
ARBITRATION IN THE MATTER

Between

The County of Timkin

and

The Timkin Employees Association

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Grievant: Gerlinda Waters

Issues: Discharge

Judy A. Gust, Arbitrator

PRELIMINARY STATEMENT

The hearing in this matter was held on March 28-29, 2001, at the County of Timkin, CAO Conference Room, 206 Civic Center Dr, Anytown, California. The parties appeared through their designated representatives and presented evidence through exhibits and testimony of their witnesses who were subject to cross-examination, for a final and binding determination by the arbitrator. The record of this case was closed on May 15, 2001 upon receipt by the arbitrator of the parties' post hearing briefs.

APPEARANCES & WITNESSES

For the Association

Derek K. Dunn Counsel, Timkin County Employees Association
Linda Guthrie Adm. Rep., Timkin County Employees Association
Gerlinda Waters Grievant
Judie White Former Information Processing Specialist

For the County

Kathy Drake Deputy County Counsel
Letty Lind HR Rep, Public Facilities Department
Bill Lane Employee Relations Manager, County of Timkin
Neil M. Bomberg Former Chief of Administrative Services
Rita D. Julian Former Office Supervisor
Cami Robertson Former Office Supervisor
Deidre Givens Sr. Office Supervisor
Ruthann M. Dirk Former Office Technician
Alice Cardoso Sr. Staff Analyst
Roger Mirth Staff Assistant
Patrice Martindale Staff Analyst
Gabriel T. Scott Former Management Services Manager

Rusty Richardson. Human Resources Analyst

BACKGROUND AND FACTS

Gerlinda Waters was employed by the County of Timkin on September 1, 1988 as an Information Processing Specialist¹. (Un. Br. pp. 2, Un. Ex. 5) The Information Processing Technician position duties include producing a variety of materials such as letters, memos, reports, manuals, policies and procedures, financial and statistical documents, charts and graphs; reviewing and proofreading materials; ensuring signature readiness of documents; keyboarding from rough draft or a variety of source documents; and performing general office duties as required. The position description states that an employee in the position must produce a variety of difficult and complex materials requiring the application of advanced keyboarding and correction skills with subject matter knowledge in the production of finished products. The class is distinguished from the Office Technician by the level of independence exercised and the complexity and impact of the work product.(Co. Ex. 1, pp. 181-182)

Ms. Waters testified that in 1988 she was hired by and worked directly for Earl Garth, Chief of Administrative Services within the Environmental Management Agency (EMA). Only one other person worked with Waters and Garth and that person was assigned duties in the warehouse. Waters' duties at that time consisted primarily of logging subpoenas into a Lotus file, running subpoena reports, maintaining the equipment inventory, some typing and filing, and assisting with the warehouse duties. (Gr. Testimony) Under Mr. Garth's supervision, Waters received satisfactory and above standard performance ratings. (Un. Ex. 3, 4, 5a) On the next two performance evaluations Waters received satisfactory ratings -- one from Susie Takagama in 1993 and the other from Rita Julan in February of 1994. (Un. Ex. 1, 2) After the 1994 bankruptcy, the County reorganized and Waters was assigned as an Information Processing Technician (IPT) to the Public Facilities Department (PFRD). (Co. Br. pp. 1)

Later in 1994, Waters began experiencing performance difficulties and received her first disciplinary action, a written reprimand, on August 25, 1994 for rude, disruptive behavior, below standard quality and quantity production, and low proficiency in the DEC computer system. (Co. Ex. 1, pp. 36) Thereafter, Waters received a number of disciplinary actions and substandard performance evaluations for substandard quantity and quality of work, failure to follow supervisory directives, and improvement needed in personal relations (2/21/95 Written Reprimand, 3/3/95 Performance Evaluation, 6/14/96 Written Reprimand, 10/4/96 Written Reprimand, 11/18/96 Two-day Suspension, 2/28/97 Performance Evaluation, 8/7/97 Five-day Suspension, 4/23/98 Performance Evaluation, 12/7/98 Ten-day Suspension). (Co. Ex. 1, pp. 039, 042, 045, 052, 087, 165, 023, 021, 010)

In 1995 and 1996, Ms. Waters was temporarily assigned outside of the Information Processing Center to the Redevelopment Department for several months. She received a satisfactory rating from Mr. Miller, her supervisor at Redevelopment; however, it was noted that improvement was needed in her punctuation and spelling. (Co. Ex. 1, pp. 043; Co. Ex. 3, pp. 026-033) Waters' received a performance evaluation in March, 1996, from Cami Robertson that

¹ The job title was changed in 1993 to Information Processing Technician (IPT).

rated all categories as standard and, in the narrative section, described some performance deficiencies including lack of proficiency on the DEC system, difficulty completing assignments in a timely manner, and improvement needed in grammar, spelling, punctuation and proofreading. (Co. Ex. 1, pp. 46)

