

IN THE MATTER OF THE ARBITRATION) ARBITRATOR'S
)
BETWEEN) OPINION
)
STATE OF WASHINGTON, KING COUNTY) AND
DEPARTMENT OF ASSESSMENTS (DOA))
) AWARD
"THE EMPLOYER" OR "THE COMPANY")
)
AND)
)
INTERNATIONAL BROTHERHOOD OF)
TEAMSTERS LOCAL UNION NO. 763)
) ***GRIEVANT REDACTED***
"THE UNION") Termination Grievance

HEARING: October 31, 2006
Seattle, Washington

BRIEFS: Union's received: November 30, 2006
Employer's received: November 30, 2006

HEARING CLOSED: November 30, 2006

ARBITRATOR: Timothy D.W. Williams
2700 Fourth Avenue, Suite 305
Seattle, WA 98121

REPRESENTING THE UNION:
Tom Leahy, Attorney
Rob McCauley, Union Business Agent
GRIEVANT REDACTED, Grievant

REPRESENTING THE EMPLOYER:
Gretchen Herbison, Labor Negotiator
Karen Place, Labor Negotiator
Rick Medved, Chief Deputy Dept. of Assessments
Debra Prins, Director Residential Division

APPEARING AS WITNESSES FOR THE UNION:

*****GRIEVANT REDACTED*****, Grievant

APPEARING AS WITNESSES FOR THE EMPLOYER:

Rick Medved, Chief Deputy Dept. of Assessments

Debra Prins, Director Residential Division

Bob Kaldor, Senior Appraiser

David Ek, Appraiser I

EXHIBITS

Joint

1. Collective Bargaining Agreement between King County and International Brotherhood of Teamsters Local 763, effective January 1, 2004 through December 31, 2006
2. Grievance, dated 7/8/2005
3. 2004 monthly calendars
4. 2005 monthly calendars

Union

1. Performance Analysis 9/15/1997
2. Performance Analysis 3/16/1998
3. Performance Analysis 1/21/1998
4. Performance Analysis 8/31/1999
5. Performance Analysis 8/31/2000
6. Performance Analysis 8/31/2001
7. Performance Analysis 8/31/2002
8. Performance Analysis 8/31/2004
9. E-mail to Bob Roegner

Employer

1. King County organizational chart
2. Mission statement and goals
3. Personnel Guidelines
4. Loudermill letter, dated 6/30/2005
5. Separation letter, dated 7/6/2005
6. Residential Appraiser I
7. E-mail to Frank Lippman, dated 6/30/2003
8. E-mail on medical condition of the Grievant, dated 8/19/2004
9. E-mail to Debora Prins, dated 1/6/2005
10. Communique to Grievant regarding meeting of 3/29/2005

11. Communique to Grievant regarding meeting of 4/14/2005
12. E-mail to Rich Medved, dated 4/19/2005
13. Notes on meeting of 4/19/2005
14. E-mail to Rich Medved, dated 5/3/2005
15. Memo, dated 5/17/2005
16. E-mail, dated 5/17/2005
17. E-mail, dated 5/18/2005
18. E-mail to Bob Kaldor, dated 6/2/2005
19. E-mail to Rich Medved, dated 6/2/2005
20. E-mail to Rich Medved, dated 6/3/2005
21. E-mail to Debra Prins, dated 7/12/2005
22. E-mail to Bob Kaldor, dated 6/2/2003
23. E-mail from Debra Prins, dated 7/23/2003
24. E-mail to Bob Kaldor, dated 12/4/2003
25. Letter to *****GRIEVANT REDACTED*****, dated 8/11/2004
26. E-mail to Debra Prins, dated 9/27/2004
27. Memo to *****GRIEVANT REDACTED*****, dated 9/28/2004
28. E-mail to Debra Prins, dated 10/7/2004
29. E-mail to *****GRIEVANT REDACTED*****, dated 1/10/2005
30. Maintenance Check List
31. E-mail to Debra Prins, dated 5/11/2005
32. E-mail to Debra Prins, dated 5/18/2005
33. E-mail to Debra Prins, dated 7/2/2005
34. E-mail to Joni Shirer, dated 7/12/2005, 4:14 p.m.
35. E-mail to Joni Shirer, dated 7/12/2005, 4:15 p.m.
36. Review of *****GRIEVANT REDACTED*****' work
37. Two samples of *****GRIEVANT REDACTED*****' Work #1
38. Samples of *****GRIEVANT REDACTED*****' Work #2
39. Sample of *****GRIEVANT REDACTED*****' Work #3
40. Sample of *****GRIEVANT REDACTED*****' Work #4
41. Sample of *****GRIEVANT REDACTED*****' Work #6
42. Sample of *****GRIEVANT REDACTED*****' Work #7
43. Sample of *****GRIEVANT REDACTED*****' Work #8
44. Sample of *****GRIEVANT REDACTED*****' Work #9
45. Signature on oaths of office
46. Series of e-mail messages per April meeting
47. E-mail to *****GRIEVANT REDACTED*****, dated 5/12/2005

BACKGROUND

King County (hereafter "the Employer) and the International Brotherhood of Teamsters, Local 763 (hereafter "the Union") agreed to submit a dispute to arbitration. A hearing was held before Arbitrator Timothy D.W. Williams in Seattle, Washington on October 31, 2006.

