ARBITRATION AWARD SUMMARY

OCB Award Number: 141

OCB Grievance Number: Arbitrability - "Certified Against"

Union: OCSEA/AFSCME

Department: OCB

Arbitrator: John E. Drotning

Management Advocate: Chesler, Steven B

Union Advocate: Smith, Daniel S.

Arbitration Date: 7-1-87

Decision Date: 1-18-88

Decision: Granted

IN THE MATTER OF ARBITRATION

BETWEEN

OFFICE OF COLLECTIVE BARGAINING
STATE OF OHIO

AND

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION
LOCAL 11, AFSCME

# ARBITRATION AWARD

GRIEVANCE: Arbitrability - "Certified Against"
HEARING: July 1, 1987
ARBITRATOR: John E. Drotning

## I. HEARING

The undersigned Arbitrator conducted a Hearing on July 1, 1987 at 375 S. High Street, Columbus, Ohio. Appearing for the Union were: Daniel S. Smith, Esq. and John Brennan. Appearing for the Employer were: William L. Lavelle, Esq., Steven B. Chesler, Esq., Edward H. Seidler, and David Levine.

The parties were given full opportunity to examine and cross examine witnesses and to submit written evidence and documents supporting their respective positions. Post hearing briefs were filed by October 27, 1987 and a reply brief by the Employer on 11/20/87 and the case was closed. The discussion and award are based solely on the record described above.

## II. ISSUE

The parties did not agree on a joint submission. The Union asked:

> Is the following issue arbitrable?
>
> > Is the Collective Bargaining Agreement violated when non-probationary bargaining unit employees are removed from their employment for failure to pass a Civil Service examination?

The Employer asked:

> Does the Collective Bargaining Agreement entered into between the State of Ohio and the Ohio Civil Service Employees Association/AFSCME (hereinafter OCSEA/AFSCME), effective July 1, 1986, authorize the filing of grievances by employees who have been replaced by individuals who have taken and passed a Civil Service examination for the positions held by employees who were replaced?

## III. STIPULATIONS

The parties jointly submitted the exhibit marked Joint Exhibit #1 - the Contract between the parties.

## IV. TESTIMONY, EVIDENCE, AND ARGUMENT

### A. EMPLOYER

#### 1. TESTIMONY AND EVIDENCE

Mr. Edward Seidler testified that there was little disagreement between the parties and that the State, throughout the negotiations, indicated that it was inappropriate to bargain the issue of certification in the Contract. Seidler noted that a constitutional amendment provided that the appropriate authority had to deal with the top three people who passed a Civil Service test. Seidler went on to say that as far back as the year 1913, there existed the possibility of appointments of a qualified employee. Employees, continued Seidler, who elect not to take the test or who fail the test are dismissed because they failed to complete the appointment process. Such employees are not discharged in the common sense of that word, said Seidler, but are dismissed.

Seidler testified that Ohio Civil Service system has never been strong and the legislature eventually put in an automatic provision which indicated that after two years on the job, that qualified as a "passing grade" on a test.

Seidler said that the federal government began its involvement in the 1930's and federal service system employees who were appointed to grant-in-aid programs had to take tests. He noted that employees funded through federal government monies are not covered by the above-noted automatic provision.

Seidler testified that an original appointment is the first appointment in the state agency and it is provisional and provisional employees who subsequently are promoted are not covered. The only individuals involved in this case are original appointees who are not promoted. Seidler also noted that in the past, Ohio had a patronage system and the public sector law will end that sort of process.

Seidler went on to say that the Employer would like to have granted certification to employees, but in this specific case, it could not under Ohio's Constitution and Civil Service Law. He cited an example by way of noting that an entry level vacancy is posted and, if no one in the unit applies, the appointing authority asks for an eligibility list. This authority then interviews the first three who are ranked in that order and one is selected. Again, he went to say that assuming a vacancy and that no one in the bargaining unit applies and if there is no eligibility list available, the department appoints a qualified applicant as a provisional employee and if that appointee takes a test and fails or simply does not take the test, he/she may be replaced.

