

BEFORE THE ARBITRATOR

---

In the Matter of the Arbitration of a Dispute Between  
**WISCONSIN COUNCIL 40, AFSCME, AFL-CIO, LOCAL 2494**

and

**COUNTY OF WAUKESHA**

Case 189  
No. 67620  
MA-13957

(Pedersen Discharge Grievance)

---

**Appearances:**

**John P. Maglio**, Staff Representative, AFSCME Council 40, AFL-CIO, Local 2494, 8033 Excelsior Drive, Suite B, Madison, Wisconsin 53717-1903, on behalf of Local 2494.

**Attorney Nancy L. Pirkey**, Davis & Kuelthau, S.C., 111 East Kilbourn Avenue, Suite 1400, Milwaukee, Wisconsin 53202, on behalf of the County of Waukesha.

**ARBITRATION AWARD**

Wisconsin Council 40, AFSCME, AFL-CIO, Local 2494, (Union), requested that the Wisconsin Employment Relations Commission provide the Chairman of a Tri-Partite Arbitration Panel to hear and decide the instant dispute between the Union and the County of Waukesha, (County), in accordance with the grievance and arbitration procedures contained in the parties' labor agreement (Contract or Agreement). The County subsequently concurred in the request. Pursuant to the parties Agreement, Mr. James H. Richter, Labor Relations Manager of Waukesha County was chosen as the County's representative on the panel, and Mr. Larry Rodenstein, AFSCME Council District 40, was chosen as the panel representative for the Union. The undersigned, Steve Morrison, of the Commission's staff, was designated to arbitrate the dispute and chaired the Tri-Partite Panel. A hearing was held before the panel on April 3, 2008, in Waukesha, Wisconsin. The hearing was transcribed and is the official transcript thereof. The parties submitted post-hearing briefs in the matter by June 18, 2008, and the panel members submitted their position statements by September 12, 2008 marking the close of the record. The panel members expressed their desire to include a statement of concurrence or dissent, which statements, if any, are set forth herein.

## **ISSUES**

The parties stipulated to the issue to be decided by the Panel as follows:

Did the County violate the collective bargaining agreement when it terminated Vickie Pedersen on November 30, 2007?

If so, what is the appropriate remedy?

## **RELEVANT CONTRACTUAL PROVISION**

### **ARTICLE I - MANAGEMENT RIGHTS**

Except as otherwise provided herein, the Management of the County of Waukesha and the direction of the work force, including but not limited to the right to hire, the right to promote, the right to discipline or discharge for proper cause, the right to decide job qualifications for hiring, the right to lay off for lack of work or funds, the right to abolish and/or create positions, the right to make reasonable rules and regulations governing conduct and safety, the right to determine schedules of work, the right to subcontract work (when it is not feasible or economical for County employees to perform such work), together with the right to determine the methods, processes, and manner of performing work are vested exclusively in the Management. Management, in exercising these functions will not discriminate against any employee because of his/her membership in the Union.

## **BACKGROUND**

Vickie Pedersen, hereinafter Grievant or Pedersen, was initially hired as a Clerk Typist I on March 20, 1995. She was promoted to Clerk Typist II about a year later and assigned to the Environmental Health Division of the Department of Parks and Land Use. In August of 2001 she was promoted to Clerk Typist III in the Corporation Counsel's office, but, pursuant to her contractual rights, she elected to return to her previous position as Clerk Typist II in the Department of Parks and Land Use. Since September, 2001 she had served as one of two receptionists in the Department. She was assigned to room 230 and her responsibilities included serving the customers of Planning and Zoning, and the Enterprise and Park System Divisions. The Clerk Typist II job description reads:

Advanced-level work which is varied, difficult, and increasingly responsible. Work allows some independence of action, and requires an increased degree of accuracy and exercise of independent judgment in carrying out established procedures in accordance with general instructions. Work methods follow standard procedures, but independent judgment or specific instructions may be required in applying procedures and precedents in unusual cases. Decision making authority may be

described as a freedom of choice from among learned things which generally follow a well-defined pattern. Work requires the consistent use of a keyboard.

The required job duties of the Clerk Typist II assigned to room 230 in the Department are set forth in County Exhibit 10 and will be referred to in more detail, as required, in the Discussion section below.

The County conducts performance evaluations of its employees each year. The Grievant's evaluations initially were generally good but began to decline. During her last two-plus years of employment (2005 thru November, 2007), her evaluations showed significant decline in the quality of her work and an increase in the conduct of personal business on the job.

