

BEFORE THE ARBITRATOR

In the Matter of the Arbitration  
of a Dispute Between

LOCAL 2223, AFSCME, AFL-CIO

and

EAU CLAIRE COUNTY

Case 179  
No. 49363  
MA-7915

Appearances:

Mr. Steve Day, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 1937, Eau Claire, Wisconsin 54702-1937, for the Union.

Mr. Keith Zehms, Corporation Counsel, Eau Claire County Courthouse, 721 Oxford Avenue, Eau Claire, Wisconsin 54703, for the County.

ARBITRATION AWARD

Local 2223, AFSCME, AFL-CIO (the Union) and Eau Claire County (the County), are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant to the parties' request for the appointment of an arbitrator, the Wisconsin Employment Relations Commission, on June 30, 1993 appointed Jane B. Buffett, a member of its staff, to hear and decide a dispute regarding the interpretation and application of the agreement. On July 27, 1993, the County petitioned the Circuit Court for a Declaratory Judgment wherein the court, *inter alia* would determine whether the Clerk of Court had authority to appoint a Deputy Clerk without following the provisions of the Collective Bargaining Agreement. The arbitration was held in abeyance. On July 21, 1995 the parties notified the Arbitrator that the Wisconsin Supreme Court had denied the County's petition for review of the Circuit Court's ruling and further requested that the arbitration hearing go forward. Hearing was held in Eau Claire, Wisconsin on October 4 and 5, 1995. A transcript was taken and received on October 17, 1995. The parties filed briefs and reply briefs, the last of which was received December 13, 1995.

ISSUE

The parties stipulated to the following statement of the issue:

Was the Grievant, Shirley Ives, discharged for just cause? If not, what is the appropriate remedy?

## BACKGROUND

Grievant Shirley Ives was hired by the County on September 12, 1988. After an initial extension, she passed her probationary period. She served as the receptionist at the Clerk of Court's office. Her main duties were to answer the telephone and respond to inquiries of courthouse visitors, directing them to the appropriate person or office.

On June 5, 1992, Grievant received a negative evaluation. After a series of unsatisfactory evaluations, and meetings with her supervisor, she was ultimately terminated on April 5, 1993. That termination was grieved and appealed to arbitration. The County contested the arbitrator's jurisdiction over the matter and the arbitration hearing was held in abeyance while the matter was pending in Circuit Court and the Supreme Court. Ultimately, the arbitration hearing took place on October 4 and 5, 1995 as noted in the jurisdictional preface, above.

## FACTS

Grievant's major responsibilities were to answer the telephone and assist courthouse visitors who approached the counter. 1/ The County considered her both slow and inefficient. In dealing with telephone calls and counter traffic, she had difficulty ascertaining the person's central concern so that she could quickly transfer the call or give direction to the courthouse visitor. This slowness, which might seem minor at first, created problems at those times when calls or visitors came close together. This difficulty in efficiently getting to the heart of the caller's concern was a factor in the County's frequent complaint that Grievant did not answer the phone quickly enough.

When answering the telephone, she did not take messages as often as would have been appropriate. If the appropriate staff person were unavailable, instead of taking a message, Grievant would transfer the caller to other staff members. Apparently, Grievant was reluctant to follow management instructions to offer to take a message if the first employee were unavailable. At times, this reluctance caused people to be put on hold when it would have been more appropriate for Grievant to take a message. In some cases, callers were put on hold and forgotten.

One example of inappropriate handing of telephone calls involved a conference call that came for the Clerk of Court. Since the call arrived half-an-hour after the scheduled time, the Clerk of Court was no longer at her desk. Instead of taking steps to have the Clerk summoned, Grievant merely took a message.

Inaccurate or incomplete messages were also a problem, causing difficulty for staff when

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1/ Grievant also had some clerical duties that were reduced and modified during her tenure, but the County did not consider those her core responsibilities and it did not base the termination on her performance of those duties and any shortcomings in that area.

they returned telephone calls. When the date or time was omitted from the message, staff had difficulty determining whether the telephone call had come before or after earlier contact with the caller. Frequent incorrect use of the "please call" check box caused unnecessary calls. Sometimes the identification of the caller was omitted, impeding the staff member in attending to the message.

