#732

In The Matter of the Arbitration

-between-

The State of Ohio
Department of Youth Services

-and-

Ohio Civil Services Employees
Association, AFSCME Local 11

OPINION AND AWARD
The Stanley Williams Matter

35-08-(99-10-22)-0015-01-03

ARBITRATOR: John J. Murphy
Cincinnati, Ohio

APPEARANCES:

FOR THE DEPARTMENT: Bradley E. Rahr, Sr.
Department of Youth Services
State of Ohio
51 N. High Street
Columbus, Ohio 43215

Also present: Debbie Turner
Personnel Officer

Ellen Wallace
Food Service Manager

John Bragg
Human Resources Manager

FOR THE UNION: Victor Dandridge
OCSEA Representative
390 Worthington Road
Westerville, Ohio 43082

Also present: Stanley Williams
Grievant

FACTUAL BACKGROUND:

On September 21, 1998, the Grievant was first hired as an Interim Cook 1 by the Circleville Youth Center--an institution within the Department of Youth Services. His employment status was that of an "interim" employee--a status of employment that is exempted from the collective bargaining agreement between the State and the Union. Consequently, his employment relationship with the institution was governed by the Ohio Revised Code rather than the collective bargaining agreement. His initial wage rate was $10.58 an hour, and he received a step increase on January 17, 1999 to $10.83 an hour.

The Grievant resigned from the Circleville Youth Center effective April 24, 1999, and accepted a full-time position as a Cook 1 in another institution within the Department--Training Institution of Central Ohio (TICO). He commenced work at TICO on April 26, 1999 at a pay rate of $10.58 an hour, and received a step increase on August 15, 1999 to $11.90 an hour. By letter dated October 19, 1999, the Grievant was notified by the Superintendent of TICO and the Director of the Department of Youth Services that he was "probationarily removed" from his position as a Cook 1 at TICO. "Probationarily removed" is a term of art to refer to a removal during an initial probationary period.

A grievance was filed on October 22, 1999 that challenged whether the Grievant was, indeed, on probation as of the date of his removal. The grievance stated:

> This employee (Stanley Williams) was past his probation period and should have been given credit for one-half of

time spent at CYC (Circleville Youth Center) as cook 1 interim.

ISSUES:

1) Was the grievance properly before the arbitrator under the time requirements contained in Article 25 of the contract?

2) Was the subject of the grievance--the removal of the Grievant on October 21, 1999--a matter that is excluded from the grievance and arbitration process under the contract?

3) Was the Grievant a probationary employee under the terms of Article 6? If not, what should the remedy be?

RELEVANT CONTRACT PROVISIONS:

ARTICLE 6 - PROBATIONARY EMPLOYEES

6.01 - Probationary Periods

. . .

The probationary period for all other employees of the Department of Rehabilitation and Correction and Department of Youth Services shall be one hundred eighty (180) days.

. . .

During an initial probationary period, the Employer shall have the sole discretion to discipline or discharge probationary employee(s) and any such probationary action shall not be appealable through any grievance or appeal procedure contained herein or to the State Personnel Board of Review.

. . .

6.03 - Conversion of Temporary, Intermittent, Interim, Welfare to Work Initiative or Seasonal Employees

A temporary, intermittent, interim, funded position under a Welfare to work Initiative or seasonal employee who becomes a permanent employee in the same agency, classification and job duties will be credited with their time served, but no more than one-half (1/2) the length of the probationary period for that classification.

. . .

ARTICLE 25 - GRIEVANCE PROCEDURE

25.01 - Process

. . .

Probationary employees shall have access to this grievance procedure except those who are in their initial probationary period shall not be able to grieve disciplinary actions or removals.

. . .

25.02 - Grievance Steps

Step One (1) - Immediate Supervisor

. . .

All grievances must be presented not later than ten (10) working days from the date the grievant became or reasonably should have become aware of the occurrence giving rise to the grievance not to exceed a total of thirty (30) days after the event.

. . .

Suspension, Discharge and Other Advance-Step Grievances

. . .

A grievance involving a suspension or a discharge shall be initiated at Step Three (3) of the grievance procedure within fourteen (14) days of notification of such action.

. . .

ARTICLE 36 - WAGES

. . .

36.03 - Step Movement

. . .