From June 1997 until January 1998, Waters was assigned to the Copy Center within PFRD and was off work intermittently on Workers' Compensation temporary disability. Upon Waters' return in January 1998, she was assigned to Special Services and reported directly to the Chief of Special Services, Alice Cardoso. (Co. Ex. 1, pp. 018) Cardoso testified that she gave Waters an exclusive assignment to convert and revise policies and procedures. Because of the uniqueness of the project, there were no quantity standards established. (Co. Ex. 1, pp. 18) In that assignment, Waters had full responsibility for making some consistent changes such as replacing references to the "agency" with references to the new department title as well as converting the documents into MS Word, formatting the policies and making policy revisions. After a few weeks, Cardoso testified that some of the same errors were occurring repeatedly. (Cardoso Testimony) In April 1998, Waters received her annual evaluation wherein the quantity of her work was rated as "Standard", the quality of her work rated "Unsatisfactory", and the other four categories of performance measurement, Work Habits, Personal Relations, Adaptability and Progress were rated "Improvement Needed". The evaluation noted that between 2/11/98 and 3/31/98, sixty-five percent (65%) of Waters' assignments were returned due to errors, many of which were attributable to a lack of proofreading and failure to refer to department routing slips for correct organizational titles. (Co. Ex. 1, pp. 019) Waters was suspended in December 1998 for ten days for continued unacceptable work performance, failure to follow directives and instructions and failure to demonstrate sustained improvement following previous disciplinary action. (Co. Ex. 1, pp. 010) Waters filed a rebuttal to the Notice of Intent to Suspend that preceded the ten-day suspension. (Co. Ex. 011)

After Waters returned from the December 1998 suspension, she was counseled again on several occasions about the quality of her work and was advised to register for a proofreading class offered through the County. Waters was also counseled to not take notes on the activities of other County employees. On March 4, 1999 Waters was observed again taking notes on County staff's conversation. The Notice of Intent to Discharge was issued on April 8, 1999. (Co. Ex. 1, pp. 003) Waters responded orally to the Notice in a meeting on April 15, 1999. The Notice of Discharge was issued on April 20, 1999 with an effective date of April 21, 1999. The grounds for the discharge included: (1) continued unacceptable work performance after receiving prior discipline, (2) continued failure to follow supervisory directives and instructions after receiving prior discipline, and (3) continued failure to remediate after previous disciplinary action. (Co. Ex. 1, pp. 001)

ISSUE

The parties stipulated to the following issue:

Was Gerlinda Waters discharged for reasonable cause? If the answer is "no", then to what remedy is she entitled?

RELEVANT CONTRACT PROVISIONS

Article VIII, Section 5. Discharge and Right of Appeal

- A. *No regular or limited-term regular employee shall be discharged except for reasonable cause. No proposed discharge shall be effected unless approved by the Personnel Director except for discharges imposed by the Chief Executive Officer.*

POSITION OF THE COUNTY

The County relied on the Grievant's history of poor performance and her attitude that tested the patience of her supervisors and peers to support its decision to discharge Waters. Waters did not accept suggestions and directives for improvement and failed to act upon them. She was in massive denial of her poor performance and insisted that everyone was wrong but her. At the time of her discharge, there had been a series of reprimands, poor evaluations and suspensions. One suspension occurred just months before. Nonetheless, her work performance simply remained substandard without any realistic sign of improvement. (Co. Br. pp. 24)

The Notice of Intent to Discharge stated that after the December, 1998 suspension, the Grievant's work product continued to be substandard and reflected the same kinds of errors and omissions, that an inordinate amount of staff time was spent working with Grievant on a one-to-one basis, and that from December 22, 1998 through her last day of work, sixty-nine (69%) of the policies and procedures assigned to the Grievant were returned with errors. The simple task of sorting receipts and interfiling them took Grievant four hours rather than the 45 minutes in which another employee completed a similar task. The Grievant was urged to take a proofreading class and failed to do so. (Co. Br. pp. 2) She also failed to satisfactorily perform basic computer functions.

The Notice of Intent to Discharge also repeated the grounds of failure to follow supervisorial directives and instructions, and failure to improve after prior discipline. The Grievant was found to be taking notes twice the morning of March 4, 1999, on staff's comings and goings in the office. The Grievant had been previously counseled about taking notes on staff. Additionally, the Grievant exhibited defiant behavior to Ms. Cardoso, her supervisor, and engaged in personal verbal insults of Ms. Cardoso in front of staff on her last day in the workplace. (Co. Br. pp. 3)

In summary, the County argued that at the time of the Grievant's discharge, she had a substandard work record despite a series of discussions, memoranda, counseling and warnings that had not been heeded by her. She had a record of repeated notices that she must improve, which did not result in improvement. She also had a record of refusing directives, refusing to admit errors, making constant excuses, and she had made no progress in becoming a standard employee. (Co. Br. pp. 3)

According to the County, whether Grievant could not or would not perform to standard expectations, there clearly was no reasonable basis for anyone to believe, at the time of her discharge, that she would be performing IPT job duties satisfactorily in the future. (Co. Br. pp. 6)