There were also deficiencies in dealing with visitors at the counter. At times Grievant would not notice or acknowledge visitors or, in responding to them, would provide inaccurate information. Working at the counter, Grievant was responsible for receiving papers to be filed. Here, the problem was that she sometimes accepted papers that were improperly completed. Although the most common error was the acceptance of papers that were not signed, an example of a more egregious mistake was the acceptance and file stamping of a judgment that was identified as being for Kenosha, not Eau Claire, County. Sometimes incorrect fees were accepted, or the original, instead of a copy, was returned to the attorney.

At the same time that Grievant's shortcomings in fulfilling this position are delineated, it must be made clear that the receptionist has a demanding position, with a variety of duties and many interruptions and distractions. In addition to the responsibilities already discussed, the receptionist is responsible for the copier machine that is available to the public. This causes difficulty when it is out of paper or toner or if it jams. The receptionist must go outside the counter to remedy the problem. If the telephone should ring, she must return to the other side of the counter, and answering it within three rings <sup>2/</sup> is difficult.

The challenges of the position were noted by one of Grievant's successors, an employe who had a college degree in business, but nevertheless found the position difficult and frustrating. Since Grievant's discharge, six different employes have held the position. Some of the five who left did so for apparent reasons that do not reflect on the nature of the work. Three left for more highly-compensated positions. Two other employes returned to the other County positions from which they had come.

It must also be noted that during 1992 and 1993, the Office of the Clerk of Court underwent a transition that imposed additional burdens on all employes. Reorganization of the office included both a change of the physical arrangement of the office, which changed the demands on the receptionist, and the computerization of records. For a period, records were kept both by hand and by computer. These changes created additional stress for all staff members, especially in keeping pace with clerical functions. However, Grievant had the same core responsibilities, covering the telephone and the counter, both before and after the reorganization, and those responsibilities, not the clerical functions, are the matters at issue here.

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2/ The County directs the receptionist to answer the telephone within three rings based on suggestions of business etiquette offered by the telephone company.

There is a long pattern of dissatisfaction with Grievant's performance. The intensity of the dissatisfaction varied over time, but the area of concern remained more or less the same. On December 7, 1990, the Clerk of Courts issued the following evaluation of Grievant:

Evaluation - Shirley Ives - Receptionist  
12/7/90

First and foremost, Shirley is to answer the phone and greet the Public. Currently, too much time is being spent on a call before it is transferred. Consequently, others have to pick up calls on the other line. Generally, 10 to 12 seconds is the recommended turnover time for transferring a call. Shirley needs to bring her handling of calls in line with these timelines. It is not appropriate for others to continue to act as receptionist.

The position of receptionist has gone through a number of changes since it was originally created. Responsibility for assisting the Traffic and Small Claims Judicial Clerks has been added and a demanding Public has increased the amount of contact that the receptionist has with the Public. The addition of a seventh Judicial Clerk and a .5 Docketing Clerk for Civil, Family and Small Claims cases and the remodeling of the Clerk of Courts office in 1991 will relieve Shirley of much of the Traffic and Small Claims work that was forced unto (sic) her position because of being understaffed.

It is commendable that Shirley has worked towards understanding the workings of other areas of the Clerk of Courts' office. I appreciate her willingness to assist others, but only if it is in addition to her primary responsibilities and not in place of her primary duties.

Among my suggestions for Shirley are:

More use of the hold button on the switchboard so that the other incoming line is not ringing unanswered or is picked up by someone else.

Increased use of taking messages for those not at their desks, rather than interrupting others or trying to answer the questions herself.

Becoming more comfortable with informing people

that the appropriate clerk will be with them in a moment.

I'm sure that Shirley will have ideas of her own. We will work together for improvement in this area.

This evaluation reflects many of the same concerns that persisted throughout Grievant's tenure. On June 11, 1992, Grievant had a special supervisory meeting with Clerk of Court Diana Miller at which Ms. Miller clearly indicated that much improvement was needed. The evaluation indicated specific problems, objectives and suggested remedies. After that time, there were special meetings with Grievant and either Ms. Miller or Grievant's immediate supervisor, Chief Deputy Clerk of Court, Judy Jensen. These meetings occurred at least once a month for the next ten months until Grievant's termination.