On redirect, Seidler said that the ten thousand employees in the system are not just those under AFSCME and he indicated that perhaps six thousand are covered by the AFSCME Contract and they fall into about nine hundred classifications. He noted that the Department of Administrative Services has probably given tests in only twenty of the nine hundred classifications.

Seidler noted that the Union wanted to cover this situation and the State; that is, the bargaining representatives of the State, said it could not bargain that issue. He said he was not sure whether the disagreement was over the State's decision to remove provisionals who failed the test and he noted that in some fashion, the parties agreed to address this question in the future.

2. ARGUMENT

The question, argues the Employer, is whether displaced provisional employees may grieve their separation from employment as a result of being replaced by individuals who had taken and passed a Civil Service examination for the displaced employees' positions. The State argues that this question is precluded by statute from being a subject of collective bargaining between the parties. Since the parties cannot negotiate the issue, the Contract's grievance procedure cannot be invoked.

Ohio's public sector bargaining law took effect on 4/1/84 and it allowed Ohio's public employees to bargain over wages, hours, and other terms and conditions of employment. Prior to 4/1/84, notes the Employer, such employees were governed by State Civil Service law as codified in R.C. Chapter 124.

Chapter 4117, continued the Employer, put few restrictions on appropriate subjects of collective bargaining, but one of those is stated in 4117.08(B) as follows:

> The conduct and grading of civil service examinations, the rate of candidates, the establishment of eligible lists from the examinations, and the original appointments from the eligible lists are not appropriate subjects for collective bargaining.

The State asserts that the basis for the above statutory prohibition is Article 15, Section 10 of the Ohio Constitution. This section authorized the General Assembly to create a civil service system in Ohio and it was adopted on September 3, 1912. That states that:

> Appointments and promotions in the civil service of the state, and of the several counties and cities shall be made according to merit and fitness, to be ascertained, as far as practicable, by competitive examinations. Laws shall be passed providing for the enforcement of this provision.

This provision, continues the Employer, was designed to establish a merit system for public employment appointments and to avoid political considerations along with potential discrimination for religious or political reasons (see arbitral precedent on page 4 of the brief).

As noted in Article 15, Section 10 of Ohio's Constitution, the General Assembly was to pass laws creating a civil service system and Ohio courts have recognized that such legislation must provide for appointments and promotions based on merit and fitness as a result of competitive civil service examinations (see precedent on page 4 of the Employer's brief). Thus, the proscription in 4117.08(B) reflects Ohio's commitment to the competitive civil service examination as the way to establish an applicant's suitability for public employment. Such appointments are entirely outside the arena of collective bargaining.

The Employer describes the appointment process as follows:

> 1. Given a vacancy, the Agency Head contacts the Department of Administrative Service to obtain the top three names on an eligible list for the position in question.
>
> 2. The appointing authority must select one of the three persons certified by the DAS.

If there is no eligible list certified by DAS, the procedure is as follows:

> The appointing authority appoints a candidate of its choosing and that individual is called a provisional appointee.

This appointment is limited, argues the Employer [see R.C. 124.30(A)] and lasts "until a selection and appointment can be made from eligible lists". This means, continues the Employer, that once the examination is given and a list prepared, the appointing authority must replace all provisional appointees with one of the three candidates certified by DAS and such provisional

appointees who are replaced are said to have been "certified against".

The Employer argues that the courts which have addressed the status of provisional appointees have ruled that they have no legal right to the position over individuals who have scored better on the Civil Service examination (see precedent on page 6 of the Employer brief).