The County referenced several other arbitral decisions related to unsatisfactory job performance. Although other arbitral awards are not binding unless such an agreement is set forth in the parties' Agreement, awards are sometimes instructive in the reasoning applied by a party or another arbitrator. In the three cases cited, the requirement for satisfactory job performance was at issue and acknowledged as a reasonable expectation by the employer. Two of the cases involved long-term employees (13 years and 16 years) and had evidence that the employees received prior discipline and warnings concerning their performance. In Ms. Waters' case, the County gave her abundant notice of the need for improvement and an opportunity to improve. The County tried different supervisors and different work tasks. Nothing made a difference. The Grievant appeared committed to doing things her way, or more accurately, not doing them as directed and required by her supervisors and the County. (Co. Br. pps. 25-26)

The County argued that it acted patiently and with great deliberation in spending years trying to salvage the Grievant as an employee through placing her in different work environments, with different managers and peers, and by changing her assignments. The Grievant failed to become a standard employee. Accordingly, the County of Timkin submitted that there was just cause for Grievant's dismissal and requested that the discharge be sustained. (Co. Br. pp. 30)

POSITION OF THE ASSOCIATION

The Association asserted that there was no cause for Ms. Water's discharge and that her job performance was admirable when considering the environment that she was forced to work in. Further, the Association's position is that Waters was terminated because she was personally disliked by an entrenched supervisorial clique that, with the tacit support of top level management, embarked upon a concerted campaign to force her separation from County service. (Un. Br. pps. 2-3)

Any shortcomings the County alludes to were manufactured as part of its plan to terminate Waters. Additionally, according to the Association, the County failed to provide Waters with adequate training, tolerated and encouraged the hostile work environment to which she was subjected, imposed an unreasonable workload, and refused to abide by her legitimate work restrictions. (Un. Br. pp. 2)

The Association's argument followed the seven questions often asked to determine whether or not just cause existed for the discipline. Normally a negative response to even one of the questions indicates that sufficient cause does not exist. In general, a negative response,

". . . means that the employer's disciplinary decision contained one or more elements of arbitrary, capricious, unreasonable or discriminatory

action to such an extent that said decision constituted an abuse of discretion warranting the arbitrator to substitute his [her] judgment for that of the employer." (Hill and Sinicropi, p. 43) (Un. Br. pp. 4)

The first question is answered in the affirmative: The County *did* give Gerlinda Waters foreknowledge of possible disciplinary consequences. From 1994 forward the County consistently attempted to "beat down" Waters by repeatedly reminding her that she was a substandard employee and that she failed to follow supervisory directives. The County issued a series of biased and undeserved poor performance evaluations, negative memoranda, written reprimands, suspensions and a verbal onslaught of criticism and derision. The County clearly informed Waters that her alleged substandard performance and failure to follow supervisory directives would result in continuously escalating discipline, including discharge, but in doing so it abused its responsibility to treat her in a similar manner to other employees and its obligation to evaluate her performance fairly and impartially. (Un. Br. pp. 4)

The Association agreed that standard or better performance from an employee is reasonably related to proper employer operations and reasonable management expectations. It made a distinction between "pure" incompetence, which is inherent inadequacy or ineptitude in performance, and poor performance that includes intentional and negligent misconduct as noted by Brand in Discipline and Discharge in Arbitration, p. 134. The Association argued that Ms. Waters' performance never approached "pure" incompetence, nor did it include intentional or negligent misconduct.

It is undisputed that Waters gave the County standard or better performance for more than six years. Then in 1995, concurrent with her workplace injury and subsequent assignment to new supervision, her performance became substandard in the eyes of a series of supervisors. Standard or better evaluation of employee performance is just as related to reasonable management expectations as is standard or better employee performance. The Association asserts that Ms. Waters' supervisors did not meet reasonable expectations in this case. (Un. Br. pp. 5)

It is the Association's belief that the County made little effort to determine whether Waters' work performance was substandard. Waters' supervisors were inexperienced and were more interested in substantiating the opinions than had already formed about her. Waters was an irritation to them because she firmly asserted her rights to privacy, reasonable accommodation and to a safe and supportive workplace. (Un. Br. pp. 5) Her supervisors managed from the top down and consistently refused to accommodate her work restrictions and intentionally gave her assignments that aggravated her injuries. Although Waters' supervisors devoted an extraordinary amount of effort in her supervision, the goal was to ensure her work performance *appeared* to be substandard rather than determining *whether* her work performance was substandard. (Un. Br. pp. 6)

The next question to be answered is whether the County investigated fairly and objectively. Again, the Association's position was that the succession of supervisors found her too idiosyncratic, too injured, and not sufficiently "social" to fit their composite of an acceptable employee. These supervisors formed a mutual support group with one, consistent objective – to

force Waters to resign or, in the event she would not succumb, to accumulate enough damaging "evidence", however specious, to justify her discharge.