At the hearing, the parties had full opportunity to make opening statements, examine and cross examine sworn witnesses, introduce documents, and make arguments in support of their positions. The Arbitrator made a digital recording of the proceedings, but he made it clear that this was for his own notes and not to be considered an official transcript. A Copy of the recording, however, was offered to both Parties, who accepted. The recordings were transmitted after the hearing via e-mail in three Windows Media Audio (WMA) files.

At the close of the hearing, the parties were offered an opportunity to file post-hearing briefs. Both parties accepted and the briefs were timely received by the Arbitrator. Thus the award, in this case, is based on the evidence and arguments presented during the hearing and on the arguments found in the briefs.

SUMMARY OF FACTS

The Employer and the Union are bound by a Collective Bargaining Agreement (CBA) for the term of January 1, 2004 to December 31, 2006 under which the instant grievance was filed.

The following is a brief summary of the events that led up to the filing of the grievance. It is based on both documentary and testimonial evidence presented during the hearing. The Parties acknowledge that the facts are generally agreed upon and not a point of controversy. What is a point of controversy is the question of whether the County acted consistent with the requirements of the CBA when it terminated the grievants employment.

*****GRIEVANT REDACTED***** was employed by DOA as a Residential Appraiser I, responsible for inspecting and valuing property in her territory for tax assignment purposes. She was initially assigned to a revaluation position, but was moved to a maintenance assignment following an investigation of her work which resulted in finding the quality and quantity unacceptable. In that role for a year, she again was determined to have not met quality standards set for the position and was informed that her work needed improvement.

In a Performance Appraisal at the end of August, 2004, the Grievant was made aware that her work was still unsatisfactory. Her work was personally reviewed by Senior Appraiser Kaldor for

the rest of the year, during which time he also offered coaching and mentoring. Despite this, no noticeable improvement on the part of the Grievant was shown.

Beginning in January, 2005, the Grievant was again moved to a maintenance position and informed of the Employer's expectations for her work, including increased accuracy in collecting data and calculating value as well as improved writing skills. Over the next three months, she was routinely counseled by Senior Appraiser Kaldor, who reviewed her work and pointed out unacceptable mistakes. Again, from the County's perspective, her work did not improve. A two-hour meeting between the Grievant, Mr. Caldor and Director Prins followed, in which the Grievant was again informed of needed corrections in the quality of her work and strategies to improve. She was notified that a meeting would be held April 19, 2005 in which her progress would be evaluated.

During the April meeting, Mr. Kaldor went over the Grievant's previous three weeks' worth of work, noting no significant change in quality. She was notified in writing two days later of her specific deficiencies and that a further meeting would be held on May 17, 2005 to again review her work for demonstrated improvement.

The May meeting again consisted of the Grievant being informed that she had made no visible progress and that her work

was still unacceptable. At this time she was warned that further deficient work could lead to termination.

On June 30, 2006, the Grievant was presented with a letter from Director Prins notifying her of her proposed termination, in part stating:

...The fact is that you are struggling in your position as a Residential Appraiser I and have for some time. It has been an ongoing department effort to provide you with special education, guidance and instruction that might help you to learn to function at an acceptable level. In spite of all the extra effort to assist you your work remains error filled and you have been incapable of improving on its quality.

(Employer's Exhibit #4)

The letter closed with notification of a meeting to be held July 9, 2006 during which the Grievant could respond to the allegations. Following this meeting, DOA was convinced that termination was appropriate, and so a letter notifying the Grievant of her termination was presented to her (Employer's Exhibit #5).

On July 8, 2005, Union Business Agent Robert McCauley filed a grievance on behalf of the Grievant, stating that:

Grievant was terminated without just cause or progressive discipline. As relief, the Union requests the grievant be returned to work and be made whole and that the discipline be stricken from the file.

(Joint Exhibit #2)

The grievance was processed through the steps of the grievance procedure; however, the Parties were ultimately unable

to resolve the matter. Therefore, the grievance was submitted to arbitration.

STATEMENT OF THE ISSUE

The parties were able to agree upon the following issue statement at hearing:

1. Did the Employer violate Article 14.1 of the CBA when it terminated the Grievant's employment effective July 6, 2005?
2. If so, what is the appropriate remedy?