The Employer points out that the civil service examination is not an absolute requirement in that any provisional appointee who serves for two years without having the opportunity to take an examination, automatically becomes certified and is assumed to have taken and passed an examination. Any provisional employee with between six months and less than two years employment need only pass an examination to maintain their jobs even though others scored higher. These latter two exceptions, notes the State, do not apply to positions funded through federal dollars since those positions are subject to the federal merit system.

Provisional appointees, argues the Employer, have no right to their positions absent demonstrating their merit and fitness as described above. These employees are covered by 4117.08(B) regarding prohibitive subjects of collective bargaining and this language, continues the Employer, indicates that persons appointed from an eligible list after passing a civil service exam have a pre-eminent right to the position over provisional appointees and the parties to a collective bargaining agreement may not bargain to the contrary.

The Employer goes on to say that employees who feel aggrieved in the above situation are not without recourse in that they could 1) file a mandamus action pursuant to Chapter 2731, 2) file a declaratory judgement suit pursuant to Chapter 2721, or 3) perfect an appeal to the State Personnel Board of Review under Chapter 124 [see R.C. 4117.10(A)]. That language gives the State Personnel Board of Review jurisdiction when the Contract, "makes no specification about a matter". Thus, the State Personnel Board of Review has jurisdiction in such situations.

The State claims that the Contract contains no language by which employees are initially appointed to State employment. The parties cannot bargain that issue under 4117.08(B). Moreover, the grievance definition in Article 25.01 of the Contract authorizes grievances only on the four corners of the contract and there is no language on the issue in this case. Moreover, Article 25.03, in part, states that arbitrators can only deal with disputes over the collective bargaining agreement.

The Employer points out that the General Assembly stated its intention that the original hiring process was the exclusive authority of the public employer and, therefore, prohibited that from being a subject of collective bargaining. Since this issue is not bargainable, it clearly is not subject to arbitration, states the Employer (see precedent on pages 11 and 12 of the Employer's brief). The Employer cites the City of Salamanca v. City of Salamanca Police Unit, Local 805, 120 NY Misc 2d 819; 497 NY Supp 2d 857 (1986), wherein the New York Supreme Court, the

lowest court in New York, held that the issue of original appointments was a prohibited subject of collective bargaining and overruled an arbitral award. New York State Constitution, notes the Employer, is very similar to Ohio's with respect to this issue.

The State also cited, Matter of Port Jefferson, 45 NY 2d 898, 411 N.Y.S. 2d 1, which said, in part, that if arbitrators dealt with issue of original appointment, there could be a host of qualifications for civil service employment. In addition, the State cites several other rulings in Illinois, Massachusetts, and Iowa (see page 13 of its brief).

In conclusion, the Employer states that 4117.08(B) identifies the intent of the legislature which was to prohibit collective bargaining and, therefore arbitration, on matters relating to original hiring of classified civil servants for the State of Ohio. Therefore, the grievance should be denied.

In the reply brief, the Employer notes that Section 25.03 of the Contract limits the Arbitrator's authority to, "the four corners of the Agreement." This dispute involves more than the Contract, argues the Employer, and the arbitrator is not authorized to interpret statutes and to determine the interplay between the Ohio Constitution and R.C. Chapters 124 and 4117 and the Collective Bargaining Agreement. Moreover, the Employer notes that the Union on page 9 of its brief acknowledges that the Arbitrator cannot make determinations with respect to statute or law. However, the Employer asserts that this dispute goes beyond

the authority of the Arbitrator and, therefore, that is the basis for its contention.

The Employer also argues in its reply brief that Union neglects to mention that the collective bargaining agreement was negotiated in full knowledge of civil service hiring procedures and the Union accepted the fact that the Employer refused to discuss original hiring or civil service procedures in the negotiations.

The Employer argues that the Union mis-characterized conditions under which provisional employees were terminated. Provisionals were terminated not only because they failed a test but because other candidates passed and were placed at the top of the eligible list. While these facts are not properly before the Arbitrator, because only arbitrability rather than merits is at issue, none of these terminated employees was a twenty year employee of the State and, in fact, none of the above employees had completed two years of service with the State. All the employees involved were properly categorized as provisional and they only had to pass a civil service test and would be certified and, if they failed, the Department of Administrative Services was obligated to certify the top three candidates to fill the positions.

