

In the Matter of the Arbitration

between International Federation of Professional &
Technical Engineers, Local 17 (“Union”), on behalf of
grievant Alana Hess,

Findings,
Discussion and
Award.

and

The Washington Department of Transportation
 (“Department” or “Agency”).

Case Numbers:	Arbitrator’s case No. L53.
Representing the Agency:	Andrew F. Scott, Assistant Attorney General, 7141 Cleanwater Drive SW, Olympia, WA 98504-4167.
Representing the Union:	Bill Kalibak, Union Representative, 2900 Eastlake Avenue East, Suite 300, Seattle, WA 98102.
Arbitrator:	Howell L. Lankford, P.O. Box 22331, Milwaukie, OR 97269-0331.
Hearing held:	In the offices of the Washington Attorney General in Olympia, Washington on February 17 & 18, March 29, and April 28, 2011.
Witnesses for the Agency:	Kim Britton, Bob Jones, Dale Severson, Art Sporseen, Deanna Brewer, Debbie Maker,
Witness for the Union:	Alana Hess, Michael Marshall, Kell Boy, and Loren Risher.
Post-hearing argument received:	From both parties on June 29, 2011, both timely postmarked June 28, 2011.
Date of this award:	July 28, 2011.

This is a discharge dispute. The parties stipulate that the issue presented is: Did the Agency violate the just cause provision of the collective bargaining agreement when it first reduced the grievant's salary and then discharged her based on behavior and performance issues in the workplace, and, if so, what is the appropriate remedy? There are no preliminary issues of substantive or procedural arbitrability; and the parties agree that the burden is on the Agency to establish just cause for the discipline and discharge. The hearing was orderly. Each party had the opportunity to present evidence, to call and to cross examine witnesses, and to argue the case. Both parties had the benefit of a hearing transcript for the preparation of their post-hearing briefs, and both of those briefs were timely received.

FACTS

Ms. Hess was hired in September, 2005 as a Transportation Engineer 3, Development Review Engineer. Her section consisted of two or three TE3s, one Permits Technician, and a supervisor. The function of the section is to serve as an institutional liaison between the various parts of WSDOT and project developers and thus to facilitate the permitting process and speed development. Ms. Hess's first annual evaluation, at the end of June, 2006, found that she had "performed very well in her role [and] brought excellent SEPA experience to this section [and] has also shown that she can communicate very well in writing." It concluded that she "had performed very well...and is a welcome addition to the Planning Office." The evaluation form included a request for employee response and suggestions, and Ms. Hess noted that "there is a very significant learning curve associated with this position, and for someone coming into an agency the size and complexity of WSDOT from the 'outside' there are a lot of other things to learn in addition to just the technical aspects of the position. *** I have received nothing short of absolute support since starting this position. *** Dan [Severson, Ms. Hess's supervisor] has been a great mentor and has always been supportive and helpful with my projects."

2007. By her next formal evaluation things had changed substantially. Two senior reviewers had left the section, one of whom Ms. Hess had frequently used as a resource. In early October, 2007, her supervisor noted that her "[t]eamwork efforts need improvement. Alana is a very independent worker who typically only communicates with others on the team as a last resort. She will openly communicate but the noticeable and intentional lack of communication with her teammates creates a wedge between Alana and those around her, both on the team and within the Planning Office." He noted that inactive files accumulated in her office and that she was "frequently critical of her customers and their projects. Some of her customers we deal with have made comments about her being negative, not customer friendly and not an advocate of their projects." Ms. Hess's written response to the evaluation included fourteen ways the supervisor could "assist me...:"

- Ensure that open, honest and timely communications occur...
- Recognize staff contributions and accomplishments ...

- Recognize the need for independent work...
- Recognize the contribution of individual and diverse personalities to the team.
- Recognize common actions and behaviors in the office and not hold individuals to different standards.
- Recognize “One-DOT” team efforts beyond the Planning office and expect the same team efforts from all staff equally.
- Be more responsive to staff training requests.
- Recognize staff commitment to wise use of state tax dollars.
- Keep employee scheduled meetings asking for guidance on projects...
- Be clear in expectations of “who’s up first” in customer service. (Favored consultants and drop-in customers can place customers that have been waiting on a back-burner beyond a reasonable response time...)
- Recognize the amount of day to day personal effort...that is needed to deal with the volume and complex nature of the work.
- Achieve a better balance of workload within the office and be more proactive and responsive to staff work load issues.
- Encourage staff to offer to help each other.
- Note that office common courtesy could be improved. (Excuse me, please, thank you or “do you have a minute” are still appreciated by most I think).

