the facts in the individual case. Normally, progressively more severe penalties will be administered before removal action is initiated, unless the offense is so serious that it warrants removal action. The severity of the penalty will be that which is required in order to correct the attitude or conduct of the employee or to correct the situation.

(8) Although oral or written counselings of employees are not considered disciplinary actions, such counselings may be considered when assessing the appropriate penalty for a particular offense.

2. RANGE OF PENALTIES FOR STATED OFFENSES

NATURE OF OFFENSE	1 ST OFFENSE	2 ND OFFENSE	3 RD OFFENSE
4. Loafing, willful idleness or waste of time.	Admonishment Reprimand	Reprimand Reprimand	10 days Removal
5. Careless or negligent workmanship resulting in waste or delay.	Admonishment Reprimand	Reprimand 10 days	10 days Removal
12. Deliberate failure or unreasonable delay in carrying out instructions.	Admonishment Reprimand	3 days 10 days	10 days Removal
13. Sleeping on duty. b. Where safety of patients may be endangered.	5 days Removal	Removal	

Joint Exhibit 7

RESPIRATORY CARE SERVICES PRIORITY GUIDELINES

PRIORITY ONE = to be done first/immediately:

- Codes/ cardiopulmonary emergencies
- Mechanical ventilation (invasive and non-invasive)
 - Initiation
 - Scheduled checks
 - Airway care/ assessment
 - Troubleshooting
- STAT arterial blood gases
- STAT patient assessment and treatment for respiratory distress
- Transport of ventilator dependent patients

* * *

(emphasis added) Agency Exhibit 7

POSITION OF THE AGENCY

The Agency argues that removal of the Grievant is consistent with the range of penalties and table of offenses and penalties set out in VA Handbook 5021. It points to consideration of the Douglas factors and asserts that the "Grievant's offenses are especially egregious because patient care is involved." Agency Post-hearing Brief at page 3. It argues that imposition of a range of discipline and counseling in an attempt to correct the Grievant's behavior has not been effective leaving only removal to correct the problem. It argues that the Agency's concern that its reputation could be harmed or put at risk was another important factor in its decision to remove her from her position.

The Agency cites and provides quotations from cases where others have been removed for sleeping while on duty following progressive discipline. It cites to its Exhibit 14, a File Memorandum written by Rick Meier, Employee & labor Relations Coordinator which includes his application of the twelve Douglas factors to the facts of this case. The Agency quotes the EEO hearing Decision submitted with its Post-hearing Brief. It summarizes the Grievant's supervisor's testimony with regard to timeliness of response to requests for assistance with patient care and the Department Policy which places airway care as a top priority.

The Agency concludes that the Grievant has been disciplined following progressive discipline, and that efficiency of the Agency is diminished by her failure to follow instructions relative to patient care and sleeping on duty. It argues that she has

had a history of an uncooperative attitude with Agency employees. The Agency argues that patient care is the most important consideration in this case.

The Agency cites to several provisions of federal law which properly bring the Grievant to this venue and asserts that “the (A)rbitrator is bound to follow the same substantive standards as the MSPB”. Agency Post-hearing Brief at page 7. It argues that the burden of proof in the case is a preponderance of the evidence and that the Douglas factors are used to decide whether the level of discipline is appropriate.

After listing the twelve factors, the Agency argues support for the removal based on each of the factors. It argues that the offenses upon which the Grievant was charged are very serious because of the risk of harm to patients from failure to follow instructions, respond timely and for sleeping when assistance may be needed. It points to the fact the Grievant was working independently on the night shift and that her misconduct had been repeated. It argues that the Grievant’s behavior has undermined trust in her judgment and that her conduct has reflected poorly upon her Department. It argues once again that progressive discipline has been followed with no success in correcting the Grievant’s behavior leaving no recourse but removal. Pointing to earlier counseling, the Agency argues the Grievant was fully aware of rules and policies and the manner in which she had failed to follow them. Finally, the Agency asserts that the Grievant has been unwilling to take responsibility for her actions or to respond positively to earlier discipline. It concludes that there are no mitigating factors to justify lesser discipline and that her actions were deliberate and repeated. It seeks an Award denying the Grievance.