When Grievant asked for Union representation after the unsatisfactory annual evaluation she received at her October 30, 1992 annual evaluation, the County held another meeting which included Union President Carol Bowe. With the help of Union representation, strategies designed to help Grievant were developed. The parties agreed that it would be helpful for other employees to bring errors to Grievant instead of merely correcting them, so that Grievant could be aware of the specific problems. In addition, Ms. Bowe suggested that Grievant could not be expected to perform the clerical work involving the Civil Team, and that work was removed from Grievant's assignment. A rotation was established so that several different employees filled in for Grievant during her breaks and absences so that they would have some feeling for the difficulty of the receptionist position with its constant interruptions and distractions.

RELEVANT COLLECTIVE BARGAINING AGREEMENT PROVISIONS

ARTICLE 1

RECOGNITION AND MANAGEMENT RIGHTS

. . .

1.06 The Employer shall have the right to:

. . .

- (c) Suspend, discharge, or take other appropriate disciplinary action against the employee for just cause; or to lay-off employees in the event of lack of work or funds, or under conditions where continuation of such work would be inefficient and

non-productive.

## POSITIONS OF THE PARTIES

### The Union

The Union asserts the County did not have just cause to discharge Grievant. It argues that management had unreasonable expectations for the employee in the position of receptionist. It notes that Grievant did not have poor performance evaluations before the reorganization of the office in 1992. It was that same reorganization, according to the Union, that thrust additional duties upon the position of receptionist. It points out that most of the dissatisfaction with Grievant's work was in the area of clerical duties, and these duties were difficult to perform because she was constantly interrupted by her main responsibility of meeting the public and answering their inquiries and the telephone.

The difficulty of the position is demonstrated by the fact that since Grievant's discharge, six different people have filled the position and several duties have been deleted from the responsibilities of the position.

The Union asserts that Grievant could not be summarily discharged because she was entitled to the same progressive discipline the County utilized with other employees whose performance it considered inadequate. The supervision Grievant received consisted of unjust criticism and conflicting directives and only served to make Grievant nervous. Notwithstanding the anxiety caused by management's supervisory style, Grievant had worked hard to improve her performance and satisfy her superiors.

According to the Union's reply brief, the County has grossly exaggerated the extent of Grievant's errors and distorted their significance in relationship to the work she performed. It insists she did not have a chronic problem with performance, but that the reorganization of the position made it difficult for her to concentrate on her duties. It emphasizes again the unreasonableness of the expectations for the position, pointing to the number of employees who held and left the position after Grievant. It asserts Grievant was not treated properly, since the so-called supervisory meetings were not constructive and only served to increase Grievant's discomfort in the position, and Grievant was not afforded the progressive discipline given to other employees with performance problems.

### The County

The County asserts it had just cause to discharge the Grievant for inability to perform the essential functions of her position: answering the telephone and helping people at the counter. It enumerates the documented incidents of errors and points out that the Union did not challenge that evidence. It asserts that it properly notified Grievant that her performance was unacceptable and attempted to help her remedy her performance problems through coaching and supervision. It

points to the twelve supervisory meetings that took place between the June 11, 1992 meeting notifying her of the performance problems and her discharge on April 5, 1993

It disputes the Union's contention that Grievant was entitled to progressive discipline, relying on arbitration cases that hold that progressive discipline is not required of employers in situations of chronic failure to perform. It insists that progressive discipline is not necessary when the unsatisfactory behavior is not within the Grievant's power to control or the result of deliberate wrongdoing. Finally, it rejects the Union's contention that it bound itself to a relevant precedent for using progressive discipline by its treatment of other employees. It argues that those other employees had problems that could be deliberately rectified by the employees and therefore were appropriately addressed by progressive discipline.

The County responds to the Union by disputing the contention that it held unreasonable expectations for the position and it discounts the turnover in the position as evidence of that reasonableness. It concludes that Grievant simply could not perform the essential functions of the position.

## DISCUSSION

### The Performance Problems

In evaluating the seriousness of Grievant's shortcomings, the undersigned must first consider the Union's argument that the County had unrealistic expectations, expectations that were nearly impossible to fulfill in light of the difficulty of the position. The Union emphasizes the burden created by the constant interruptions of multiple phone calls or visitors, some of which could be demanding and rude. The Union also points to the high turnover rate in the position as evidence of the impossibility of satisfactory performance in the position.