Ms. Hess sent that same list over her supervisor’s head to the second tier supervisor, the Planning Section Manager with a cover letter which included her understanding of her evaluation, which had come “as a complete surprise...”

Here is what I heard and what I perceived as the overall attitude toward me during both evaluation meetings:

- My personality is unacceptable in this office.
- Minds are made up, I was shut out and no real discussion was occurring. Nothing I said was being listened to.
- No matter what the issue, circumstance or situation presented I was told the only responses that were coming from me were deflection and lack of admitting any fault or responsibility on my part.
- That I do not have a good working relationship with anyone inside or outside of this agency and the reason for that was solely due to my behavior.
- Than I worked too independently and not as part of a team.
- Than I am an aggressive and vengeful person that intimidates others.

*** I attempted to show some documentation to demonstrate my efforts and accomplishments but I do not feel that effort was acknowledged. *** My main concern is that I do not believe my efforts are being recognized now so I do not foresee the opportunity of receiving any recognition through the next year and the new PMP.

At the end of that month, the section revised its general standards of behavior; and there is no dispute that the revision was primarily due to Ms. Hess's behavior. The general "inclusiveness" standard continued to be "Treats everyone with respect;" but there were additions to "unacceptable behavior:" "Brusque responses in normal work related requests," "Rolling your eyes and turning your back on the speaker during meetings," "Failure or refusal to acknowledge an individual's presence or authority," etc. Similar additions were made elsewhere in the lists of unacceptable behaviors.

2008. In March, 2008, Ms. Hess sent her supervisor a last minute email that she was going to be out on a site inspection the next day. He countermanded that proposal and instructed her to be at a meeting at Region HQ, and she replied with a string of emails. Her supervisor issued her a Letter of Expectations addressing, first, her claim that no map was required because she anticipated a simple drive-by (which the supervisor said was contrary to the usual policy) and, second, her response to his instruction, and ending with the directive, "you will discontinue your email debates about my managerial decisions."

In late April her supervisor memorialized a discussion over a field meeting which Ms. Hess had told him had been a total waste of time which she did not actively participate in for various reasons. Others at the meeting described it as a "win/win for everyone." Ms. Hess responded in detail, but none of the sixteen itemized paragraphs in her response addresses the allegation that she was not an active participant in the field meeting.

Near the end of September, Ms. Hess received her annual evaluation. It found her "behavior, performance, and accountability in most areas has improved since about the beginning of August," because she "has actively participated in two monthly office safety meetings and most noticeably, she has begun to actively participate in the daily Development Services team meetings. She has noticeably improved in taking direction from [her supervisor], and has demonstrated the ability that she can conduct herself with appropriate office decorum when she chooses to do so." But the evaluation noted that during "the first 10 months of the evaluation period, Alana experienced difficulty managing relationships with [her supervisor, his supervisor], and co-workers. She frequently demonstrated combative and aggressive behavior to me and these others. ***" The evaluation announced the imposition of a four month evaluation period because Ms. Hess "has previously stated to both me and my supervisors that she has had difficulty understanding performance standards set by management." Overall, the evaluation found her "below standards" in "Demonstrates a Working Knowledge of WSDOT Safety and Health Policy," "Inclusiveness," "Relationship Building and Support," "Tact and Diplomacy," "Accountability / Follows Directions / Accepts Guidance from Superiors and Co-workers," "Works as Part of a Team," "Review and Comment on Developments," and "Solves Problems Using Independent Judgment." She was found to meet standards in "Prepares Access Permits." Ms Hess refused to sign the evaluation but later filed a written response. Her "Initial Example of Response" to the evaluation included a section captioned "Employee Complaints" which began with this example:

Complaint: There has been misuse of positions of authority including ‘rallying’ of internal staff and external customers to my detriment.