The Employer also notes that Congress, not the State, makes it a prerequisite that employees in agencies receiving federal funds can only be certified through competitive examinations taken while operating as a provisional employee. It is not

unfair to the Union, argues the Employer, and these employees are not involved in this dispute.

The Employer goes on to argue that provisional appointees have no legal right to a position over those who scored better on a civil service exam. Moreover, an "original appointment" is more of a process which is not completed until an individual has either held a civil service position for two years or taken and passed a competitive exam. This whole dispute involves original appointments and is prohibited from the bargaining process by virtue of R.C. 4117.08(B).

The Employer finally argues in its reply brief that the Union's brief ought not be considered since it was due by the end of July and, therefore, it should be ignored.

B. UNION

1. TESTIMONY AND EVIDENCE

The Union did not adduce direct testimony from its bargaining unit employees, but confined itself to a cross examination of Mr. Ed Seidler.

On cross, Seidler testified that there are probably ten thousand provisional employees in Ohio at any given time. He noted that a provisional employee can come off the street without having taken the test or that provisional may come from an eligibility list. He went on to say that original appointments promoted under the terms of the Collective Bargaining Agreement are safe in that they are provisional, but are covered by Article 17 of the Contract.

Seidler went on to say that a cornerstone of the Civil Service system involves testing and it should be done more quickly than has been the case. Seidler noted the very strong Civil Service systems which exist in New York and Michigan.

Seidler testified that tests are set up by the testing division of the Personnel Office of the Department of Administrative Services and the test itself is in part dictated by federal guidelines so that it is unbiased.

In the negotiation process, Seidler claimed that the State indicated that it could not bargain certification and he went on to say that he did not believe the parties discussed probation, promotions, and transfers, etc.

Seidler testified that the appointment process requires the employee to meet qualifications, pass an exam, and then pass the probationary period. Under the Contract, continued Seidler, provisional employees who pass the test are only fired for cause.

2. ARGUMENT

The Union points out that Article 43.01 states in part that:

> To the extent that this Agreement addresses matters covered by conflicting State statutes, administrative rules, regulations or directives in effect at the time of the signing of this Agreement, except for O.R.C. Chapter 4117, this Agreement shall take precedence and supersede all conflicting State laws.

The Union alleges that the Contract (see Joint Exhibit #1) replaced past civil service laws, rules and regulations affecting the wages, hours, and working conditions of State employees. Moreover, the Contract also contains Articles on probation (see Article 6), promotions and transfers (see Article 17), and discipline (Article 24) as follows:

> Article 6.1 - all newly hired and promoted employees shall serve a probationary period. The probationary period shall be either one hundred twenty (120) days or one hundred eighty (180) days dependent on the length that exists for the classification at the effective date of this Agreement. ....

Article 17, notes the Union describes the rights of employees to promotion based on traditional principles of seniority and Article 24 articulates the disciplinary procedure and the fact that discipline is only for just cause.

The Union asserts that the probationary periods of either 120 or 180 days cannot be changed without the consent of the Union and despite this and the above noted contractual protections, the Employer has terminated a number of employees who have failed to pass a civil service examination for the positions they held. The Employer, notes the Union, relied on 4117.08(B) in implementing these terminations on the grounds that, "the conduct and grading of civil service examinations, the rating of candidates, the establishment of eligible lists from the examinations, and the original appointments from the eligible lists are not appropriate subjects for collective bargaining".

The Union notes the testimony of Edward Seidler who indicated that Ohio's Civil Service system is not run as strictly as those in other states. If it were ideally administered, notes the Union, applicants would be tested prior to their hire and the probationary period would be the final test as to whether an employee was fit to hold his/her position. The Union goes on to say that Seidler testified that Ohio law contains many loopholes to circumvent the pure Civil Service system.