POSITION OF THE UNION

The Union seeks an Award which sustains the Grievance or, in the alternative, reduces the discipline. It argues that the Agency violated the parties’ Master Agreement when it removed Ms. Savage from her position without just and sufficient cause. It argues that the Agency failed to meet its burden of proof, imposed an unreasonable penalty and failed to promote the efficiency of the service by its action. It sets out the 12 Douglas factors and the requirement to apply each properly in support of discipline, citing cases for the proposition that an Arbitrator’s discretion is broad and allows for considerations beyond those set out in the Douglas case. The Union argues that every element of a charge must be proven and “that the Agency must prove that its discipline improves the functioning of the federal service rather than impede it.” Union Post-hearing Brief at page 4. The Union argues that the Agency’s breach of its Agreement with the Union where it fails to satisfy the contractual obligation to take action only for just and sufficient cause provides independent authority for vacation or mitigation of the discipline.

With regard to the facts of this case, the Union argues that the Agency can only support its charges of ‘Unreasonable Delay in Reacting to Patient Care’ and ‘Failure to Follow Instructions Regarding Patient Care’ by showing that the Grievant was told that the patient required immediate care, that she understood the urgency and her response

justified discipline. It points to Dr. Rice's initial reaction to the matter questioning whether there had been an expression of urgency which was understood by Ms. Savage. The Union discredits Dr. Rice's later "revision" of her view in support of the conclusion that Ms. Savage had violated Department Policy and protocol. It critiques and criticizes Ms. Arjes investigation of the matter and knowledge of applicable policies arguing that Ms. Savage was being held to a higher level of judgment than a medical doctor exercising hindsight.

The Union argues that Ms. Savage did not understand the urgency of the request, that Ms. Krehnke did not call her back, suggesting that another therapist might have been called and that Ms. Savage should have been able to depend upon Ms. Krehnke's professional judgment. It asserted, "The truth of the matter is that Ms. Krehnke called Ms. Savage to perform routine tasks and became upset when Ms. Savage did not immediately appear to do those tasks." Union Brief at page 9.

The Union argues that the incident involving Ms. Krehnke did not warrant any discipline because there is no policy which requires immediate response to the request which was made. It cites to footnotes to AARC guidelines which it argues do not support the guidelines or the purpose for which the Agency relied upon them in presenting their case.

The Union argues that the patient in question was not harmed, that the nurses on the unit were qualified to do the work Ms. Savage had been requested to do and, if the described risk of extubation existed, Ms. Savage was not the proper professional to call.

The Union argues that the Agency's Performance Plan sets out relevant expectations for performance of work duties which Ms. Savage met. It asserts that this one instance of unreasonable delay in providing patient care does not justify the discipline consistent with the Plan which allows for error. It argues that Ms. Savage has been removed from her position for "exceptional" work performance.

The Union points to the parties' Agreement which allows for a 30 minute lunch break. It argues that the Agency violates federal regulation and the parties' Agreement when it requires Ms. Savage to respond immediately to all pages. It argues that Ms. Savage works independently and has been punished for exercising discretion in managing her schedule.

With regard to the sleeping on duty charge, the Union argues that the Agency has not met its burden. It details and highlights the testimony provided by Mr. Anderson and Ms. Nelson, both of whom testified they had not seen Ms. Savage asleep on while on duty and it points to Ms. Savage's unequivocal denial. The Union challenges the credibility of the Agency's witnesses. It argues that Ms. Camp was diverting attention from herself when she reported that Ms. Savage was sleeping. It points to Mr. Anderson's testimony with regard to Ms. Camp being an evil person and one with whom Ms. Savage had experienced tension concerning work scheduling. It argues that there is no corroboration for the Agency witnesses' testimony. It argues that there were no

reports of failure to respond to pages and there was no specificity as to dates and times when Ms. Savage was observed sleeping. Finally, it challenges consideration of Ms. Arjes' Memo and testimony with regard to her conversation with Mr. Massaquoi. It argues that the Memo and testimony constitute unreliable hearsay.

The Union argues for mitigation of the penalty. It argues that the Agency's application of the Table of Penalties is inconsistent and incorrect. It asserts that Ms. Savage was not charged with "Sleeping on Duty Where the Safety of the Patient may be Endangered" and it has, therefore, followed the wrong grid in that regard. It also argues there was no evidence at hearing that her alleged sleeping endangered a patient. The Union points to its Exhibit 3 which includes discipline of another employee for sleeping which did not result in removal. It argues disparate treatment of Ms. Savage.

