

IN THE MATTER OF THE ARBITRATION BETWEEN;

SEIU HEALTHCARE MINNESOTA

AND

ALLINA HOSPITALS & CLINICS, d/b/a MERCY HOSPITAL

FMCS Case No. 13-54912-3

OPINION AND AWARD OF ARBITRATOR

**Richard A. Beens
Arbitrator
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APPEARANCES

For the Union:

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**Date of Award:
December 1, 2013**

JURISDICTION

This arbitration arises pursuant to a collective bargaining agreement (“CBA”) between SEIU Healthcare Minnesota (“Union”) and Allina Hospitals and Clinics, d/b/a Mercy Hospital (“Employer” or “Allina”).¹ Tammy Picotte (“Grievant”) is a member of the Union and worked at the Employer’s Mercy Hospital facility.

The undersigned neutral arbitrator was selected by the parties to conduct a hearing and render a binding arbitration award. The hearing was held on October 29, 2013 in Minneapolis, Minnesota. The parties stipulated that the matter was properly before the arbitrator. Both parties were afforded the opportunity for the examination and cross-examination of witnesses and for the introduction of exhibits. Written closing arguments were submitted by November 27, 2013. The record was then closed and the matter deemed submitted.

ISSUE

The parties agreed that the issue to be determined is:

Did the Employer have just cause to terminate Grievant and, if not, what is the proper remedy?

FACTUAL BACKGROUND²

Allina Hospitals & Clinics is a network of health care providers. Based in Minneapolis, it operates hospitals and clinics throughout Minnesota and western Wisconsin. Grievant was one of its approximately 23,000 employees from early 2000 to November 5,

¹ Union Exhibit 1.

² The Employer objected to Union Exhibit 28. After reviewing Minnesota Statute §268,105 Subd. 5a, the objection is sustained. Consequently, Union Exhibit 28 was not considered in deciding the grievance.

2012 when she was terminated for improperly accessing patient health information (“PHI”).³ Throughout her career, she worked as a patient registrar at the Employer’s Mercy Hospital facility in Coon Rapids, Minnesota.

Registrars are the first contact prospective patients have when entering an Allina hospital. Their job is to obtain the patient’s basic demographic information; name, address, age, social security number, emergency contact information, employer, health insurance information, etc.⁴ Registering a patient entails creating a computer file in the patient’s name, interviewing her, and entering the patient’s demographic data into the file. The Employer uses a program called Excellian to handle and store all patients’ medical records, including the demographic data. Subsequent access to and dissemination of a patient’s demographic and medical record information is tightly protected and regulated by both state and federal law.⁵ The Employer’s operating policies and procedures reflect significant efforts toward compliance with applicable law.⁶

The chain of events leading to Grievant’s termination began on the morning of September 20, 2013. Grievant’s life-long (39 years) friend, Kim Hanson sought admittance to the Mercy Hospital Emergency Room (“ED”). Grievant registered her friend into Mercy on that morning. This was not Hanson’s first visit to Mercy. She has no relatives, other than her small children, living in Minnesota. Consequently, she has listed Grievant as her “Emergency Contact” on Mercy records since at least 2010, when she underwent surgery there. Hanson describes Grievant as her, “closest, best, most personal friend.” After

³ Employer Exhibit 10.

⁴ Employer Exhibit 4, p. 2.

⁵ See 42 C.F.R. Chap. 164 and M.S.A. Chap. 144.

⁶ Employer Exhibits 14, 15, 16, 17, and 18.

receiving treatment in the ED, Hanson was released and sent home later on that same day.

On the following morning, September 21, 2012, Grievant was assigned to register patients in Mercy's Surgery Department. Shortly after 9:00 AM, she received a series of text messages from Hanson indicating that she felt extremely ill and was returning to the Mercy Emergency Room. She asked Grievant to inform ED that she was returning. At 9:21 AM, Grievant accessed the Excellian records she had created for Hanson the day before to recheck them for accuracy. She reviewed the records for 33 seconds.⁷ Finding no mistakes, she exited the computer file.

