

Financial Information Services Agency v. Leung

OATH Index No. 2115/13 (Apr. 9, 2014), *aff'd*, NYC Civ Serv. Comm'n Case No. 2014-0510
(Jan. 20, 2015), **appended**

ALJ recommends dismissal of that portion of the charges that alleges time and leave infractions, where petitioner condoned respondent's regular practice of scanning out from work at exactly 4:53 p.m., seven minutes before her scheduled departure time on 164 occasions, and failed to place her on notice that such behavior would be deemed misconduct. ALJ also recommends dismissal of Specification 32 of Charge II(A), which alleges time and leave infractions on a Saturday. ALJ sustains that portion of the charges that alleges that respondent was absent from her work station without authorization where the evidence established that on 164 occasions, respondent left her work station on the tenth floor at approximately 4:35 p.m., 18 minutes before she scanned out on the fourth floor, without the knowledge or authorization of her supervisor. By so doing, respondent also failed to comply with time and leave procedures which require that daily time records show the actual hours worked by each employee. ALJ further sustains the charge that respondent is incapable of performing tasks appropriate for her title of Level II Computer Programmer Analyst. For the sustained charges, ALJ recommends that respondent be demoted to a Level I Computer Programmer Analyst.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
FINANCIAL INFORMATION SERVICES AGENCY
Petitioner
- against -
BETTY LEUNG
Respondent

REPORT AND RECOMMENDATION

INGRID M. ADDISON, *Administrative Law Judge*

This is a disciplinary proceeding referred by petitioner, the Financial Information Services Agency ("FISA"), pursuant to section 75 of the Civil Service Law. Petitioner charged respondent, Betty Leung, a Level II Computer Programmer Analyst, with 102 instances of incompetence, alleging that on each instance, respondent failed to competently perform the tasks

associated with her position and title. Petitioner also charged respondent with misconduct, alleging that among other things, she was insubordinate in failing to follow her supervisor's instructions to meet with and submit questions to a designated mentor and to complete ramp-up tasks and exercises by the due dates, in violation of section C of petitioner's Standards of Conduct (ALJ Exs. 1, 2). Petitioner further charged that on at least 165 occasions between October 22, 2012 and September 10, 2013, respondent left her work station well before her scheduled departure time, and signed out on another floor, thereby depriving petitioner of significant production time and engaging in theft of services, while obtaining a personal benefit for herself, in violation of sections B.1. a, b, j and o, of petitioner's Standards of Conduct (ALJ Ex. 2).

At a hearing on October 29, November 26, and December 10, 2013, and January 15 and 29, 2014, both parties submitted documentary evidence. In addition, petitioner presented the testimony of respondent's supervisors and her assigned mentor. Respondent testified on her own behalf. Closing arguments were heard on February 18, 2014.

The evidence established that petitioner condoned respondent's regular practice of scanning out from work at exactly 4:53 p.m., seven minutes before her scheduled departure time, and failed to place her on notice that such behavior would be deemed misconduct. I therefore recommend dismissal of the charges that allege that this practice constituted time and leave infractions and a theft of services. Specification 32 of Charge II(A) should be dismissed because it references a Saturday, which was not one of respondent's regular work days.

The evidence also established that respondent left her work station at 4:35 p.m. on each of 164 days charged without her supervisor's knowledge or authorization. Therefore, that portion of the charges that alleges that respondent violated petitioner's Standards of Conduct by leaving her work station on the tenth floor well ahead of the time that she scanned out on the fourth floor, without the knowledge or authorization of her supervisor, should be sustained.

The evidence further established that respondent is unable to perform the duties associated with her job title, and that her incompetence has disrupted her unit in that her portion of the work has to be re-assigned to workers who are already carrying full assignments.

For the proven charges of incompetence and time and leave infractions, I recommend that respondent be demoted to a Level I Computer Programmer Analyst.

ANALYSIS

Respondent, who holds an Associate's degree in data processing, joined FISA in 1984, as a provisional Office Associate in the Quality Control Unit. She moved to the Configuration Management Unit in 1987, where she was responsible for migrating programs, which entailed running a Job Control Language ("JCL") to make sure that programming changes ran smoothly (Tr. 665-71). In 1993 or 1994, respondent became a Computer Programmer Analyst Trainee, and in 1996 or 1997, she sat and passed an exam to become a full-fledged Level I Computer Programmer Analyst. After satisfying a probationary period, she was made a permanent employee with more responsibilities (Tr. 670-73). Respondent became a Level II Computer Programmer Analyst in 1999, while still in the Configuration Management Unit. In 2001, she was transferred to Program Management, where she kept track of project information on various Excel spreadsheets, and was accountable to Peggy Kowalski, her current supervisor (Resp: Tr. 674, 676, 678; Kowalski: Tr. 396-97). Two years later, in 2003, respondent was transferred to the unit that handled the second generation of FISA's Financial Management System ("FMS/2"), where she operated as a tester (Tr. 675, 679). FMS is the system that the City uses for accounting and budgeting procurement (Kowalski: Tr. 140; Resp: Tr. 681). In 2007, six FMS/2 testers, including respondent, were transferred to FMS/3 (Kowalski: Tr. 144-45, 400-01; Resp: Tr. 691-92).

The incompetence charges against respondent are based on her performance in the FMS/3 unit, while the misconduct charges are based on alleged time and leave infractions since she became a member of that unit. The time and leave charges will be addressed first.

Time and Leave

Petitioner charged respondent with misconduct for leaving her work station well before her scheduled departure time of 5:00 p.m. on 165 occasions over a ten and a half-month period, and signing out on another floor at exactly 4:53 p.m. on each occasion, with the intent to deprive the agency of time. Under FISA's Standards of Conduct, misconduct includes:

Refusal to carry out the responsibility of the position, including the supervisor's instructions, with reasonable promptness. Section B.1.a;

Conduct which disrupts the work of the agency or any agency employee. Section B.1.b;

Unauthorized absence from assigned work location. Section B.1.d;

Failure to comply with time and leave procedures promulgated by the New York City Department of Personnel. Section B.1.j.

Revised Standards of Conduct (January, 2010) (Pet. Ex. 4). Respondent signed for the Standards of Conduct on January 12, 2010 (Tr. 27-28; Pet. Ex. 5).

Sherri Roth, FISA's Director of Human Resources since 2007, is ultimately responsible for employee time and leave (Tr. 15). Ms. Roth explained that through Citytime, the City's timekeeping system, employees may clock in and out from their computers using the Citytime webclock, or they may scan their palms at arrival and departure times on an electronic palm reader. Respondent uses the palm reader. FISA's palm readers are located on its tenth and fourth floors and there are no restrictions on which palm reader an employee may use (Tr. 40-41, 51, 55, 83). On the Monday or Tuesday following each work week, employees confirm the accuracy of the recorded times and submit electronic timesheets to their supervisors whose approvals are also made electronically (Tr. 42). A supervisor's approval is an affirmation that there is no issue with the times submitted. The supervisor has reviewed the timecard and approved the times indicated on it (Roth: Tr. 44-45; Kowalski: Tr. 421-24). Following the supervisor's approval, the timekeeping unit of Human Resources checks the timesheet to make sure there is nothing untoward, and then approves it as "Final" (Tr. 45-46).

Respondent has a 9:00 a.m. to 5:00 p.m. work schedule (Roth: Tr. 56; Kowalski: Tr. 390). Ms. Roth testified that Citytime rounds arrival and departure times to the nearest 15 minutes. Thus, if an employee with a 9:00 a.m. to 5:00 p.m. schedule arrives at 9:07 a.m., Citytime will round the time down to 9:00 a.m., whereas if the employee arrives at 9:08 a.m., Citytime will round the time to 9:15 a.m. The employee will therefore be required to work until 5:15 p.m. to satisfy a seven-hour work day. Likewise, a 4:52 p.m. departure time would be rounded down to 4:45 p.m., whereas a 4:53 p.m. departure time would be rounded to 5:00 p.m. (Tr. 49, 94). Employees are permitted up to a half hour of flex time, which allows an employee who arrives after his/her scheduled start time to make up the lateness at the end of the day. But flex time is not an absolute right. It depends on the business needs of the unit. Hence, flex time may not be permitted if there is no one to supervise the employee at his/her arrival and departure flex times (Tr. 57).

Petitioner submitted printouts of respondent's electronic time records for the period October 22, 2012 to September 10, 2013 (Tr. 38-40; Pet. Ex. 7). The records showed days of the week and dates, respondent's arrival and departure times, the start and end times for her meal, any form of leave taken, the reason given for the leave, the tasks on which respondent worked during the relevant work week, and the status history of respondent's timesheets from draft to submission, to approval by her supervisor, and final approval by Human Resources (Tr. 46-49). Petitioner also submitted the "DCD Punch Status Report" from Citytime covering the time period for which respondent was charged with leaving early (Tr. 50; Pet. Ex. 8). The DCD report matched respondent's timesheets in that it displayed the dates and times that respondent scanned in and out. In addition, it displayed the particular palm reader that respondent used (Tr. 52).

As an initial matter, petitioner's records revealed that December 22, 2012, one of the 165 days that respondent is alleged to have scanned out early, fell on a Saturday.¹ That specification should therefore be dismissed. For the remaining 164 days, petitioner's submissions establish that on each day, respondent scanned in on the tenth floor and scanned out on the fourth floor. Her arrival times varied but were mainly before 8:30 a.m. Her departure times remained constant at 4:53 p.m.

Ms. Roth maintained that petitioner only became aware that respondent was scanning out on the fourth floor each day when Ms. Roth's unit generated the DCD Punch Status Report at some point after September 19, 2013, at the request of petitioner's Legal Division (Tr. 55-56). The time estimated for respondent to get from the tenth floor where she works, to the fourth floor, where she scans out, was about ten to fifteen minutes, because she had to proceed to the building's lobby, cross the lobby, re-enter the other side of the building through security gates using her ID card, and take another bank of elevators to get to the fourth floor (Roth: Tr. 52-53, 57; Kowalski: Tr. 581-82, 592). Ms. Roth conceded that respondent's timesheets were approved by her supervisor, but since the timesheets did not indicate the location of the scanner where respondent was signing out, Ms. Roth suggested that Ms. Kowalski would have had no way of knowing that information (Tr. 71, 73, 95).

¹ See ALJ Ex. 2, Chg. II(A), Spec. 32.

Ms. Roth testified that employees are expected to work a seven-hour day and should be in their work areas until the end of their work day, unless they have authorization or work-related business that justifies their presence elsewhere. Thus, employees may not leave their work area approximately 20 minutes early in preparation to sign out (Tr. 75-76, 93). Ms. Roth noted that while occasionally clocking out on a different floor is not prohibited, systematically doing so without the supervisor's knowledge or approval is unauthorized conduct (Tr. 101-02). Therefore, she opined that respondent's early departures from her work station on the tenth floor to sign out on the fourth floor on 164 occasions were unauthorized absences from her assigned work location in violation of petitioner's Standards of Conduct (Tr. 93). Ms. Roth explained that petitioner's time and leave procedures were unlikely to contain regulations governing an employee clocking in and out in Citytime because the procedures pre-dated the introduction of Citytime to City agencies (Tr. 82-83; Resp. Ex. A).

Peggy Kowalski, FISA's Assistant Executive Director of Testing for FMS/3, testified that when FMS/2 testers were transferred to FMS/3, they needed to be trained to do the work or, to use her term, to be "ramped up" (Tr. 139, 142-44). So on August 20, 2007, she notified the FMS/2 testers by e-mail that effective immediately, in order to facilitate their ramp-up, their work schedule was being changed to a 9:00 a.m. to 5:00 p.m. shift so that team leaders, or test leads, who were working on the project until well after 9:00 p.m. each night would be available to assist them with training and work assignments. She contemplated that once fully ramped up, the FMS/2 testers would return to their previous schedules (Tr. 390, 393; Pet. Ex. 42).