For example, the Union notes that an individual can be employed provisionally when a Civil Service test is not administered quickly. Such tests, testified Seidler, was that

purposeful under-funding of the agency responsible for the tests meant that many civil service positions are never tested and he identified about 10,000 provisional bargaining unit employees in Ohio.

As a result of these shortcomings, argues the Union, the State passed a law in 1974 providing that a provisional employee would become certified after two years of continuous service with the exception that the law did not apply to positions funded through certain federal funds. Thus, employees in the Ohio Bureau of Employment Service were not viewed as certified and they run the risk of having to pass a test in order to keep their jobs even after years of exemplary service to the State. This is the basis for this arbitration because secretaries, typists, clerks, investigators, and others - some of whom have twenty years of unblemished service in Ohio, are or were terminated for not having passed a civil service exam.

The Union argues that bargaining unit employees who have passed their probationary period, cannot be terminated because they have not passed a civil service exam. 4117.08(B), points out the Union, protects the Employer's right to administer a pure civil service hiring system in which examinations are conducted and graded, the candidates rated, an eligible list is created, and finally, an appointment is made from that eligible list.

The Union argues that the legislature in generating 4117.08(B) did not intend to protect or exclude from collective bargaining all the exceptions to the pure civil service system.

The noun, "appointment", in that section is modified by the adjective, "original", notes the Union and individuals replacing provisional appointments are not original appointees as testified to by Seidler. The original appointment is the provisional appointment. Therefore, the State's argument that 4117.08(B) requires it to remove the provisional employee and replace that employee with the individual having passed the test is false. That language, argues the Union, only prohibits the Union from negotiating over those procedures used to select the original appointment. Once the appointment is made, the wages, hours, and terms and conditions of employment for that appointment are negotiable. The Union points out that it did negotiate for thousands of such employees.

Article 6 of Joint Exhibit #1, the Collective Bargaining Contract, provides for a specified probationary period and does not define the term "probationary". The purpose of probation, notes the Union, is to give the Employer a chance to examine and evaluate an employee or to test and try out an employee to ascertain fitness for the job. The parties agreed to a specified period of time during which an employee was subject to the above examination and evaluation and during that period, the Employer has the exclusive right to hire or fire the probationary employee and the latter individuals who are in their initial probationary period cannot grieve under Article 25.01(B) of the Collective Bargaining Agreement. Thus, argues the Union, the parties negotiated a period in which the Employer could evaluate the

employees performance, but that right does not inure to the Employer beyond the end of probation by virtue of utilization of antiquated Civil Service legislation.

The Union points out that once an employee passes probation, they enjoy the disciplinary language under Article 24 of the Agreement which provides, in part, that discipline shall only be just cause. Thus, it is clear that the Contract language is violated by the State's decision to remove non-probationary employees who failed to pass civil service examinations.

The Union argues that the Contract provisions also reflect basic principles of equity and fairness and employees ought to know about their job security as long as they maintain acceptable standards of work. A whole host of decisions are made by employees as a result of their employment and termination after years of good service because a test is not passed is not fair or reasonable.

The Union also points out that the Employer argues that this issue is not arbitrable because only disputes which involve the four corners of the Contract are subject to arbitration. However, the Union argues that it has shown that the Contract language has been violated.

The Employer, notes the Union, relies on statutory and constitutional principles and it argues that even if the Contract language negotiated protects the employees in question, it is void and prohibited by law. The language of Article 25.03, argues the Union, requires the Employer to consider the Contract

and if the language violates statute or law, the arbitrator is not the proper finder of fact to make that determination. Non-probationary employees can only be removed for just cause and any employee is entitled to have this issue heard by an arbitrator.