APPLICABLE CONTRACT LANGUAGE

* * * * *

ARTICLE 4: RIGHTS OF MANAGEMENT

4.1 The management of the County and the direction of the work force is vested exclusively in the Employer subject to terms of this Agreement. All matters not covered or treated by the language of this Agreement may be administered for its duration by the Employer in accordance with such policy or procedures as the Employer from time to time may determine.

* * * * *

ARTICLE 14: MISCELLANEOUS

14.1 **Discipline** - The Employer shall not discipline, suspend, or discharge any non-probationary, regular employee without just cause. The Employer shall recognize the principle of progressive discipline in the administration of employee discipline. Further, the Employer shall forward a copy of any and all warning notices relating to an employee's work performance to the Union at the time of issuance to the employee.

14.1.1 In the event the Employer requires an employee to attend a meeting, for purposes of discussing an incident which may lead to suspension, demotion or termination of that employee, the employee shall be advised of the employee's right to be accompanied by a representative of the Union. If the employee desires Union representation in said matter, the

employee shall notify the Employer at that time and shall be provided a reasonable time to arrange for Union representation.

* * * * *

ARTICLE 15: GRIEVANCE PROCEDURE

* * * * *

15.3.5 STEP 5 - SHOULD THIS Committee be unable to agree, either Party may request arbitration within thirty (30) days of conclusion of STEP 4, and must specify the exact question which it wishes arbitrated. The Committee shall then select a third disinterested party to serve as an arbitrator. In the event that the Parties are unable to agree upon an arbitrator, then the arbitrator shall be selected from a panel of seven (7) arbitrators furnished by the American Arbitration Association. The arbitrator shall be selected from the list by both the Employer representative and the Union representative, each alternately striking a name from the list until only one name remains. The arbitrator, under voluntary labor arbitration rules of the Association, shall be asked to render a decision promptly and the decision of the arbitrator shall be final and binding on all Parties.

15.4 The arbitrator shall have no power to change, alter, detract from or add to the provisions of this Agreement, but shall have the power only to apply and interpret the provisions of this Agreement in reaching a decision.

15.5 The arbiter's fee and expenses and any court reporter's fee and expenses shall be borne equally by both parties. Each party shall bear the cost of any witnesses appearing on that party's behalf. Regardless of the outcome of the arbitration, each Party shall bear the cost of its own legal representation.

POSITION OF THE EMPLOYER

The Employer begins its argument by accepting the burden of proof in showing that they had just cause to terminate the Grievant; however, they place the burden to prove that the termination required previous progressive discipline solely on the shoulders of the Union. It is the Employer's main contention that the staggering amount of training, counseling and warning offered the Grievant more than suffice to prove that her discharge was based on inability to perform the work as opposed to disciplinable misconduct. Therefore, the termination was not disciplinary in nature, and hence not subject to progressive discipline.

Under the language present in the Management Rights Clause, the Employer argues that they have the exclusive right to determine the penalty for incompetent job performance. Incompetence is not directly addressed in the contract, thus the power to determine policy regarding it lies with the Employer.

Furthermore, Article 14 of the CBA deals with disciplinary matters only. Arbitral authority is cited which states that suspension is not necessarily required prior to termination, particularly when made on the grounds of incompetence. In the instant matter, the Grievant's desire to do good work is not in question, nor is her inability to provide satisfactory performance. It is clear that she was, for whatever reason,

unable to meet the expectations of her job, and it was for that reason that she was terminated. In light of this, there is no applicable requirement for a suspension prior to termination.

The Employer continues by noting that the contract's requirement of progressive discipline does not disallow the discharge currently in dispute. There are no hard and fast guidelines for the specific steps of progressive discipline to be followed, thus there are no grounds to say that the long history of counseling sessions and training was insufficient under the principle. What is more, it is uncontroversial that the Employer has the right to disregard progressive discipline and issue discharge in cases of severe misconduct, so there is precedent for such action in certain cases. In addition, the imposition of a firm series of steps comprising the progressive discipline process (as the Arbitrator would surely have to do in order to deem the Employer's actions in violation of it) would constitute a modification to the contract language; an action specifically denied the Arbitrator under the authority granted by the contract.

Incompetence, argues the Employer, has been historically considered as a deficiency substantially different from misconduct. In cases of misconduct, there is a reasonable expectation that corrective discipline will have a remedial effect. With incompetence, however, discipline is not as

effective. One cannot simply punish an incapable worker into acceptable work performance. Therefore, the principle of progressive discipline as traditionally applied would have little relevance to such cases of incompetence. Rather, the Employer took it upon itself to spend an immense amount of time and resources to provide corrective counseling and training in the hopes of providing the Grievant the necessary tools to ameliorate her performance. When she failed to do so, her termination was the only remaining option.