Example: We received the direction from you that we were ‘not to work on anything that was not on the [your office] board’. During one of our staff meetings I asked to have timesheets put on the board since that work needed to be done. The response I received from you to my request was implied disgust and the remark “unbelievable” in front of the other DS staff. You then proceeded to solicit the other staff’s opinion on whether or not timesheets should be on the board.

At the end of September, she filed a “Hostile Work and Bullying Complaint” with the regional HR office. The beginning bullet points of that complaint were,

- I have been treated inequitably and held to different standards than others in the office.
- I have been subjected to unwarranted and invalid criticism associated with my work style, personality and performance.

The issue of the April field meeting was covered under a bullet point, “I was directed to an assigned project meeting where I had no function then I was accused of not being a team player and ‘doing nothing’ at the meeting..” Ms. Hess’s complaint included among its alleged “factors causing these problems:” “closed minds,” “obvious favoritism,” “non-work related social interactions,” and “micro-management.”

As a result of the September evaluation, Ms. Hess was put on a Performance Improvement Plan on October 13, 2008. (Technically, Ms. Hess’s refusal to sign the PIP required her supervisor to issue it as a Letter of Expectations.) That PIP required her to prepare a “project summary sheet” for each of her Developer Agreements. The PIP specified the nine headings of the project summaries. It proposed “measurement and evaluation” based in part on the project summaries and indicated it would continue until Ms. Hess met standards for three consecutive review periods in “Inclusiveness: Treats everyone with respect..”, “Accountability / Follow directions / Accepts guidance from superiors and co-workers,” “Review and Comment on Developments,” and “Solves Problems Using Independent Judgment.” Ms. Hess had been given an opportunity to respond to the proposed PIP. Her four page written response foresaw “a significant problem with regards to developing [the “recommendations” and “Design Manual Standard Plans” items of the project summaries] in that expert-level and thorough review of submittals would be required.” It also proposed that meetings “and correspondence requiring employee response be provided with ten working days advance notice.” Her supervisor, his supervisor, and HR jointly replied—at length—that the content of the PIP was “not negotiable.”

On October 22, Ms. Hess amended her hostile workplace complaint alleging retaliation in three additional supervisory “allegations” of her misbehavior so far that month.

On October 23, her supervisor attempted to detail his expectations with respect to the PIP in general and project summaries in particular. She submitted the first project summaries on

time; but the supervisor replied that “they seem to have been done very quickly, with very little thought or effort given to the content.” He attached detailed comments on each of her submitted project summaries. She resubmitted them on November 7.

At the November 20 morning team meeting Debbie Maker, the team’s Permits Technician, passed out a list of outstanding receivables; and Ms. Hess steadfastly refused to take it or to acknowledge its existence and would not take it out of the meeting, saying “I don’t need it.” Her supervisor memorialized that as a failure “to actively participate in a team discussion” and “to show respect to a fellow team member.”

On December 5, Ms. Hess’s supervisor closed out a file with an email notice that “WSDOT is not asking for any improvements or funding contributions from this project. *** In summary we have no objections to this development being approved. We also have no other comments about this project as our jurisdiction is only the state highway system.” Less than an hour later, Ms. Hess sent an email beginning,

At the time the WSDOT comments were made on this project there was (and likely still is) a project listed in the County’s six-year plan that potentially affects the operation of the ...intersection – which is of concern to us within WSDOT jurisdiction.

*** As a result I suspect there were local issues outstanding. If for some reason a problem has been caused by the comments issued by WSDOT on this project kindly bring that to my attention.

Her supervisor considered her email to fly in the face of his own, issued less than an hour earlier, and told Ms. Hess so in some detail in a December 8 staff meeting. On the 16th she sent him a three page defense of her email, which included this comment:

If I had not witnessed this same pattern of extraordinary effort on your part and others to imply some deficiency in my work or performance in front of others and if I there was any reasonable explanation for your email then I may not be so inclined to believe the intention to be another effort to adversely affect me.

On December 17 she received a written reprimand for the email. The letter or reprimand particularly cited the passage set out just above and noted that it “further demonstrates that you still do not understand the chain of command in this office or our expectation that you will accept your supervisor’s decision as final...”