Ms. Kowalski recalled that in or around March 2010, she was informed that certain testers were working different hours from what they were recording on their timesheets, and she was unable to ascertain the times that those individuals actually arrived or left. Among them was respondent, one of two testers who had not been ramped up on FMS/3. Consequently, members of the test group were assigned cubicles close to the test leads, and Ms. Kowalski relocated respondent and the other tester who needed to be ramped up closer to her office so she "could visually scan when they were coming in and when they were leaving." Respondent, however, contended that Ms. Kowalski's stated purpose for relocating her and the other tester was that Ms. Kowalski could personally train them (Kowalski: Tr. 391-94, 582; Resp: Tr. 718).

Ms. Kowalski testified that she never authorized respondent to leave work prior to 5:00 p.m. on a daily basis, nor to clock out on the fourth floor, and respondent rarely had a business reason to be on the fourth floor (Tr. 394, 590). Nevertheless, she approved respondent's timesheets, and was aware that respondent was consistently signing out at 4:53 p.m. (Tr. 423-24, 578). Ms. Kowalski did not speak with respondent about the departure times she observed on respondent's timesheets (Tr. 424). But in the fall of 2012, she told Peter Reddy, her manager, that a worker was punching out at 4:53 p.m., and asked him if this was a problem that should be addressed. Mr. Reddy replied that Citytime rounded up to the nearest 15 minutes and that there appeared to be some confusion as to whether or not signing out at 4:53 p.m. was acceptable (Tr. 425-26). Mr. Reddy also advised Ms. Kowalski not to "take on too many fish to fry," and suggested instead that she focus on ramping up respondent (Tr. 428, 579-80, 589). As a result, Ms. Kowalski took no action regarding respondent's pattern of signing out early (Tr. 427).

Even though she brought respondent and the other tester who needed ramping up closer to her so she could keep an eye on them, Ms. Kowalski testified that she did not have a direct line of vision to respondent's cubicle because it was situated at an angle to her office. So she did not notice that respondent was leaving "abnormally early." Nor did she check daily to see the times that respondent was arriving and departing (Tr. 428-29, 582). Around spring of 2013, she observed respondent leaving earlier than her check-out times and discovered that she was checking out on the fourth floor (Tr. 430). Later, Ms. Kowalski posited that it was in the fall of 2013 that respondent's scanning out on the fourth floor came to light (Tr. 581). She indicated that she may have spoken to respondent on "a couple occasions" but her elaboration on those occasions suggests that she did so prior to the 9:00 a.m. to 5:00 p.m. schedule that she had set for the testers in her August 20, 2007 e-mail (Tr. 431). She also testified that respondent was issued a warning letter in March 2010 for "leaving early and then putting nine to five on her timecards" (Tr. 432). No such letter was produced.

Ms. Kowalski never addressed time and leave with respondent after the installation of Citytime's hand scanner because it "eliminated the need for [her] to actually be looking" Nor did she speak with respondent about scanning out on a different floor because she never received any further instructions from Peter Reddy (Tr. 431, 583). Her rule of thumb for employees was that they should let her know if they were leaving work early, because generally,

early departures were for scheduled appointments (Tr. 588). While Ms. Kowalski was aware that respondent was scanning in early, she opined that respondent did so by choice (Tr. 433).

Respondent testified that for more than ten years, she had an approved 8:00 a.m. to 4:00 p.m. schedule because she has heart palpitations and prefers to come to work early and leave early, to avoid crowded trains which trigger her palpitations (Tr. 694-95). She transferred to FMS/3 in 2007 with the same early schedule. When her work schedule was changed by Ms. Kowalski for training purposes, respondent filed a complaint with the New York State Division of Human Rights, seeking a reasonable accommodation. Following her complaint, Human Resources changed her schedule back to 8:00 a.m. to 4:00 p.m., pending a decision (Tr. 696-99). Her complaint was denied and FISA reinstated a 9:00 a.m. to 5:00 p.m. schedule for respondent (Tr. 699-700).

Respondent further testified that before Citytime was introduced to FISA in 2012, she recorded her arrival and departure times manually into her computer at the end of each week. With Citytime, respondent began to use the hand scanner to record her times (Tr. 764-66). She averred that she left her desk at about 4:35 p.m. each day and walked past Ms. Kowalski's cubicle. Ms. Kowalski's desk did not face the hallway which respondent took to the tenth floor exit, and she was not sure that Ms. Kowalski saw her leaving early. Respondent never called out goodbye to Ms. Kowalski nor seek her approval to leave at 4:35 p.m. each day. But no one ever questioned where she was going or inquired into her early departure (Tr. 772-75). She produced a copy of the floor plan to show, among other things, the location of her cubicle in relation to Ms. Kowalski's, and the exit route that she took daily (Tr. 709-14; Resp. Ex. D).

Respondent argued that no rules prohibit scanning out on a different floor and that she had scanned out for more than 12 months on the fourth floor. She went there each day to drop off fruits for a co-worker who never left the office for lunch, and to receive payment for them (Tr. 767-68). Respondent was unsure whether dropping food off for a co-worker constituted City business. And no one had ever explained to her what "City business" meant (Tr. 820, 824). Even though she left her desk at 4:35 p.m. daily, she conceded that she scanned out at 4:53 p.m., knowing that Citytime would round her time up to 5:00 p.m. Respondent contended that other workers did the same thing, no one ever told her that it should not be done, and she was unaware that she was violating any rules (Tr. 769-71). Respondent maintained that she arrived between

8:15 and 8:30 a.m. and started work ahead of her schedule, but was not compensated for her early start times (Tr. 771-72). But when asked about specific work activities during her early arrival times, respondent testified that prior to October 2012, when she got to work early, she checked her e-mails and went to the ladies room (Tr. 822).

In not so many words, respondent raised a defense of condonation and waiver for her practice of scanning out at 4:53 p.m. Condonation and waiver is an affirmative defense which respondent bears the burden of proving. *Health & Hospitals Corp. (Bellevue Hospital) v. Olosunde*, OATH Index No. 262/05 at 3 (June 15, 2005); *Dep't of Correction v. Calligaro*, OATH Index No. 925/95 at 8 (Apr. 25, 1995). For this doctrine to apply as a defense to misconduct, respondent must show that the behavior charged as misconduct was a regular practice known to and accepted by his/her supervisor. *See Dep't of Correction v. Heredia*, OATH Index No. 1070/91 at 12 (Aug. 23, 1991). The principle underlying condonation and waiver is that an agency may not lead an employee into believing that his/her conduct will not be considered in violation of a rule and then reverse its policy and seek to have the employee disciplined. *See Fahey v. Kennedy*, 230 A.D. 156, 159 (3d Dep't 1930); *Dep't of Environmental Protection v. Critchlow*, OATH Index No. 709/07 at 12 (Mar. 5, 2007); *Dep't of Environmental Protection v. Taylor*, OATH Index No. 925/04 at 14 (June 22, 2004), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 06-04-SA (Jan. 9, 2006); *Law Dep't v. Coachman*, OATH Index No. 1370/00 at 8 (June 13, 2000), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 01-13-SA (Apr. 11, 2001); *Dep't of Parks and Recreation v. Wilson*, OATH Index No. 398/91 at 3-4 (May 3, 1991).

A *prima facie* defense of condonation and waiver will be defeated if petitioner can establish that respondent's conduct was fraudulent, in that respondent knowingly misrepresented a material fact with the intent to defraud. *Olosunde*, OATH 262/05 at 4; *Taylor*, OATH 925/04 at 14.

From the evidence adduced at trial, Ms. Kowalski was well aware that respondent was regularly scanning out at 4:53 p.m. Respondent made no attempt to conceal the time that she left the building because she used Citytime's hand scanner. Ms. Kowalski repeatedly approved respondent's timesheets which showed these departure times. She never spoke to respondent about the times that she scanned out because of Mr. Reddy's statement to her that Citytime rounded up to 5:00 p.m., and there was confusion as to whether a 4:53 p.m. departure time was

permissible given the rounding up. Thus, I found credible respondent's testimony that the practice of scanning out at 4:53 p.m. was not isolated to her, and no one ever instructed or advised her to cease the practice. While respondent and others availed themselves of the Citytime technology to the disadvantage of the agency, petitioner provided no directive or warning prohibiting this practice. Therefore, I find that respondent established a *prima facie* defense of condonation and waiver for her 4:53 p.m. departures which petitioner failed to rebut.

Respondent's departure from her work station at 4:35 p.m. each day for 164 days is another matter. I have only her uncorroborated testimony that she walked past Ms. Kowalski's cubicle on each of those days when she left her work station. But even if true, there was no testimony that Ms. Kowalski was in her cubicle each day at the time respondent walked past, or that she saw respondent, as respondent herself testified.

While its witnesses agreed that there were no rules prohibiting respondent from signing out on the fourth floor, petitioner's Standards of Conduct prohibited respondent's unauthorized absence from her assigned work location. I find that respondent's absences from her work station at 4:35 p.m. each day were neither known to nor approved by her supervisor. Nor could respondent justify her food delivery to a co-worker as work-related. In essence, on 164 occasions, respondent stopped work at 4:35 p.m., not at the 4:53 p.m. departure time that was condoned by her supervisor. These constituted unauthorized absences from her work station on 164 occasions, in violation of section B.1.d of petitioner's Standards of Conduct. Respondent's cessation of work at 4:35 p.m. each day for 164 days, while simultaneously scanning out at 4:53 p.m., also violated section B.1.j., in that she failed to comply with section 6.1 of petitioner's time and leave procedures, which provides that "Daily time records shall be maintained showing the actual hours worked by each employee" (Resp. Ex. A). Since she ceased working at 4:30 to 4:35 p.m. each day, respondent's scan-out time did not accurately reflect her actual hours worked. This was a deliberately deceptive practice in which respondent engaged, and thus, contrary to her counsel's argument that her time cards were accurate, they were not.

In sum, the charge that alleges that respondent left work well ahead of her scheduled sign-out time of 5:00 p.m. and was away from her work station without authorization should be sustained. The charge that alleges that respondent punched out at 4:53 p.m., in order to deprive

the agency of seven minutes each day for 164 days should be dismissed because that sign-out time was condoned by her supervisor.

Incompetence and Misconduct

Petitioner charged respondent, a Level II Computer Programmer Analyst, with incompetence, for repeatedly failing to competently perform her assigned tasks, and with misconduct, for failing to follow her supervisor's instructions to meet with and/or submit questions to a designated mentor, and disrupting agency work with her early departure.

As per petitioner's job descriptions, a Level I Analyst codes program instructions; assists in surveys and feasibility studies; documents computer systems and programs; assists in writing procedure manuals; meets with users of computer services, explaining the procedures and standards required; assists in the preparation, review and analysis of detailed computer systems specifications; modifies existing programs to accommodate changing needs; and, under general supervision with some latitude for individual action or decision, may supervise a unit or group of subordinate employees engaged in the [delineated] tasks. A Level II Analyst's tasks and responsibilities differ only to the extent that he/she has "wide latitude for the exercise of independent initiative and judgment, performs more complex and responsible work in the development of computer programs, including performance of all of the [tasks delineated for a Level I analyst]" (Tr. 64-65; Pet. Ex. 6). For both levels, the educational requirements are the same. Respondent concurred that the civil service exam that she passed in order to become a Level I analyst tested her on the functions listed on petitioner's job description for that title (Tr. 778-80). She also agreed that her work in Configuration Management was similar to testing, in that she ran JCLs to make sure that changes to a computer program ran smoothly (Tr. 781-82).