The Employer next turns to its defense regarding the just cause for terminating the Grievant. As she was discharged for incompetence rather than for misconduct, the focus of the just cause inquiry is on the Employer's training and counseling in the attempt to bring the Grievant's performance to an acceptable level rather than the imposition of progressive discipline. To that effect, the Employer presents four assertions.

First, the Employer notes that it has always maintained "clear, attainable, reasonable and fair expectations" (Employer's Brief, Page #30) for its Residential Appraisers I. These expectations were made clear to the Grievant in several manners, ranging from the Classification Specification made available to employees at time of hire to individual Performance Evaluations and an impressive history of personal communication in various media.

Second, the training and tools offered the Grievant were more than sufficient to ensure acceptable job performance. Upon the Employer's discovery of the Grievant's unsatisfactory performance, she was removed to a lower-stress position and offered intensive one-on-one counseling over ten months. It was clear that she understood the proper methods, even if she chose not to exercise them.

Third, the Grievant and the Union were both notified repeatedly during the process that continuing poor performance would lead to consequences including termination. Over the course of the Grievant's individual counseling sessions, she was told of the specific deficiencies in her work and informed of the steps she would need to take to bring her work up to par. Despite this, her work was continually rated as unacceptable, particularly in her error rate. In the memo issued on May 17, 2005, over a month before her discharge was issued, the Grievant was informed that "If you fail to successfully fulfill this assignment then serious consequences are going to be considered. These consequences may include the termination of your employment from this department" (Employer's Exhibit #15). The Grievant's understanding of this warning was made evident by her comments to Mr. Kaldor that she feared for her job. Indeed, over the span there were no fewer than ten documented instances where the Grievant was warned that her work was unsatisfactory.

Many of these warnings were witnessed by Union representation as well.

Fourth, the Employer gave the Grievant ample opportunity to bring her work up to standards. The Grievant was moved from a high-stress position to a less intensive job in order to facilitate her improvement, she was given personal counseling and coaching stretching over several months, and she was evaluated on an ongoing basis and offered advice on what she specifically needed to do to raise her performance to acceptable levels. Despite all this, the Grievant showed no appreciable progress, as is evidenced by the weight of exhibits entered which document her work over time. At the conclusion of the ten month period, having seen no improvement whatsoever on the part of the Grievant, the Employer determined that she was incapable of providing the level of work required of her position, and terminated her.

Having demonstrated the just cause for their termination, in their view, the Employer notes that arbitral authority states that the judgment of the arbitrator in matters of discipline should generally not be substituted for the employer's own, barring extenuating or extreme circumstances. As no such circumstances exist, the Employer states that the Grievant should not be returned to work in a position she has proven herself unable to fulfill.

Finally, the Employer denies that any mitigating factors weigh on their decision to discharge the Grievant. The Grievant was never denied her Union representation; indeed, under cited arbitral authority the *Weingarten* right to Union representation in a meeting which could lead to discharge is only considered violated if it is denied when asked for. Neither is an informational meeting necessarily a situation "leading up to discharge." The Grievant herself has testified that the incidents in question were counseling sessions, which are substantially different from disciplinary meetings.

Nor should the Grievant's prior satisfactory Performance Appraisals be seen as evidence of previous acceptable work performance. The Grievant was never "under the microscope" until the fiasco following the "Queen Ann Revalue That Never Ended," after which her Performance Appraisals were consistently unsatisfactory.

The Employer ends by denying a third mitigating factor: length of service. Arbitral authority citing service times far longer than the Grievant's are cited, none of which are considered mitigating factors in disciplinary cases. The fact of the matter is that the Grievant has proven herself fundamentally unfit for the position.

For the reasons listed above, the Employer asks that the grievance be denied, along with any and all recompense requested by the Union.

POSITION OF THE UNION

The Union begins their argument by alleging that the Employer violated both just cause and the explicit language of the contract in not submitting the Grievant to the steps of progressive discipline. They note first that under substantial arbitral authority a progressive discipline requirement is to be inferred as inherent in a contract, even if a provision to that effect is absent, and that the contract states explicitly, "The Employer shall recognize the principle of progressive discipline in the administration of employee discipline." (Joint Exhibit #1) Thus it is the Employer's burden to 1) prove that progressive discipline was applied in the instant matter and that 2) they had just cause to do so. As the Grievant was not disciplined in any progressive manner prior to her discharge, the Union claims that it is clear that the Employer violated both the contract and the implied just cause requirement in terminating her.

In discharging the Grievant in this manner, the Employer saw a substantial benefit as opposed to similar terminations. First, the Employer was absolved of the need to justify any of

the preceding levels of discipline necessary under the principle of progressive discipline. Similarly, the Grievant was denied the right to appeal these lower disciplines as they came along. Secondly, by not applying progressive discipline, the Employer failed to adequately notify the Grievant that her termination was imminent. As she was aware that progressive discipline was a contractual requirement prior to discharge, she could not know that she wouldn't receive it. The warnings of unacceptable conduct and performance were just that, warnings. Failing the implementing of disciplinary procedure as required by contract, there is nothing else sufficient to serve as official notice of potential termination.