As evidence of the County's intention, the Association argued that the performance of any employee will comparatively suffer when work assignments are given that are more intensive, more time-consuming, and less clear than those given to other employees of similar ability and experience. Waters' supervisors failed to accommodate her work restrictions and assigned her work that exacerbated her injury and was intentionally designed to result in substandard performance and cause her great physical pain. (Un. Br. pps. 6-7) Further, Waters was pulled out of training designed to help her learn new technology and was refused a work schedule adjustment that would enable Waters to pursue her educational objectives. She was criticized by Cami Robertson for not attending "staff meetings" that were thinly disguised birthday, shower and holiday parties at which Waters' was made fun of and where Waters felt uncomfortable and unwelcome. Her supervisors talked about her and laughed at her behind her back and on numerous occasions papers and other objects, including her ten-year County service pin, were thrown at or near her by her supervisors. In such an environment, fairness and objectivity were impossible. (Un. Br. pp. 7)

The final decision maker with regard to Waters' discharge, Gabriel Scott, did not receive substantial evidence of poor work performance. Rather, he received substantial documentation taken out of context, jaded opinions and unsupported judgments about Waters' performance. When Waters was assigned to an area outside the particular supervisory clique that was out to get her, she consistently met and often exceeded the expectations of those who supervised her work. (Co. Br. pp. 7)

The next question is whether or not the County applied its rules, orders and penalties even-handedly and without discrimination to all employees. The Association argued that from 1995 on, the expectations placed on Waters were much greater than those placed on her co-workers and that those expectations and Waters' work assignments consistently disregarded her injuries and illnesses and her resulting work restrictions.

Following Waters' first surgery, she was reassigned to the Word Processing Department where the typing demands upon her were regularly excessive, both in terms of physical endurance and degree of difficulty. Unlike other employees in her department, she was unfairly required to supply doctor's notes for absences of less than one month after her return to work. (Un. Br. pp. 8)

After her second surgery, Waters returned to work and was assigned to the copier room. Her supervisor ignored her restrictions that she not use her left hand or arm at all. Waters was required to lift reams of paper to load a large copier, copy large projects requiring continuous use of her left hand and arm, and utilize a large stapler that required both hands to operate. Waters' supervisor ignored Waters' repeated protestations that her job assignments violated her work restrictions until Waters was forced to contact Career Works and was once again placed on medical leave. (Un. Br. pp. 8)

When Waters returned from this leave, she was assigned an enormous typing job, more than twice the workload of any other IPT at the time. She was to retype more than 700 departmental policies and procedures, an assignment that should properly have been given to three experienced IPTs. Further, policies and procedures have unique formats and input requirements and are drafted in highly specialized, often legalistic language. Waters lacked any experience typing policies and procedures while other IPTs with such experience were available to handle the assignment. It was this assignment that her supervisors manipulated to ultimately trigger Waters' discharge.

Waters admitted that she did make some mistakes on various documents just as any other IPT makes mistakes. She further admitted that she might have made more mistakes on this particular assignment than she normally would have. However, she attributed many of those mistakes to the enormity of the assignment, her unfamiliarity with the specialized language and format of policies and procedures, the complete lack of support from her supervisors, the fact that her injured hand and arm caused her almost constant pain, and the fact that instructions given to her were often unclear and contradictory. (Un. Br. pps. 9-10)

Many of the mistakes alleged by the County were made because Waters followed the directions of her supervisors. Waters was specifically instructed not to make changes to policy and procedure language that had not previously been corrected by hand, yet at the same time she was criticized for not correcting grammatical or spelling errors that had not been hand corrected. She was often given multiple versions of the same policy or procedure, and then was criticized for retyping the wrong version. She was repeatedly given copies to retype that were not decipherable either because of inferior print quality or poorly handwritten insertions. She was criticized if she asked for clarification or, if she made her best guess, was then criticized for an incorrect work product. (Un. Br. pp. 10)

Finally, the degree of discipline imposed was not reasonably related to the seriousness of the offense and Ms. Waters' record of service with the County. Ms. Waters had been a consistently successful employee with the County prior to her first workplace injury. Her disciplinary record occurred subsequent to her injury and was imposed by the same supervisory sorority that testified against her at the arbitration hearing. Waters is a loyal and dedicated County employee who takes pride in the quality of her job performance and has consistently served the County with a high degree of competence and integrity. The proposed discipline is excessive in light of all of the circumstances set forth above. (Un. Br. pps. 10-11)

In summary, the Association argued that had Ms. Waters been supervised by reasonable, competent supervisors during her last five years with the County, she would still be employed as an IPT. Rather than being encouraged to overcome her injuries and illnesses and supported in her career development, her supervisors determined to undermine her efforts, destroy her resolve, and publicly humiliate her. The County's conduct towards Ms. Waters was consistently unfair, unsupportive, and inexcusable. The Association asked that Gerlinda Waters be restored to her position as an Information Processing Technician with full back pay and benefits. (Un. Br. pp. 11)

DISCUSSION

Job performance cases are among the most difficult to decide. Performance, particularly in a service environment, is much more subjective than in a manufacturing environment. Despite management's attempts to quantify the quality and quantity of performance, there always remains subjectivity in the overall assessment of an employee's performance. There is no exception to this general principle in Ms. Waters' case.