A Level I analyst may be promoted to a Level II based on the quality of his/her work, or based on a grievance filed² (Tr. 66). In spite of the delineated job descriptions, petitioner's Standards of Conduct provides that:

It is a manager's obligation to explain to each member of his or her staff precisely what is expected for satisfactory performance of his or her job, and to ensure that the employee's Tasks and Standards accurately and completely reflect those expectations;

² Respondent could not recall whether or not she was promoted to Level II based on an out of title grievance that she had filed (Tr. 782).

supervisors must discuss those Tasks and Standards with the employee to ensure that they are understood at the time the employee is asked to sign them. **For any employee to be charged with incompetence, management must show that the employee has not performed reasonably in accordance with the standards defined for his or her job.** (emphasis added).

(Pet. Ex. 4 at 000004). The supervisor must make a written notation if the employee refuses to sign for the Tasks and Standards (Tr. 87-89).

As Director of FMS/3 and respondent's supervisor, Ms. Kowalski is responsible for ensuring that any software that is added or changed to the City's programs is thoroughly tested before it goes into production. Production means moving the software onto the production server, which is the system that end users employ (Tr. 139-40). The end users are all City agencies of New York City government that engage in accounting and procurement. They include the Comptroller's office, the Office of Management and Budget, and the Mayor's Office of Contracts, which is the primary oversight office for procurements (Tr. 140-41). In addition, FISA also oversees applications that City vendors use via an external portal (Tr. 141).

Ms. Kowalski plans the work that needs to be done, assembles workers and allocates the work into teams, assigns test leads, makes sure that workers are cross-trained, and plans for the controlled release of software while monitoring quality and timelines (Tr. 142). Ramping up a worker for a particular project may be multi-faceted. Some projects require reading the functional and technical design documents for a particular software change. If the software is developed by a FISA vendor, it would also include the vendor's testing materials, and its test plan and test results. In order to be ramped up, the FMS tester would need to read all documentation related to the software in order to understand the change that would be effected by it. Workers may be ramped up for an entirely new functionality which may require them to read training materials, module by module, that are designed for users. For a new tester, Ms. Kowalski prepares a training plan which would incorporate documents assembled in a sequential order, along with other project artifacts. A tester might be ramped up for a specific project or for a set of functionalities. Because the FMS supports many applications, testers must be able to handle more than one application (Tr. 143, 167).

Test leads are available to any worker for guidance. On a daily basis, they make sure that work is assigned and that the testers understand the work. The test leads also review the work of the testers during development, as well as after implementation. If things are going well, Ms. Kowalski does not monitor the work daily (Tr. 162-64).

Ms. Kowalski explained that the FMS/2 used a mainframe system while the FMS/3 uses a different technical architecture and platform. A vendor package on the FMS/3 platform was purchased and had to be modified. Since that vendor did “massive builds” about once a year, and FISA’s software sat on top of that vendor’s base product, the test team had to test the entire system as well as some auxiliary applications that had to be integrated into the system. But the basic functionality of FMS/3 remained identical to FMS/2 in the accounting area (Tr. 144).

When the FMS/2 testers were transferred into FMS/3, Ms. Kowalski supervised a staff of approximately 30 individuals. Only the six transfers were City employees. The remainder comprised outside consultants (Tr. 145-46). Since Ms. Kowalski inherited FMS/2 testing, she assigned that testing to the transferred FMS/2 testers, who should have known both FMS/2 accounting and FMS/2 budget. But respondent claimed that she did not know FMS/2 budget, had had no hands-on training on it, and could not test it (Tr. 175-76, 454-55, 461-62, 545-46). A few months prior to this hearing, however, Ms. Kowalski learned that respondent had indeed been ramped up on FMS/2 budget (Tr. 455-56).

Ramp-up of the FMS/2 testers for FMS/3 testing was attempted on three separate occasions but the plan was not formal and structured. Rather, it required the tester to be self-paced and operate independently (Tr. 386; Pet. Ex. 10). Ms. Kowalski maintained that respondent was provided with a copy of the plan and that she was personally involved in efforts to ramp up respondent for FMS/3 work (Tr. 164, 170-71).

The first ramp-up took place between June and July 2007. It involved DOE OTPS on-the-job training (Pet. Ex. 10 at N4049). FISA had recently implemented an accounting system application which was built to integrate the Department of Education’s (“DOE”) financial system into FISA’s. The application was called DOE OTPS, which stood for “Other Than Personnel Services.” Because they were “seasoned testers” the FMS/2 testers were assigned to do verifications and documentation for the execution of other FMS/3 testers’ test cases so they could familiarize themselves with the system. Verifications involved making screen prints that

documented test results. Ms. Kowalski stated that “that didn’t work out . . . ,” but did not further explain what she meant (Tr. 175-76). Ms. Kowalski did not write up respondent because respondent had received no formal ramp-up. Moreover, because it was a new system, Ms. Kowalski understood that some people learned at a faster pace than others. However, there was nothing else she could assign respondent. Ms. Kowalski explained that as a newly-implemented system, the DOE OTPS had bugs which had to be fixed before the system went into production. This consumed the focus of the FMS/3 test leads who were only available for training purposes and as mentors for a short period in the late afternoon (Tr. 165-66, 458-60, 508-11).

For the second ramp-up, a formal training plan was developed to span August through October 2007 (Pet. Ex. 10 at N4050-53). The FMS/2 testers, other than respondent, followed the training plan independently; someone was always present to answer their questions and they availed themselves of their mentors. Ms. Kowalski stressed that this phase of the training required initiative on the part of the testers. Because respondent left at 4:00 p.m. during the pendency of her Human Rights complaint, it was difficult to provide her with the kind of support that she needed (Tr. 166-67, 175, 512-13). Moreover, respondent did not demonstrate the same initiative as other FMS/2 testers, and the mentors could not “coddle” her. Nor did they have the time to create a highly structured training program for her (Tr. 167-68, 173-75). Thus, until the FMS/3 unit got past the hurdle of their “final implementation and the heavy duty maintenance of that first year,” Ms. Kowalski had no time to provide the kind of ramp-up that respondent needed in order to be productive. Ms. Kowalski’s responsibility and focus were on getting the new applications into production without defects (Tr. 175-76, 452-54).

The third ramp-up of the FMS/2 testers spanned November through December 2008. It was designed to teach them the Pay Information Portal (“PIP”) (Tr. 167; Pet. Ex. 10 at N4054-57). PIP is the application used by external vendors and/or prospective vendors of the City to register to become vendors. PIP also permits users to access their account information, and view payments and their tax information, among other things (Tr. 167). Like the other ramp-up levels, this phase of the training also required the tester to operate primarily on his/her own initiative, reading the materials given, testing, and referring to the test leads for guidance. The same training materials for PIP were given to all the FMS/2 testers, including respondent. FMS/3 had installed five full applications in five years. As a direct consequence, the testers were operating at a highly accelerated pace and clocking approximately 55 hours per week, all self-initiated.

Ms. Kowlaski could not allocate a test lead or mentor to train respondent when, with little exception, the other testers who were transferred into the unit with her and were provided with the same training materials had ramped up independently (Tr. 172-73, 463, 465, 468, 518-22). Combined, the DOE OTPS and the PIP training, which included online or other courses and the reading of design documents and other project artifacts before the hands-on work, should have taken about six weeks of formal training (Tr. 172). But this attempt at ramping up respondent was unsuccessful because she did not self-initiate (Tr. 463-65, 471, 517-18).

Effective 2010, the FMS training materials were loaded onto the FISA website which anyone could access, to educate him/herself (Tr. 468). Ms. Kowalski testified that she attempted another PIP ramp-up with respondent beginning in March 2010 (Tr. 470-72).

In June 2010, Ms. Kowalski developed a detailed set of Tasks and Standards for the FMS/2 testers (Tr. 147; Pet. Ex. 9). The task areas included: functional knowledge; ramp-up; test development; test execution; data and systems set-up; defect management; and, general performance criteria applicable to all jobs. The following is a description of these task areas:

Functional knowledge: Ms. Kowalski operated on the premise that based on their backgrounds in FMS/2, the six City testers who were transferred into FMS/3 would already have acquired the functional knowledge in at least one of the tasks listed. She therefore expected them to build on that knowledge and develop core functions in one to two FMS production applications, while most of the outside consultants and the new City hires were required to know three or more applications and handle more complex or highly complex work (Tr. 152-53).

Ramp-up: This was either based on a formal training program provided by a test lead, or on specific design/test documentation for a simple to moderate defect, change request, or test segment. A test segment refers to a group of cases assigned for regression testing, where software changes are tested around the same functionality to make sure that the change does not cause system crashes (Tr. 154).

Test development: This may either require undertaking and developing a detailed test case for a single or stand-alone defect or change request, or developing an entire test segment (Tr. 154).

Test execution: In both test development and execution, Ms. Kowalski focused on quality because if software was not tested properly or broadly enough, it may be prematurely moved into

production with flaws. Documentation is also critical upon testing, in the event that a software fix is undone by a subsequent change. The amount of testing required and the timing of the testing are based on the business need and when particular software needs to be moved into production and be fully functional (Tr. 155-56). Test execution also involves running back-end queries to verify test results (Tr. 156-57).

Data and systems set-up: The tester creates a test case and simulates the problems that need to be fixed or are likely to occur in production (Tr. 157).

Defect management: If bugs are detected, the simulation must be documented so that the software vendor, who is responsible for fixing the bug, can comprehend and fix the problem (Tr. 158).

General performance criteria: Because of the nature of the work, testers have to communicate with business analysts, and sometimes, directly with clients. Therefore, Ms. Kowalski established general performance criteria such as: maintaining good working relationships with each other and a demonstration of initiative and self-reliance, problem solving skills, and dependability (Tr. 169).

In order to make performance in each area distinctly measurable, Ms. Kowalski listed the key tasks associated with each area, and itemized detailed performance standards in terms of: quality of work; quantity of work; timeliness of work; and, supervision (Tr. 154-55; Pet. Ex. 9). She reiterated that the FMS/2 transfers had done similar work, with similar performance standards, and should therefore have needed minimal test supervision (Tr. 156). Ms. Kowalski recalled placing a copy of the Tasks and Standards on the chairs of each FMS/2 tester, after she had developed the criteria in June 2010, but acknowledged that to be certain that they were aware of what she expected of them, each tester should have signed for its receipt, which they did not (Roth: Tr. 89; Kowalski: Tr. 160, 183, 437-38, 444-45).

On September 6, 2012, Ms. Kowalski gave respondent a written evaluation for the period May 1, 2011 through April 30, 2012, based on the 2010 Tasks and Standards. But she admitted that she had not reviewed the Tasks and Standards with respondent prior to the evaluation period, as supervisors are required to do, nor previously given respondent an annual review after she joined the FMS/3 unit (Tr. 179-81, 439-42; Pet. Ex. 1). Respondent received an overall rating of

“unsatisfactory.” In her assessment of respondent’s “Functional Knowledge,” Ms. Kowalski wrote:

Betty is not proficient in any FMS Production Application. She was assigned to the FMS/3 Test Team because of her FMS/2 expertise but claimed to lack the requisite skills to test FMS/2 budget functionally. Earlier attempts to ramp-up Betty were not successful.

A Test Lead will be assigned to attempt once again to train Betty to do her job.

In her narrative on “Ramp-up,” Ms. Kowalski wrote:

Betty has never ramped-up completely for any FMS/3 functionality/application. Her initial FMS/3 ramp-up was delayed as a result of a Reasonable Accommodation request and appeal. Prior to FMS/3 implementation, a second attempt was made to quick start her ramp-up by assigning her to make screen prints to document the test results of other experienced testers (a method used successfully to ramp-up other testers who joined the team late in the project). The quality of her work product was so poor that it interfered with the test team’s progress overall. After FMS/3 implementation, a third attempt was made to ramp-up Betty on PIP functionality. This effort was unsuccessful since it required intensive Test Team resources which were needed for handling implementation issues. Since that time, no effort has been put forth to pick up where that left off.