The Grievant had a significant history of discipline. She received a written warning in August, 1999 regarding proper procedures for requesting time off; in March, 2000 a verbal warning for making and receiving excessive personal phone calls at work; in April, 2002 she received "counseling" in an effort to increase her productivity and motivation in her work; in June, 2003, a written warning for poor work performance; in April, 2004, a written warning for a number of performance deficiencies as follows:

- Failure to notify supervisor of changes in clerical schedule.
- Processing of archived boxes and notifying staff when boxes have arrived.
- Processing of subdivided plat maps.
- Failure to process mail on a timely basis.
- Failure to screen incoming calls.
- Keeping a messy and poorly organized desk that is visible to the public.
- Failure to submit Planner of the Day schedules on a weekly basis.

In January, 2005, she was given a one day suspension without pay for a number of performance related issues as follows:

- Excessive personal phone calls.
- Excessive use of the internet for personal reasons.
- Failure to open the mail on time.
- Failure to accurately record lunch periods taken on time sheets.
- Talking to customers about (her) personal problems.
- Failure to answer incoming calls on a timely basis.
- Unprofessional conduct by eating at the front desk.
- Leaving the cash box on the reception desk unattended.

Subsequent to this suspension her access to the internet was revoked and she was placed on a corrective action plan and required to meet with her supervisor on a monthly basis to review her work performance and to address performance deficiencies more quickly. In September, 2006, she

was given a written warning for tardiness resulting from taking extended breaks and lunch periods. In December, 2006, she received another written warning for poor work performance as follows:

- Excessive personal phone calls.
- Excessive personal e-mails.
- Failure to seek prior approval for time off.

As a result of this discipline, the Grievant was denied the privilege of making personal phone calls and sending and receiving personal e-mails and moved from a “corrective action plan” to a “disciplinary action plan.” This had the effect of changing the County’s response to her work performance issues from corrective in nature to disciplinary in nature. She was informed that she now faced more significant disciplinary action if her work performance did not improve during 2007. In February, 2007, she was given another written warning for poor work performance for the following reasons:

- Poor quality of work in maintaining number of street atlases and plat books sold.
- Errors in calculating the number of customers served.
- Falsifying her performance evaluation for a job interview.
- Receiving personal phone calls at work.
- Failure to obtain approval of supervisor to attend computer classes.

In March, 2007, she received a verbal warning as a result of a complaint received by a fellow clerical employee who had heard the Grievant complaining to a customer about her personal life, an issue for which she had been previously disciplined. In May, 2007, she received a three day suspension without pay (in lieu of which she was required to contact the Employee Assistance Program) for numerous work related performance issues as follows:

- Working overtime without prior approval.
- Failure to promptly answer the telephone.
- Complaining to co-workers about her weekly meeting with her supervisor.
- Disrupting other employees during work time.
- Failure to establish a training schedule for new employees.
- Failure to follow the directive to have her supervisor approve the schedule for clerical coverage.
- Poor work product by sending a clerical coverage schedule to staff that was incorrect.

The Grievant was also notified, on May 16, 2007, of the following, in pertinent part, by her supervisor:

...

I need to stress very clearly to you that your continued employment with Waukesha County is in jeopardy and that your failure to perform as expected will result in your termination.

. . .

I hope that you realize and understand the seriousness of this matter. We have attempted to work with you on these performance issues over the course of the past several years and have not reached a successful conclusion. It is our expectation that you will take the necessary steps to modify your behaviors and performance to be in compliance with the expectations and standards. Failure to do so will ultimately result in the termination of your employment.

. . .

The above notice is signed by Donna Walbert, the Grievant's supervisor, and by the Grievant who notes that:

I'm signing this under distress. And I totally disagree with some of these comments. I asked to go over with these issues with my Labor Union Rep, but was told that it is due on Monday, May 21<sup>st</sup> or I'd have to take. . .(the balance of the handwritten entry of the Grievant is not reproduced on Joint Exhibit 5-K)

Her work performance failed to improve following the three day suspension. On May 31, 2007, the Grievant met with her supervisor, the Senior Human Resources Analyst and her Union President to discuss her performance problems. The Union President suggested that the Grievant be monitored over a three month period so that she could demonstrate that she was capable of performing her duties. The County agreed to this plan and the Grievant was made aware of the fact that she was to be scrutinized during this period.

Following the three month period of evaluation Walbert realized that the Grievant was not going to be able to adequately perform her duties. Walbert reviewed the Grievant's overall work performance and the nature and extent of efforts made to improve her work performance. She also reviewed the amount of time she was spending in supervising the Grievant. After this review Walbert decided to explore termination. Walbert prepared numerous documents, including performance charts and a summary of the Grievant's discipline history, and analyzed the job duties for Grievant's position in comparison with Grievant's overall performance. This documentation was presented to the County's Department Director, Dale Shaver, with Walbert's recommendation for termination. After reviewing this information, Shaver called a meeting with the Grievant on October 8, 2007, at which time she was notified of the County's decision to terminate her employment. As a sign of respect and dignity, the County provided the Grievant with 8 weeks notice of termination. Her termination date was effective November 30, 2007.