After considerable counseling, disciplinary action and reassignments, the County was faced with another subjective decision -- whether further attempts to bring Waters' performance up to standard would be likely to produce satisfactory performance on her part. Obviously, the County's decision was that further efforts would be futile. This arbitrator must now decide whether the County's decision was reasonable under all of the circumstances and sufficient to find reasonable cause to sustain the discharge of Ms. Waters.

When determining reasonableness, one must look both to the actions of management and the actions of the employee. One would hope to find a demonstration by both parties of a good faith effort to correct and/or improve whatever deficiencies existed. The responsibility for a productive, effective and harmonious working environment rests *primarily* with management; however, employees also bear *some responsibility* for being able and willing to perform their respective jobs proficiently, to communicate and problem-solve reasonably, and to follow the reasonable directives of their supervisors unless the directive would cause one to break the law or cause an immediate threat to one's health and/or safety.

The County has the burden of proving that reasonable cause existed for the dismissal of Ms. Waters. It charged Waters with unacceptable work performance, failure to follow supervisory directives and instructions, and failure to remediate, all after receiving prior discipline on the same or similar issues. The record is clear that Waters had received continual notices of performance deficiencies beginning in 1994 and continual notice that she failed to follow supervisory directives and instructions. The last charge, failure to remediate, can be inferred from the several occasions on which Waters' performance deficiencies were brought to her attention and continued, necessitating further disciplinary action and, in the County's view, ultimately dismissal.

In this case, there is a lengthy history of mutual dissatisfaction between Waters and her supervision. Accordingly, there are two quite opposite views of the causes and effects of Waters' performance and behavior. Although the record is clear that Waters received continual notice and warning about what the County considered to be unacceptable work performance and behavior, the Association argued several mitigating circumstances.

The County's view of Waters' performance will be discussed first. The County focused on the IPT job description and its requirements. The job description clearly sets forth an IPT's responsibility for typing or word processing a variety of important and complex documents requiring independence of action in producing finished products. It requires an IPT to format correctly, proofread, and correct spelling, grammar, justification, pagination, hyphenation,

sentence structure and word usage errors in addition to performing general office duties. (Co. Ex. 1, pp. 181) The record contains considerable documentary evidence of Waters' errors in both typing and filing assignments. Waters testified that she did make some errors but pointed out that everyone made errors. She also suggested in her rebuttals to her many disciplinary actions and performance evaluations that she makes no more errors than other IPTs. Unfortunately, no records of other IPTs were produced with which to compare Waters' performance or, as she also alleges, the difficulty of her assignments as compared to others. Other than Ms. Waters' assertions, there was no evidence that the error rate of other IPTs was similar to that of Ms. Waters and no evidence of whether or not other IPTs received discipline for performance or behavior similar to that of Ms. Waters. Although Ms. Waters' belief that her performance was satisfactory is not questioned, documentary evidence introduced at the hearing contradicts her belief. Further, Waters testified that she filed grievances on her prior disciplinary actions and, with the exception of one suspension that was reduced from eight days to five days, the prior discipline was sustained and the performance evaluations remained in her record. Where discipline has been sustained in the past, particularly following an appeal, such discipline may be relied upon as to the accuracy of the charges set forth.

Although there was no evidence of an identified quality standard regarding error rates, there was evidence that Waters was given notice some four weeks into the policy and procedure (P&P) assignment prior to her discharge that an error rate of 32% was not acceptable. (Co. Ex. 1, pp. 022) Further, she was counseled on more than one occasion prior to and during the P&P assignment to proofread her work before turning it in as completed work. Many of the errors that were noted could have and should have been caught and corrected by adequate proofreading. In fact, Ms. Waters was counseled to take a proofreading class that was offered through the County. She did not take the class or make any effort to enroll in it. There was evidence from the County that she informed her supervisors that she could not afford to take the class². When Cardoso offered Waters tuition reimbursement, Waters then stated that she didn't have a phone available to make the call to register for the class. (Co. Ex. 1, pps. 006, 277) At hearing, Waters testified that she did not take the class because it would take her away from her regular duties and she was fearful of receiving more criticism. On cross-examination, she was somewhat evasive in her response and testified that she didn't have any particular reason for not taking the class. Thus, Ms. Waters cannot be found to have acknowledged the need for her to improve her proofreading skills. Her failure to make any effort to help herself is noted and not commensurate with an employee who is seeking to improve her performance.