All employees of the Department of Youth Services . . . assigned to classifications . . . which require a one hundred eighty (180) day probationary period, as set forth in Article 6 shall be eligible for a step increase in the pay period following the successful completion of one hundred twenty (120) days of the probationary period.

POSITIONS OF THE PARTIES

A) Department Position

The Department made two challenges to the arbitrability of the grievance. The first claims that the grievance was not timely filed under Article 25. The second challenge is a claim that the grievance is not substantively arbitrable. In other words, it raises a subject matter that the parties decided to exclude from their grievance and arbitration process.

With respect to the first claim, the Department argued that the Grievant was aware or reasonably should have become aware of the fact that he was on probation when he was hired as a cook at TICO. On this point, the Department relied upon a June 19, 1992 decision by Arbitrator Rivera. According to the Employer, this decision was based on similar facts and held that the Grievant should have known that he was on probation prior to his removal and should have filed a grievance within ten days of becoming aware of his probationary status.

The substantive arbitrability challenge by the Department to the grievance centers on the undisputed fact that the Grievant was removed on the 179th day of his employment at TICO. This removal, according to the Department, was within the 180 day, initial probationary period. Consequently, the removal was not subject to the grievance and arbitration procedure. During this probationary period, the probationary removal was not appealable through the grievance and arbitration process. Consequently, the arbitrator has no jurisdiction to hear the grievance.

The Department rejected the Union's claim that the Grievant had a credit toward his probation under Section 6.03 from his time served as an interim cook 1 at Circleville Youth Center. Such a credit is conditioned upon the Grievant performing the same "job duties" at TICO, and the undisputed evidence shows that the duties of a cook 1 at TICO were different from that of Circleville.

Finally, the Department has demonstrated in the evidence all of the elements of a practice of requiring all interim employees from one institution within the Department to serve a full initial probationary period on becoming a full-time employee at another institution within the Department. This practice illuminates the meaning of "job duties" as found in Section 6.03 of the contract.

B) The Union Position

With respect to the arbitrability of the grievance, the Union urged that this is a removal case. As such, the grievance must be filed within fourteen days of the date of the removal on October 21. Since the Grievance was filed on October 22, the grievance is timely.

Should the arbitrator consider this case to be a "probation" case rather than a removal case--as asserted by the Department, the Union and the Grievant never denied that the Grievant had to serve a probationary period at TICO. The issue, according to the Union, was the length of this probation. The Department's view that the Grievant had to file a grievance when he learned he was on probation at TICO is a misconstruction of the dispute between the parties.

The Union bases its case on the merits on the language of the first paragraph of Section 6.03 of the contract. The Grievant had been an interim cook 1 at Circleville, and had worked for 228 days. As such, he should be credited with one-half the length of his probationary period--a period that was agreed to be 180 days. Therefore, the Grievant should have started his work as a permanent full-time employee at TICO with a credit of 90 days probation. Consequently, the Grievant was well beyond his probationary period when the Department notified the Grievant on October 21, 1999 that he was "being probationarily removed."

With respect to the duties performed by the Grievant at TICO, the Union opined that they were the same duties that he performed at Circleville but in a different method. Evidence of a past practice offered by the Department to eliminate the meaning of "job duties" cannot nullify the clear, unambiguous language of Section 6.03. The Grievant was entitled to the credit of 90 days in his probationary period.

OPINION:

A) Arbitrability of the Grievance

The Department's argument concerning the arbitrability of the grievance is based upon the contract's declaration that: "Questions of arbitrability shall be decided by the arbitrator." (Section 25.03). The theory of the Department is that the grievance did not meet the time requirements set out in Section 25.02 that: "all grievances must be presented not later than ten (10) working days from the date the grievant became or reasonably should have become aware of the occurrence giving rise to the

grievance . . . " The occurrence giving rise to the grievance, according to the Department, was when the Grievant knew or should have known that he was on probation at TICO.

The obvious difficulty with this theory is that the Union conceded that the Grievant was indeed on probation when he commenced employment at TICO. The problem in this dispute is the length of the probation. The Department claims that the length of the probation was 180 days--the initial period of probation; the Union claims that the 180-days should be subject to a credit of 90 days under Section 6.03.