This grievance followed.

### **THE PARTIES' POSITIONS**

#### **The Union**

Past supervisors found the Grievant to be an effective employee. Waukesha County uses a point system in its assessment process. A rating of 1.0 - 1.9 yields a rating of 'unacceptable' which the Grievant never received. 2.0-2.9 indicates that the employee 'needs to build'. 3.0-3.1 scores an 'effective' rating and 3.2-3.7 rates the employee 'greater than effective'. 3.8 or greater is an exceptional rating. From May, 1997 to October, 1997 she received an overall rating of 3.2 or 'very good'. From May, 1997 to May 1998 she received a rating of 3.15 or 'effective'. She was lauded for her attendance, preparation, reliability and willingness to assist others. Her supervisor at that time also noted her effective skills, including record-keeping responsibilities and indicates that "Overall, Vickie is performing well."

Her December 1998 thru December 1999 evaluation, performed by her new supervisor, Kathy Brady, finds her with a 2.9 score indicating a 'need to build'. It did not result in any corrective action plan or disciplinary action. Section IV of that evaluation indicates that "Vickie is overall a good employee and does good work."

In 2000 her evaluation, generated by a Mr. Mase and reviewed by Kathy Brady, scored her at 3.178 or 'effective'. Her general performance factor scores were good and her supervisor's overall comments said "Overall I consider Vickie to be a good employee. She has improved on her work habits a great deal during the year. . ." This improvement occurred without the need for a corrective action plan, disciplinary action plan, weekly or daily meetings and no microscopic examination of her performance.

In 2001 her supervisor was Carol Palmer. Palmer gave her an evaluation score of 3.36, a 'greater than effective' rating. She was given high marks in all areas of performance including quality and quantity of work. Palmer notes that she is an excellent employee and commends her for doing excellent work even though she was going through some tough times in her personal life.

In 2002 Palmer again finds the Grievant 'greater than effective' with a score of 3.24 and thanks her for 'another great year.'

In 2003, the Grievant was supervised by Donna Walbert who gave her an evaluation score of 3.1 or 'greater than effective.' Walbert notes that "Vickie shows improvement in retrieving the archived boxes from Records and notifying the pertinent staff." This note is important because one of the reasons for the County's actions against the Grievant was that she was lax when it came to tracking these same archived boxes.

The Grievant's 2004 evaluation gave her a score of 3.1 or 'greater than effective.' Walbert noted that the Department received three positive citizen comments issued on the Grievant's behalf.

Walbert evaluated the Grievant again in 2005 and gave her a rating of 2.94. Walbert deemed her general performance factors such as analytical ability, communication, cooperation, dependability, job knowledge and quantity of work 'effective' and noted that the Grievant had received a letter of recommendation from the County Executive. Her score was dragged below the 3.0 level in the area of quality of work citing errors made by the Grievant in proofing permit guides. Walbert tacitly acknowledges that proofing of lengthy documents in the future would happen away from the front desk where the Grievant was constantly interrupted by phone calls and public visits to the Department. The record demonstrates that the Grievant fielded hundreds of phone calls per day in addition to scores of walk-in business.

In 2006 the wheels began to come off. She received a score of 2.5 indicating a 'need to build'. This score was far below the 1.0-1.9 required for a finding of 'unacceptable.' In prior years there were notations about issues the Grievant needed to improve. The Union asks why past supervisors deemed her to be a good employee and suddenly, during the last two years of her employment, did she end up with corrective action plans and ultimately termination? The Union asks "what changed?"

Walbert testified that the Grievant's past supervisors were effective. All four of them thought the Grievant was doing a good job although Walbert, after generating good reviews in 2003 and 2004, suddenly thought not.

The County's reliance on past discipline in its decision to terminate Pedersen was unjustified. An eight year old written reprimand is arguably stale. Joint Exhibit 5-A, a recant of procedures to utilize when taking time off, does not indicate it was issued to Grievant.

The March, 2000 verbal reprimand is stale. Further, Walbert testified that personal phone calls were not an issue in 2007 and did not factor into her decision to terminate the Grievant. Joint exhibits 5-C, 5-D and 5-E (reprimands) all occurred in years the Grievant was given 'greater than effective' evaluations. Joint 5-F, the February, 2005 discipline for excessive phone calls, is irrelevant because Walbert had no issue with phone calls in 2007. The same with 5-H.

The February, 2007 discipline regarding the street atlases and plat books were explained by the Grievant at hearing. The numbers did not add up when Walbert asked for a report. The situation was rectified when it was discovered that a third box of plat books was found behind a filing cabinet resulting in the difference in the totals submitted to Walbert.