Although the high turnover rate calls for careful consideration, the undersigned does not conclude that turnover proves that the County's expectations were impossible to fulfill. Three of the successor receptionists left the position to make more money in different positions. Others returned to their former position. Moreover, whatever these employees felt about the position, they did not have performance problems. Apparently the assignment could be successfully performed and the undersigned concludes that the County's standards were not unreasonable, notwithstanding the frequent change of employees.

Having determined that the County could reasonably expect acceptable performance in this position, the undersigned must determine whether Grievant achieved that standard. This issue cannot be decided quantitatively or determined by a statistical analysis of Grievant's errors. The answer to the question of adequacy cannot come from a batting average of errors and correct action. Any employee will make mistakes or suffer lapses in judgment from time to time. The question is whether Grievant's actions were appropriate, accurate and acceptable enough of the

time that the County could reasonably rely on her work and consider the telephones and counter to be competently serviced for the public.

When viewed as a whole, it is clear that Grievant's performance was plagued with constant deficiencies: the inefficiency in handling calls, the lack of competence in handling more than one call at the same time, the inaccuracy and incompleteness of messages, the inattention to details when accepting papers for filing, the poor judgment in holding people or taking messages and the poor quality of service suffered by visitors and callers who were either forgotten or ignored. The County was entitled to a higher level of service from its receptionist.

Equally as significant as the level of performance is the lack of progress in Grievant's work. As noted above, the central problems in Grievant's work, noted by the Clerk of Court in December 12, 1990 were similar to the problems presented at the time of the discharge. Throughout the history of supervisory efforts to make Grievant's work acceptable, there was intermittent improvement, but after each improvement, the old problems would reappear.

Although many of Grievant's lapses were not serious by themselves, it is the weight of their aggregation and the intractability of the problem which justifies the termination. The history of the situation indicates a clear pattern. At this point there is no reason to believe Grievant is capable of a significant, lasting change in performance.

### Progressive Discipline

The Union argues that Grievant cannot be terminated because the County has not used progressive discipline. According to the Union, progressive discipline is required not only by general principles, but also pursuant to the precedent set by the County's discipline in the case of employe G.W. The County responded that progressive discipline is appropriate for cases that involve willful misconduct that is in the employe's power to deliberately control, but that it is not appropriate or required when problems involve general inability to fulfill the job assignment, such as in this case.

Progressive discipline is a tool that can serve the two purposes of giving fair warning that certain conduct is unacceptable and of offering rehabilitation to a potentially valuable employe. In the light of these purposes, the County is right in its contention that, absent explicit contractual obligations, progressive discipline is irrelevant in situations where the employe has little control over the unacceptable conduct.

In the instant case, Grievant's performance problems were not isolated incidents of willful misconduct, but were shortcomings that persisted throughout her tenure. Her problems were, apparently, not matters that were in her power to change, for, although negative evaluations would sometimes bring short term improvement, that improvement was not sustained, and the old problems reappeared. As for the fair warning value of progressive discipline, the County gave Grievant clear notice that it considered her performance inadequate. This notice was reinforced by



its consistent efforts to try to help her.

It is important to note that Grievant continued to make efforts to improve her work. Although the results of her efforts varied, and intermittent improvement was followed by regression, the County does not contend that Grievant had an indifferent attitude or did not try to meet standards. The record indicates that Grievant tried to fulfill the responsibilities of her position, but that her skills did not match those needed for the receptionist position. This unfortunate mismatch becomes more obvious when the earlier supervisory comments are compared with her later evaluations. As noted above, in a December, 1990 evaluation, the Clerk cited Grievant's problems involving the core responsibilities of the position: answering the telephone efficiently, taking correct and useful messages and dealing competently with visitors. These are the same problems cited in the June 11, 1992 evaluation. During the four years of her employment, the situation did not appreciably improve.

Since the contract does not contain any contractual obligation to utilize progressive discipline and in the light of the fair notice given to Grievant and the nature of problems involved in this case, the undersigned does not find that the County was required to use progressive discipline.

In the light of the record and the above discussion, the undersigned issues the following

AWARD

1. The Grievant, Shirley Ives, was discharged for just cause.
2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 11th day of July, 1996.

By Jane B. Buffett /s/  
Jane B. Buffett, Arbitrator