Theoretically, even under the Union's theory of the case, there was a point in time during the employment of the Grievant at TICO that he should have been taken out of probation--perhaps a point 89 days prior to his removal on October 21, 1999. The failure of the Department to remove the Grievant from probation at that earlier date could have been argued as the occurrence which would trigger the time requirement for the filing of a grievance. On the other hand, the Department did not make this argument. Further, the division between the Department and the Union on the length of the Grievant's probation at TICO did not become a matter of dispute until the Department acted to "probationarily remove" the Grievant on October 21, 1999. At that point, the division between the Union and the Department ripened into a dispute about the length of the Grievant's probation.

The grievance was filed on October 22, 1999 and was timely. The relevant contract provision on the timeliness of this grievance is found in Section 25.02:

> "A grievance involving a suspension or a discharge shall be initiated . . . within fourteen (14) days of notification of such action."

The Department relied upon an opinion by arbitrator Rivera in 1992 concerning OCB Award No. 794. This case does contain facts that are similar to the facts of the present case. An employee who had served in one institution of the Department, resigned that position and took employment in the same classification at TICO. The employee was then probationarily removed by TICO management on November 23, 1991.

Arbitrator Rivera reported in this opinion that the Grievant testified under oath that he did not know that he was considered "probationary" until his removal. The arbitrator also noted that the Union's essential point was that the Grievant was entitled to a "transfer." On these facts, the arbitrator held that the Grievant should have been aware that he was on probation no later than September 30, 1991, and that he had ten days to grieve his status as an employee on probation at TICO. Since the Grievant missed that deadline by more than sixty days, the arbitrator found "that the Grievance was not timely, and, hence, no issue exists for arbitration."

The posture of the present case is significantly different from the matter before Arbitrator Rivera. In this case, the Union and the Grievant agreed that the Grievant was on probation when he commenced employment at TICO. The question in this case is the length of this probation, and that is the dispute between the parties.

The Department also makes an argument based on substantive arbitrability; that is, this dispute is not subject to the grievance and arbitration process under the contract. At the arbitration hearing, the representatives of the Department and the Union agreed that the facts on the merits and the facts on this issue of substantive arbitrability were intertwined. Indeed, this argument challenging the substantive arbitrability of the grievance is conditioned upon the premise that the Grievant was not entitled to a ninety day credit on his probation at TICO based upon his prior employment at Circleville--another institution within the Department. It is obvious that the answer to this challenge to the substantive arbitrability of the grievance cannot be determined until we answer the substantive issue between the parties: was the Grievant entitled to a ninety day credit on his probationary period at TICO? If the Department prevails on this basic question, and the Grievant's probation was, indeed, 180 days at TICO, then the grievance was not substantively arbitrable. To make this determination, we turn to the merits.

B) The Merits

The following analysis concludes that the Grievant knew at the time of his employment at TICO that he was under an initial probationary period, and that period was 180 days. This factual determination is based upon resolving credibility issues, and implications from the Department's longstanding practice in hiring full-time permanent employees who had previously been interim employees at other institutions within the Department. Lastly, the analysis concludes that the Employer's longstanding practice does

not conflict with the language in Section 6.03; rather, the practice resolves an ambiguity in the language in this section.

It is undisputed that the Grievant was interviewed by the personnel officer and the food manager about a week prior to his employment at TICO. The personnel officer testified that she told him about the need to resign at Circleville, explained about his pay, and that he would be hired as a new hire at TICO. She testified that about a week later she called the Grievant, made the offer of employment, and again told him to provide his resignation to the office of human resources at Circleville. Again, she told him about his pay, and told him his probationary period would be 180 days. The personnel officer's testimony was corroborated by the testimony of the food service manager who testified that the Grievant was very receptive, and never questioned having to resign or be "put on a new probationary period."

The Grievant's contradictory testimony that he was never told that he would be under a new probationary period, an initial probationary period of 180 days is rejected. First, on April 15, 1999, the Grievant signed a Supplemental Employment Agreement that refers to his "initial employment" with TICO. Second, the Grievant's pay at TICO began at the same level--$10.58 per hour--that he received at his initial date of employment at Circleville. Lastly, the Grievant did not receive a step raise at TICO until four months had elapsed--all of which indicates that the Grievant's employment at TICO was considered an initial employment for which the Grievant would serve an initial probationary period of 180 days.