For “General Criteria,” Ms. Kowalski wrote:

Betty is not a contributing member of the FMS/3 Test Team. Attempts to bring her up the learning curve have not succeeded to date.

An employee may appeal an unsatisfactory evaluation in writing to the supervisor who issues the evaluation, and then to the reviewer, after which, a Performance Evaluation Board (“PEB” or “Board”) may convene. The Board comprises the director or deputy director of Human Resources, someone from the Equal Employment Opportunity office, and a manager to whom the employee is not accountable. Respondent availed herself of the appeal process (Tr. 23, 732). In a rebuttal to Ms. Kowalski on September 13, 2012, which she copied to Mr. Reddy, Ms. Kowalski’s supervisor who reviewed respondent’s evaluation, Ms. Roth of Human Resources, and Michael Rodgers, the union shop steward, respondent asserted that she received the Tasks and Standards for the very first time on September 6, 2012, and questioned how she

could be evaluated when she had “no idea what the standards of performance [were] for each task that they expect[ed] [her] to be evaluated on” (Tr. 728-31; Pet. Exs. 2, 3). She testified that she was surprised at receiving an overall rating of “unsatisfactory” because she was never assigned any work (Tr. 724-25).

Respondent’s rebuttal also challenged Ms. Kowalski’s evaluation of her functional knowledge, ramp-up, and her contribution to the team. She wrote that she could not recall any attempts by test leads or otherwise to ramp her up, and queried why Ms. Kowalski had not written her up if her screen prints had been so poorly done. Respondent also wrote that she was told to read PIP manuals in anticipation of being personally trained by Ms. Kowalski. At the hearing, Ms. Kowalski acknowledged that respondent needed much more support, monitoring and mentoring, and that since “the level of work was not off the charts,” FISA could develop a more structured training plan for, and allocate more resources to respondent (Tr. 182).

Petitioner’s PEB convened on November 19, 2012, to consider respondent’s appeal. Ms. Kowalski appeared before the Board and defended her evaluation of respondent. She could not recall with certainty whether she had apprised the Board that she had not sat down with respondent to review the Tasks and Standards with her (Tr. 523-24). Respondent also appeared and was asked pointed questions by the Board, which issued a report the following day, upholding Ms. Kowalski’s “unsatisfactory” rating of respondent (Roth: Tr. 23-26; Kowalski: Tr. 181-82; Resp: Tr. 733; Pet. Ex. 3). Respondent opined that the Board did so under the mistaken belief that respondent had been aware of the Tasks and Standards on which she was being evaluated (Tr. 734-35). The Board observed that:

In response to PEB questions, specifically how Ms. Leung has spent her days (2007 to 2012, approximately), she stated that she read some PIP manuals and was unable to answer further. She said that she was asked to write a summary of what she read, and did so, but never provided it to her supervisor. When asked if she ever communicated to her supervisor that she did not know what her Tasks and Standards were, she answered that she did not and she did not explain why, when PEB posed the questions. She admitted that she was not able to test PIP and that she was not familiar with FMS/2 testing either.

(Pet. Ex. 3 at ¶ 4).

The Board further noted that Ms. Kowalski had already undertaken “a very structured supportive plan to get [respondent] up to speed, including some online courses, tutorials, a mentor and a weekly status/progress meeting” (Pet. Ex. 3 at ¶ 6). According to the report, respondent was asked if she needed any additional resources to get her trained, and she declined. Given that the primary predicate for respondent’s challenge to her evaluation was that she had not previously been given the Tasks and Standards by which she was evaluated, the PEB recommended that another evaluation be done three months after her September 6, 2012 evaluation, the time at which she signed for the Tasks and Standards.

The structured, supportive plan to which the PEB alluded was a training plan which Ms. Kowalski developed in October 2012, before the PEB issued its report, tailored specifically for respondent, and which accommodated her 28-hour work week.³ It was projected to span six weeks (Tr. 184, 188-89, 193; Pet. Ex. 11). Ms. Kowalski maintained that “from about June 2007 and basically, [un]til we started her again on [this] formal training plan in October 2012,” respondent was a non-productive member of the unit (Tr. 177).

The plan required respondent to read design documents and understand what the software was intended to accomplish, and complete online classes in Chart of Accounting (“COA”), Vendor Management, and Contract Management, followed by hands-on exercises using real test cases. It focused on the front end of the expenditure chain and was designed for respondent to comprehend the flow of vendor accounts from pre-encumbrance or requisition stage to contract encumbrance and then payment or disbursement. The plan listed specific tasks with projected start and finish dates, and also allocated half-hour periods for question-answer sessions as well as review meetings with respondent’s test lead, Atul Patel, and Ms. Kowalski. Mr. Patel assembled all the documentation and identified by name and location, the online resources necessary for respondent’s training. He also crafted the hands-on exercises for respondent to engage in after reading software design documents and completing the online training classes. Respondent was given a copy of the plan on October 1, 2012, when her training period commenced. The training, which was initially scheduled to end in mid-November, included a total of 22 assignments (Kowalski: Tr. 185-87, 193-95; Patel: Tr. 607-08, 625; Resp. 737-38). In an e-mail on October

³ Respondent’s shortened work schedule was due to excess annual leave that she had accumulated (Tr. 189).

10, Ms. Kowalski summarized her initial meeting with respondent and Mr. Patel, confirming that by mid-November, she expected respondent:

to write test cases, identify data requirements, run back-end queries to identify test data or set-up new data, and execute test cases for simple to moderate defect resolutions and/or regression test cases with minimum Test Lead supervision, work product review, or work product revision.

(Pet. Ex. 12).

A mentor was made available to respondent on a daily basis and she was instructed that if unable to comprehend something, “she should escalate it to her test lead as soon as possible” (Tr. 195). Respondent was also informed that she was expected to complete all hands-on exercises independently, without direction from her mentor, and because her mentor was carrying a full testing load, respondent should e-mail her questions to her mentor the night prior to their meetings. Rosemarie Ramirez, an FMS/3 system integration tester, was respondent’s designated mentor (Kowalski: Tr. 202-04; Ramirez: Tr. 647-50; Pet. Ex. 12).

In accordance with the plan and with little departure, Ms. Kowalski met weekly with respondent to review her progress in terms of productivity, timeliness, and quality and provide her with feedback. But it was quickly apparent to Ms. Kowalski that respondent eventually began to fall behind. She testified that at their meetings, respondent was unable to answer high-level or sometimes the most basic questions on materials she was assigned to read. For instance, the reading materials for Contracts Design outlined functionality such as the approvals that vendors needed and from whom they had to be obtained. Respondent could neither answer inquiries into what constituted approval by the Office of Contracts Administration, nor even point out in the reading materials how contract requirements are satisfied. Respondent also had difficulty with hands-on exercises (Kowalski: Tr. 196-98; Resp: Tr. 739). So Ms. Kowalski revised the training to include a course on purchase orders, and persisted in her training efforts with respondent well after the six weeks initially projected, but had to suspend them on January 28, 2013, to focus on a new Build (“Build 40”),⁴ which required her time, as well as that of respondent’s test lead and mentor (Tr. 185-87, 193, 197-98).

⁴ On multiple occasions, Ms. Kowalski identified the new Build as “Build 41” (Tr. 200, 229, 259, 270-71). However, progress e-mails to respondent and Ms. Kowalski’s later testimony indicate that the new Build was

Petitioner presented Ms. Kowalski’s weekly e-mails to respondent summarizing their progress meetings, as well as weekly status visuals which charted respondent’s progress by task, her targeted dates for completion, and her actual completion dates (Tr. 204-05; Pet. Exs. 13-38). The following chart provides a snapshot of data extracted from Ms. Kowalski’s weekly progress e-mails of respondent’s performance during her protracted ramp-up. The weekly status reports showed the specific tasks that respondent had completed and what remained outstanding (Tr. 206-08; Pet. Exs. 14, 16, 18, 20, 22, 24, 26, 28, 30, 32, 34, 36, 38). Details on respondent’s weekly progress follow.

SNAPSHOT OF RESPONDENT’S CUMULATIVE RAMP-UP PERFORMANCE RATINGS

Petitioner’s Exhibit No.	Week	Dates Covered	Productivity Rating	Timeliness Rating	Quality Rating
13, 14	1	10/01/12 – 10/09/12	Unsatisfactory – 2 of 8 tasks completed	Unsatisfactory Completed - up to 5 days late Open – up to 4 days late	Unratable ⁵
15, 16	2	10/10/12 – 10/16/12	Unsatisfactory – 6 of 10 tasks completed	Unsatisfactory Completed - up to 6 days late Open – up to 7 days late	Unratable ⁶
17, 18	3	10/17/12 – 10/23/12	Unsatisfactory – 8 of 15 tasks completed	Unsatisfactory Completed - up to 10 days late Open – up to 6 days late	Unratable ⁷
19, 20	4, 5	10/24/12 – 11/06/12	Unsatisfactory – 9 of 20 tasks completed	Unsatisfactory Completed - up to 16 days late Open – up to 14 days late	Unratable ⁸
21, 22	6	11/07/12 – 11/13/12	Unsatisfactory – 11 of 21 tasks completed	Unsatisfactory Completed - up to 20 days late Open – up to 17 days late	Unsatisfactory ⁹
23, 24	7	11/14/12 – 11/20/12	Unsatisfactory – 12 of 22 tasks	Unsatisfactory	Unratable ¹⁰

actually “Build 40” (Tr. 370, 372, 378, 382-84; Pet. Exs. 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, 35, 37). Accordingly, going forward, reference will be made to Build 40 only.

⁵ No hands-on exercises yet due.

⁶ No hands-on exercises completed yet.

⁷ No hands-on exercises completed yet.

⁸ No hands-on exercises completed yet.

⁹ Respondent missed major test steps that had been identified and pointed out to her on October 26, 2012.

¹⁰ Respondent had not yet completed required reading to be assigned vendor management hands-on tutorial and exercises.

Petitioner's Exhibit No.	Week	Dates Covered	Productivity Rating	Timeliness Rating	Quality Rating
			completed	Completed - up to 20 days late Open – up to 21 days late	
25, 26	8	11/21/12 – 11/27/12	Unsatisfactory – 13 of 22 tasks completed	Unsatisfactory Completed - up to 22 days late Open – up to 23 days late	Unratable ¹¹
27, 28	9	11/28/12 – 12/04/12	Unsatisfactory – 13 of 22 tasks completed	Unsatisfactory Completed - up to 22 days late Open – up to 28 days late	Unratable ¹²
29, 30	10, 11	12/05/12 – 12/18/12	Unsatisfactory – 13 of 22 tasks completed	Unsatisfactory Completed - up to 22 days late Open – up to 38 days late	Unratable ¹³
31, 32	12	12/19/12 – 12/25/12	Unsatisfactory – 13 of 22 tasks completed	Unsatisfactory Completed - up to 22 days late Open – up to 42 days late	Unratable ¹⁴
33, 34	13	12/26/12 – 01/01/13	Unsatisfactory – 15 of 22 tasks completed	Unsatisfactory Completed - up to 44 days late Open – up to 46 days late	Satisfactory ¹⁵
35, 36	14	01/02/13 – 01/08/13	Unsatisfactory – 15 of 22 tasks completed	Unsatisfactory Completed - up to 44 days late Open – up to 51 days late	Unratable ¹⁶
37, 38	15, 16	01/09/13 – 01/22/13	Unsatisfactory – 16 of 23 tasks completed	Unsatisfactory Completed - up to 44 days late Open – up to 60 days late	Unratable ¹⁷

Week 1 (October 1 to October 9, 2012)

In her e-mail dated October 17, which summarized their meeting on October 10, Ms. Kowalski noted that she had assigned respondent eight tasks to be completed during week one, but by October 10, respondent had completed only two tasks (Tr. 209-12; Pet. Ex. 13). She

¹¹ Respondent had not done the vendor management hand-on tutorials and could not be assigned exercises in order to be rated.