Neither the Association nor Ms. Waters deny that she made errors. What they offer is a series of reasons why she should not be held accountable for those errors. Two of those reasons were discussed in Waters' testimony. She testified that some of the typing errors were a result of errors on the original documents or changes by the originator after the document had been completed. (Co. Ex. 2, pps.71-76, 120-124) Of the two examples pointed out by the Association during the hearing, one was a spacing error on the original from which Waters typed. The second appeared to be a title change to "Director" that was not noted on the original from which Waters typed. However, Waters had been instructed to correct any errors on the old documents (i.e., the spacing error). She was also directed to make some changes for consistency throughout all of the policies and procedures such as formatting, changing the EMA title to PFRD and

² Testimony at the hearing revealed that these County-sponsored classes cost less than \$5.00.

changing former position titles to the new titles listed on the routing sheets. (Co. Ex. 1, pps. 19, 22) To this Ms. Waters testified that there were different versions of the routing sheets and that the errors discussed with her on one occasion resulted from her using the wrong routing sheet. Waters's supervisors were aware of changes/revisions made after the document was typed and indicated that those types of changes were not included in her error rate. (Co. Ex. 1, pp. 014) Thus, Ms. Waters' implication that the errors were not her fault are without merit in this example.

The County's second charge is that Waters failed to follow supervisory directives and instructions. Waters' record indicated that she failed in the past to attend staff meetings as directed and failed to access her email account regularly when she was reporting to Cami Robertson. (Co. Ex. 1, pps. 045, 052) Under Cardoso's supervision, Waters' supervisor at the time of her discharge, Waters was charged again with ignoring supervisory directives and instructions regarding her assignment, her use of County time for personal business (reading school texts, applying for financial aid), and the directive to refrain from taking notes on the activities of her coworkers. (Co. Ex. 1, pps. 003-009, 012-015) Again Ms. Water's rebuts these charges. (Un. Ex. 7, 8, 9; Co. Ex. 1, pps. 011a-c) The bases for these denials include: legitimate excuses, according to Waters, for failure to attend staff meetings; that she did not use the DEC system on a daily basis and therefore forgot or was too busy to access her email account on occasion; the burden of two email accounts to access while others only had one account; incorrect instructions and/or directives from supervisors; and errors in original policies and procedures that were given to her for revision. Her rebuttal to the more recent charges involving directives from Alice Cardoso denied that she was writing notes about coworkers on October 18, 1998, that she was doing homework, or that she was completing financial aid papers on November 3, 1998. (Co. Ex. 1, pp. 11-b) As to the consistent changes in format, titling, etc. that Waters was expected to make, she relied in her rebuttal on information received from the originators that "if it wasn't marked, don't change it". (Co. Ex. 1, pp. 011-c) Obviously this was contradictory to the directive given by her supervisor to change some items on each P&P to make it consistent with other P&Ps. Although Waters denied writing notes on anyone on October 18, 1998, there is clear evidence that she did so on March 4, 1999. Additionally, she was resistant to turning over the note and untruthful about having it when questioned by her supervisor, Cardoso (Co. Ex. 1, pp. 180) What is becoming evident is a pattern of denial of responsibility and multiple excuses by Waters concerning her performance and her behavior.

From the Association's point of view, Waters' errors and behavior were caused by a number of other factors: that she was not provided adequate training; that she had an unreasonable workload; that the work restrictions imposed as a result of her work-incurred injury were ignored causing her to work with severe pain that impacted her ability to produce accurate and timely work, and that she was subjected to a hostile work environment characterized by ridicule, harassment and heckling primarily from management. Let us explore each of those premises.

The Association pointed out that Ms. Waters' work record of her first five plus years of County employment under the supervision of Mr. Garth and her temporary assignments to Redevelopment and Flood Control demonstrated that she was a satisfactory to above standard employee. In fact, the evaluation on her temporary assignments was mixed with recommendations for improvement in accuracy and spelling. (Co. Ex. 3, pps. 026-033). It must

be noted here that the first several years of Waters' employment she worked directly with her immediate supervisor, Mr. Garth, performing "routine tasks that were mundane and repetitive". (Un. Ex. 9, last page, "To Whom It May Concern" letter dated 8/31/94 from Earl W. Garth) Further, Waters was given goals to expand her knowledge of computer theory by taking additional courses offered by the County beginning with her first evaluation in February 1989. (Un. Ex. 5A) In 1993, her evaluation specifically noted that she was to work through the DEC Automated Office System Manuals and the computer based training to become proficient on the DEC system. This evaluation was prepared by Susie Takaga, a whom Ms. Waters testified was "okay" as a supervisor. These suggestions to gain proficiency in the DEC system continued in subsequent performance evaluations and under different supervisors. There was no evidence that Waters, herself, ever took any action to increase her proficiency on the DEC system. She then faults her supervisors for failing to provide technology training in 1995 and later. One must conclude that Waters had ample notice of the need for her to improve her proficiency on the DEC system and failed to take action to maintain or improve her skills on required equipment. As noted by the Association, Waters "firmly asserted her rights to . . . a safe and supportive workplace." It is interesting to note that Waters did not assert her "right" for DEC training that was critical to her successful performance. She was specifically given notice of this requirement in her March 1995 evaluation. (Co. Ex. 1, pp. 044)