Ms. Hess additionally submitted what she titled a “Preliminary Response” to the reprimand a month later, on January 15, 2009. In it she objected that she had not been given time to prepare to discuss the issue before it was addressed at the December 8 staff meeting; denied any intent to undermine her supervisor’s action; insisted that she did understand the chain of command and had never failed to accept her supervisor’s decision as final; claimed that she had “recently demonstrated that I make every effort to thoroughly prepare and discuss any issue

where I am invited to do so when I am allowed reasonable time for preparation;” and noted that she was still “in the process of substantially responding to” her September, 2009 evaluation. (Written reprimands can be grieved only up to Step Three, within the Agency, under the parties’ collective bargaining agreement, so the grievance could not be pressed to arbitration.)

Meanwhile, on December 9, 2008, her second level manager issued her a predisciplinary notice “up to and including dismissal.” That notice, and the subsequent investigatory interview, led to Ms. Hess’ 10% salary reduction the next month. At that investigatory interview, Ms. Hess indicated that she had “skimmed” the pre-discipline notice and refused to respond to any of the charges orally.

2009. 2009 began with a grievance of the December written reprimand and with the issuance of HR’s investigatory report of Ms. Hess’s hostile work environment complaint. Although Ms. Hess testified that it was a “very neutral report,” it was by no means neutral. It found her claim unsupported: “it was found the actions taken since the filing of the complaint are correlated with continuing issues and performance deficiencies.” Overall, the report found no retaliation or violation of agency policy:

Ms. Hess’s allegations were determined to be founded more on personal belief or partial information rather than on actual fact.

In interviewing current and past members of the Developmental Services work unit, all have shared their personal difficulty in working with Ms. Hess because of her behaviors toward them, which include glaring, rolling of eyes, extended sighing, lack of communication and disrespectful actions. * * * Of eight employees interviewed, five described their work environment as not hostile; two described their work environment as tense and unfriendly because of how they are treated by Ms. Hess, and one described their work environment as hostile because of how Ms. Hess treated them.

January, 2009 also brought the 10% pay reduction which is the first of the two disciplinary actions at issue here. The stated basis of that reduction was “unsatisfactory performance of duties.” The allegations began with Ms. Hess’s unsatisfactory completion of the progress reports required in the PIP:

During the pre-disciplinary meeting and in your written statement, you stated that the project summaries were a “*redundant paperwork exercise that duplicates my existing database tracking and other methods of task follow-up.*” You also expressed your belief that the assignment served no real purpose and distracted you from working on issues with your customers. I reminded you that the summaries were to be used by your supervisor in bi-weekly meetings with you to assist you in managing your projects, but these meetings could not begin until the summaries were complete. *** [I]f the information requested in the project summaries was redundant and contained elsewhere in existing files or records, this information should have been easily extracted and allowed you to complete the project summaries within the assigned timeframe.

The allegations then provided an example of failure to perform ordinary duties: a file that Ms. Hess had shown in the status, "Maintain and continue dialog..." which had been closed by a junior employee in training during a 45 minute discussion in Ms. Hess's absence. Finally, the notice turns to communications and submission to supervision:

During the pre-disciplinary meeting you complained that [your supervisor] does not communicate with you, is not available to assist you, and that his lack of availability is preventing you from being successful. At the meeting, [your supervisor] reiterated that he is available to discuss issues with you if he is free... that you should feel free to come in and talk with him. You stated that entering [his] office without a pre-scheduled meeting was rude and you refused to do it. You also stated that you felt this put you at a disadvantage, recognizing that others on the team do have access...by this means.

* * *

During the pre-disciplinary meeting and in your written response, you continue to challenge [your supervisor's] direction, question the basis for my expectations of the Development Services Office staff, and refuse to accept responsibility for your behavior and performance. * * *

The disciplinary notice concludes,

You have consistently challenged [your supervisor's] feedback; deflected accountability for the problems experience with management of your projects, and refused to take responsibility for providing meaningful and consistent project support for your customers. Your work performance has not been commensurate with a senior level Developer Agreement Reviewer at the Transportation Engineer 3 level. Likewise, your behavior toward your management, team members, and customers is unacceptable and has a significant negative impact on relationships with our customers and on the morale of the office.

Ms. Hess's pay was reduced by 10% for a six month period. The Union filed a timely grievance.