A little over an hour later, Hanson's father, who had flown into Minnesota to be with his ill daughter, sought out Grievant. He advised her that Hanson was being registered in Emergency Department and would be assigned to Room 12. Grievant then sent an Instant Message ("IM") to the ED registration staff at 10:34 asking, "*Do you ahve (sic) Room 12. ITS MY FRIEND....I REGD HER YESTERDAY SHE ALREADY RCVD MNCARE.*"⁸ After viewing this IM, a co-worker in the ED, emailed supervisor Debra Pelsert questioning whether patient privacy had been breached.

The Employer's Excellian Records indicate Grievant again accessed Hanson's records at 11:09:30 hours. They indicate she "clicked" through six different computer screens in a total of 5 seconds.⁹ Although some of the screens contained tabs that, when opened, would access medical chart information, there is no evidence Grievant entered those

⁷ Employer Exhibit 3.

⁸ Employer Exhibit 2. MNCARE refers to a large packet of written materials given to entering patients and explaining their rights when they are insured through Medicare. That fact that a patient has already received this information does not show up on his/her Excellian record the following day.

⁹ Employer Exhibit 3. Excellian records only show the time of "clicking" on a given screen, but not the duration of viewing the final screen. However, Hakim acknowledged there was no evidence that the entire access lasted more than the 5 seconds indicated in the records.

areas. Grievant has no recollection of doing this and believes this was an inadvertent patient record access.

In response to the co-worker's complaint¹⁰ the Employer commenced an investigation into Grievant's conduct. She was interviewed by her supervisor Deb Peisert and Patient Registration Manager Fran Hakim on September 25, four days after the incident.¹¹ Grievant explained her close relationship to Hansen and indicated her IM to co-workers was intended to be helpful and avoid duplication of efforts. She also explained that she learned the room number from Hansen's father, not by perusing patient records. In a subsequent interview on October 5, 2012, Grievant could not recall or had no explanation for the 11:09 access to Hansen's records. Hakim later speculated that the access may simply have been to reconfirm Hansen's room number prior to Grievant's break time visit to her friend.¹² No attempt was ever made by the Employer to interview Hansen or her father.

On October 30, 2012, a telephonic phone conference was held. It included supervisors Fran Hakim, Deb Piesert, Leah Schmoyer Michelle, and someone named Jennifer.¹³ Conference notes indicate Hakim offered, "Tammy is very privacy minded...curiosity got the better of her."¹⁴ Although the notes do not indicate the length of the discussion, all eventually agreed Grievant had committed a Level 3 privacy violation that required discharge.

A corrective action meeting was held with Grievant on November 5, 2012.¹⁵

¹⁰ Employer Exhibit 2.

¹¹ Employer Exhibit 6.

¹² Employer Exhibit 8.

¹³ Employer Exhibit 7.

¹⁴ Ibid.

¹⁵ Employer Exhibit 9.

Attendees included Grievant and her Union steward, Manager Fran Hakim, Supervisor Pam Medley and Mercy H.R. Director, Leah Schmoyer. Hakim handed out copies of the Corrective Action document.¹⁶ The Union pointed out that no malice was involved and it sounded like her friend wanted her to check on things. Hakim responded that Grievant had no business reasons or consent forms for the record accesses.¹⁷ Grievant was formally advised that her employment was being terminated. The Union filed a grievance on November 5, 2012¹⁸. At some point in the process, Grievant told Schmoyer that she could get a permission letter from Hansen. She was told it “would make no difference.” Nevertheless, Hanson wrote a letter to the Employer on January 2, 2013 stating, “*At no time during my visit to Mercy hospital did I feel that my privacy was violated nor did I think Tammy Picotte did anything to violate my privacy...*”¹⁹ Grievance Step meetings on December 12, 2012²⁰ and February 15, 2013²¹ did nothing to alter Employer’s decision to terminate Grievant.

APPLICABLE CONTRACT AND POLICY PROVISIONS²²

ARTICLE 6 CORRECTIVE ACTION AND DISCHARGE²³

(A) Just Cause: *The Employer shall not initiate corrective action, discharge or suspend an employee without just cause.*

¹⁶ Employer Exhibit 10.

¹⁷ Employer Exhibit 9.

¹⁸ Union Exhibit 15.

¹⁹ Employer Exhibit 24.

²⁰ Employer Exhibit 19.

²¹ Employer Exhibit 21.

²² Only CBA and policy provisions deemed directly applicable to this grievance have been included.

²³ Union Exhibit 1.