The March 16, 2007 discipline regarding the complaint from a co-worker about the Grievant whining to a customer, the owner of a company called Bonek Pools, should be disregarded. No documentation was supplied at the hearing about Bonek Pools lodging such a complaint nor did any person representing Bonek Pools testify.

The County's reliance of Pedersen's disciplinary record is fundamentally flawed. The types of discipline she received in the past should not support a determination that termination is warranted.

The County's order of EAP counseling in the instant matter was fundamentally flawed. EAP is normally used to assist employees with drug and alcohol problems and, sometimes, with behavioral or psychological problems. Nothing in the record indicates Pedersen had any such issues. Walbert suspected that the Grievant suffered from personal problems dating as far back as 2004 and that she was emotionally upset and easily distracted. The County created a nexus between EAP participation and discipline.

Walbert admitted she did see areas of improvement in Grievant's behavior as a result of EAP participation. The record suggests that Grievant did not complete the EAP program and thus was not afforded the opportunity to rehabilitate. The County would have allowed her to finish if it truly wanted her to improve and thus the County performed an inadequate investigation as to whether or not termination was justified. The punitive nature of the County's position (i.e. tying EAP to discipline) indicates that the County had no intent of using EAP as a tool to in any manner help the Grievant. Walbert admitted it was harder for Grievant to stay focused because of the pressure of discipline attached to EAP participation. The record is void of any single act which triggered the termination and the Union believes that EAP involvement helped the Grievant. She was in the process of achieving the goal of the County but was not given the opportunity to take advantage of that assistance.

History indicated Pedersen has been a respected and valued employee. As mentioned above, the Grievant has received accolades from many sources over the years. Everett Powell, former County landscape architect, testified that she assisted him by assimilating bidder's lists, distributing plans and specs and compiling and distributing addendums. Whenever he made requests of Pedersen there were never any problems and no one he dealt with ever reported any problems with her work product.

Holly Glainyk, Waukesha County Park System Coordinator Supervisor, wrote a letter on Pedersen's behalf characterizing her as a team player who was always willing to give a helping hand. Likewise, Duane Grimm wrote on her behalf saying he had worked with the Grievant for six years and always found her to be pleasant and willing to do various things on his behalf. Past evaluations sometimes characterized her as a team player and she received a letter of recommendation from the County Executive. Several managers viewed her as an asset to the operation and she received three positive citizen comments.

In conclusion, the Union says something happened in 2005 causing minor things which had happened in the past to be viewed as major problems now. The relationship with her supervisor turned sour and she was under undeserving scrutiny. Her supervisor micro-managed her. Her supervisor became obsessive and virtually compulsive. She (Pedersen) was attacked on several fronts - corrective action plans; disciplinary action plans; weekly management meetings. She was not allowed to access the phone for personal reasons although others were allowed to do so and



her personal phone numbers were placed in a data base to determine if calls had been made. She was wrongly critiqued for the inaccurate street atlases and plat counts.

In 2006 she trained new employees. If her performance was so bad, why was she training new employees? She was called on the carpet for the way in which she reported the status of archived records although she was not the only person who had access to them. Also, the Grievant testified that she had computer problems requiring IT assistance and that this contributed to the problems. She was compared to others in the Department even though her job was different than theirs-she did all the cashiering in the Department and the others did not. Her criticism for allowing the phone to ring twenty times is misplaced because she was in another area doing something else and her headset was not working properly causing her not to hear the phone ringing.

The Union intimates that Walbert's high employee turnover of those she supervised may relate to the problems the Grievant was having. (I believe the Union means to suggest that Walbert was either a poor supervisor or she had a bone to pick with the Grievant, or both.)

The corrective action plan, the disciplinary action plan and the botched EAP counseling were all designed to guarantee Pedersen's failure, and fail she did. No-one could have survived the micro-management Pedersen was forced to withstand. Few people could.

### **The County**

The Contract language provides management with the exclusive authority to decide to discipline and discharge employees for proper cause. The Grievant was aware of and understood her job duties and responsibilities and knew, through progressive discipline and corrective action and disciplinary action plans that job performance inconsistent with those job duties could result in her termination.

The role of the arbitration panel is limited and is not allowed to substitute its judgment for that of the employer unless the penalty is excessive, arbitrary, capricious or constitutes an abuse of management's discretion. Only where management has abuse its discretion may an arbitrator disturb the discipline imposed by management. The Agreement does not give the panel the authority to second-guess or otherwise modify a disciplinary decision made by management. The County has offered ample evidence that the Grievant either could not or would not perform her job duties at an acceptable level despite a corrective action plan and a disciplinary action plan and thus, the County had just cause for termination.