In continuing their argument, the Union points out that the Employer cannot deny the fact that in this case it simply did not follow the wording of the contract. The Union states that the anticipated Employer arguments regarding the amount of time they spent working with the Grievant and the unsuitability of progressive discipline to her case are not justifications, but rather excuses. Nothing can obviate the fact that the Employer simply did not apply the methods required by the contract to the Grievant's dismissal. The Employer is not at liberty to pick and choose when it is bound by the contract; such an interpretation flies in the face of the spirit under which such contracts are bargained. Should the Employer wish to retain the

ability to determine when progressive discipline is appropriate, then it must do so at the bargaining table. Assuming it de facto through discipline is inappropriate.

The steps of progressive discipline, argues the Union, are a crucial notification tool in correcting unacceptable behavior. In not applying the gradually increasing levels of discipline, the Employer left the Grievant surprised when she finally did face termination. The counseling sessions and meetings provided did not preclude the imposition of progressive discipline; indeed, the discipline would have reinforced the seriousness of the warnings handed down.

The Union goes on to surmise that, in order to be persuaded by the Employer's arguments that they had no need to follow progressive discipline in the Grievant's case, the Arbitrator would have to lay aside or effectively change the language of the contract. The language states that all employees are due progressive discipline, plain and simple. To determine that the Grievant was properly terminated, the Arbitrator would have to rule that she was somehow less covered by the contract than other workers due to unintentional performance problems, with the nonsensical corollary that, had her poor performance been intentional, she would have been more fully covered by the contract.

In fact, argues the Union, the Employer's very assertion that this discharge was not disciplinary in nature is preposterous. Discipline for poor performance is, by definition, a disciplinary act. The contract itself recognizes this fact in requiring that disciplinary notices relating to work performance be issued to the Union as well as to the employee in question. Thus, such corrective measures, as undoubtedly termination can be considered, are discipline under the contract and pure common sense; therefore they need to be applied consistently with the principle of progressive discipline.

Finally, the Union contends that the Grievant's right to due process was violated as well over the course of actions leading to her termination. First among these alleged violations is the Employer's attempt to use previous incidents of poor performance for which the Grievant was not disciplined as grounds for her discharge. Arbitral authority is cited to illustrate the general interpretation that, in cases of prior infractions for which discipline was not handed down, these same infractions cannot be later used as evidence supporting the propriety of further discipline.

Having considered them unworthy of discipline once, the Employer cannot now state that these incidents provide grounds for the ultimate form of discipline. Were progressive

discipline appropriately applied at the time of these incidents, the Employer could be considered justified in admitting them in order to terminate the Grievant. As they were not, there is no reason that the Employer should now be able to declare them disciplinable offenses.

Furthermore, the reasons listed for discharge in the initial letter of termination are far fewer than those being claimed now. The Union contends that they are unable to mount a defense against a body of evidence which is continually added to, and that because they were never made aware of the full extent of the incidents which were used as grounds for the termination in question, that discharge must be overturned.

The Grievant was further denied her contractual and due process right to be informed that she could have Union representation present at meetings which could lead to her discharge (and did, in this case). The Employer now introduces each of the "counseling sessions" held with the Grievant and statements made during them as evidence of her continued poor performance, and thus for the propriety of her discharge. The Grievant was never notified that these meetings could later be used to justify termination; much less that she had the right to the presence of a Union steward during them.

The Union asks in closing that interest be added on top of any award made by the Arbitrator in their favor, computed from

the time of discharge until such a time as the award is paid, to compensate the Grievant for the value of the money she is due over the span of the grievance procedure. Arbitral authority is cited which states that "[t]here is no rational reason why interest should not be awarded on a back-pay award" (Union's Brief, Page 14), recognizing it as a reasonable part of the oft-used term "make whole."

For the reasons listed above, the Union respectfully requests that the Arbitrator uphold their grievance, and that the Grievant be reinstated to her position, her file be purged of any reference to the discharge, and that she be made whole in every way.

ANALYSIS

The Arbitrator's authority to resolve a grievance is derived from the Parties' collective bargaining agreement (CBA) and the issue that is presented to him. The pertinent language of the CBA is found in Article 14.1. The language reads:

14.1 Discipline - The Employer shall not discipline, suspend, or discharge any non-probationary, regular employee without just cause. The Employer shall recognize the principle of progressive discipline in the administration of employee discipline. Further, the Employer shall forward a copy of any and all warning notices relating to an employee's work performance to the Union at the time of issuance to the employee.

The issue before the Arbitrator is the matter of whether the Employer violated Article 14.1 when it terminated the Grievant's employment on July 6, 2005.