The resolution of credibility among the witnesses on what the Grievant was told at his initial employment concerning his probationary period is also supported by the application of the longstanding practice of the Department in employing persons who had been interim employees at other institutions within the Department. The Department's human resources manager testified of a longstanding practice. When an interim employee at one institution within the Department applies for a full-time, permanent position at another institution within the Department, the Department requires a resignation, and the employee is put on a new, initial probationary period. This practice has been in existence since 1986 and is applied annually from 5 to 10 times per year without exception.

The testimony of the personnel officer and food services manager shows the application of this longstanding practice to the facts in this case. This supports the conclusion that the Grievant knew at the time of his initial employment at TICO that he was being employed as a new hire and would serve an initial probationary period of 180 days.

The final question is whether this practice does violence to the language found in Section 6.03 of the contract. The Union made a strong argument that this practice must fall because it conflicts with the clear, unambiguous command in the first paragraph of Section 6.03. The command is that "[I]nterim . . . employee . . . will be credited with their time served . . ." (emphasis added). The practice of the Department in insisting that interim employees at one institution within the Department serve an initial

employment period of 180 days when hired at a full-time, permanent employee in another institution in the Department must fall because it conflicts with the language requiring credit for time served by the interim employee.

The command in Section 6.03 is, however, conditioned upon the interim employee becoming a permanent employee in the "same classification and job duties." Section 6.03 does not clarify the distinction between "classification" and "duties." Both words--"classification" and "job duties" are set forth as separate conditions to the command that an interim employee receive credit for time served for prior position as an interim employee.

Neither of the parties cited to any provisions in the contract that distinguish between classification and job duties, and a perusal of sections cited in the index to the contract do not reveal any such provision. On the other hand, the contract in the second paragraph of Section 6.02 does recognize that the lateral transfer by employees covered by the contract may result in a probationary period if the work varies among positions within the same classification.

The practice of the Department in this case has been applied continuously for fourteen years in 5 to 10 cases involving interim employees annually. All of these cases are similar to the one in this present case where an interim employee in one institution within the Department seeks a full-time, permanent position in another institution within the Department. The premise of the Department's practice is the belief that duties within the same classification vary among institutions within the Department

particularly when measured from the perspective of an employee who has been only an interim employee--an employee not covered by the collective bargaining contract. The volume of cases involving interim employees to which the Department has applied this practice, and the 1992 decision by Arbitrator Rivera clearly establish knowledge and acquiescence by the Union over a period of time that the practice has been applied.

The practice clearly avoids a close factual analysis on a case by case basis concerning interim employees who wish to move on a permanent basis to another institution in the Department. The value of the practice in avoiding this case by case analysis is seen in the facts of this present case. The food service manager testified about her understanding of the duties performed by the Grievant as an interim employee at Circleville, and the difference in these duties in the same classification at TICO. The obvious response by the Union was that the duties were in fact the same but were performed in a different manner in the different institutions.

Ambiguity in the language of a provision in a contract may arise when a provision uses two words that trigger a result, but the distinction between the two words is unclear. In this case, the credit for time served for an interim employee under Section 6.03 is triggered by the requirement that the interim employee move on a permanent basis to another institution in the same classification and job duties. Left unclear is the distinction between "job duties" and "classification." A proper function of a practice is to clarify the ambiguity arising from this unclear distinction. In this manner, the practice of the Department in

requiring an interim employee to fulfill an initial probationary period--in this case 180 days--does not violate the language of Section 6.03 of the contract.

The Grievant, therefore, was on an initial probationary period of 180 days at TICO and was removed during this period. The contract has two provisions that place such a removal outside the scope of the grievance and arbitration process: Sections 6.01 and 25.01. Section 25.01 states: "[T]hose who are in their initial probationary period shall not be ale to grieve . . . removals." Arbitration set forth as Step Five in Article 25.02 is only available to: "Grievances that have not been settled . . .".

This grievance must be denied because the arbitrator did not have the authority under the contract to hear it. Since the grievance challenged a removal during an initial, probationary period, the decision of the Department to remove the Grievant was outside the scope of the grievance and arbitration process.

AWARD

For the reasons stated above, the grievance is denied.

Date: October 21, 2000

John J. Murphy
Arbitrator