On February 10, she received her supervisor's review of her third version of the project summaries. He found,

The Project Summaries do show that you have a baseline understanding of general participants and current issues for six of the fifteen projects. However, four of the fifteen projects require development or alternative approaches because your recommended approach is not appropriate. Two of the project summaries are unacceptable and need to be completely redone. Three of the projects are complete or on indefinite hold and should be returned to the main DS files, though this need was not recognized in your summaries and was not included in your recommendations.

* * *

* * * It is also very troubling that in almost all cases you attribute decisions and recommendations to others, such as OR Hydraulics Engineer, PEO, Traffic Office, or other "subject matter experts". Collaboration with subject matter experts is fine, but I still expect you to make decisions and recommendations about your projects. ***

* * *

The attached table lays out your assignments and due dates for the work plan that has been developed by your Management Team from your Project Summaries. Reasonable due dates are listed and the work products that will be presented to your Management Team are listed. I will be scheduling these meetings through schedule+ and expect that you will accept the invitation and respond within one working day.

Ms. Hess requested for overtime to “manage day to day work load plus additional ‘Project Summary’ / ‘Work Plan’ assignments;” and her supervisor turned her down, noting that “Team resources are available to help you and have been offered.”

On March 9, Debbie Maker, the team’s Permits Technician, filed her own Hostile Work Environment complaint, about Ms. Hess. The complaint alleged a general hostility in Ms. Hess’s manner and an unwillingness to provide the most basic and necessary information. In particular, as a last straw, it painted this picture of a March 4, morning team meeting:

During our team meeting, we discussed the active projects we were working on. Art and I wrote our projects on the whiteboard and discussed where we were at with those projects, as well as other questions or issues that we were dealing with. [Supervisor] Dale then handed out the JC Invoice Report, which is a report we discuss twice a month during our team meetings. Alana asked if discussion on this report was necessary as we were meeting monthly with Financial Services about this issue. (Her tone with Dale was rather condescending). Dale said yes, it helped him see where things were at. I mentioned that in my previous discussion with Misun Peck, it was agreed that we would keep an eye on customer’s outstanding invoices and let financial services know if there were “past due” issues. This would help Financial Services, as if they hadn’t already talked to us about contacting the customer, would bring it to their attention. Alana wouldn’t even acknowledge that I was speaking, never looking at me. We then started going through the JC Invoice report. I asked if she could tell me the status of the Port of Tacoma project, and if they were going to be catching up their bill. After a pause, Alana said it appears so (still not even looking at me). Dale stated that he’d answer that question; and that based on the phone conference with the Port of Tacoma basically a check was in the mail.

I then asked Alana about the Hong Convenience Store project. She said she didn’t know anything about that project. Her tone of voice was very angry, gruff and aggressive. I felt verbally slapped. I repeated the name of the project and said that “it’s your project”. She then paused and looked straight at Dale and asked about backing out my labor hours—totally ignoring that I had asked her a question. I interrupted her when she was speaking by stating “I’m sitting right here”, then I sat back in my chair. After finishing conferring with Dale she turned to me and angrily asked if I was aware of my hours being backed out. This was done in an angry accusatory manner and made me feel uncomfortable. I stated “yes, as of today”. I decided to try again, and asked her that since the project was cancelled, did she need help with closing the JC and releasing the Bond? She said I’m not closing the JC at this time. I asked if she was waiting for my hours to be backed out. She said it wasn’t a priority for her at this time. Dale then asked her more about what she was waiting for to close the JC. I asked her if any other labor hours were going to be charged to this, she said no. At this point I just sat back in my chair and waited

for the meeting to be over. It was apparent that anything I said would just inflame the situation and I didn't want her losing control of what seemed to be a very short string.

On March 31, the Agency finally gave Ms. Hess formal notice that it was considering disciplinary action up to and including dismissal. The notice made two charges: it essentially alleged misbehavior in her behavior toward Ms. Maker in the March 4 team meeting, and it alleged failure to perform the duties of her position as demonstrated by the history of the project summaries and her recent handling of the Fred Hill Materials project that had been assigned to her on February 19. There was a predisciplinary interview on April 13, which Ms. Hess attended with her Union representative. She said she had not prepared for the hearing, had not read the notice carefully, and was not clear about what the issues were. The Agency discharged her on April 13 based on the allegations set out in the March 31 notice. The Union grieved the discharge, and the parties agreed to combine their disputes over the 10% reduction and over the subsequent discharge into a single hearing.