The test for establishing proper cause for discipline and discharge is a two-part test. The first part is a determination that the employer has established employee misconduct in which it has a disciplinary interest and the second is a determination that the employer has established that the discipline imposed reasonably reflects that disciplinary interest. The County has satisfied both parts of that test here.

The Grievant has a long history of disciplinary actions relating to the same performance deficiencies that ultimately lead to her termination, including time-off procedures; excessive personal phone calls; timely processing mail; overtime approval; conducting personal business at work; excessive use of the internet; and many others. The Grievant was given many chances to improve her work performance but failed to do so. Importantly, the Union did not grieve any of these prior disciplinary actions and the Union cannot now challenge the amount of discipline the Grievant received or the underlying facts and reasons for any actions taken.

The County placed the Grievant on a corrective action plan for about 22 months during which time she met with her supervisor monthly to review her performance and to correct any performance issues which arose. She continued to exhibit deficiencies and to receive continued discipline and, for that reason, was eventually moved to a disciplinary action plan. On January 5, 2007, she was notified that it was crucial for her to put her best efforts forward from here on out and that it was important for the County to see that she was able to conduct herself in a manner “that we should see and expect as an employee in her position.” Under the disciplinary action plan the Grievant was to meet with her supervisor each week to address performance issues. By this time the emphasis had shifted from an emphasis on correcting her behavior to an emphasis on issuing formal discipline to reinforce the need to improve her performance. This attempt failed and on May 16, 2007 she was issued a 3-day suspension without pay and was notified of the seriousness of the situation and that her failure to improve her performance would likely result in her termination from employment. Importantly, this terminology differed from that used in the past. In the past the Grievant had been informed that her failure to improve would result in further discipline whereas this time she was informed that her failure to improve would result in termination from employment. At hearing the Grievant admitted that she knew she faced termination if her performance failed to improve following the 3-day suspension. Her performance did not improve, however.

Over the last two years of the Grievant’s employment the County took various steps to provide her with the tools to succeed in her job. These steps were meant to assist her in improving her work performance and to focus the Grievant’s attention on her job duties. These steps included multiple job duties transferred to other employees; removal of personal e-mail privileges; removal of internet privileges; opportunities to interview for other County jobs; a corrective action plan establishing monthly meetings with her supervisor; a disciplinary action plan establishing weekly meetings with her supervisor; a 3-month review period (at the Union’s request) to allow her to demonstrate her capabilities; an EAP referral in lieu of a 3-day suspension; and the ability to use sick leave for EAP meetings. There is no better example of the County’s good faith efforts to see her improve than the referral to EAP because it offered her a mechanism to address her personal issues and stop being so distracted at work. By sending the Grievant to EAP the County hoped that she would improve her work performance and be able to focus her attention on her job, given the vast number of warnings and discipline she had received in these areas relating to conducting personal business on work hours. After the 3-day suspension was issued, the Union requested that the Grievant be given an additional three months during which time she could demonstrate her ability to do her job, but she continued to engage in poor work performance during this three month period. Her poor performance included working overtime without prior approval; failure to

answer phones promptly; failure to arrange for clerical coverage for breaks and lunch periods; failure to follow proper procedures to request time off; making many grammatical, mathematical and typing errors; tardiness in reporting for work or in returning from breaks and lunch periods; failure to accurately record the number of plat books and atlases sold and still on hand; failure to manage the archived boxes used by the Parks Department; and failure to follow the directions issued by her supervisor. All of these issues had been addressed in the past via disciplinary actions, annual performance reviews, monthly meetings with her supervisor under the corrective action plan or weekly meetings under the disciplinary action plan. The record contains a summary of the vast number of times the Grievant had been counseled on these same performance deficiencies. All of these warnings and meetings placed the Grievant on sufficient notice that her work performance needed significant improvement or she faced termination.

Following Grievant's notice of her discharge she continued to make the same mistakes. During her last month of employment she made mistakes on clerical coverage resulting in a clerical coverage schedule having to be revised and then amended because of coverage issues. Her repeated unauthorized overtime work, although not in and of itself the sole reason for her termination, along with the repeated nature of many other issues, ultimately did lead to it.

The County has a disciplinary interest in seeing that the Grievant performs the job duties listed on her job description at a proficient level and has the right to discipline employees when they cannot perform simple job duties in a satisfactory manner. Based on the Grievant's overall record of performance and disciplinary history, there was proper cause for discharge.

The discipline imposed is reasonable considering the Grievant's continued inability to do her job despite repeated attempts to improve her performance. The County has presented a case demonstrating a significant history of discipline and warnings putting her on notice of the need to show significant improvement and she did not do so. The question is whether any level of discipline short of discharge would have improved her overall work performance. Clearly not, and the County has satisfied the second test for proper cause.

