

VOLUNTARY LABOR ARBITRATION TRIBUNAL

#936

In the Matter of Arbitration *
Between *

OHIO CIVIL SERVICE *
EMPLOYEES ASSOCIATION *
LOCAL 11, AFSCME, AFL/CIO *

and *

OPINION AND AWARD

Anna DuVal Smith, Arbitrator

Case No. 16-11-20060222-10224-01-09

OHIO DEPARTMENT OF JOB *
AND FAMILY SERVICES *

Patricia Milliken, Grievant
Arbitrability

APPEARANCES

For the Ohio Civil Service Employees Association, Local 11 AFSCME, AFL-CIO:

Tim Rippeth, Staff Representative
Thomas Cochrane, Associate General Counsel
Ohio Civil Service Employees Association, Local 11 AFSCME, AFL-CIO

For the Ohio Department of Job and Family Services:

Michael Duco, Manager of Dispute Resolution and SERB Services
Ohio Office of Collective Bargaining

Pam Fisher, Labor Relations Officer
Ohio Department of Job and Family Services

I. HEARING

A hearing on this matter was held at 9:00 a.m. on August 22, 2006, at the offices of the Ohio Civil Service Employees Association in Westerville, Ohio, before Anna DuVal Smith, Arbitrator, who was mutually selected by the parties pursuant to the procedures of their collective bargaining agreement. One issue was presented. The parties waived oral testimony and presented the case by documents and oral argument. The record was closed at 9:30 a.m. This Opinion and Award is based solely on the record as described herein.

II. BACKGROUND

The facts of this case are not in dispute. On October 27, 2005, the Grievant accepted an inter-agency transfer and demotion and headquarter county change. Relevant portions of the document she signed state,

I, Patricia Milliken, do hereby acknowledge that I understand the position I am accepting PCN 95909.1, Clerk 1, in the Ohio Department of Job and Family Services' Office of Local Operations/Jackson Processing Center is an inter-agency transfer and demotion covered by collective bargaining in provisional status.

In accordance with Article 6.01 (D), Inter-Agency Transfer, I understand that I will serve an initial probationary period and may be removed if I fail to perform the job requirements to my employer's satisfaction. I also understand that I may not challenge such removal. (Joint Ex. 3)

The Department sent her a congratulatory letter dated November 9, 2005, notifying her, amongst else, what her pay rate would be, where and when (November 14) to report, and that she would "serve a probationary period of 60 days in this position." (Joint Ex. 4) The Department admits that "60 days" was erroneous. It mistakenly cited one-half of the regular probationary period, which is what is used for a demotion "trial period" (Article 6.01 C).¹ A month later, the Department issued a "Corrected Letter" informing her that she would, instead, serve a probationary period of 120 days. Article 6.01 D governing inter-agency transfers provides:

¹"The Employer may require employees who are demoted pursuant to Article 17.04 to serve a trial period equal to one-half of the regular probationary period for the classification...."

D. Inter-Agency Transfer

Employees who accept an inter-agency transfer pursuant to Article 17, shall serve an initial probationary period. If the employee fails to perform the job requirements of the new position to the Employer's satisfaction, the Employer may remove the employee. The employee may not challenge such removal. (Joint Ex. 1)

Probationary periods for the Grievant's new classification are defined in Article 6.01 A: "The probationary period shall be one hundred twenty (120) days for classifications paid at grades 1 to 7 and grades 23 to 28...."

The Grievant's Final Probationary Evaluation rated her performance as unsatisfactory. She was thus probationarily removed from her position of Clerk 1 effective at the close of business on February 14, 2006.