DISCUSSION

The overwhelming majority of just cause issues divide into three headings: Did the employer establish that the grievant actually did whatever he or she was disciplined for? Should the grievant have known in advance that such behavior or misbehavior might result in this degree of discipline? And was the discipline process administered fairly and regularly producing a result that was not grossly unreasonable? Cutting across those traditional classes of issues, just cause cases also divide into discipline or discharge for *misbehavior* and discipline or discharge for failure to perform adequately. The case at hand clearly presents a failure to perform dispute; but it also includes at least a borderline long-term misbehavior allegation.

Did the Agency show that Ms. Hess did what she was disciplined for by a 10% pay reduction? The primary focus of this charge is that Ms. Hess's third attempt at the project summaries was still inadequate. The Union offers several defenses to this allegation. First, it argues that the thrust and details of the project summary requirement shifted substantially over time. The record does not support that claim. But it does support the Agency's final judgment that Ms. Hess, even at the end of the feedback process, still viewed her work as consisting of activities to be engaged in rather than as goals to be accomplished. To the very end of the hearing Ms. Hess pointed to what she found to be a puzzling directive not to include phone calls or emails in the project summaries: but it seems pretty clear that she was told *not* to say "I'll call X," but to list the next goal to be accomplished (whether through a call to X or otherwise).

The Union cites an arbitration award by the late Carlton Snow (NAA) (*IFPTE v. Clark County*, AAA #75 390 85 85, 1986) in which the employee *was* given conflicting instructions by changing management teams. This is not such a case. Ms. Hess's view that the instructions were confusing and inconsistent makes sense *only* in light of her steadfast determination *not* to view the project summary assignment as a tool for improving her performance but, as she said in the predisciplinary hearing, a "redundant paperwork exercise that duplicates my existing database tracking and other methods of task follow-up." Since Ms. Hess consistently refused to accept

that there could be any problems with her performance or to accept the stated and reasonable goal behind requiring the project summaries, she rejected the reasonable and oft-repeated goal of the assignment which provided a unifying basis for interpreting its details.¹ Viewed in light of the express purpose of the project summaries, there was no substantial alternation in the instructions for their completion throughout this process.

The Union argues that Ms. Hess was prejudiced by the changes in personnel.² The record reasonably shows that the section's work load per employee increased. But it does not show that Ms. Hess's failure to complete the project summaries satisfactorily was substantially impacted by her workload. There is not even a hint that the basis for the discipline here was caused by time that had to be redirected to the project summaries. Indeed, as the Agency points out, her insistence that the summaries duplicated data that she already had readily available contradicts any attempt to argue that the time required for completing the summaries was a substantial burden, regardless of the reduced size of the section.

The Union next argues (Post-hearing Brief at 28) that the Agency did not establish that Ms. Hess's work had caused complaints from customers. Here, the Union is certainly correct. The Union called three customers to say Ms. Hess's performance was fine; and the Agency did not call any of the customers alleged to have complained about it, despite my indication that hearsay evidence would not provide the necessary support for that part of the allegations against her. The record the Agency created does not adequately support the allegation that Ms. Hess's work caused customer complaints.

The charges underlying the 10% pay reduction also include general charges, first, that Ms. Hess had "consistently challenged Mr. Severson's feedback, deflected accountability for the problems experienced with management of your projects, and refused to take responsibility....," and second, that her "behavior toward your management, team members, and customers is unacceptable and has a negative impact on relationships with our customers and on the morale of the office." The first of those charges is eloquently supported in the facts set out above, beginning with Ms. Hess's written response to her first mixed evaluation in 2007 (on pp. 2-3)³

1. This refusal to interpret directions in light of their purpose is also exemplified by Ms. Hess's puzzlement (on p. 5, above) that an instruction to work only on things listed on the board at the morning meeting did not mean she should not complete a timesheet.

2. In arbitrator Snow's case (cited in the prior footnote), the grievant was prejudiced by changes in *management* teams during the period in question. Here, on the other hand, the very same first and second tier supervisors were involved from beginning to end.