Another mitigating factor referenced by the Association is that Waters was subjected to an unreasonable workload. No evidence was presented to support its assertion that three people should properly have been hired to do the P&P job and that this workload was more than twice that of any other IPTs at the time. What was in evidence is that there were no quantity standards established for the P&P assignment. (Co. Ex. pp. 018) Criticism of Waters' use of time arose primarily from the number of errors and times that documents had to be returned for revision and the number of errors in performing ancillary tasks such as filing policies and procedures. (Co. Ex. 1, pps. 005, 006, 013, 014) The Association's claim that the P&Ps had unique formats and had highly specialized language with which Waters was unfamiliar is unpersuasive. Once the P&P format was set up, it became routine to draft or edit further in the format. In reviewing the P&Ps offered as evidence to demonstrate Waters' errors, there was nothing unusual or highly specialized about them. The P&Ps are policy and procedure statements designed to guide employees and/or the public in various aspects of the department's operations. Nevertheless, the IPT job description requires the ability to produce a variety of complex documents and the P&P assignment is found to be within the scope of Waters' duties.

The next mitigating factor, according to the Association, was the County's failure to adhere to Waters' work restrictions as a result of her work-incurred injury. Again, no specific evidence was offered that the County violated her work restrictions. When Waters returned from her second surgery in 1997, she was assigned to the Copy Center for approximately one month (5/6/97 – 6/4/97) during which time she took one week of vacation (5/19/97 – 5/26/97). (Co. Ex. 1, pp. 019; Co. Ex. 3, pp. 034) Her medical restrictions were acknowledged in a May 6, 1997 memorandum from Cami Robertson. (Co. Ex. 3, pp. 082) When it was discovered that she could not lift the reams of paper to load the copy machine, she was placed on temporary disability again and returned to work on January 4, 1998. (Co. Ex. 1, pp. 018) At that time, Waters was assigned to Alice Cardoso in the Special Services section. A work station evaluation was ordered for Waters and she was moved to the 8th Floor on February 19, 1998, and given an

ergonomic keyboard. Waters objected to the keyboard on February 24th and the ergonomic keyboard was replaced with a standard keyboard on March 2, 1998. (Co. Ex. 3, pp. 038) Waters' final restrictions of January 5, 1998, were: no repetitive lifting, carrying, pulling or pushing more than five pounds with her left arm; keyboarding limited to six hours per day, approximately 45 minutes per hour, and no prolonged or repetitive gripping with the left hand. (Un. Ex. 11) Again, in the P&P assignment at that time, Waters testified that she did limit her typing to 45 minutes per hour. She could perform proofreading during the non-keyboarding time or other duties such as filing, organizing her work area, etc. Because there were no quantity standards in the P&P assignment, she was not inhibited from adhering to this schedule. There was no evidence that her filing tasks violated these restrictions although she was criticized for taking an inordinate amount of time with filing duties. (Co. Ex. 1, pp. 006) There was no evidence beyond Waters' assertion that any medical restrictions were ignored.

The last mitigating factor offered by the Association was that Waters was subjected to a hostile work environment characterized by ridicule, harassment and heckling primarily from management. This factor is the most subjective of all the mitigating factors. There is no doubt that Ms. Waters was of the belief that "someone was out to get her". Both Waters and her friend, Judie White testified that someone in higher level management was orchestrating this abuse of Waters to either force her to resign or to lead to her termination. It is likely that this belief influenced Waters' attitude in a negative fashion; however, again there was no credible evidence presented that this was the case. It is apparent that County management was frustrated with Waters' performance and behavior. Additionally, it is more likely than not that various supervisors may have treated Waters with less than an appropriate level of respect and/or support on occasion. The proverbial question is which came first – supervisory disrespect or employee disrespect. And the dispositive factor is whose behavior was the more reasonable under all of the given circumstances.

It is important to keep in mind that Waters is the one constant throughout this situation. Although the Association advanced a theory of supervisory collusion among some three to four supervisors, there is no evidence to support that allegation, particularly when viewed in light of the actual performance deficiencies and repetitive behavior found in Waters' record.

Waters testified that when she worked for Rita Julan in the Copy Center between 1993 and 1994, that she got along with her. Waters also testified that she agreed with the evaluation prepared by Julan in February 1994 that rated her as standard in all categories. (Un. Ex. 1) The first form of discipline that Waters received was then issued by Rita Julan in August, 1994. Waters' rebuttal to that reprimand not only denied any responsibility for any of the issues raised in the reprimand, but the tone of her rebuttal is sarcastic and accusatory; e.g. "as I value my time not like some people I am aware of in the center. Apparently they have idle time on their hands". Further, Waters went on to attack other employees and raised her own grievance about the department's failure to approve vacation time so that she could attend a class at the local college. (Un. Ex.9) Accordingly, it appears that Ms. Waters reaction to the very first criticism she received was unresponsive to the issues being addressed.