The Union argues that progressive discipline has not been followed since a two day suspension was followed by this removal action. It argues that discipline is meant to be corrective, not punitive. It asserts that Ms. Savage has made mistakes but has never repeated the same mistake twice. It argues that the mistake in this case was based on misunderstanding and does not justify removal. It argues that Dr. Rice shared the same misunderstanding. With regard to the sleeping charge, the Union argues it was her first and removal does not represent progressive discipline.

The Union points to testimony by Ms. Savage's colleagues that she is a competent professional and to her receipt of a positive performance evaluation even after she had been notified of the proposal to remove her. The Union challenges Mr. Meier's analysis of the case asserting that "the Agency made up whatever excuse was necessary to justify the removal". Union Brief at page 21. It points to multiple errors in Mr. Meier's reporting of the facts; failure to perform due diligence to determine how others had been disciplined for the same offenses; and unresponsive answers to some of the Douglas criteria. It suggests that the Agency was purposeful in being incomplete and inaccurate in its analysis.

Because Ms. Savage has never repeated a mistake, the Union argues she has strong potential for rehabilitation and should not be removed from her position. It urges her reinstatement and that she be made whole consistent with the law and that the Arbitrator retain jurisdiction to consider an application for attorney's fees in that event.

OPINION AND FINDINGS

A careful review of the entire record made in this case and analysis consistent with the parties' Master Agreement, Handbook provisions and Agency policy supports a conclusion that removal of Ms. Savage from her position was for just and sufficient cause. The Agency met its burden of proof with regard to support for its action. It demonstrated that the removal reflects proper application of progressive discipline and supports efficiency in the service. There is no evidence of disparate treatment or that the table of penalties has been applied to Ms. Savage in an inconsistent manner.

It is important to once again address the Agency's submission of the EEO Decision with its Post-hearing Brief and to make clear that reference in this Award to the Decision is solely for the purpose of procedural history and not for substance. Ms. Savage referred to the EEO matter in her written response to the Notice of Proposed Removal. It is unknown whether the case is pending on appeal or in another forum. No consideration has been given to the quotation from the EEO Decision in the Agency's Brief nor has any consideration been given to the hearing officer's findings or conclusions with regard to the facts of the suspension of the Grievant in September, 2006. In any event, the EEO hearing officer's analysis of the case before her was clearly distinct from the task before the Arbitrator here. Hers was a civil rights analysis while the task in this case is to determine whether there was just cause for removal. The issue of disparate treatment was framed in this case in a manner not to raise the issues of discrimination raised in the EEO case.

The Agency has demonstrated that Ms. Savage's conduct in the workplace reflects a pattern of unwillingness to conform to policy and protocol. She has refused to follow directions and to respond positively to counseling and lesser discipline. She admitted at hearing to conflict with several individuals in the workplace. Her performance record reflects that she has been counseled with regard to communication, interpersonal skills and customer service. The offenses for which she has now been removed demonstrate poor attitude and intentional misconduct.

Contrary to the Union's arguments, Ms. Savage's behavior and "mistakes" have been consistent. The Union refers to earlier discipline and counseling and how it should be regarded vis-à-vis the specific incidents and matters in this case. The several incidents for which she has been disciplined reflect intention and repetition in nature, if not in absolute fact. The circumstances, including the precise requests and the people with whom Ms. Savage was dealing were different. However, the tone and nature of the offenses has been the same.

At the center of this matter, is the highest concern for patient care and the adverse impact Ms. Savage's conduct potentially has. It is not enough and no excuse to say no harm has been done. Ms. Savage holds a position of great responsibility and importance. There can be little question that she is charged with the need to be alert and responsive to requests for her services. She is also responsible as a member of a team of professionals. While working independently, she has not been given unfettered discretion to decide when and how she will do her work. It is unreasonable and unsupported to argue that her delay in responding to a request should be excused because she was not expressly told the matter was urgent. It appears that much of her job responsibility is urgent in nature. In addition, there has been no evidence to support the veiled reference to authorized breaks and the inappropriateness of interrupting or asking her to work on her break.