The Arbitrator notes that in a grievance arbitration proceeding, the employer is generally assigned the burden of proof in any matter involving the discipline or discharge of an employee. In all other matters the Union is assigned the burden of proof. As the instant grievance involves a matter of discharge, the burden lies with the Employer.

Also, this Arbitrator has regularly determined in prior decisions that where discipline or discharge relates to questionable circumstances which would create a permanent stain on the Grievant's employment record (sexual harassment, theft, etc.), to sustain the action the employer must establish by clear and convincing evidence that it had just cause to discipline or discharge the employee. The matter in the instant case involves inadequate performance. In this Arbitrator's view, questions about the adequacy of performance do not place a permanent stain on the Grievant's employment record. Therefore, the standard used, in this case, is a preponderance of evidence. In other words, to sustain the discharge, the Employer must show by a preponderance of evidence, that it had just cause to terminate the Grievant's employment.

The Union's basic contention is that the language of the contract is explicit in requiring that progressive discipline be applied before moving to discharge, and thus the Grievant's discharge without prior suspension constituted a violation of the CBA and of the just cause standard.

The Employer strongly disagrees and contends that progressive discipline is necessary only in cases of employee misconduct, not in cases of demonstrated inability to perform at acceptable levels. The Employer further posits that, even if progressive discipline is ruled as applicable in this case, the series of counseling and coaching sessions held, coupled with the documented series of warnings about potential consequences, constitute an adequate demonstration of progressive discipline prior to their termination of the Grievant.

Having carefully reviewed the evidence and arguments in the instant dispute, the Arbitrator finds himself persuaded by the Employer's arguments. Ultimately the Arbitrator concludes that the termination was made for just cause and consistent with the principle of progressive discipline. The reasoning behind this conclusion is outlined in the following analysis.

First, the Arbitrator takes particular notice of the unique language of article 14.1 which requires that the Employer "recognize the principle of progressive discipline in the administration of employee discipline" [emphasis added]. In the

Arbitrator's view, this language requires the Employer to apply the principles of progressive discipline, but does not bind the Employer to any specific set of disciplinary actions. Nothing in this language, for example, requires the Employer to suspend an employee prior to a termination.

Second, as to what exactly constitutes the principle(s) of progressive discipline, the Arbitrator provides the following extensive citation from page 14-13 of Bornstein, et, al, *Labor and Employment Arbitration*, Second Edition, Mathew Bender Publisher:

Arbitrators assume that the parties are committed to utilizing discipline progressively as a tool to bring about change in the behavior of employees, reserving termination for those guilty of serious offenses and those who have run the gamut of progressive discipline and have shown themselves to be incorrigible. For the employee, corrective discipline, through escalated penalties, opens the door to rehabilitation and the opportunity to restore his standing and continue his employment. For the employer, providing the opportunity for an employee to profit from discipline by reforming his behavior also brings benefits. The employer is able to recoup the cost invested in the training and skill development of such employees and to avoid the additional cost of hiring and training replacement personnel. Thus, there is a strong motivation to offer progressive discipline as a means of rehabilitating wayward employees before facing the often unavoidable conclusion that certain employees are incapable of taking advantage of such opportunity and must be removed from the workplace.

There is no set formula of progressive discipline steps. Usually, the steps and penalties are not negotiated between the employer and the union but are established by management unilaterally. They vary from establishment to establishment. In most enterprises there is an oral warning (often reduced to writing, for verification),

followed by a written warning, a first suspension of less than a week, a second suspension for a longer period, and finally, removal. However, the system and penalties vary from place to place and require flexibility to meet unique situations. It is important that the steps be sufficiently well known that employees are alert to the increasing economic cost and increasing risk of termination for failure to reform.

This Arbitrator, in response to the facts of the instant case, focuses his attention on three elements of the above description of progressive discipline. The first is found in the initial paragraph which describes progressive discipline as the effort to bring about change in the employee's behavior. It is well established that progressive discipline is not administered for purposes of punishment, but rather for purposes of correction or improvement. The next element is the point in the second paragraph that emphasizes the need for corrective discipline to be sufficiently flexible to meet unique situations. The final element is the need for corrective discipline to clearly communicate to the employee that the failure to correct or improve will result in the termination of employment.

Third, the Arbitrator continues his specific analysis by recognizing the distinction between employee misconduct and unacceptable performance. Both can be subjected to discipline, but there is a substantial difference, in this Arbitrator's view, as to how progressive discipline ought be applied to each.

Misconduct usually involves the willful disregard of standards and practices. Typical examples of misconduct can include violation of safety rules, insubordination, sexual harassment, personal use of a county vehicle and other similar infractions. In these cases, discipline can be applied in the hopes of raising awareness of appropriate conduct, as well as of the consequences for continued misconduct. As expressed in the above citation, the purpose of progressive discipline in cases of misconduct is to reform the behavior. Termination of employment is appropriate only when reformation proves futile.