The County followed a progressive course of discipline even though the Agreement did not require it to do so. It issued the Grievant a number of verbal and written warnings followed by a one-day suspension and a three-day suspension. Unfortunately, these steps failed and there is no reason to believe that another suspension would have corrected her behavior.

The Grievant's letters of recommendation are not relevant and should not be considered. These were not provided to the County until Step 3 of the grievance procedure, after the decision to terminate had been made. None of the individuals who authored them were aware of the Grievant's performance deficiencies, her disciplinary history or her disciplinary action plan. None of them directly supervised the Grievant on a daily basis nor did they evaluate her work performance. The letters were written to assist her in finding other employment, not to counteract or offset the disciplinary action plan or ongoing progressive discipline she continued to receive. Finally, all of the letters were written as personal letters of recommendation, not in the author's professional capacity as employees of the County.

The County has presented a well-documented case of unsatisfactory job performance. It has presented substantial evidence that Grievant was given every opportunity to correct her work performance. The County was patient and put forth great effort to correct Grievant's deficiencies. It followed the steps of progressive discipline and it has presented a proper case for termination.

### DISCUSSION

The issue in this case is whether the County had proper cause, otherwise known as 'just cause', to terminate the Grievant's employment. The Union does not suggest that Management exceeded its contractual rights to terminate in the event it had just cause to do so. The County correctly notes that the Agreement requires just cause for termination but that it fails to define that term. Although some arbitrators apply Arbitrator Daugherty's so-called 'seven questions' to determine the existence of just cause, the undersigned believes that the better analysis of just cause is achieved by applying the facts of each case to a two part test. Part one consists of a determination as to whether the employer has established misconduct in which it has a disciplinary interest and, part two, a determination that the employer has established that the discipline imposed (here termination) reasonably reflects that disciplinary interest. The Union argues, in essence, that Management did not have just cause in this case because it relied on past discipline in making its case against her and should not be allowed to rely on 'stale' incidents of behavior, and further, that the disciplinary actions and other warnings and counseling afforded to the Grievant should have been designed to assist her in doing her job better. In other words, the effort and emphasis should have been placed on improving her performance as opposed to building a case against her. The Union also seems to argue that because the Grievant had done fairly well in years preceding 2005, and fairly poorly thereafter, that it was a change in supervisors which caused the problem. The Grievant was under a microscope and essentially over-supervised to the extent that she was placed under so much pressure to perform and scrutinized so closely that she was destined to fail.

#### Did the County establish misconduct in which it had a disciplinary interest?

The Union does not argue, nor could it do so with any credibility, that the County does not have a disciplinary interest in conduct which results in the employee's failure to do her job properly. An examination of the discipline received by the Grievant prior to her termination is instructive both in terms of an analysis of the conduct itself and in considering whether it rises to the level of poor conduct worthy of disciplinary interest. The Grievant received the following discipline for the following reasons. In chronological order they are:

- |                 |                                                                                                    |
|-----------------|----------------------------------------------------------------------------------------------------|
| August 8, 1999: | Written warning for violating time-off procedures                                                  |
| March 22, 2000: | Verbal warning for making excessive personal phone calls and failure to follow time-off procedures |

- April 30, 2002: Counseling for excessive personal phone calls, failure to timely process mail, work area cleanliness and failure to obtain prior approval for overtime work
- June 17, 2003: Written warning for failure to timely process mail and other documents and for conducting personal business at work
- April 7, 2004: Written warning for failure to notify her supervisor of changes to the clerical schedule, work area cleanliness, failure to timely process mail, failure to process archived boxes and failure to screen incoming calls properly
- February 22, 2005: One day suspension without pay for excessive personal phone calls, excessive use of the internet, failure to timely process mail, tardiness when returning from breaks and lunch periods, failure to answer incoming calls on a timely basis
- September 1, 2006: Written warning for tardiness due to extended breaks and lunch periods
- December 15, 2006: Written warning for excessive personal phone calls, excessive personal use of e-mails, and failure to follow time-off procedures
- February 16, 2007: Written warning for excessive personal phone calls, inaccurate record-keeping on plat books and atlases, mathematical errors in customer counts, and submitting a falsified performance evaluation at a job interview
- March 16, 2007: Verbal warning for discussing personal problems with a customer
- May 16, 2007: Three-day suspension without pay for working overtime without approval, failure to follow directions, failure to create training program for new employees, and disrupting other staff by frequently complaining about work

In addition to the disciplinary actions set forth above, the record demonstrates that the County had many meetings and other conversations with the Grievant in its attempt to address these issues. Although the Grievant would appear to make progress following these incidents, she seemed to return to her old habits in time.