¹² No hands-on exercises completed yet.

¹³ No hands-on exercises completed yet.

¹⁴ No hands-on exercises completed yet.

¹⁵ Respondent completed the vendor management tutorials and did hands-on exercises which did not require revisions.

¹⁶ No hands-on exercises completed during the week.

¹⁷ No hands-on contract management exercises yet attempted.

further noted that Mr. Patel, respondent's test lead, had sent respondent a zip file with training materials on October 1, yet only on October 10, the morning of the first weekly meeting, did respondent seek Mr. Patel's help in opening the file (Kowalski: Tr. 214-15; Patel: Tr. 611-12; Pet. Ex. 13 at N4068). Respondent's completed assignments were up to five days late and her open assignments were up to four days late, yet she indicated that she had no questions regarding the materials that she had completed (Pet. Ex. 13 at N4069, N4074).

Week 2 (October 10 to October 16, 2012)

By the second meeting on October 17, respondent had completed six out of ten assigned tasks. The completed assignments were up to six days late and her open assignments were up to seven days late (Pet. Ex. 15 at N4070, N4075). Ms. Kowalski's e-mail for the second week's meeting noted that the hands-on tutorial and exercises for week two were sent to respondent on October 15 and that for a second time, respondent had no questions regarding the materials (Tr. 221-24; Pet. Ex. 15 at N4071-72).

Week 3 (October 17 to October 23, 2012)

Ms. Kowalski's weekly summary for her week three meeting with respondent revealed that by the end of that week, respondent had completed eight out of fifteen tasks, and was running up to six days late with her open assignments even though she had received the training materials for that week on October 1. Also, after Mr. Patel had reviewed the hands-on tutorial and exercises for COA with her, respondent indicated that she understood. But when respondent entered the online portion of the cases, she did not follow the instructions and became stuck for a day without escalating the problem to Mr. Patel, which Ms. Kowalski considered a deliberate failure on respondent's part. During week three, respondent met with her mentor twice. One session was entirely devoted to FMS/3 navigation which Ms. Kowalski found unacceptable because it had already been covered in the "Getting Started" online course, and a seasoned FMS system tester should not need mentoring in basic navigation. It appeared also that respondent did not follow the tutorial instructions (Kowalski: Tr. 226-28, 231-33, 562; Patel: Tr. 633-34; Ramirez: Tr. 649-50, 654-55; Pet. Exs. 17, 18).

Weeks 4, 5 (October 24 to November 6, 2012)

Ms. Kowalski's progress meeting with respondent for weeks four and five was held on November 7, 2012 (Tr. 241-45; Pet. Ex. 19). Respondent had completed only nine of twenty assigned tasks. Her completed assignments were up to 16 days late and her open assignments were up to 14 work days behind schedule (Pet. Ex. 20). In her e-mail status summary to respondent, Ms. Kowalski expressed that respondent's performance had deteriorated since the previous meeting, and that respondent had ignored the formalized plan by not taking the vendor online course or reading the assigned design paper. She commented that in spite of respondent's claim that she did not know how to take an online course, respondent had taken one for the COA (Tr. 234-36; Pet. Ex. 19 at N4083). Ms. Kowalski also noted that she and the test lead met with respondent on October 26, 2012, and had given her a "walkthrough" of the COA hands-on exercise. At that time, respondent showed her preliminary work product but did not indicate in detail the steps that she had taken for each case. She was instructed to do so by the test lead. Ms. Kowalski wrote that while working with her mentor, respondent asked questions about entering vendor documents, which Ms. Kowalski considered premature because respondent had not yet taken the online course or read training materials. Moreover, up until that point, respondent still had not written and submitted questions to her mentor regarding functionality. As a result, Ms. Kowalski opined that she expected respondent to need little or no supervision to develop and execute simple to moderate test cases for COA functionality (Kowalski: Tr. 245; Ramirez: Tr. 649-50; Pet. Ex. 19 at N4084). The ramp-up status report for that week showed that of the 11 outstanding tasks, six were 10 or more days delinquent (Tr. 237-39; Pet. Ex. 20). Ms. Kowalski testified that by that time, respondent had a mentor available to her for at least a half-hour each day (Tr. 247).

Week 6 (November 7 to November 13, 2012)

The status reports for the weeks following the November 7, 2012 meeting, up until the end of January 2013, showed an increasing pattern of delinquency. By the end of week six, respondent was 20 work days or approximately one month behind schedule and had completed eleven of twenty-one tasks, four of which were 14 or more days overdue. Moreover, respondent still had not submitted any written questions to her mentor who was available to answer questions in writing or in person. Noting that respondent needed to meet with her mentor to

learn how to develop and run a structured query language (“SQL”) to verify her back-end results for her COA exercise, Ms. Kowalski rated respondent’s work as unsatisfactory because the COA work had to be redone. Respondent had failed to follow previous instructions to identify the test steps per test case. Ms. Kowalski and respondent’s test lead were concerned that vendor and contract documents, which were the next topics on the plan for respondent, were too complex for her. They recommended that she prepare summaries of the written materials for herself (Tr. 250-57, 260-64; Pet. Exs. 21, 22).

Week 7 (November 14 to November 20, 2012)

Ms. Kowalski’s meeting with respondent for week seven was held on November 21, 2012 (Tr. 265-66; Pet. Exs. 23, 24). By then, the projected completion date for respondent’s ramp-up had passed, respondent had completed only twelve of twenty-two assigned tasks, which were up to 20 work days late. Her open assignments were up to 21 work days behind plan. Seven of the ten outstanding tasks were 11 days or more overdue (Tr. 265-68; Pet. Exs. 23, 24). Ms. Kowalski’s ultimate goal was to get respondent ready for the new build so she could do regression testing. Hence she was concerned that respondent had not met her ramp-up completion deadline (Tr. 270-71). In her progress report, Ms. Kowalski indicated that she and Mr. Patel had asked respondent if there was anything they could do to assist her in finishing more quickly and respondent declined assistance (Tr. 272-73; Pet. Ex. 23 at N4095). Even though she had taken the vendor management online course and read the approach paper which gave a broad overview of the software’s functionality, respondent could not answer questions regarding vendor documents, even after referring to her notes. Meanwhile, she neither submitted questions to nor met with her mentor (Tr. 274-76).

Week 8 (November 21 to November 27, 2012)

During week eight, respondent completed one exercise, leaving nine of twenty-two tasks still outstanding. Her completed tasks were up to 22 work days late and her open tasks were up to 23 work days late (Tr. 278; Pet. Exs. 25, 26). Ms. Kowalski stated that two of the assignments were reading assignments and even though respondent claimed to have read all the material, she did not appear to comprehend it. For instance, while she knew that in vendor management, vendors were being created, she could not distinguish between the different types of vendors. Further, she could not explain what an interface was, far less create one (Tr. 279-80, 283). As a

result, she could not be assigned hands-on exercises and therefore could not be evaluated for quality (Tr. 280-81). Respondent's test lead reviewed with respondent the Minority Women Business Entity interface and Vendor Extract, and respondent was instructed to re-read the materials. She was also informed that that particular task would not be considered completed until she demonstrated a grasp of the materials (Tr. 282; Pet. Ex. 25 at N4099, N4103). Ms. Kowalski again pointed out that respondent did not submit questions to or meet with her mentor (Tr. 284-85; Pet. Ex. 25 at N4103). Nevertheless, Ms. Kowalski persevered with respondent's ramp-up because even if respondent could not develop test cases, she might at least be able to execute them, thereby assisting the team (Tr. 288).

Week 9 (November 28 to December 4, 2012)

Respondent completed no tasks in week nine so the total completed remained at thirteen of twenty-two. The open tasks were 28 work days behind plan (Tr. 292-93; Pet. Exs. 27, 28).

Weeks 10, 11 (December 5 to December 18, 2012)

During week ten, and pursuant to the PEB's directive, Ms. Kowalski completed another evaluation of respondent for the period September 6 through December 6, 2012. This was beyond the time that respondent should have completed the six-week ramp-up that was specifically designed for her (Pet. Ex. 41). Ms. Kowalski gave respondent unsatisfactory ratings for functional knowledge, ramp-up, and general criteria, because the individualized ramp-up for respondent was not successful, and after nine work weeks of training, respondent was only marginally trained on COA. She also rated respondent's overall performance as unsatisfactory, and made the following observation:

Betty has taken very little responsibility or initiative for her ramp-up. Despite being advised to do so, Betty has never prepared notes, outlines, or summaries to help her grasp the material. On several occasions, she has indicated that she has completed an on-line course or read the assigned material but has been unable to answer the most basic questions about the functionality. She has never submitted questions in writing to her mentor as she was instructed to do so [sic]. And, she has met with her mentor in only 4 of the past 9 weeks.

In the areas of test development, test execution, data and system set-up, and defect management, Ms. Kowalski classified respondent as “unratable,” because she had never written or executed an FMS/3 test case, never performed FMS/3 data or system set-up, and had never entered an FMS/3 defect. At the hearing, Ms. Kowalski stated that her ratings in these areas were based on respondent’s earlier attempts at execution because testing on Build 40 had not yet commenced (Tr. 382-83). Respondent signed for her evaluation on December 13, 2012, between weeks 10 and 11.

By the end of week eleven, respondent had still only completed thirteen of twenty-two tasks, meaning that she had completed no additional assignments since the week that ended November 27, 2012. The nine remaining tasks were now up to 38 work days late (Tr. 308-09, 314; Pet. Exs. 29, 30). The meeting to review respondent’s progress was held on December 19, 2012. At that time, respondent provided Mr. Patel with a final copy of six vendor management tutorial assignments which she completed on December 17, 2012, but which should have been completed on October 29, 2012. Nevertheless, it was done satisfactorily. In her report, Ms. Kowalski wrote that “Atul reviewed Betty’s tutorials and found that she did a good job While the quality of Betty’s work is approaching acceptable levels, she is taking too long to complete the work.” Respondent still could not be rated because she had not yet undertaken any hands-on exercises (Tr. 310-313; Pet. Ex. 29 at N4115). Ms. Kowalski remarked that it took respondent nine days to accomplish what a trained Level I tester should have done in a day and a half (Tr. 315; Pet. Ex. 29 at N4115). She designated the different levels for the testers based on their skill sets, and therefore expected Level I testers to perform simple to moderate test cases, while outside consultants who were hired with a certain set of specifics in mind, were expected to perform highly complex tasks (Tr. 475-76).

Ms. Kowalski stressed that her unit is driven by business need and the hard target dates by which software must go into production. The software must be tested before production hence the importance of timeliness (Tr. 313-14). By the end of week 11, respondent still had not re-read the materials on vendor management interfaces as she was instructed during her progress meeting in week six. Moreover, since her last progress meeting, yet again, respondent did not meet with or submit questions to her mentor (Tr. 316; Pet. Ex. 29 at N4116).

Week 12 (December 19 to December 25, 2012)

Respondent accomplished no additional tasks in week twelve. Nine of twenty-two tasks still remained outstanding and were now up to 42 days late (Tr. 317-20, 323; Pet. Exs. 31, 32). Ms. Kowalski could not rate respondent's work because she had not completed any exercises. She acknowledged that respondent's work, although incomplete, was becoming acceptable and respondent was progressing at a faster pace (Tr. 320-22; Pet. Ex. 31 at N4121). But respondent was still delinquent, and she had not re-read the materials on vendor management interfaces. Because of her slow progress, the cases that would have been assigned to respondent had to be re-assigned to another Level I tester. During week 12, respondent did not write to or meet with her mentor or test lead although they were both available to her (Tr. 323-27; Pet. Ex. 31 at N4122).

