#264

IN THE MATTER OF ARBITRATION

BETWEEN

STATE OF OHIO
OFFICE OF COLLECTIVE BARGAINING

AND

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION
LOCAL 11, AFSCME, AFL-CIO

ARBITRATION AWARD

HEARING: December 14, 1988
ARBITRATOR: John E. Drotning

I. HEARING

The undersigned Arbitrator conducted a Hearing in the offices of Collective Bargaining, 65 East State St., Columbus, Ohio on December 14, 1988. Appearing for the Union were: Daniel S. Smith, Esq. and the grievant, Ms. Lois J. Brown. Appearing for the Employer were: Steve Chesler, Esq., Mr. Peter Applegarth, Ms. Felicia Bennardini, Mr. Thaddeus W. Adamaszek, Ms. Judy DeVore, and Mr. Jack Fantine.

The parties were given full opportunity to examine and cross examine witnesses and to submit written documents and evidence supporting their respective positions. Post hearing briefs were filed on or about January 9, 1989; the Union filed a reply brief on 2/2/89; the Employer responded on 2/27/89; and, the case was closed. The discussion and award are based solely on the record described above.

II. ISSUE

The parties jointly asked:

> Did Management have just cause to dismiss a provisional employee who took and failed a Civil Service Exam?

III. STIPULATIONS

The parties jointly submitted the exhibits marked Joint Exhibits #1 through #15.

IV. TESTIMONY, EVIDENCE, AND ARGUMENT

A. MANAGEMENT

1. TESTIMONY AND EVIDENCE

Mr. Thaddeus W. Adamaszek testified that he is an administrator of the Merit Systems Development Section and that he is involved in state training programs. He said that Joint Exhibit #15, specifically pages 1 and 2, describe the grading of a typist exam. He noted that pages 1 through 20 are multiple choice test for typists and that it contains two parts; the first being practical questions and the second being a typing performance. Adamaszek testified that an individual has to pass both portions of the test.

Adamaszek said that the typing score is based on strokes and that 152 is not passing because it amounts to about 44 words per minute. The typing test lasted for five minutes and Adamaszek said it is given on State equipment and the machinery is checked before the provisional employee takes the test.

Brown took the test in June of 1986, said Adamaszek who went on to say that tests are given to build up eligibility lists or because of agency demands and by directives. He went on to say that the individuals who take the tests are people who are seeking new jobs or provisional employees. He said that perhaps 400-500 people took that test.

On redirect, Adamaszek said that Management Exhibit #1 is the notice of testing and he said that all provisional employees are notified that they must take the test.

Ms. Judy DeVore testified that she is a Personnel Officer for ODOT and that she knew Lois Brown who was a Typist 2 in an ODOT garage. DeVore said that she explained the procedures to Mrs. Brown and the latter had been working in the District garage as a Typist 2. She said that she discussed the typing 2 test with Brown and the fact that Brown had to take that exam.

DeVore said that while Brown was employed at the ODOT garage, she carried out her duties in satisfactory fashion.

DeVore said she tried to reassure Brown with respect to the upcoming Civil Service exam because the latter was apprehensive. DeVore said she thought Brown could pass and that she told her about preparation for the exam.

DeVore testified that Brown signed an application for the exam and was notified of the test on 3/17/86 and she took it in June of 1986. DeVore said that the test was given in Columbus and the ODOT garage drove Brown to Columbus from Cadiz.

DeVore indicated that Management Exhibit #2 was a certification list showing three people who wanted the job. She went on to say that if one of those persons was not interested or waived, the garage could ask for another list.

Management Exhibit #3, continued DeVore, is an exam for clerical specialists and Lois Brown was aware of this and she could have applied and taken this test, but she did not; rather, she decided on the typist test.

DeVore said that she also posted other job openings in the garage.

On redirect, DeVore said that ODOT does not control the testing. In addition, she said that of the 500 employee who took the test, there could have been fifty different classifications.

Mr. Jack Fantine testified that he was an Equipment Supervisor employed by ODOT and that he oversaw garage and equipment of the district. He said that he knew Mrs. Brown and that she had worked for him for one and one-half years and she took care of work orders, mechanics time sheets, and that she did a good job.

Fantine said that Brown did some typing in the Typist 2 position.

Fantine went on to say that Brown told him that she had to take the test and that she was somewhat nervous. He said that he did not see her practice typing.

Fantine said that Brown's replacement types a lot.

On redirect, Fantine said that Brown did type posted times and that the individual who now holds Brown's job also does that sort of work.

Management also cross examined Ms. Lois Brown who said that she was never told that she would be fired if she failed the test.

Brown testified that she wondered why she had been classified as a Typist 2 and she asked a number of people about that question and they told her not to worry because that's the way it has always been.