3. Ms. Hess testified that after her written response to her 2007 evaluation "things just got worse." She seems genuinely oblivious to the fact that responding to her evaluation by attacking her evaluator was almost guaranteed to make things get worse. She reiterated her criticisms in an attempt to have an outside facilitator, apparently unaware that she consistently appeared to be looking for someone to be brought in to overrule her supervisor.

and her written response to her PIP. Indeed, it was her absolute unwillingness to move on from her final poor evaluation that eventually led to her discharge: she has consistently maintained that that evaluation, the PIP that followed it, and all subsequent corrective and disciplinary action, including the requirement of project summaries, was the fault of her supervisor and not a consequence of her performance.⁴

The second general charge is only partly supported in the record before me. To the extent that that charge reflects Ms. Hess's behavior toward customers or negative impact on the Agency's relations with customers, it is not adequately supported in the record. On the other hand, the claim that Ms. Hess's "behavior toward your management [and] team members is unacceptable" was well supported in the record. The Agency called a series of former and current section employees who gave the same account that became the conclusion of HR's response to Ms. Hess's hostile work environment complaint: "all [current and past members of the Developmental Services work unit] have shared their personal difficulty in working with Ms. Hess because of her behaviors toward them, which include glaring, rolling of eyes, extended sighing, lack of communication and disrespectful actions." Apart from Ms. Hess's general denial, there is no substantial contrary evidence.⁵

Should Ms. Hess have known that such discipline would be a possible consequence of her actions? Even without specific work rules, any employee should certainly realize that the sort of office behavior so aptly characterized in HR's conclusion may result in substantial discipline. Here, moreover, the Agency had specifically revised its office expectations to focus on the behaviors with which Ms. Hess had long inflicted her co-workers. She certainly should have realized that substantial and financial discipline was a possibility.

With respect to her continuing resistance to the requirement of project summaries, the record makes it clear that management repeatedly explained to her that the purpose of that requirement was to give her supervisor a perspective on how to improve her performance. On

4. Right into the Union's Post-hearing Brief (at 16), Ms. Hess objects that none of her peers were required to do project summaries, thus steadfastly refusing to accept that there were any flaws to be repaired in her performance. The Union argues that the Agency did not "provide Ms. Hess the tools and support to succeed;" but the Agency told Ms. Hess over and over that the project summaries were the initial step in just that process, and she would hear nothing of it.

5. The Union offers an alternate view that would paint Ms. Hess as the victim of her disinclination to socialize with her co-workers, at least during work hours. But the record here goes quite beyond that. It is possible that Ms. Hess's performance was crippled by her preference for communication by detailed email string (she testified that when specifically told not to email her supervisor, she sent email to herself, printed it out, and handed it to her supervisor) and her insistence on formal advance scheduling of every meeting. In an office that runs as a team and is supported by team member informal input, that insistence on advance notice and opportunity to prepare was nonfunctional.

the record before me there is no basis to discount that claim: the project summary format is a reasonable managerial tool for assuring an employee has a grip on the process, appreciates the current challenges, and sees a reasonable path to completion. The record shows convincingly that Ms. Hess never accepted the project summaries as such a tool because she was still fighting the battle over the accuracy of her prior evaluation and the appropriateness of the PIP. When an employee does not accept management's carefully designed vehicle for possible repair of shortcomings in the employee's performance, he or she can be surprised at the imposition of substantial discipline.

Was the discipline process fair and regular and was the 10% pay reduction not unreasonable? The Union does not raise serious issues with the discipline process other than Ms. Hess's continuing insistence that the evaluation and PIP from which it ultimately arose were unfounded. The 10% reduction was reasonably chosen as a financial penalty intended to convince Ms. Hess of the seriousness of the Agency's intent to see a correction in her performance, and the Union does not suggest that any other employee has ever received a lesser penalty for such failure of performance and office misbehavior. The overwhelming weight of the allegations did not involve the unsubstantiated claims about Ms. Hess's relations with customers. The pay reduction was administered for just cause.