The facts of this case along with relevant background information and Contract, Policy and Guideline provisions have been detailed above and will not be repeated. In

many cases the facts and quoted language speak for themselves. It is appropriate to address the credibility of the parties' cases and certain of the issues which have been raised.

The Agency has presented a credible case supported by documentation and testimony which addressed and satisfied the factors identified in the parties' Agreement, and Employer Handbooks. The Union raised several valid issues which have been carefully considered and resolved in favor of the Agency. They include Dr. Rice's involvement and input in this case; the apparent contradiction of positive performance evaluation of Ms. Savage and this discipline; shortcomings in Mr. Rick Meier's File Memo; the absence of specific dates and times when Ms. Savage was observed sleeping while on duty; and its assertion that she was subject to disparate treatment when disciplined for sleeping on duty.

In brief, Dr. Rice's initial inquiry, hours after the incident reported by Ms. Krehnke, with regard to the nature of the request directed to Ms. Savage, provided an unwarranted focal point for Ms. Savage's response to the Notice of Proposed Removal and the Union's case in her defense. Dr. Rice had had experience with complaints against Ms. Savage. She asked a question which was answered to her satisfaction and which led to her conclusion that professional policy and protocol comported with Ms. Krehnke's expectation that Ms. Savage respond immediately to her request without being expressly told that it was urgent.

Notwithstanding numerous Contract provisions which distinguish between discipline based upon work performance and that which is based upon misconduct, the Union argued that Ms. Savage was being removed from her position for "exceptional" performance referring to the Agency's "Plan" set out in Performance Appraisal documentation. The Arbitrator agrees, at first blush, that there appears to be an implausible and blatant contradiction between the Agency's evaluation of Ms. Savage and its action to remove her. However, the dual system to which Mr. Meier and Ms. Arjes testified is described, as noted, in the parties' Agreement citing federal law which undergirds the procedures set out by Agreement and in Handbook provisions implicitly promulgated pursuant to the law.

The Arbitrator agrees that Mr. Meier's File Memo which was apparently used as the basis for reporting to Director Kleinglass and support for the Notices of Proposed Removal and Removal included nonresponsive and possibly inaccurate answers to the Douglas factor questions. Notwithstanding Mr. Meier's imprecise depiction of the detail of the analysis, the record otherwise supports his conclusions.

The Arbitrator also agrees that it would have been far better for the Agency to provide as much detail as possible with regard to specific dates and times when Ms. Savage was observed sleeping. Time records for the witnesses who provided the testimony could have been produced and summarized to show when they each were on duty at the same time as Ms. Savage. There was admission that there was no request for the detail. Greater detail usually enhances credibility of evidence and testimony.

Notwithstanding the shortcoming in the Agency's record, the witnesses' testimony was credible and compelling.

Lastly, the Union has not demonstrated disparate treatment of Ms. Savage based upon comparison of discipline for sleeping on duty imposed upon other employees. It appears that the Union's exhibit includes discipline of more than one employee, not one employee who received multiple disciplines ending in a last chance agreement. More important, the disciplinary record(s) of the individual or individuals is not a part of this record. Consequently, the necessary close comparison among cases where there has been discipline for sleeping on duty is not possible.

Ms. Savage has been removed following a series of counseling and disciplinary actions over the course of her tenure at the Medical Center. The sleeping while on duty charge is one of several offenses cited in support of this action. While it is the first disciplinary action taken with regard to sleeping, she was counseled earlier and the table of penalties provides for potential removal for a first offense. The Union has argued that she was not charged with sleeping while on duty to the potential endangerment of patients and therefore, lesser discipline for a first offense is appropriate. In this case, where Ms. Savage was the only RT assigned to assist with a large number of patients, the concern with her sleeping on duty is implicit in that fact. It is understood that another RT may have been available to cover for her. In addition, the counseling can properly be taken into consideration, and more significant, the sleeping offense is but one of several offenses over a relatively short period of time justifying more stringent discipline.

The Union has provided a long string of arguments and challenges to the Agency's case, none of which defeat it. There is no doubt that Ms. Savage is competent to perform her work. However, she has failed to perform in the best interests of the patients she was employed to serve or to the credit of the Agency. Consequently, her misconduct has required that she be removed from her position.

AWARD

The Grievance is denied.

Dated: March 10, 2008

Janice K. Frankman, Attorney at Law
Arbitrator