It is noteworthy that none of the above-referenced disciplinary actions were grieved by the Union. Also worthy of note is the fact that a number of the issues addressed in the earlier disciplinary actions (excessive phone calls; extended breaks; failure to follow proper procedures) continued to appear in the two years prior to the Grievant's termination. Not only did they continue to occur, the problems seem to have been getting worse. The Grievant began using e-mail and internet privileges to excess and complained to customers and co-workers alike about personal and work problems. It is obvious that excessive personal phone calls, excessive use of personal e-mails and excessive use of the internet during work hours results in lowered productivity on the part of the employee and an overall denigration in the operation of the Department. The County responded to these detractors from productivity by eliminating them and acted well within its management rights to do so.

The County certainly had a disciplinary interest in addressing these types of behavior. The record shows that the County took very seriously the duty to provide the Grievant with the tools and the assistance to aid her in doing her job successfully. The County argues persuasively that the removal of the Grievant's personal e-mail and internet privileges were designed to help the Grievant more effectively concentrate on paying attention to her job responsibilities as an aid to improving her work performance, whereas the Union argues, not persuasively, that these measures were merely punitive in nature and aggravated the problem by adding stress to the Grievant. The Union also makes the same argument with regard to the corrective action plan and the disciplinary action plan and the frequent meetings with the supervisor these plans required. The Union argues that "She was attacked on several fronts." The evidence does not support such an argument. It does lead the undersigned to conclude that the County was taking every measure to attempt to help the Grievant succeed at the job but, for whatever reason, the Grievant was unable to modify her behavior. The record suggests that the Grievant was under some stress relating to personal problems and the County, in response to its recognition of this difficulty, directed the Grievant to EAP in hopes that this intervention might help. The undersigned rejects the Union's argument that the County's EAP referral was nothing more than a thinly veiled attempt to present the appearance of progressive discipline since EAP is normally reserved for referrals due to drug or alcohol abuse or for some type of psychological problem which the Grievant did not have. The County certainly did employ progressive discipline, although there was no contractual duty to do so, but more importantly, the evidence fully supports the conclusion that the County's EAP referral was made for two reasons: first, to give the Grievant an option in lieu of suffering the consequences of discipline resulting in three days without pay, and second, to aid the Grievant in dealing with what the County believed to be personal problems which were interfering with her ability to do her job. This referral was justified and appropriate under the circumstances. Unfortunately, the record shows that the referral did not result in the hoped for results and the Grievant's job performance did not improve appreciably. The Union concludes that because the record does not indicate that the Grievant completed the EAP referral, the County must have prevented her from doing so in its efforts to ensure her failure. This inference is illogically drawn and cuts against the manifest weight of the evidence. The undersigned disagrees with it.

The undersigned is persuaded beyond any doubt that the County's overall interest was to see the Grievant succeed, and the actions it took were attempts to further that goal. The Grievant

was afforded more than a fair opportunity to rehabilitate herself and modify her behavior to conform to the County's reasonable expectations for her. This conclusion is overwhelmingly reinforced by the three-month period the County agreed to give the Grievant, at the request of the Union, to show that she could perform her duties in a satisfactory manner. The County, after all it had done leading up to this agreement, had no duty to agree to this "last chance" kind of trial period, but it did agree to it, and I believe it did so in hopes that the Grievant would pull through.

**Did the County establish that the Grievant's termination reasonably reflected its disciplinary interest?**

Another way of putting this question is "Did the punishment fit the crime?" The record demonstrates a long history of discipline and warnings, many for the same infractions and performance issues time after time. There is no question that the Grievant was placed on sufficient notice that her job performance was lacking and that her employment was in jeopardy. On May 1, 2007 she was specifically informed, in writing, that:

Vickie does understand that she is in a disciplinary action plan and has been advised that if her behavior continues and does not improve to meet our standard policies and expectations, that we will have no other option but to terminate her employment.

The County persuasively argues that the question in this case is not whether discharge is the appropriate penalty but whether any level of discipline short of discharge would have improved the Grievant's work performance. The undersigned is convinced that the Grievant was either unable or unwilling to rise to the reasonable expectations of the Employer. The County cites EAU CLAIRE COUNTY, DEC. NO. 49363 (Buffett, 07/11/96) as being remarkably similar to the instant case. The undersigned agrees with Arbitrator Buffett's analysis therein as follows:

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 on 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 significant, lasting change in performance.