Did the Agency establish that Ms. Hess did what she was discharged for? The underlying justification for the discharge was that even in the face of the serious financial discipline of the 10% pay reduction, Ms. Hess's behavior and performance continued to show the same problems in both major areas, and that the new misbehavior and shortcoming were significant.⁶ The 'final straw' leading to Ms. Hess's discharge was certainly her behavior in the morning team meeting on March 4. The record here shows quite clearly that Ms. Maker's allegations in her resulting hostile work place complaint (set out on pp. 9-10) did not exaggerate but rather understated the offensiveness of Ms. Hess's behavior toward Ms. Maker and toward the supervisor.⁷ Other than Ms. Hess's denial, all of the participant witnesses provided an account more extreme than the picture set out in Ms. Maker's complaint.

The other subsequent failures of performance cited in the dismissal notice are Ms. Hess's performance of her regular duties on two of her assigned projects, the SR 104 Fred Hills Materials project and the SR 108 Squaxin Tribe Little Creek Casino Access project. With respect to the latter of those, there is no dispute that Ms. Hess missed a filing deadline. She admirably agrees that she did, without excuse. The SR104 project error involved her misinterpretation of a permit. The customer was a supplier of building materials ("Rock-To-Go"), and the Agency had required him to construct a center "refuge" lane and a wide shoulder

6. Ms. Hess was not charged with insubordination, as the Union suggests.

7. For example, the record shows quite clearly that Ms. Hess's final response to Ms. Maker at the March 4 team meeting was a shouted "NO" which rather shocked the rest of the participants.

acceleration lane at the entrance to his operation. But the traffic increase was expected to be gradual, so the Agency merely established future triggers for those requirements and required the customer to conduct a yearly traffic analysis to let the Agency see whether those triggers had been hit. One of the stated triggers was “when the Level of Service (LOS)...falls to LOS E...,” and the October, 2008 traffic analysis showed one two-hour period when the LOS dropped to F. That data was set out clearly in the general report and repeated in the “Summary” paragraph; but Ms. Hess missed it, and she also missed the fact that the delay in the Agency’s requirement expired at 2009: On March 16, 2009, she wrote the customer that “the warrants for the required improvements have not yet been met.” The record establishes that Ms. Hess made the alleged error and that the basis for the correct decision appeared fairly clearly on the face of the documents she was working from.

Should Ms. Hess have known that her discharge was a possible consequence of her actions? There is some room for doubt about whether Ms. Hess should have realized that the missed filing deadline and the SR 104 error taken alone would justify cutting short the 10% pay reduction period. But her behavior in the March 4 team meeting fell squarely within a class of misbehavior that had been brought to her attention again and again over the years and had been part of the basis of the pay reduction. An employee serving a pay reduction period for such misbehavior cannot reasonably be surprised when a clear and extreme additional instance of it results in dismissal.

Was the discipline policy fair and regular and Ms. Hess’s discharge not unreasonable? The Union points out that the Agency disciplined Ms. Hess with a six-month 10% pay reduction effective February 1, 2009 and then dismissed her on April 13, less than half-way through the pay reduction period. But a disciplinary pay reduction is never a guarantee of continuing employment, come what may, for the period of that reduction. It is certainly true, as the award by Arbitrator George Lehleitner (*IFPTE #17 v. City of Tacoma*, 1986, cited by the Union) points out, that an employer cannot take disciplinary action and then reconsider its choice of discipline and take more extreme disciplinary action for exactly the same misbehavior. But if, for example, an employee was temporarily demoted for threatening a co-worker, and that employee then assaulted the co-worker during the period of the demotion, it would be bizarre to argue that he was immune to further discipline for additional misbehavior during the period of the demotion. Neither can Ms. Hess argue that she should have been immune to additional discipline when she again behaved in March in just the way that had been a basis for her 10% pay reduction beginning just the month before.

Finally, nothing in this record provides a reasonable basis for my questioning the Agency’s decision that there was no reasonable hope of correcting Ms. Hess’s continuing misbehavior, after the March 4 team meeting, and that her dismissal was the only reasonable course of action. The facts set out above quote extensively from Ms. Hess’s own written responses and protestations, because she, herself repeatedly generated the most compelling record for the Agency’s eventual reluctant decision to discharge her. She was discharged for just cause.

AWARD

The Agency did not violate the just cause provision of the collective bargaining agreement when it first reduced the grievant's salary and then discharged her based on behavior and performance issues in the workplace. The grievance is dismissed.

Respectfully submitted,



Howell L. Lankford
Arbitrator