The Union goes on to argue that statutory and Constitutional arguments are not offended by provisions of the Contract. For example, the Union points out that over the years, the State legislature has found numerous ways to avoid the "competitive examination" requirement found in Article XV, Section 10 of the Ohio Constitution and the courts have so approved (see precedent on page 10 of the Union brief). The Union notes that in Richley v. Youngstown, the Ohio Supreme Court stated that the automatic certification of provisional employees after two years of continuous service was an acceptable substitute for competitive testing to determine merit and fitness. In another case, notes the Union, the District Ohio Court of Appeals (see page 10 and 11 of the Union brief) held that promotions based on seniority did not offend the Ohio Constitution. The seniority provision, held the Court, was an acceptable substitute for competitive testing. Moreover, that court recognized that Chapter 4117 prevailed over conflicting laws and, therefore, the Contract supersedes Civil Service regulations.

The probationary period, argues the Union, is a substitute for competitive testing to determine merit and fitness and even if a court held to the contrary, the Employer could be said to have waived its right to test the affected non-probationary

employees. Section 124.30 of the Revised Code, argues the Union, requires that under Civil Service law, the Employer conduct competitive examinations within six months after a provisional appointment. The State Legislature, itself, recognized the unfairness and inequity of delaying such requirements. Thousands of provisional employees have not been tested and there is no basis to penalize these employees because of the State's neglect, intentional or otherwise, of its statutory duty.

The Union, therefore, argues that Contract language was violated by the Employer's termination of non-probationary employees who failed to pass Civil Service examinations. Moreover, statutory and constitutional provisions are not offended by the Contract and grievances over such terminations are, therefore, arbitrable.

## V. DISCUSSION AND AWARD

The parties did not agree on a specific question, but the issue is whether the grievance process and arbitration forum are appropriate for the handling and resolution of a dispute involving the displacement of certain provisional employees. In summary, the Employer asked whether replaced employees can grieve and the Union asked whether the question of non-probationary bargaining unit employees being displaced when they fail to pass civil service exams is an arbitrable issue? The questions presented by the Union and the Employer were somewhat different, but it is clear that both parties are concerned about arbitrability and the merits of the disputed issue are not to be answered by this Arbitrator.

It is usual when the arbitrability question is raised that the Employer has the burden of proving that the dispute is not arbitrable either because of procedural or substantive defects. Thus, the State must provide persuasive reasons why the issue is not arbitrable. It must show in what respect the Contract does not authorize the filing of grievances by the affected employees.

Before examining the State's reasons for considering the dispute not grievable or arbitrable, it is necessary to briefly describe the nature of the dispute. The dispute involves non-federally funded employees of the State who are not "certified" because they had not passed a civil service exam prior to hiring and were not selected for the job according to the eligibility list for that position but were hired as provisional employees.

In addition, these employees had not worked in their particular positions provisionally for two years and thus had not yet obtain certified status based on state legislation which deemed that two years working in the job was comparable to passing an exam.

The dispute focuses on the removal or termination of certain of these provisional employees who have worked beyond their probationary periods, but less than two (2) years in the position. Their removal was predicated on the fact that they worked in a position for which a civil service exam was given during the time they were provisional employees. If no civil service exam is given, the provisional employee becomes certified after two years have passed. If a civil service exam is given and the provisional employee takes the exam and passes it, the employee becomes certified. If, however, the provisional employee either failed to take the exam given for his position or took it and received a failing mark, he is "certified against" and can be removed from the job and replaced by a person from the eligibility list established from the exam.

Can these displaced employees grieve and can the Union use the arbitral forum to resolve the general question of whether or not removing these employees violates the Collective Bargaining Agreement? The Employer argues there are several reasons why these displaced employees cannot grieve their removal.