CONFIDENTIALITY OF PATIENT INFORMATION²⁴

Overview

Allina Hospitals & Clinics expects you to keep all health information confidential. ...

Applies to

This policy applies to all employees and other workforce members.

Definitions

Protected health information (PHI) means, generally, health information that identifies or could reasonably be used to identify the individual and relates to:

- *An individual's physical or mental health or condition*
- *The provision of health care to an individual*
- *Payment for health care provided to an individual*

For example, protected health information includes information that identifies an individual as an Allina patient, or that associates condition, treatment or payment-related information (diagnosis codes, dates of service, charge data, etc) to information that could be used to identify the individual (name, other demographics, medical record number, images, et.)

Access of protected information means looking up, reviewing or examining such information.

Use of protected health information means sharing, employing, applying, utilizing or analyzing such information.

Disclosure of protected health information means the releasing, transferring, providing access to, or divulging of such information.

What is covered

Allina permits the access, use or disclosure of protected health information only for a legitimate business reason. In determining whether there is a legitimate business reason to access, use or disclose the information, you must also consider whether it is the minimum necessary information to accomplish the intended purpose.

Electronic communications

All communications must be in compliance with Allina's HIPAA Privacy and Security policies and procedures and Information Systems policies and procedures.

Violating the policy

Looking up or talking about anyone's medical record without a legitimate business need is not allowed. A provider has a legitimate need to know a patient's medical information

²⁴ Employer Exhibit 15.

during the course of treatment. Note that a treating relationship does not include accessing a spouse, child's or other relative's records. It also does not apply if your role in the treatment of the individual has ended. For someone in the billing office, the legitimate business need to know is in the context of obtaining payment for a bill. Following are some examples of violations of this policy which represent varying degrees of severity of violation and corrective action. When determining the level of corrective action, Allina will investigate as to whether the violation was intentional or unintentional, were the rules, policies or procedures followed, was there a business purpose or was it out of curiosity, was there personal gain by disclosing the informant.

.....

- accessing PHI of family member, an acquaintance or neighbor who has given employee permission, but has not signed authorizations
- accessing PHI of a family member, an acquaintance, or neighbor without consent or a permitted business or care-related purpose

.....

You should be aware that Allina routinely audits its records to ensure that employees are accessing PHI for only legitimate business reasons.

As you can see, you can violate a patient's confidentiality either intentionally or inadvertently. Generally speaking Allina will take more serious forms of corrective action where an employee is aware that there is not a legitimate business reason for the use or disclosure of PHI. However, all violations are considered serious and should be avoided. If you are found to be in violation, you may be subject to:

- **Corrective action**
- legal action
- notification to law enforcement officials and regulatory, accreditation and licensure organizations

MANAGING VIOLATION OF CONFIDENTIALITY OF PATIENT MEDICAL INFORMATION²⁵

Overview

Allina Hospital & Clinics must ensure that management imposes appropriate sanctions for violation of policies supporting confidentiality of protected health information ("PHI")

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Procedure

.....

Step 2: Conducting the Investigation

²⁵ Employer Exhibit 16. Again, only those portions deemed applicable to the present case are included.

Allina Hospitals & Clinics will undertake an immediate and thorough investigation which may include a review of system access issues, timecards, interviews with employees, patients or family members, or others with knowledge of the alleged violation. Most situations will include an interview of the employee who is allegedly involved in the violation and notification of the appropriate manager. However, the scope of the investigation will depend upon the facts of the alleged violation.

.....

Step 3: Determining the Type of Violation

If the investigation concludes that there was no violation of confidentiality, the investigation will end and no corrective action will be taken. If a violation is confirmed, the level of violation must be considered.

The following is a list of examples to help consistently determine the appropriate level of violation.....

Level	Description	Examples, may include, but are not limited to:
1	Unintentional violation or carelessness	<i>(None relevant to present case)</i>
2	Intentional use disclosure, or access, without following proper rules, policies or procedures	<p>.....</p> <p>Accessing PHI of a family member, an acquaintance or neighbor who has given permission, but has not signed authorizations.</p> <p>.....</p>
3	Intentional use, disclosure or access without a permitted business reason such as, curiosity personal gain, ill will, intent to harm a patient or others	<p>.....</p> <p>Accessing PHI of a family member or acquaintance or neighbor without consent or a permitted business or care-related purpose</p> <p>.....</p>

Step 4: Determining The Appropriate Level of Corrective Action

*Below are general guidelines for **corrective action**:*

.....