Unacceptable performance looks directly at the work that is being performed by an employee. Typically, assessment is made in terms of timeliness, quality and quantity. Work that is too little, too late and of a poor quality is deemed unacceptable. Poor performance may reflect either employee indifference or even maliciousness. In that case the indifference and/or the maliciousness take on the characteristics of misconduct. On the other hand, poor performance may reflect a lack of the skill set necessary to effectively perform the work. In such cases, the employee may be providing a best effort, but that effort simply fails to meet the acceptable level. If this is the case, then efforts by the Employer to help the employee acquire the necessary skill set ought be far more helpful in overcoming the

deficiency then a written warning or a suspension, traditional steps in the progressive discipline sequence.

To help illustrate the difference between a problem with misconduct and a problem with unacceptable performance, the Arbitrator turns to the Civil Service Reform Act of 1978. Under the Act, a Federal employee is given 30 days to correct performance deficiencies in the event that work performance is deemed unacceptable. Failure of the employee to improve work performance during this time results in termination or a reduction of grade (Public Law 95-454-Oct 13, 1978, 92 STAT. 1133).

While this statute deals with employees in the Federal sector and the instant case involves a County employee, the Arbitrator uses it to help illustrate the difference in approach between a matter of misconduct and a problem of unacceptable performance. If a county employee, in a fit of anger, picked up a hammer and smashed the keyboard to his/her computer (malicious destruction of County property), one would hardly think that the appropriate response is to give the employee 30 days to stop this type of behavior. On the other hand, if that same employee was in good-faith struggling to achieve an acceptable quantity of work, one would hardly expect a formal act of discipline (written warning or suspension) to produce an immediate increase in the quantity of work. Providing a period of time, whether 30

days or greater, for the employee to work on overcoming the barriers to effective performance seems much more helpful and appropriate.

Fourth, the Arbitrator again notes the fact that the Employer first argues that progressive discipline does not apply in matters of unacceptable performance, and argues second that even if progressive discipline did apply, the coaching and warnings provided the Grievant were sufficient to meet the requirements of Article 14.1. Ultimately, the Arbitrator disagrees with the Employer's first argument, but concurs with the second.

The simple fact is that the Grievant's employment was terminated. And, there is nothing in the language of Article 14.1 which distinguishes between a matter of misconduct and a matter of unacceptable performance. In the Arbitrator's view, however, Article 14.1 is written in such a fashion as to allow the Employer to custom fit the progressive discipline requirements to meet the specific facts of each situation. The language does not require any specific set of actions, but rather the focus is on insuring that the principles of progressive discipline are followed. Of those principles, it seems to the Arbitrator that the most important in the instant unacceptable performance case is the requirement that the Employer's actions be corrective in nature; the Employer must

show a good-faith effort to help the employee achieve acceptable performance levels.

Fifth, in the Arbitrator's view, while the County's emphasis was on working with the Grievant to overcome her performance deficiencies, she was ultimately made well aware that the eventual consequence of continued unacceptable performance would be termination. The evidence indicates that throughout the process she was told specifically what her deficiencies were, how to correct them and what the ultimate status of her employment would be if she did not.

The Arbitrator is specifically mindful of the memo given to the Grievant on May 17, 2005 (Employer Exhibit #15). This memo spells out the Grievant's work deficiencies, the process by which the Employer has attempted to address the problem, the further help that will be provided the Grievant and specifically warns on page two of serious consequences if performance is not improved, including the possibility of "termination of your employment from this department." In the Arbitrator's view, this memo provides the necessary notice sufficient to meet the requirement of progressive discipline in a matter of unacceptable performance.

Sixth, the Arbitrator finds it clear from the testimony that the Grievant's work did not rise to an acceptable level with regard to both quantity and quality, even after nearly a

year of personalized coaching. In the instant matter, the process by which the Employer hoped to allow the Grievant to improve herself has been exhaustively documented. There is no question that extensive support was made available to the Grievant, from personal coaching to specific instruction on what was expected of her. The evidence, however, indicates that this effort produced no significant positive result. The Arbitrator is particularly mindful that neither in the evidence nor in the arguments is there any indication that the Union ever challenged the Employer's conclusion that the Grievant's performance had not risen to an acceptable level.