The basic Employer argument is that the appointment process is not a subject of collective bargaining and during the two year period before a provisional appointment becomes certified, the

appointment process is not complete. It claims that if a provisional employee is displaced because of his/her failure to pass a civil service exam, this is part of the appointment process and follows civil service procedures which are not covered by the Contract. Thus, the appointment process is not bargainable and therefore, according to the State, disputes arising because of the civil service appointment process are not arbitrable. It argues that employees appointed on a provisional basis cannot grieve when they are replaced according to civil service procedures.

The original legislation established in 1912 was designed to avoid patronage in public appointments and mandates that the legislature pass laws to enforce appointing and promoting within the civil service by merit and fitness. The statute setting up public employee bargaining states that the parties cannot negotiate the conduct and grading of civil service exams. R.C. 4117.08(B) states:

> The conduct and grading of civil service examinations, the rate of candidates, the establishment of eligible lists from the examinations, and the original appointments from the eligible lists are not appropriate subjects for collective bargaining.

The Collective Bargaining Agreement, as noted by the State, cannot incorporate anything about the civil service exam or the appointments made from eligible lists.

However, the Union argues that the appointment to an open position is an "original" appointment which in a pure civil service system would be based on competitive exams and

eligibility lists, but notes several impurities in the system. For instance, the testimony and evidence indicated that of the several thousand classifications of jobs, exams are conducted for a very few, presumedly, on an erratic schedule. The Union claims that once an appointment is made it is the original appointment and the employee is represented by the Union and all provisions of the Contract apply to the employee regardless of whether the appointment was made from the eligible list or on a provisional basis.

One provision of the Contract covering the terms and conditions of employment is the provision for probation after which the employee obtains seniority privileges and the right to grieve disciplinary suspensions and removals. The probationary provision of the Contract is not limited only to certain employees. The Union represents employees - those hired by the state for certain classifications - and the Contract does not distinguish between employees hired from an eligibility list and those hired on a provisional basis. The probationary period covers both and there is nothing in the Contract which says that an non-probationary employee cannot grieve their separation from employment.

What would be the basis to find against arbitrability. The Collective Bargaining Agreement articulates the grievance process ending in arbitration. There is nothing in the Agreement which states that provisional employees of the State cannot grieve. There is nothing in the Collective Bargaining Agreement to

distinguish between an appointment, original appointment, a hire, or a new employee. All are employees and it is difficult to find that a union dues paying person employed by the State for more than six months but less than two years cannot avail himself of the benefits of the Collective Bargaining Agreement; i.e., attempt to arbitrate his/her termination.

Even if one assumes that the fact that an employee failed to take a civil service exam or to obtain a passing grade is just cause to terminate a non-probationary, provisional employee, there may be other factors or extenuating circumstances which that employee views as important reasons why he should not be terminated. For instance, perhaps, he was not properly notified of the exam, was hospitalized or had a death in the family at the time of the exam, etc. and if the Employer did not account for these reasons, there is no reason not to allow the employee to grieve.

Moreover, the manner in which the contractual probation period meshes with the provisional appointment is not clear. The significance of provisional status and meaning of "original appointment", as suggested by the Employer, are questions whose scope goes beyond the four corners of the Contract. However, the intent and meaning of the probationary period in the Contract is a term and condition of employment which falls within the four corners of the Contract and can be interpreted in the arbitral

forum. Thus, if there is presumed conflict or ambiguity between Civil Service Law and the Contract, it may have to be resolved in the courts, not by the arbitrator whose jurisdiction is limited to the Collective Bargaining Agreement. However, the arbitrator can and should interpret the Contract. If that interpretation conflicts with State Civil Service statute in the eyes of the State, the proper forum for resolution is the State Courts. Even if the arbitrator is presumed to have extended his jurisdiction by answering a question not covered by the Contract, the loser would surely make the argument that the arbitrator exceeded his authority and seek redress in State Court.

Thus, the State's argument that displaced bargaining unit employees cannot grieve is not persuasive and the grievance is sustained.

John E. Drotning
Arbitrator

Cuyahoga County
January 18, 1988