Brown went on to say on cross that after failing the test, she asked for a job audit as a result of the advice from another mechanic. That demand was denied, said Brown, because she had failed the test and it was too late to reconsider the job.

On cross, Brown acknowledged that if she asked for a job audit, her position might have been downgraded and she understood that she might have had a lower paid position.

Brown testified that she did not type inter-office communications (IOC).

Brown acknowledged that she recalled signing papers to take the test.

Brown went on to say that after passing her four month probationary appointment, she dropped her husband's insurance policy and she thought that a provisional employee meant that after four months, she had the job. She acknowledged that she probably confused "provisional" and "probationary" employees.

Brown pointed out that she was given an employee handbook as noted on Management Exhibit #5. She acknowledged that she saw both Joint Exhibits #13 and #14 as well.

Brown went on to say on cross examination that she believed that she had told Ms. DeVore prior to March of 1986 that she did not type. She went on to say that she told that to Mr. Pollack as well. Brown said that both indicated to her that they thought they had a job that they could save for her and would take care of it. As a result of that conversation, Brown said that she thought she would not lose her job.

Brown went on to say that no one talked to her after the test result and she expected that they would, "take care of me", but no one said a thing to her.

Brown testified that she bought a new car in May of 1986 and dropped her husband's insurance in the summer of 1986 because she thought she had a permanent position.

After termination, Brown said she received unemployment but she also said that she did not have a copy of her insurance policy with her. She said that she had contacted Social Security and they helped. Brown went on to say that she tried to find alternative opportunities but was unsuccessful.

Brown testified that she learned that she had lost her job the day after she received a letter in October or November of 1986.

Brown indicated that she was nervous about the typing test because she was taking it with a bunch of women typing at the rate of "fifty miles an hour" and she said she was apprehensive.

2. ARGUMENT

The Employer argues that the State has the right to require non-certified employees to take Civil Service exams and to determine the impact of the results of such tests. It went on to note that provisional employees must take a Civil Service exam to retain their job.

In this case, the State notes that the grievant was advised that she was a provisional employee and had to take a Civil Service exam. The grievant, notes the Employer, did not ask for re-classification. Moreover, the State claims that all Typist 2's had to take the test.

4117.10(A), points out the Employer, requires that public employees be subject to state law. Therefore, the Employer must replace employee Brown with those on the list who passed the Civil Service exam. Moreover, the State points out that 43.05 of the Collective Bargaining Agreement states in part that it is "the entire agreement between the parties... All rights and duties of both parties are specifically expressed in this Agreement...". Given that the Agreement does not talk about Civil Service exams, the State then can rely on 4117.10(A).

In this case, the Employer argues that it was fair to the grievant because Brown knew or should have known that she was a provisional employee. Therefore, the State under existing law had to replace the grievant. Once the grievant failed the typing test, the State, under R.C. 124.27 had to create and place an employee who had passed the Civil Service exam in Brown's former position. A similar consequence occurred with every provisional typist who failed the competitive examination.

Moreover, the State argues that even if the Arbitrator finds in the grievant's favor, the State's taxpayers should not be liable for medical bills. The Union produced no bills or doctor statements and the grievant did not submit her insurance policy in

order for the State to compare what was covered under it and what would have been covered under the State's policy.

The State also points out that the grievant's husband had health insurance, but they cancelled it after she passed her probationary period in May of 1986 which was about two months after she was informed that she would have to take a competitive exam. At the time that Brown and her husband cancelled their insurance, the Collective Bargaining Agreement was not even in existence. Therefore, she could not rely on its protection.

The grievant, argues the Employer, should have acted more prudently and waited the results of her examination and if she had, she would not be in her current predicament. The State sympathizes with the grievant's plight and does not mean to be heartless, but she acted hastily and the State should not have to remedy her mistake.

The Employer also notes that in all other cases between these two parties, no medical damages have been awarded; rather, the Employer provides back pay and benefits and the employee is then free to submit a claim to the insurance company seeking retroactive payment.

The Employer asserts in its reply brief that the Union's claim that the employer is dishonest is incorrect. The Employer argues that the grievant in this case was required by law to take the Civil Service exam and all she had to do to maintain her job was to pass the examination. Once Brown failed the exam, an eligible list was created in accordance with R.C. Chapter 124 and

the grievant, having failed the exam, had no legal right to retain her position.

The Employer cites judicial precedent which holds that provisional employees do not acquire permanent status following a probationary period and may be replaced before or after this time by a regular appointee from an eligible list (see State ex rel Higgins v. George, 147 Ohio St.165, 70 NE2d 370). In short, the Employer asserts that until the provisional employee either takes and passes a competitive examination or serves two years, he has no legal right to a position and it cites additional judicial precedent in its reply brief.