A grievance was timely filed on February 22 claiming the Grievant was removed without just cause and that there were several technical violations with her probationary period and removal. This grievance was denied at Step 3 and thereafter came for arbitration as aforesaid where the parties bifurcated on arbitrability and merits. Thus, the threshold issue as agreed by the parties is: *Is this matter arbitrable?*

The Department argues that the Arbitrator has the authority under Article 25.03 to decide matters of arbitrability but she does not have the authority to add to, subtract from or modify the Agreement. The Contract at Article 25.01 B, it says, explicitly excludes disciplinary actions and removals of probationary employees in their initial probationary period from the grievance procedure. This is reiterated in Article 6.01 A. Therefore, regardless of the mistake made by the Department (but later rectified) the Arbitrator has no authority to review the Department's removal decision.

The Department continues that with respect to its mistake, the Contract defines probationary periods for the Grievant's pay grade to be 120 days. It admits she was demoted in that she accepted a lower pay range. But because she accepted an inter-agency transfer, she was subject to a mandatory "initial probationary period," not the "trial period" defined in Article 6.01 C as "one-half the regular probationary period." The Contract, it says, is clear. Regardless of

what the documents say, the Grievant was in an “initial probationary period,” not a “trial period,” and so the Arbitrator has no authority to decide whether the Grievant was discharged for just cause.

The Union argues that the grievance is arbitrable. It agrees that Article 6.01 D says “probationary period,” but it does not say what the length of that period is. The Grievant was told by telephone that it would be sixty days and this was confirmed by the November 9 letter. The Contract even specifies one-half the regular probationary period for demotions, which calculates to sixty days. The Union believes the Department was deceptive. Had the Grievant known at the time that she was going to be subject to a 120-day probationary period she would not have accepted the move. The Union asks that the Department be made to uphold the November 9 letter specifying the sixty day probationary period. Thus, since she was removed after her probationary period ended, she is entitled to due process on that action.

III. OPINION OF THE ARBITRATOR

When addressing issues of substantive arbitrability, which is what is before this arbitrator by agreement of the parties, there is a strong presumption that unless a matter is specifically excluded from the arbitration agreement or there is other forceful evidence that the parties intended to exclude the matter, it is, indeed, arbitrable. The language here could not be clearer: “Probationary employees shall have access to the grievance procedure except those who are in their initial probationary period shall not be able to grieve discipline actions or removals.” (Article 25.01 B) If this were not enough, the same restriction is spelled out in at least two other places in the Agreement, in 6.01 A New Hires, Promotions and Lateral Transfers to a Different Classification and in 6.01 D Inter-Agency Transfer. The only question then is whether the Grievant was in her “initial probationary period” at the time she was removed. If so, her removal is not arbitrable.

Probationary periods are defined in 6.01 A and made use of in other sections, 6.01 D Inter-Agency Transfer and 6.01 E Cross-Collective Bargaining Agreement Rights, e.g. They are

distinguished from trial periods, which apply to lateral transfers within the same classification (6.01 B) and demotions (6.01 C). Trial periods differ from probationary periods in that they are one-half the regular probationary period and employees in trial periods are not prohibited from using the grievance procedure to protest discipline and discharge actions. The fact that these terms are used in the same sentence in an either-or construction in 17.04² is further evidence that they are not the same.

It is clear to me that the Grievant was in an initial probationary period and not a trial period when she was removed. The Acknowledgment she signed on October 27, 2005 explicitly references Article 6.01 D, uses the term "initial probationary period" and places her on notice that she could be removed during that period without recourse. The Grievant could have consulted the Collective Bargaining Agreement or Union before signing the Acknowledgment or she could have inquired about the change or filed a grievance when she got the corrected letter. She did neither of these and continued to sit on her hands after the 60-day period expired when she might have noticed that she had not received a final probationary evaluation and notice of its outcome. As it was, the Department brought itself into conformity with the Collective Bargaining Agreement less than thirty days after the transfer became effective and never learned of her disagreement until it removed her while she was still in her initial probationary period, as was its right under the negotiated Agreement.

IV. AWARD

For the reasons given, the matter of the Grievant's removal is not arbitrable.



Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
August 23, 2006

²"Employees serving in an initial probationary period, trial period or promotional probationary period, shall not be permitted to bid on job vacancies."