Week 13 (December 26, 2012 to January 1, 2013)

During week 13, respondent completed two additional tasks, the vendor management tutorials and the hands-on exercises. The completed assignments were up to 44 days behind plan while the open assignments were up to 46 days late. Respondent's work did not require revisions, so Ms. Kowalski rated it as "satisfactory." In her e-mail report of their weekly progress meeting, Ms. Kowalski pointed out to respondent that this was the first time since her ramp-up began three months prior that she had received a satisfactory rating. But respondent's timeliness was of grave concern because it took her 14 work days to complete the tutorials and eight work days to complete the exercises, which far exceeded the six days that Ms. Kowalski estimated it should have taken a trained Level I tester to complete (Tr. 328-29, 333, 339, 342-43; Pet. Ex. 33 at N4125, N4127, N4128; Pet. Ex. 34). Ms. Kowalski identified the shortcomings that precluded respondent from developing vendor management test cases for Build 40 (Pet. Ex. 34). She testified that respondent failed to grasp the readings on vendor management interfacing and did not re-read the materials as instructed. As a result, respondent never engaged in running back-end queries that would have been necessary to do interface testing for vendor management. The COA test cases were more complex than the vendor management test cases and also required interface testing, which respondent could not be assigned. Instead, she could only execute regression testing on simple, stand-alone vendor management and COA test cases that did not have interface transactions. This translated into 12 of 66 test cases for vendor

management and 3 of 33 test cases for COA functionality, which could be assigned to respondent. Ms. Kowalski expected FMS/3 testers to be able to handle all cases (Tr. 334-37; Pet. Ex. 34). Once again, during week 13, respondent neither submitted questions to nor met with her mentor, and she offered no explanations to Ms. Kowalski for her failure to do so or to re-read her assignments as previously instructed (Tr. 344).

Week 14 (January 2 to January 8, 2013)

Respondent did not complete any additional assignments in week 14. There were still seven outstanding tasks, two of which were 51 days late. The remaining tasks were 36 or more days late (Tr. 352-59; Pet. Exs. 35, 36). During week 14, respondent completed the online training course for contract management, but her meeting with Ms. Kowalski on January 16, 2013, revealed that she did not comprehend the material. Yet, she did not submit questions to or meet with her mentor, and informed Ms. Kowalski that she didn't need assistance. Ms. Kowalski explained that the vendor management and contract management cases represent expenditure chains and involve encumbrances. Respondent's failure to grasp the material limited the number of contract management cases she could be assigned to test (Tr. 360-65; Pet. Ex. 35 at N4135; Pet. Ex. 36).

Weeks 15, 16 (January 9 to January 22, 2013)

Ms. Kowalski's next progress meeting with respondent was on January 25, 2013, covering weeks 15 and 16 (Tr. 365; Pet. Exs. 37, 38). By then, respondent had completed one additional task, the procurement accounting online course, which was newly added by Ms. Kowalski, to help respondent understand the contract management online course material. This brought her total assignments to 23 and left seven tasks outstanding. According to Ms. Kowalski, respondent demonstrated an understanding of the new material, in that she was able to correctly answer questions regarding basic purchase order functionality (Tr. 368-70; Pet. Ex. 37 at N4142). Over the course of 16 weeks of training, respondent requested to meet with her mentor on only four occasions even though the mentor was available to her daily (Tr. 372).

Post Week 16

After 16 weeks, Ms. Kowalski notified respondent that her ramp-up was being suspended in preparation for Build 40, which was scheduled to commence on January 28, 2013, and run for

eight weeks (Kowalski: Tr. 200, 372; Resp: Tr. 743; Pet. Ex. 39). By that time, respondent had six open tasks which were as late as 65 days (Tr. 379-80; Pet. Ex. 40). As yet, she could not interface with vendors, and therefore, could only perform limited regression testing which required flushing through different phases of the contract program to eliminate bugs. Because she was not fully ramped up, test development and test execution work originally intended for her had to be re-assigned to other testers. Accordingly, respondent's contribution to Build 40 was limited (Kowalski: Tr. 199-200, 385; Patel: Tr. 614-18). To put respondent's delinquency in perspective, Ms. Kowalski testified that the same training plan was provided to two outside consultants who joined the FMS/3 unit as testers the day after Tropical Storm Sandy, at the end of October 2012. Respondent was at a disadvantage in that those two consultants worked a 40-hour work week compared to her 28-hour work week. But they were fully ramped up by January 28, 2013 (Tr. 288-89).

On or around January 31, 2013, respondent was given 11 simple to moderate vendor management test cases to execute independently. The test leads and mentors could not support and/or closely monitor her because they were focused on getting Build 40 into production. Respondent was informed that upon successful completion of her assignment, she would be assigned vendor management verifications for the primary tester (Tr. 298, 341, 364, 370, 374-75; Pet. Ex. 37 at N4139-40; Pet. Ex. 39).

In an e-mail to respondent, Ms. Kowalski laid out her expectations in terms of timeliness, supervision/support, and quality, as they related to the Build 40 assignments. Since respondent had recently been trained on functionality but lacked "target-driven hands-on experience," Ms. Kowalski lowered her expectations of respondent from two test cases per day to one and a half cases. The primary tester was executing vendor management regression test cases at a rate of three or more per day, and was therefore only available to provide respondent with assistance for 15 minutes at the beginning of each day. Ms. Kowalski made it clear that she did not want the primary tester to be otherwise interrupted. Mr. Patel would meet with respondent weekly to review her test execution documentation, and if they were incomplete, inaccurate, or failed to meet the verification requirements, Ms. Kowalski would halt respondent's work and provide her with feedback (Tr. 374-75; Pet. Ex. 39). She testified that respondent executed the test cases but did not complete them until after Build 40 went into production (Tr. 374, 537). It took respondent about 21 or 22 days to complete the vendor management test cases, well in excess of

the seven or eight days it should have taken at the rate of one and a half cases per day (Kowalski: Tr. 374-75; Patel: Tr. 618-20).

After Build 40 was released on or around March 20, 2013, Ms. Kowalski resumed respondent's ramp-up (Tr. 200, 373, 484). This time, respondent reached the purchase order stage, which was "a simplified encumbrance versus a contract" (Tr. 200). But after another four weeks of training, the results were not dissimilar from the ramp-up that commenced in October 2012. Ms. Kowalski stated that although respondent was not as late as she was previously, she still did not finish her tasks before they had to suspend the training once again to focus on another software release scheduled for mid to late May 2013, which was followed by another release in August 2013. Respondent participated in both releases, having been assigned tasks that were commensurate with work that she had completed during training. For both releases, she exhibited the same pattern that she did during training. It took her an inordinate amount of time to complete her assignments. Thus, while other testers were completing nine purchase orders per day, respondent was assigned three but completed less than two per day. Ms. Kowalski noted that respondent's performance on the August release was better than before because the assignment that she was given was simple enough to match her skills. However, it only constituted a minute percentage of the functionality of the software. The August release was followed by an October software release. Respondent was given assignments for the October release to reinforce her knowledge of the COA training which she had successfully completed. Once again, her timeliness was an issue. Instead of completing her assignment in a week or so according to Ms. Kowalski's estimate, it took respondent from mid to late August all the way until production time in October 2013. Notwithstanding, Ms. Kowalski conceded that respondent's work was satisfactory. After that, another release was scheduled for December 2013, but the work associated with that release was far too complex for respondent's skills set. So she was given no assignment (Tr. 484-90, 540-43).

Even though Ms. Kowalski assessed the quality of some of respondent's work as acceptable, she rued that "the timeliness is just so egregious and off the chart that we would never make our release schedules." She explained that testing must be completed by the production or target date or there is a risk that it may not function correctly (Tr. 178-79, 384-85, 539). Respondent's inability to meet deadlines caused a disruption in the office because it required Ms. Kowalski to reassign work to another tester, thereby increasing that tester's

workload (Tr. 565-66). Further, Ms. Kowalski opined that respondent is unable to competently perform the job of an FMS/3 tester and there is no training that would be able to advance her level of competence (Tr. 389). Even though she initially felt that respondent was not putting her best foot forward, she felt that towards the end of the ramp-up program in January 2013 and thereafter, respondent was fully engaged and “she wasn’t getting it done because she couldn’t get it done” (Tr. 562-64).

Respondent’s test lead, Atul Patel, supported Ms. Kowalski’s assessment of respondent’s performance. He recalled that respondent would occasionally identify or correlate something to FMS/2, which suggested that she was attempting to learn the system. She had also approached him on two or three occasions with questions. In Mr. Patel’s opinion, respondent was given an appropriate timeframe to learn FMS/3, based on her prior testing experience, considering her shortened work week. He was not opposed to working with her but he had grave reservations about being able to satisfy expectations for future releases if she were on his team, because her skills were limited to very simple tasks. Frankly put, Mr. Patel stated:

Now [respondent] can only do which is very minimum and very simple, like in a whole circle, maybe a very thin slice of the pie, but still not the timely manner where it should be.

(Tr. 631-39, 644).

In essence, Mr. Patel was not convinced that respondent understood the work. He explained that underscoring the work of the testing unit is a basic understanding of functionality of the software in order to create and modify scenarios based on risk analysis and test it accordingly. While respondent could re-execute the steps of an assignment that she had previously performed, she could not anticipate or conceive of other scenarios that would need to be tested. He stated that “[respondent’s] work delivery did not show that she, she’s able to take all different aspect[s] of the system and execute it and redeliver it” (Tr. 640-41). Mr. Patel testified that with respondent on his team, he has to adjust the workload to compensate for her inability to perform certain tasks. He concurred with Ms. Kowalski that reassigning respondent’s tasks to another worker is disruptive because the other worker feels pressured to complete additional tasks (Tr. 642-44).

From respondent’s perspective, she was not trained in FMS/2 at the time she transferred to the FMS/3 unit. And FMS/3 training did not commence until October 1, 2012. Respondent

testified that when she transferred from Program Management into the FMS/2 unit in 2003, the existing testers in the unit were at a higher skill level than she. During her first two weeks in that unit, her supervisor gave her manuals to read and assigned her a mentor, after which she was expected to do testing. She worked with her mentor, but did not feel qualified to do FMS/2 testing, and to this day does not comprehend FMS/2. While in the FMS/2 unit, she had stated as much to Don Pasquale, the head of the FMS/2 unit, but she managed to do some testing with the assistance of her mentor (Tr. 681-86). In FMS/2, she received two evaluations. On the first, she was given an “unsatisfactory” rating, for which she wrote a rebuttal. In 2005, she received her second evaluation and was given a rating of “conditional,” for which she wrote another rebuttal. Around the same time, she requested a copy of the agency’s evaluation guidelines and Peter Reddy provided her with one (Tr. 686-89; Resp. Ex. C).