The Union argues that 'stale' incidents in an employee's past should not work to adversely effect her in the present. Collective bargaining agreements sometimes limit consideration of an employee's record to a specified period thus preventing the arbitrator from considering its significance. The Agreement before us does not. The Grievant's past performance is significant in this case because of its continuing nature and because it demonstrates the Grievant's inability to

modify her behavior to conform to the reasonable work standards required of the County. An employer has the right to evaluate its employee's performance and when it is faced with an employee who commits the same violations, or fails to perform work duties in the same way, over and over, time after time, it has the right to take action to break the cycle. Here, the County took numerous actions in its attempt to break the cycle, but, sadly, they failed. Arbitrator Larkin addressed this issue in *BORG-WARNER CORP.*, 22 LA 589, 596 (Larkin, 1954):

In general we should say that in discharge cases the past conduct of the employee in question is of concern to the arbitrator called upon to review Management's disciplinary action. If the employee has an excellent record in the Company's service, the Union is sure to emphasize this. No arbitrator can fail to take note of a good record, the absence of prior warning notice, and other factors which may pertain to the employee's fitness to be continued on his job.

By the same token, if an employee's past performance has been one of increasing disregard of his responsibilities to his job and to the employer who is paying him, no arbitrator can rightly sweep this sort of evidence under the rug and confine himself to technical evidence pertaining to a particular incident on a particular day. To do so would not add to the cause of good industrial relations. It might do irreparable harm to the arbitration process.

However, this does not mean that we are to consider everything that is introduced as having equal weight and significance. We sympathize with the position often taken by unions that there should be some limitation on how far back in the record one should be permitted to go in the matter of digging up old scores. Such historic incidents should be close enough in their relation to the problem involved in the immediate case to warrant consideration.

The undersigned has considered the past poor performance of the Grievant affording it lighter weight than the more current performance which led to the discharge. The past performance issues are nonetheless significant because they mirror in many ways the more current performance. The undersigned has also considered the fact that in the past the Grievant had been lauded by her Employer on occasion and had received numerous positive evaluations. I do not know why the Grievant's work performance suffered more in latter years. No evidence was presented to shed light on that matter. The Union suggests that the problem rested with the Grievant's new supervisor. The undersigned does not share that conjecture, though. The Union, in its attempt to support its supposition, points out that although Walbert only supervised two people there has been a high turnover of employees. High turnover does not, in and of itself, prove poor supervisory skill, and there is no evidence in this record leading the undersigned to reasonably conclude as such. What is clear from the testimony is that the Employer recognized that the Grievant was having problems and took steps to aid her in improving her performance at work, which it should have done. This record contains a myriad of instances and acts constituting poor work performance on the part of the Grievant. To be sure, as the Union has argued, some of them have been explained away to the satisfaction of the undersigned. Unfortunately, what remains is more than sufficient to support the extreme measure of discharge.



The Union introduced three letters of recommendation on behalf of the Grievant. The undersigned places little weight on these letters because none of the authors were familiar with the Grievant's day to day work performance and their dealings with her were tangential. In addition, the letters were composed for the purpose of supporting the Grievant's efforts to obtain other employment, not for the purpose of addressing the allegations contained in this action. The letters described her as having a 'friendly nature' with 'great customer service skills', a 'genuine caring concern for fellow co-workers' and a 'team player' (Holly Glainyk letter) and 'personable and kind' with a 'friendly demeanor' and a willingness to help others' (Duane Grimm letter). In the case of the third letter authored by Everett Powell, who's letter described the Grievant as "(exceeding) his expectations in the performance of tasks required to help (him) perform (his) job", his testimony at hearing was that he worked with her "Not very much. Just a little bit – whenever I had a bid." and "Once or twice a month." In response to the question "Would you know anything about her performance?" he answered "None." The letters generally characterize the Grievant as a nice person who is willing to help others and is friendly. The record does not indicate otherwise. The County's actions were not based on her inability to get along with others or upon the fact that she was unfriendly or unkind, though. They were based upon work performance issues and these letters fail to address those.

The Union argues that the County made no effort to keep her as an employee because it did not offer her any other County positions in lieu of discharge. This argument is not persuasive for two reasons. First, the County had no duty to offer her another job and, second, the evidence amply supports the conclusion that the County made overwhelming attempts to keep her as an employee in her present position.

An arbitrator (or an arbitration panel) is not permitted to substitute his (its) judgment for that of the employer as to the level of discipline to impose, unless the penalty is excessive, arbitrary, capricious or constitutes an abuse of management's discretion. The undersigned does not find the penalty here to be excessive or arbitrary, capricious or an abuse of management's discretion and thus may not disturb it.

In light of the above, it is my

### AWARD

The County did not violate the collective bargaining agreement when it terminated Vickie Pedersen on November 30, 2007.

The Grievance is denied and dismissed in its entirety.

Dated at Wausau, Wisconsin, this 13th day of February, 2009.

By Steve Morrison /s/  
Steve Morrison,  
Chairman, Arbitration Panel

I Dissent

I Concur

\_\_\_\_\_  
Mr. Laurence Rodenstein

\_\_\_\_\_  
Mr. James H. Richter