Level 2 Violation Corrective Action	<i>1st offense of a Level 2 Violation: Manager Should deliver reeducation and a written</i>
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Warning or suspension to the workforce Member
2nd offense of a Level 2 Violation: Managers should consult with Human Resources to determine if terminating the workforce member is appropriate

Level 3 Violation Corrective Action

1st offense of a Level 3 Violation: Managers should consult with Human Resources to determine if terminating the workforce member is appropriate.

In addition to considering the level of seriousness based on the guidelines above, the manager in consultation with Human Resources may also consider the following factors when determining the appropriate level of discipline:

- history of **Corrective Action**
- whether the workforce member has previously violated confidentiality; and
- whether the workforce member understands the seriousness of the offense and agrees not to engage in any further violations.

*However, Human Resources Representative along with Labor Relations (if applicable) will oversee the administration of **corrective action** to ensure consistency throughout the organization.*

OPINION AND AWARD

It is well established in labor arbitration that, where an employer's right to discharge or suspend an employee is limited by the requirement that any such action be for just cause, the employer has the burden of proof. Although there is a broad range of opinion regarding the nature of that burden, the majority of arbitrators apply a "preponderance of the evidence" standard. That standard will be applied here.

In determining the question of whether the employer acted with "just cause," the arbitrator is called upon to interpret the phrase as a term of art which is unique to collective bargaining agreements. While the arbitrator may refer to sources other than the contract for

guidance as to the meaning of just cause, his essential role is to interpret the contract in determining whether a given action was proper.

A “just cause” consists of a number of substantive and procedural elements. A review of discipline for alleged employee misconduct requires an analysis of several factors. First, has the employer relied on a reasonable rule or policy as the basis for the disciplinary action? Second, was there prior notice to the employee, express or implied of the relevant rule or policy, and a warning about potential discipline? A third factor for analysis is whether the disciplinary investigation was thoroughly conducted. Were statements and facts fully and fairly gathered without a predetermined conclusion? Finally, did the Grievants violate the work rule in question?

Are Allina’s rules regarding access to and use of patient health information reasonable? Clearly they are. Both federal and state law require the rules in question. Significant institutional and personal liability can result when patient confidentiality is breached. Allina has adopted a wide range of policies and procedures to insure compliance with patient privacy requirements. No one disputes their necessity and validity. Although these policies and procedures are, on their face, reasonable, their application to specific fact situations can become problematic. Further, no set of policies or procedures covers every conceivable variation of fact that may arise in a particular case.

Did the Grievant have prior notice, express or implied of the relevant rules and a warning about potential discipline? There is no question Grievant received and completed a generalized Compliance course as recently as March, 2011.²⁶ However, as in much of life,

²⁶ Employer Exhibits 11 and 12.

the devil is in the details. Consequently, the facts of this case present a far more nuanced situation. The Employer's case is, in the first instance, based on the premise that Grievant did not have a, "*permitted business reason*" to access Hanson's records on September 21, 2012. "Permitted business reason" is an extraordinarily broad concept. In reviewing the exhibits, I am unable to find any written policy or procedure definitively defining the phrase and none was mentioned in the Employer's closing brief. However, Employer Exhibit 13, Frequently Asked Questions, which was used as a training tool in registrar staff meetings, starts with the following:

*You CAN access the medical record **for anyone** during our normal care or business processes. This includes not only direct care but also follow-up of a patient's care **where a person could reasonably assume** that they might either contribute something to the patient's later care or support, or as part of learning and improving quality. (Emphasis added)²⁷*

The Employer asserts that, while working as a registrar in Surgery, it is impermissible to access a record she created the day before in the Emergency Department for any reason. Both Grievant and co-worker Heidi Cron testified that it was a common practice for registrars to recheck records for accuracy, sometimes even a day or two later. Grievant credibly testified that she first accessed Hanson's records for the purpose of making sure the entries made the day before were accurate. Maintaining an accuracy level of 95% or greater is stressed in in virtually all of Grievant's performance evaluations.²⁸ No written rule or policy the Employer presented forbids rechecking a day later or while at another registrar post. Absent such a rule or policy, the Grievant had no reason to believe she was violating any Allina policy. I find that she in good faith believed there was a

²⁷ Employer Exhibit 13.