While she claimed to lack expertise in FMS/2 testing, respondent distinguished the FMS/2 operating system from FMS/3. She testified that FMS/2 used Cobol as a programming language and DB2 as a database while FMS/3, which is web-based, uses Java as a programming language and Oracle as its database. But she did not dispute Ms. Kowalski’s testimony that the basic functionality of the two systems remained the same (Resp: Tr. 692-93, 749-50; Kowalski: Tr. 144). Respondent testified that when she got to the FMS/3 unit, Ms. Kowalski had her making screen prints for one of the consultants for a few weeks because she had learned how to do so in the FMS/2 unit. Respondent indicated that that was all she did in FMS/2. She took umbrage at Ms. Kowalski’s assessment that she was not adept at making screen prints and insisted that no one had ever criticized her screen prints (Tr. 701-02, 802, 805-06). She corroborated Ms. Kowalski’s testimony that she was given no other assignment because she was not trained for FMS/3 work and did not understand what was being done. Respondent contended that when she first moved to FMS/3, she never received any notification of a formal training plan for the DOE OTPS ramp up, was never told that there were online materials available for her to read and review, and “was never told about this self-learning thing.” So she came to work each day and sat at her desk. Meanwhile, outside consultants were hired with the title of a Level IV Computer Specialist, which required more knowledge, education, and experience than that required for her title. Among other things, the new hires were required to have an accounting background and testing experience, which respondent lacked (Tr. 701-04, 719, 741-42, 762, 806-07, 810-13).

In 2010, after committing to personally provide respondent with PIP training, Ms. Kowalski had another worker e-mail respondent PIP manuals, after which respondent was expected to write a summary of what she had read. Respondent complied and wrote a one-page summary which no one subsequently requested. She admitted that she did not comprehend all of what she had read, but she asked no questions for clarification. Respondent claimed that thereafter, she received no PIP training. After three years in the unit, she had not been told what was expected of her, had not been given a copy of the Tasks and Standards for the job, and had received no evaluations (Tr. 704-08, 721-22, 807-08). Eventually, respondent approached the head of the Configuration Management unit where she had previously worked and requested to transfer back to his unit. She was told that the decision was not his to make. She asked one other person about a transfer and was told that there were no openings available. But she never directed a transfer request to Ms. Kowalski (Tr. 719-20).

In September 2012, Ms. Kowalski spoke with respondent about being ramped up for Build 40 which, according to respondent, was a big project “to test, test some documents” (Tr. 736-37). Respondent acknowledged that when her ramp up commenced on October 1, 2012, she was given reading materials and was informed in writing what Ms. Kowalski expected of her. The reading materials included manuals, some of which contained hundreds of pages which she had to re-read in order to understand them. But they were difficult to read, she never fully comprehended them, and they retarded her pace. Respondent does not like to ask questions. Hence, she submitted none, and only approached her mentor and Mr. Patel on a few occasions. She viewed this use of her test lead and mentor as optional (Tr. 738-40, 753-56). Respondent could not articulate what COA was, and was unsure whether she felt better trained on COA maintenance by the end of January 2013, when her ramp up was suspended for Build 40 (Tr. 751).

Respondent testified that Ms. Kowalski’s evaluation of her in December 2012, was in response to the PEB’s November 20, 2012 recommendation that she be given a performance evaluation three months from the delivery date of her September 2012 evaluation and the Tasks and Standards, which were given to her concurrently. She pointed out that her ramp up did not commence until October 1 and that the evaluation was based on less than two months of ramp up (Tr. 747-49, 751). Respondent adamantly denied that any attempts prior to October 1, 2012, had been made to train her on FMS/3. She also denied that she or the other FMS/2 transfers, as a

group, were assigned a test lead when they first transferred to FMS/3 (Tr. 750, 752, 805). At the hearing, respondent was unsure whether she ever completed her ramp-up, even though she agreed that it was estimated to be completed around November 13, 2012. Her only excuse for her delinquency with her assignments was that she was “trying to re-read a manual several times to get to understand it,” and “once you fall behind, it’s hard to catch up.” She testified that since May or June 2013, she received other assignments but no additional training. Thus, on her own volition, she reads old FMS/3 manuals (Tr. 760-61, 814-17). Overall, respondent assessed the ramp-up as unsuccessful, but altered her response to “somewhat,” at her counsel’s probing (Tr. 756).

In response to a question posed by her counsel, respondent could not recall whether she had ever been written up or counseled for any infractions (Tr. 680). In an effort to impeach her, petitioner presented memos from respondent’s personnel file dated February and March 1987. One was written by respondent’s supervisor at the time, and the other, by the deputy executive director of Customer Operations (Pet. Exs. 43, 46). Both indicated displeasure with respondent’s work and her adverse reaction when it was addressed. Petitioner also submitted a rebuttal that respondent wrote on February 24, 1987, in which she disagreed with the characterization of her reaction, advanced many reasons for her reported behavior and suggested that she was being singled out for her mistakes while those of the men in the unit were not (Pet. Ex. 44). When shown the documents, respondent stated that she had completely forgotten about the incident (Tr. 785-86). Petitioner further submitted two performance evaluations for respondent from around the same period (Pet. Exs. 45, 47). Although admitted into evidence, upon closer inspection I found that these documents did nothing to further advance that respondent had been counseled for “infractions” in the true sense of the word. Rather, it appears that petitioner introduced the evaluations in an attempt to link respondent’s performance today with her performance back in the 1980s.

Incompetence is defined as either the “inability to perform one’s job as well as the persistent unwillingness or failure to do the work.” *Law Dep’t v. Stanley*, OATH Index No. 1540/05 at 4 (June 15, 2005), *aff’d*, NYC Civ. Serv. Comm’n Item No. CD 06-08-SA (Jan. 9, 2006). As distinct from misconduct, fault on the part of the employee is not necessarily required to establish incompetence. Petitioner need only prove that respondent is unable to meet the minimally acceptable threshold requirements of the duties of her title. *Employers Retirement*

System v. Myrick, OATH Index No. 505/95 at 26 (Apr. 11, 1995); *see also* section C of petitioner's Revised Standards of Conduct (Pet. Ex. 4 at 000004) ("For any employee to be charged with incompetence, management must show that the employee has not performed reasonably in accordance with the standards defined for his or her job."). Notice to respondent that his performance is viewed as inadequate "is a necessary part of an incompetence case." *Transit Auth. v. Ondeje*, OATH Index No. 1339/04 at 12 (Dec. 30, 2004).

As an initial matter, neither Ms. Kowalski nor Mr. Patel, both of whom I found to be credible, demonstrated any animosity towards respondent. On the contrary, they appeared to like her. But it was clear that their overarching concern is her inability to grasp FMS/3 testing requirements in a manner that would make her an asset to the unit and not hinder their production. They seemed to be at their wits end. On the other hand, I found respondent to be less than credible. She advanced many reasons why she could not function as an FMS/3 or, for that matter, an FMS/2 tester – she was not trained – she did not understand the reading material – she did not like to ask questions – no one ever told her about self-motivation. But she neglected to mention her early departure as a contributing factor. In fact, after 16 weeks of the agency's efforts on a plan developed specifically for her and her four-day work schedule, respondent is still unsure whether she is fully ramped up for FMS/3 testing. She exuded an attitude of indifference which was no doubt fostered by an employer that permitted her to remain a non-contributing member of the unit for years without assigning her work or giving her an evaluation.

That being said, I find that petitioner's evidence overwhelmingly established that respondent is incapable of performing the tasks of a Level II Computer Programmer Analyst, the basic title of an FMS/3 tester, and is therefore incompetent. Notwithstanding, Allegation 1 of Charge I, which asserts incompetence, and is based on Ms. Kowalski's evaluation of respondent in September 2012, should be dismissed, since that evaluation was the first time that petitioner made respondent aware that it considered her work unsatisfactory.

Petitioner's job description for respondent's job title provides that a Level II analyst has "wide latitude for the exercise of independent initiative and judgment, performs more complex and responsible work in the development of computer programs, including performance of all of the [tasks delineated for a Level I analyst]" (Pet. Ex. 6). In accordance, the FMS/3 unit requires highly-skilled workers who are able to self-motivate, have inquiring minds, and can operate

independently, because of the time constraints associated with the multiple releases of software and the anxiety of getting the software into production without kinks.

The six-week ramp-up that was tailored specifically for respondent evolved into 16 weeks, at the end of which respondent was still unable to independently handle all or even most of the aspects of FMS/3 testing for a Level II tester. Ms. Kowalski's and Mr. Patel's and respondent's own testimony demonstrated that she lacks initiative, is not interested in learning, and is unable to perform work that is complex in nature. Her admission that she did not understand most of what she was reading coupled with her reluctance to ask questions because she did not like to do so was incomprehensible. Not only did it cause her delinquency with the assigned tasks, but as a result, she was unable to participate as a fully-functioning FMS/3 tester for the Build 40 release. *See Transit Auth. v. Wong*, OATH Index No. 1866/08 (Aug. 28, 2008) (incompetence found where respondent had trouble performing tasks that someone in his position should be able to do; took five hours to complete a task that should have taken 20 minutes; made frequent errors due to a lack of knowledge and understanding of various computer systems which were necessary to perform his job; and where supervisors spent hours trying to explain his tasks to him to no avail and informed him that he was not performing at the requisite level); *Human Resources Admin. v. Barton*, OATH Index No. 2203/00 at 12 (Mar. 15, 2001) (an isolated or occasional failure to timely complete work may not rise to the level of sanctionable misconduct; but failure to do requested work over a two-month period is sanctionable misconduct where respondent neither sought help nor provided any explanation or notice to his supervisor that he was having problems completing his assignments). Further, Ms. Kowalski met with respondent weekly to review her work, and simultaneously memorialized to respondent her dissatisfaction, so respondent had notice that her performance was viewed as sub-standard and inadequate (Pet. Exs. 13-32). Thus, if respondent sought a transfer, it was perhaps in recognition of her inadequacy.

Respondent's suggestion that Ms. Kowalski's December 2012 evaluation placed her at a disadvantage because she had not had the benefit of three months of the formalized ramp-up which began on October 1, 2012, is not compelling. The PEB report which was issued in November 2012, did indeed recommend that she be given an evaluation three months from the date of the September 2012 evaluation. But it did not direct Ms. Kowalski to suspend her evaluation until respondent had received three months of formalized training, upon which

respondent's argument seems to hinge. Moreover, a delay of Ms. Kowalski's evaluation by another month would have been even more damning because, by the end of January 2013, respondent was lagging even further behind with her training (which should have been completed two months prior), and the completion of her assignments.

A finding of misconduct is predicated on willful or intentional behavior, among other factors. *Reisig v. Kirby*, 62 Misc.2d 632, 635 (Sup. Ct. Suffolk Co. 1968), *aff'd*, 31 A.D.2d 1008 (2d Dep't 1969). At the hearing, Ms. Kowalski made it clear that she had notified the FMS/2 workers that their mentors were available in the late afternoon. After respondent's Human Rights complaint was denied, her work shift of 9:00 a.m. to 5:00 p.m. was reinstated. Yet she blatantly ignored the reinstated work schedule or meetings with her mentor, and continued to leave her work station early, without authorization. What is more astounding is that even provided with a training designed to fit her work schedule, respondent continued to leave early. Her early departure was willful, and no doubt, contributed to respondent's failure to be fully ramped up. That failure caused disruption because her work had to be redistributed to other testers who were already burdened with their own work.

However, I am not convinced that respondent's failure to avail herself of her mentor constituted a failure to follow her supervisor's instructions, as charged. To establish insubordination, petitioner must prove by a preponderance of the credible evidence that: an order was communicated to respondent; the order was clear and unambiguous in its content; and, having heard the order, respondent willfully refused to obey. *See Wong*, OATH 1866/08 at 16; *Dep't of Sanitation v. Dobie*, OATH Index Nos. 2092/07, 2093/07, 2094/07, & 2095/07 at 8 (May 2, 2008); *Dep't of Sanitation v. Nieves*, OATH Index No. 1683/07 at 10 (Sept. 19, 2007) (quoting *Dep't of Environmental Protection v. Schnell*, OATH Index No. 2262/00 at 7 (Oct. 25, 2000)); *Health & Hospitals Corp. (Woodhull Medical & Mental Health Ctr.) v. Muniz*, OATH Index No. 1666/05 at 8 (Oct. 17, 2005).

