

**FINDINGS OF FACT, CONCLUSIONS OF LAW, and DECISION**

of the

**CITY OF TACOMA CIVIL SERVICE BOARD**

In the APPEAL OF

**MYUNG HEE MULLER**

The City of Tacoma Civil Service Board, having heard the appeal of Myung Hee Muller on December 5 and December 19, 2013; Ms. Muller being present and represented by counsel for the International Brotherhood of Electrical Workers 483, SaNni M-K Lemonidis of Robblee, Detwiler & Black; and the City of Tacoma Finance Department being represented by Deputy City Attorney Cheryl Comer; and having considered the evidence and testimony presented, does hereby make the following:

**FINDINGS OF FACT**

1. Ms. Muller's employment with the City of Tacoma Finance Department began in 2007. At the time of her termination, Ms. Muller was serving as a Senior Accountant, assigned to the Tacoma Public Utility's Water Fund.
2. Ms. Muller was provided with a Notice of Intent to Terminate Employment on April 19, 2013, for a violation of TMC 1.24.940.E, which included notice of her right to respond to the charges.
3. Ms. Muller requested and received a Loudermill hearing on May 6, 2013.
4. Ms. Muller was notified by the Director of the Finance Department, Andrew Cherullo, by letter dated May 14, 2013, of his decision to uphold the termination recommendation.
5. Ms. Muller's employment was terminated effective May 17, 2013.
6. Ms. Muller timely submitted an appeal of her termination to the Civil Service Board.
7. There was no evidence that Ms. Muller had any disciplinary history for the first three years of her employment with the City.
8. On October 15, 2010, Ms. Muller was placed on a Performance Improvement Management Plan ("Plan" hereinafter") by her immediate supervisor, Lisa Richardson, outlining expectations in five identified key competency areas:

(1) Accountability; (2) Analysis, Decisive & Judgment; (3) Communication effectiveness; (4) Development & Continual Learning, and (5) Ethics & Integrity. The Plan stated that failure to show significant improvement over the following ninety (90) day period could result in discipline, including termination.

9. A Performance Improvement Management Plan is not discipline. It is a pre-disciplinary corrective action.
10. On February 18, 2011, a follow up to the Plan was documented following a discussion between Ms. Richardson and Ms. Muller. At that time, there were some improvements to her performance noted. Although Ms. Richardson testified at the hearing that Ms. Muller was still not meeting minimum expectations, the February 2011 Plan does not indicate that Ms. Muller was still failing to meet minimum expectations. No disciplinary action was taken by the City at that time.
11. On December 2, 2011, Ms. Muller received a Notice of Intent to Suspend for Five Days based on her failure to meet performance expectations. Ms. Muller exercised her right to administrative review. Following a Loudermill hearing, the Finance Director at the time, Robert Biles, modified the intended suspension to a written warning, by letter dated February 10, 2012.
12. On December 2, 2011, Ms. Muller was provided with another follow up to the Performance Improvement Management Plan. The December 2, 2011 plan documented areas of concern. The December 2, 2011 plan did not contain any language warning Ms. Muller that failure to improve performance would result in further disciplinary action.
13. On March 13, 2012, a new Performance Improvement Plan was instituted, outlining management expectations in key competency areas. The March 2012 Plan contained language warning that a failure to show significant and sustained improvement within ninety (90) days would result in discipline, up to and including termination. The Plan was to remain in place for 90 days and could be extended if necessary.
14. On August 29, 2012, a follow up to the March 2012 Plan was documented indicating that Ms. Muller was apparently still failing to meet management expectations. However, no disciplinary action was taken at that time.
15. On April 19, 2013, Ms. Muller received the aforementioned Notice of Intent to Terminate.
16. Ms. Muller has been employed by the City of Federal Way as a Financial Analyst since August 1, 2013.

Based on these facts, the Civil Service Board makes the following:

#### CONCLUSIONS OF LAW

1. The Civil Service Board of the City of Tacoma has jurisdiction to hear the appeal of Myung Hee Muller of an alleged violation of TMC 1.24.940.
2. Ms. Muller timely filed her notice of appeal of her termination.
3. The Notice of Intent to Terminate, dated April 19, 2013 satisfies the notice requirements of TMC 1.24.940.
4. Rule 12 of the Civil Service Board's Rule of Procedure for Adjudicative Hearing address the standard of review for appeals to this Board. Rule 12 states that at any hearing on appeal from a disciplinary demotion, suspension, or termination, the disciplinary authority shall have the burden of showing by a preponderance of the evidence that its action was both (1) in good faith, and (2) for cause.
5. In the instant case, the City has failed to satisfy its two-prong burden by a preponderance of the evidence.
6. The Board is cognizant that, generally, the City indicates that it attempts to follow a progressive discipline policy. A central tenet of just cause termination, however, is a disciplinary policy which progresses through the recognized steps of discipline.
7. It is the view of the Board that a Performance Improvement Plan, while it may serve as a foundation for discipline, is not discipline. It is a pre-disciplinary corrective action.
8. In this case, the Board recognizes that Ms. Muller was put on repeated Performance Improvement Plans. However, despite the City's position that Ms. Muller consistently failed to meet expectations throughout the two and one-half year period, the Plans were not timely extended in writing. Further, no forewarned disciplinary action was actually taken at the end of the ninety day periods specified in the plans. Failure to either formally extend a Performance Improvement Plan in writing at the end of its expiration or, alternatively, to take timely action in the event the employee is still failing to meet performance expectations can result in confusion for an employee.
9. There were no intervening disciplinary steps, other than the February 10, 2012 written reprimand that would have indicated to Ms. Muller that she was in imminent danger of being terminated. The City's failure to either timely and formally extend the Performance Improvement Plans in writing, or to timely move to appropriate corrective action at the end of a Plan's expiration put Ms.

Muller in the position of being unaware of the jeopardy she was actually in, which undercuts the purpose of just cause discipline.

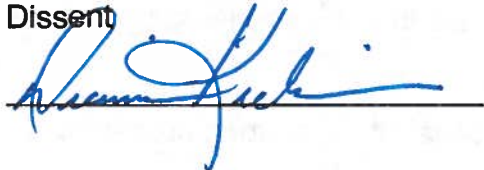
DECISION

On a vote of four affirmatives (with one dissent), the Civil Service Board of the City of Tacoma grants the appeal of Myung Hee Muller overturning her termination and directs that she be reinstated to her classification as a Senior Accountant. Further, the Board orders restoration of back pay from the period between May 18, 2013 until July 31, 2013.


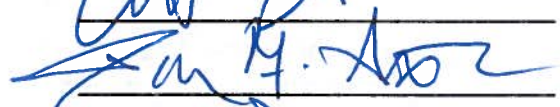

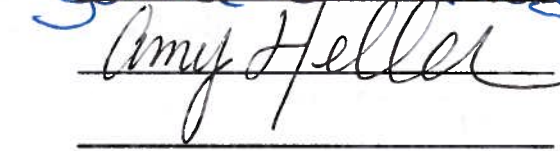
Done this 2nd day of January, 2014.

Signatures:

Dissent

  
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