²⁸ Union Exhibits 4 through 11.

legitimate business reason to access Hanson's file. Finally, there is no evidence her workflow in Surgery registration was ignored or left incomplete.

The same reasoning applies to Grievant's Instant Message to registrar coworkers. She clearly believed she was being helpful, advancing the Employer's interest and had a legitimate business reason in avoiding needless duplication. She used the minimum information needed to accomplish the purpose. The patient's name was not used, only a room number. Presumably, only the ED registrar who checked Hanson in would be able to identify her. Witnesses testified the Instant Messaging program was set up for the purpose of increasing communication between coworkers. Both Cron and Grievant testified that indications Hanson had received the insurance information packet on the 20th would not appear on her Excellian record the following day. If exchanges of this type are to be forbidden between registrars, Allina should clearly enunciate a rule to that effect. Absent such a rule, Grievant had no reason to believe she had violated any Employer standard.

If one finds, as I have, that Grievant had a business reason to access Hanson's records, lack of patient authorization for the first access is a moot point. However, it is theoretically relevant to Grievant's second access to Hanson's records. There is no question accessing PHI of an acquaintance who has given permission, but not signed an authorization is a violation of Employer policies.²⁹ Nevertheless, Grievant's second access lasted only 5 seconds. Grievant cannot recall the access. Witnesses for both the Employer and Union acknowledged that inadvertent access is not uncommon. However, no evidence was presented indicating this *de minimis* type of violation ever results in disciplinary action.

²⁹ Employer Exhibit 15, **Highlights**

Once again, while inadvertent access may trigger an investigation, there is no precise Employer disciplinary guidance for an inadvertent, 5-second access.³⁰

Was the Employer's investigation thoroughly conducted? Were statement and facts fully and fairly gathered without a predetermined conclusion? Despite the supervisors' repeated self-congratulations on the fullness and fairness of their investigation, I think not. The tone of their enquiry was best caught when Hospital Compliance Director Jean Wirzbach spontaneously testified, "*Allina has pretty much zero tolerance regarding privacy since 2011.*" Although she later attempted to rephrase it, Wirzbach's initial statement had the ring of an inadvertently uttered truth. A zero tolerance policy and a predetermined investigative conclusion are precisely what the evidence before me indicates. I come to this conclusion for a number of reasons:

- Even though Grievant articulated a colorable business reason for her first access, there is no indication anyone involved in her termination even considered it.³¹
- Although Grievant showed Fran Hakim the text messages received from Hanson, they were not reported or included in any of her investigative reports.³²
- Even though Grievant claimed she had permission from Hanson, the Employer made no attempt to contact Hanson for verification.
- Even though Grievant claimed to have learned Hanson's room number through the patient's father, no attempt was made to contact him for verification.
- Even though Grievant informed Hakim that she was listed as Hanson's emergency

³⁰ Ibid., **Step 3, Level 1.**

³¹ Employer Exhibits 6, 7, 8, 9, and 10.

³² Employer Exhibits 6, 7, 8, 9, and 10.

contact in hospital records, that critical fact appears nowhere in Hakim's reports.³³

- When Grievant offered to get a signed access permission from Hanson, Human Resource Manager Leah Schmoyer told her, "it would make no difference."
- Even though Allina's disciplinary policy allows consideration of Grievant's lack of prior violations or corrective actions,³⁴ the investigative documents make no mention of any such considerations.³⁵
- Even though Hanson wrote to the Employer indicating she felt no privacy violation, it was dismissed as an "after-the-fact rationalization."³⁶
- Hakim and Schmoyer concluded Grievant accessed Hanson records solely out of "curiosity."³⁷ This conclusion is sheer speculation, as there is simply no credible evidence to support it.

I fully understand the Employer's need to protect PHI. Exposure to significant administrative and liability penalties dictated their emphasis on patient privacy. They have obviously gone to great lengths to adopt policies and procedures for that purpose. However, Allina is also bound by a collective bargaining agreement that stipulates, "*The Employer shall not initiate corrective action, discharge or suspend an employee without just cause.*"³⁸ Absent a specific CBA provision to the contrary, zero tolerance policies and the just cause standard are mutually exclusive.