Seventh and finally, the Union raises a number of collateral issues which the Arbitrator desires to formally address. These issues include:

- The Union charges that the Grievant was not appropriately given her *Weingarten* rights. The evidence, however, indicates that in all of the meetings involving the Grievant with her superiors over performance issues that raised the question of possible discipline or discharge, the Grievant had Union representation. The Arbitrator also notes that *Weingarten* rights are specifically extended to those situations that involve an investigation with possible disciplinary consequences. There are no *Weingarten* rights, to this Arbitrator's knowledge, associated with training or coaching activities, even where the coaching focuses on overcoming specific performance deficiencies. This is true so long as the purpose of the meeting is remedial and not to generate evidence to support a disciplinary action.
- The Union also raises the issue that because the Grievant was not formally disciplined in the context of progressive discipline, it was denied the opportunity to file a grievance and challenge the basis of the discipline. The Arbitrator was

simply not persuaded by this argument given the fact that the Union had numerous opportunities at performance meetings, at the Loudermill hearing and during the arbitration hearing to challenge the Employer's conclusion that the Grievant's performance was substandard. As noted above, the record of these proceedings contains no evidence that the Union ever challenged the conclusion that the Grievant's performance was unacceptable.

More specifically, there was some discussion over whether the Grievant should have been suspended prior to a termination under the requirements of progressive discipline. The Arbitrator again notes the extensive citation provided above as to what constitutes progressive discipline. He emphasizes the conclusion that there is "no set formula of progressive discipline steps." More importantly, progressive discipline ought to be administered in such a fashion as to ensure the highest likelihood of successfully addressing the problem. Suspending an employee who is in good faith struggling to meet performance standards makes no sense to this Arbitrator. Suspending the employee simply removes him or her from the situation in which he or she can be working on addressing the deficiencies.

- The Union also suggests that the Grievant was disciplined inappropriately for prior deficiencies and that she was not made aware of all of the deficiencies for which the Employer was holding her accountable. The Arbitrator disagrees with this argument based on the fact that the Grievant lost her employment because she was unable to raise her work performance to an acceptable level. The Union's analysis works for a case involving misconduct where it is the specific act of misconduct that leads to discipline or discharge. The Grievant, on the other hand, was not discharged because she was late completing the work on a specific project or because of mistakes on a report. Rather, her employment was terminated because she was never able to achieve the efficiencies necessary to complete a sufficient quantity of work and her error rate was not abated.
- Finally, the Grievant, in her testimony, raised the issue of additional training. She indicated that she had requested training and was denied her request. The Arbitrator is in agreement with the Employer's rebuttal regarding the fact that the Grievant never asked for specific training. For example, the Grievant never indicated that she needed a refresher class on simple arithmetic, a program on the proper use of a tape

measure or a good training program on proofreading a report. Even in her testimony at hearing, the Grievant simply said that she had requested training. Had she proposed some specific training that made good sense and had the Employer rejected her proposal, the Arbitrator might have seen this issue substantially differently. Also, the Arbitrator is specifically aware that coaching is a very focused and personalized method of providing training. The Grievant was given substantial coaching in an effort to raise her performance. Thus she did receive a substantial amount of training in an effort to address performance deficiencies.

To summarize, based on the evidence presented, the Arbitrator concludes that the Employer made a conscious, good-faith effort to work with the Grievant to improve her performance. That effort was not successful. Ultimately, the Grievant was provided notice that if she failed to raise her performance to an acceptable level, her employment would be terminated. This notice was sufficient, in the Arbitrator's view, to meet the progressive discipline requirements of Article 14.1 of the CBA. Thus, the Employer did not violate Article 14.1 when it discharged the Grievant and the grievance must be denied.

CONCLUSION

The issue before the Arbitrator is whether the Employer's actions terminating the Grievant's employment violated the requirements of Article 14.1 of the CBA. The Arbitrator determined that the effort of the Employer to coach and counsel the Grievant over her employment deficiencies, combined with the specific warnings related to loss of employment, were sufficient

to meet the requirement that the principles of progressive discipline be "recognized." The Arbitrator additionally concluded that the Employer's evidence clearly established that the Grievant's work performance was inadequate for a Residential Appraiser I and that even with the coaching provided by the County she was not able to raise her performance to an acceptable level. Thus the Employer had just cause to discharge the Grievant. An award will be entered consistent with these findings and the conclusion.

IN THE MATTER OF THE ARBITRATION)	ARBITRATOR'S
)	
BETWEEN)	AWARD
)	
STATE OF WASHINGTON)	
KING COUNTY)	
)	
"THE EMPLOYER" OR "THE COMPANY")	
)	
AND)	
)	
INTERNATIONAL BROTHERHOOD OF)	
TEAMSTERS LOCAL UNION NO. 763)	
)	***GRIEVANT REDACTED***
"THE UNION")	Termination Grievance

After careful consideration of all oral and written arguments and evidence, and for the reasons set forth in the Opinion that accompanies this Award, it is awarded that:

1. The Employer was not in violation of Article 14.1 of the CBA when it terminated the Grievant.
2. The grievance is denied.
3. Per the requirements of Article 15.5 of the CBA, the Arbitrator assigns his fees 50% to the Union and 50% to the Employer.

Respectfully submitted on this the 5th day of January, 2006
by,

Timothy D.W. Williams
Arbitrator