A pattern of themes was noted in the series of performance evaluations, memoranda and disciplinary actions given to Waters. For example, Waters was disciplined on more than one

occasion for attempting to eavesdrop on supervisory discussions. Waters denied ever doing this and accused a couple of different employees of having their own motivation for making such false reports. (Un. Ex. 9) Given the variance in time of the alleged incidents and the reports coming from more than one person, it is found that Waters had the greater motivation for being untruthful about these reports. Eavesdropping, or more accurately attempting to eavesdrop, on one's supervisor(s) does not demonstrate maturity or respectful behavior. Such behavior is found to have occurred and was both unnecessary and unreasonable under the circumstances.

In many of Waters' rebuttals, she also exhibited her beliefs that management was not behaving or performing appropriately. By way of example, Waters accused Rita Julan of excessive idle chitchatting, of excessive questioning about her work, of interrupting her work, of being dishonest, showing favoritism and rude, disrespectful behavior. (Un. Ex. 9, Rebuttal of 3/4/95 evaluation) Waters complained of her assignment in the Redevelopment Department when another Secretary II was available, of doing Secretary II work without a salary increase and then having a conference about that assignment, that Robertson does not have her vehicle available every day, that Robertson leaves early and that Robertson invaded her privacy by going into Waters' locked desk. (Un. Ex. 9, reply to Staff Meeting memo) Waters also complained that she was required to bring a doctor's note for her absences, that Robertson gave inaccurate instructions, that the staff meetings were non-productive and involved social activities, and that Robertson used County equipment and time to sell food novelties and sodas to raise money for social activities in the department. (Un. Ex. 9) The record is clear that Ms. Waters *never* accepted responsibility for any issues brought to her. The record is also clear that Waters held and disseminated negative views and criticism of supervisors and management within EMA. Further, there is no evidence that Waters, herself, took any steps to improve her working relationship with any of her supervisors or to improve her technical performance that was being criticized.

The Association valiantly attempted to show that Waters was a competent employee as demonstrated by her record from 1988 to 1994 and that she was mistreated merely because she asserted her rights to privacy, reasonable accommodation and to a safe and supportive workplace. Unfortunately, Waters' prior satisfactory record does not reflect the full scope of responsibilities of an IPT. The change of management and reorganization made as the result of the financial exigencies within the County are events well within management prerogatives. These changes, as well as the introduction of new and different technologies, are the realities of the contemporary work place. It appears that Waters was unhappy with and unable to adapt to the changing circumstances. That presumption, coupled with Waters failure to accept any responsibility or make any effort to improve her skills, contributed significantly to the unpleasant circumstances that she found herself in. Waters was not a helpless victim of supervisory abuse who was only standing up for her rights. Her hostile attitude was exhibited at, and perhaps before, her first written reprimand in 1994 and before many of the other alleged provocations by management occurred. Waters remained uncooperative, had an excuse for every criticism of her, refused to take any responsibility for her job performance or behavior and consistently found fault with her coworkers and supervisors.

The Association also argued that the County devoted little effort towards determining whether Waters' work performance really *was* substandard. Rather, it asserted that Waters'

supervisors devoted an extraordinary amount of effort towards ensuring that her work performance *appeared* to be substandard. Based upon the immense volume of documented errors produced at the hearing, it is evident that Waters' supervisors did spend an extraordinary amount of time reviewing her work. However, it is also evident that such review was necessary to catch and correct the many errors present in her work.

Perhaps the most compelling evidence of Waters' inability to produce correct written products (a requirement of her position) are the many rebuttals that she prepared and submitted. These rebuttals are rife with errors in grammar, syntax, spelling, sentence construction and word usage. The very last rebuttal to the Notice of Intent to Suspend that was dated November 18, 1998, is a document that clearly demonstrated that Ms. Waters' is either incapable or unwilling to produce a satisfactory completed work product as required by the IPT job description. (Co. Ex. 1, pps. 011a-c) Even Judie White, Waters' witness, testified that the November rebuttal was not acceptable quality but dismissed it with the comment "some people are good at grammar and some are not". Unfortunately for Ms. Waters, the ability to correct spelling, grammar, sentence structure and word usage are key duties and required knowledge for an IPT. (Co. Ex. 1, pps. 181-182)

SUMMARY

Both the Association and the Grievant believe that transfer to another position, away from the alleged supervisory clique and her former top management, would correct Waters' performance. However, it bears repeating that the Grievant is the one constant in this situation. The Grievant's performance was found unsatisfactory by at least three immediate supervisors. Management's numerous attempts to assist the Grievant in achieving satisfactory performance were unsuccessful. Despite her six years of satisfactory employment as an IPT in a position with limited need for the entire scope of IPT responsibilities, Ms. Waters offered no evidence that she is or could become able to perform at a satisfactory level in the IPT position. The County is found to have had reasonable cause for her discharge. Because there is no evidence or reasonable presumption that further management efforts to bring Waters' performance to up to standard would be successful, there is no justification for returning her to an IPT position in her former department or any other department.

AWARD

For all of the reasons set forth above, the grievance is denied.

Judy A. Gust, Arbitrator

Ramona, California
May 30, 2001