³³ Ibid.

³⁴ Employer Exhibit 16, **Step 4.**

³⁵ Employer Exhibits 6, 7, 8, 9, and 10.

³⁶ Employer Exhibit 22. Further, the Employer's closing brief argues that Hanson's letter doesn't contain permission for PHI access. While it may not be in a form favored by Allina, there is no other reasonable way to interpret the letter. Hanson confirmed her comfort with Grievant's access at the hearing. Again, had Hanson been interviewed as part of the investigative process, this arbitration may not have been necessary.

³⁷ Employer Exhibit 7.

³⁸ Union Exhibit 1, Article 6.

Zero tolerance leads to discharge no matter how well intended or insignificant the violation. Zero tolerance presumes guilt, whereas just cause requires that it be proven. Zero tolerance dismisses mitigating circumstances as irrelevant. Just cause requires the Employer to view and weigh the totality of the circumstances surrounding the alleged offense. That was not done in this case. Grievant's business purpose explanations were summarily dismissed from consideration. Her unique relationship to the patient and efforts to produce a written consent were similarly ignored.

Even if Grievant's actions were correctly deemed violations, the punishment imposed was extraordinarily harsh. The Employer is, of course, free to bargain for the inclusion of strict privacy violation penalties in their next CBA. However, the current CBA makes no distinction between penalties for privacy and other violations. Intentional privacy violations motivated by ill will, simple curiosity, or for personal gain clearly warrant discharge. However, none of those elements are present in this case. The American Academy of Arbitrators has set forth the generally accepted standards for disciplinary action in *The Common Law of the Workplace* (Second Edition, 2005):

§6.7. Magnitude of Discipline: Progressive Discipline

(1) A given "cause" may justify some types of discipline, but not others. The employer's chosen level of discipline itself must be "just."

(2) Proportionality. The level of discipline permitted by the just cause principle will depend on many factors, including the nature and consequences of the employee's offense, the clarity or absence of rules, the length and quality of the employee's work record, and the practices of the parties in similar cases. Discipline must bear some reasonable relation to the seriousness of the frequency of the offense.

(3) The progressive discipline principle.

(a) Unless otherwise agreed, discipline for all but the most serious offenses must be imposed in gradually increasing levels. The primary object of discipline is to correct rather than to punish. Thus, for most offenses, employers

should use one or more warnings before suspensions and suspensions before discharge.

Grievant was an almost 13-year employee with good performance reviews³⁹ and absolutely no prior privacy breaches. Even Hakim acknowledged that no harm was done by the alleged offense. Witnesses for both sides termed Grievant a “excellent employee” who was very “ethical” and “privacy conscious.” Even if the Employer had clearly enunciated rules in place and I had found just cause to discipline her, coaching and a written warning would have been the most discipline warranted for a first Level 2 violation under the Employer’s own policies.⁴⁰ Discharging a long term employee with an impeccable record under the facts of this case is arbitrary, capricious, and an abuse of Employer disciplinary prerogatives.

Finally, did Grievant commit the offense charged. For the reasons outlined above, the answer is “No.” Absent a clear work rule to the contrary, she had a legitimate business reasons for the first access of Hanson’s records and the Instant Message sent to coworkers. There is no credible evidence that the later, 5-second access was anything but inadvertent. Grievant’s termination was without just cause.⁴¹

³⁹ Union Exhibits 4 through 11. Additionally, the Employer’s post-hearing brief cited numerous cases where discharges of long term employees were upheld by arbitrators. Each of those cases is factually distinguishable from the present grievance. Further, length of service is only one of many factors considered when analyzing the proportionality of a given discipline.

⁴⁰ See Employer Exhibit 16.

⁴¹ Once the lack of just cause has been found, there is no need to reach or analyze the issue of disparate treatment.

AWARD

The grievance is SUSTAINED. Grievant will be returned to work within ten (10) days and will be made whole for all lost wages and benefits. The Employer is ordered to remove all indications of the disciplinary action involved in this case from Grievant's personnel file. Jurisdiction is retained for 90 days so that the parties may calculate remedy amounts after adjusting for any earnings or other benefits received by Grievant during the interim.

DATED: _____

Richard A. Beens, Arbitrator