A supervisor's directive need not be made in definitive language containing the word "order" so long as a clear and unambiguous request was issued. *Wong*, OATH 1866/08 at 16; *Dep't of Sanitation v. David*, OATH Index No. 766/07 at 5 (Jan. 25, 2007), *modified on penalty*, NYC Civ. Serv. Comm'n Item No. CD 07-101-M (Oct. 25, 2007); *Dep't of Environmental Protection v. Salinas*, OATH Index No. 1020/04 at 5 (Nov. 15, 2004), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 06-16-SA (Jan. 9, 2006).

I find that petitioner's e-mail to respondent on October 10, 2012, documenting the kick-off session of respondent's formal ramp-up did not make it mandatory for respondent to utilize her mentor and therefore, could not be interpreted as an order (Pet. Ex. 12). As written, it suggested that respondent keep her interaction with her mentor to a bare minimum, in a sense dissuading her from approaching her mentor. That does not justify respondent's decision to sit by idly since she had the option of approaching Ms. Kowalski. But her failure to utilize her mentor does not constitute a failure to comply with her supervisor's orders, where no such order was given.

In sum, I find that respondent is incompetent to perform the requirements of her job as a Level II Computer Programmer Analyst. Respondent's early departure on 164 occasions constituted unauthorized absences from her work station. These early departures also impeded her ramp-up and caused disruption to the FMS/3 unit because her assignments had to be redistributed to other workers. Respondent's failure to meet with her mentor was not insubordination, as charged.

FINDINGS AND CONCLUSIONS

1. Petitioner did not prove that respondent's practice on consistently scanning out at 4:53 p.m. for approximately 164 occasions constituted a theft of time. Petitioner scanned out openly, and her supervisor signed off on her timesheet each week without question, thereby condoning respondent's departure at that time.
2. The evidence proved that on at least 164 occasions, respondent left her work station without authorization at about one half hour before her scheduled departure time, and about 18 to 20 minutes before she actually scanned out in Citytime, in violation of section B.1.d of petitioner's Revised Standards of Conduct. By so doing, respondent's timesheets did not accurately reflect her actual hours worked, which is in violation of section 6.1 of petitioner's time and leave procedures.
3. The evidence also established that respondent's early departure contributed to her failure to ramp up and caused disruption to her unit because her work had to be redistributed to other workers, in violation of section B.1.b of petitioner's Revised Standards of Conduct.

4. Petitioner proved that respondent is incompetent, as defined by section C of petitioner's Revised Standards of Conduct, in that she is unable to perform even minimally, the requirements of her job of a Level II Computer Programmer Analyst.
5. The allegation of incompetence that pre-dates September 2012 (Allegation 1 of Charge I), should be dismissed, because respondent was not given prior notice by petitioner that it considered her work unsatisfactory.
6. Petitioner did not prove that respondent's supervisor issued orders with which respondent failed to comply.

RECOMMENDATION

Upon making the above findings and conclusions, I requested and reviewed a copy of respondent's personnel abstract in order to recommend an appropriate penalty. Respondent has worked for the City of New York since 1984, and has been with FISA since that time. She started in the provisional title of Office Associate, followed by another provisional title of Computer Programmer Analyst Trainee in September 1992. In April 1996, pursuant to an out-of-title grievance filed by her, respondent became a provisional Computer Programmer Level I. In January 1997, she became permanent. Respondent has held the title of a Level II Computer Programmer Analyst since 1999. Within the last five years, she received two "unsatisfactory" evaluations, both of which were issued in 2012, and were discussed earlier. One, issued in September 2012, was upheld by petitioner's Personnel Review Board after respondent wrote a rebuttal. The second was issued pursuant to the directive of the Board that respondent be evaluated three months from the date of the September 2012 evaluation. Notably, the second evaluation was issued well after the date that respondent's personalized ramp-up was scheduled to be completed.

Petitioner seeks a recommendation of termination if the charges against respondent are sustained.

Here, respondent was found incompetent to perform the requirements of her job. She also violated petitioner's rules against unauthorized absences from an employee's work station by leaving her work station at approximately 4:35 p.m. on at least 164 occasions. By scanning out almost 20 minutes later on each of those occasions, respondent was also found to have

violated petitioner's rule that "Daily time records shall be maintained showing the actual hours worked by each employee." This practice was deceptive and translated into a theft of time from the agency. But respondent's early departure also contributed to her failure to fully ramp up and caused disruption to the unit because her work has to be redistributed to the other workers.

"Typically with time and leave violations, the principle of progressive discipline is employed to give ample warning to an employee through the formal disciplinary process and increasing penalties, that his attendance must improve or he will face the ultimate penalty in this forum, loss of employment." *Human Resources Admin. v. Beauford*, OATH Index No. 1517/03 at 17-18 (Dec. 5, 2003), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 06-15-5A (Jan. 9, 2006). Respondent has been with FISA for approximately 30 years, and there was nothing presented to suggest that she had been warned about leaving her work station early. But while a lengthy tenure at an agency may provide a basis for mitigating an employee's penalty, this may not be the case where the misconduct involves deliberate acts of deception where, as here, respondent left her work station early and proceeded to another floor where she scanned out 20 minutes later. In fact, in a seminal case, the Court of Appeals articulated that termination may not be so shocking to one's sense of fairness, even where the employee has a very lengthy tenure. *See Matter of Pell v. Board of Education*, 34 N.Y.2d 222 (1974). In *Pell*, a tenured public school teacher who was refused permission to absent himself for three days a month for seven months chose to absent himself anyway under the false pretext that he was ill, and thus received pay for those days. In reinstating the administrative decision of termination which had been reversed by the Appellate Division, the Court of Appeals found that termination was not so shockingly disproportionate to the offense as to amount to an abuse of discretion as a matter of law. The court held that:

a result is shocking to one's sense of fairness if the sanction imposed is so grave in its impact on the individual subjected to it that it is disproportionate to the misconduct, incompetence, failure or turpitude of the individual, or to the harm or risk of harm to the agency or institution, or to the public generally visited or threatened by the derelictions of the individuals.

Id. at 234.

In this case, while it is readily apparent that respondent has remained idle for a number of years, termination would be disproportionate to my findings of misconduct and respondent's

incompetence, as charged. In the first place, I find mitigation in that respondent's early departure was facilitated by the agency. At the hearing, respondent presented a floor plan of her office and the route that she took when leaving the office, to establish that someone must or should have seen her. That the agency only realized that she was leaving her work station as early as she did after it decided to bring charges against her and discovered her pattern of scanning out at 4:53 p.m. is an indictment of itself. While Ms. Kowalski was no doubt inundated with work, she was also ultimately responsible for how her workers utilized their time, and their arrival and departure times. Thus, Ms. Kowalski's failure to notice respondent's absence from her work station at around 4:35 p.m. on any of the 164 days that she did so, facilitated respondent's practice of leaving early. I therefore find that the agency must shoulder some responsibility for respondent's consistently early departures from her work station.

With regard to my finding of incompetence, what is crystal clear is that the work in the FMS/3 unit is too complex and fast-paced for respondent, whose educational background is in data processing. Her ineptitude engendered a devil-may-care or lackadaisical attitude towards Ms. Kowalski's attempts at ramping her up. It is therefore evident that respondent will never be, and is not interested in becoming, competent in FMS/3 testing.

In the majority of cases where the employee has demonstrated a prolonged and persistent pattern of unsatisfactory work performance, this tribunal has recommended termination or demotion. *See Dep't of Consumer Affairs v. Yampolsky*, OATH Index No. 2269/10 (Aug. 12, 2010) (termination recommended for clerical associate who not only improperly or inefficiently performed her duties on 13 occasions, but was persistent in her refusal to do the job as directed); *Human Resources Admin. v. Hampton*, OATH Index No. 517/08 (Dec. 12, 2007) (demotion recommended for clerical employee who consistently demonstrated an inability to properly carry out required tasks, even after receiving detailed instructions from supervisors); *Employers Retirement System v. Myrick*, OATH Index No. 505/95 (Apr. 11, 1995) (termination recommended for a computer associate who repeatedly and insubordinately failed to perform his job functions); *Dep't of Finance v. Smalls*, OATH Index No. 316/94 (Jan. 27, 1994) (demotion recommended for a supervisor of cashiers who repeatedly failed to perform assigned tasks in a proper and timely fashion and committed various instances of insubordination, but deemed able to perform a less demanding position); *Board. of Education v. Cook*, OATH Index No. 733/90

(Apr. 9, 1990) (termination recommended for food services manager who failed to keep accurate records, complete reports, manage ordering food supplies, and observe nutritional guidelines).

Here again, I find that petitioner must also assume some responsibility for its failure to evaluate and assess respondent's qualifications before assigning her a position as a tester in both the FMS/2 and FMS/3 units. Thus, given respondent's lengthy tenure and petitioner's contribution to her performance (or lack thereof), I recommend that respondent be demoted to a Level I Computer Programmer Analyst, a position which she previously held, and for which there was no allegation that she was incompetent.

Ingrid M. Addison
Administrative Law Judge

April 9, 2014

SUBMITTED TO:

ROSE-ELLEN MYERS
First Deputy Executive Director

APPEARANCES:

KRISTI GAMBLE, ESQ.
MARCY SERBER, ESQ.
Attorneys for Petitioner

JOEL FIELD, ESQ.
Attorney for Respondent

THE CITY OF NEW YORK
CITY CIVIL SERVICE COMMISSION

-----X
IN THE MATTER OF THE APPEAL OF:

LEUNG, BETTY

DATE: 01/20/15

Appellant:
-against

NYC FINANCIAL INFORMATION
SERVICES AGENCY
Respondent:

Pursuant to Section 76 of the New York
State Civil Service Law

-----X

PRESENT:

NANCY G. CHAFFETZ, COMMISSIONER
CHAIR

JOEL FIELD, ESQ.
REPRESENTATIVE FOR APPELLANT

MARCIE SERBER, ESQ.
REPRESENTATIVE FOR RESPONDENT

APPELLANT PRESENT

STATEMENT

On Thursday, October 16, 2014, the City Civil Service Commission heard oral argument in the appeal of **BETTY LEUNG**, Computer Programming Analyst, NYC Financial Information Services Agency ("FISA"), from a determination by the FISA, finding her guilty of charges of incompetency or misconduct and imposing a penalty of **Demotion** following an administrative hearing conducted pursuant to Civil Service Law Section 75.

**THE CITY OF NEW YORK
CITY CIVIL SERVICE COMMISSION**

In the Matter of the Appeal of
BETTY LEUNG
Appellant
-against-
NEW YORK CITY FINANCIAL INFORMATION SERVICE AGENCY
Respondent
Pursuant to Section 76 of the New York
State Civil Service Law

CSC INDEX NO: 2014-0510

DECISION

PRESENT:

NANCY G. CHAFFETZ, COMMISSIONER
CHAIR

RUDY WASHINGTON, COMMISSIONER
VICE CHAIR

CHARLES D. MCFAUL
COMMISSIONER

BETTY LEUNG ("Appellant") appealed from a determination of the New York City Financial Information Services Agency ("FISA") finding her guilty of incompetency and/or misconduct and imposing a penalty of Demotion following disciplinary proceedings conducted pursuant to Civil Service Law Section 75.

The Civil Service Commission ("The Commission") conducted a hearing on October 16, 2014.

This Commission has carefully reviewed the record in this case and the testimony adduced at the departmental hearing. Based upon this review, the Civil Service Commission finds no reversible error and affirms the decision and penalty imposed by the FISA.

**NANCY G. CHAFFETZ, COMMISSIONER
CHAIR**

Concurring:

**RUDY WASHINGTON, COMMISSIONER
VICE CHAIR**

**CHARLES D. MCFAUL
COMMISSIONER**

Dated: Jan. 20, 2015