The Employer claims that the Union's assertion that the Collective Bargaining Agreement's probationary provisions supersede prior statutory and judicial rulings is not supported by the evidence. There is no evidence presented which demonstrates that the parties intended such a result. The Employer goes on to say that Ed Siedler testified in the initial phases of this dispute that the Employer refused to negotiate anything that would alter the Civil Service appointment process.

The Employer argues that this is a public sector case and even in light of a collective bargaining agreement, statutes still have an effect on the parties' actions. Statutes, notes the Employer, cannot be ignored and that is the meaning of 4117.10(A).

Chapter 4117 of the Revised Code, states the Employer, was not intended to alter the rights of persons who are not parties to a collective bargaining agreement. The Union is asking the

arbitrator to find that an employee like Brown has a greater right to her job than a candidate from the top of an eligible list and such a decision was struck down by the Ohio Supreme Court in State ex rel. Dispatch Printing Company v. Wells (1985) 18 Ohio St. 3d 382, 481 NE2d 632. The Employer also cites a Washington County Court of Appeals case which elaborated on the Dispatch ruling and in the later case, the Employer noted the court held that:

> ..a collective bargaining agreement cannot bind persons or entities who are not parties to that agreement in a manner which is inconsistent with existing law.

For all the above reasons, the State asserts that it acted properly and the grievance should be denied.

B. UNION

1. TESTIMONY AND EVIDENCE

Ms. Lois Brown testified that she worked for ODOT in New Philadelphia and that prior to her hire on 10/1/85, she was interviewed by Mr. Pollack who cited the work duties to her. Brown said that she taken some typing in high school, but that was nearly forty-seven years ago. She went on to say that she typed financial statements and did some letters in the past when she worked at McComb's Ford-Mercury dealership. Brown went on to say that just prior to October of 1985, she was in the auditor's office on a part-time basis. She indicated she wanted a full-time job to pile up retirement funds.

Brown testified that she was told she would have a four month probationary period and if a test came up, she would have to take it. Upon starting her job, Janet Wence told her of the job duties, noted Brown, and she got labor cards, materials, use and repair orders, and she posted those forms. Brown went on to say that while at ODOT, people who bought gas or oil and who were from other districts, requested MT-1's and she filled them out. She said she sorted those cards and would put them into the various districts and at the end of the month, she would add them up and type out an address on the appropriate envelopes.

Brown testified that she might get 600 repair orders a month and she would have to maintain the repair orders and gas use fees for vehicles and even gas use with respect to chain saws. Brown said that she constantly posted these dollar figures on a daily basis.

Brown testified that on a monthly basis, she typed for perhaps ten minutes and that she never typed IOC's and was never asked to do so. Brown said that she does not know what an IOC is.

Brown testified that she never refused an assignment and that she thought the probationary period was designed to see if she could carry out the work involved. Brown went on to say that she thought that after completing her probationary period, she would be staying on the job permanently and that she went out to buy a new car and dropped her husband's insurance because she had a good policy from the State.

Ms. Brown went on to say that she had to take the typing test as indicated to her by Judy DeVore and she said that she told DeVore that she was not a Typist 2. She said she also made that statement to Mr. James Pollack, especially after she was told she had to take the test.

Brown said that she wrote up her job duties and was told it was too late to re-classify and that she had to take the test. Brown testified that she told Pollack and DeVore that, "I'm not a speed typist." and she went on to say that she asked them "What happens if I fail?" and they told her, said Brown, that they would try to re-classify her.

Brown testified that she did practice typing at her home in Cadiz.

Brown went on to say that she thought that DeVore and Pollack would take care of her and put her in another job if she failed the test.

Brown testified that she failed the typing test because she had problems with the space bar and that she was used to a typewriter that she used at home and the touch was light but the one on the test was a bit stiffer.

Brown said that after the test, nothing was said to her and then in October, Pollack called her in and showed her the letter and indicated she was terminated. Brown went on to say that she knew her test score about three months after the test and knew that she had failed, but no one discussed the situation with her.

Brown was also examined on direct with respect to damages.

She said her termination date as 11/1/86 and that she tried to find work in Cadiz and St. Clairsville; specifically in the mall, and in Wheeling, but she had no luck. Brown said she could not relocate because she has lived in Cadiz for over forty years.

Brown went on to say that her insurance premiums were carried for about six months and then she had to pay the premium. After six months, she maintained the insurance with Blue Cross and Blue Shield, but the premium jumped way up so she and her husband lowered it to a $1000 deductible and they pay twenty percent more.

Brown said that on 11/8/87, her husband was operated on for cancer of the esophagus and three-quarters of his stomach and he has undergone treatment ever since and she still incurs hospital bills. Brown testified that her husband is in the hospital in Columbus now and is not likely to live.

Brown went on to say that she pays twenty percent of the hospital bill and twenty percent of other hospital bills until they hit $400 a year. She went on to say that she has to make up the difference in costs of X-rays each time they are taken. She said she pays by borrowing and that she has mortgaged her house.

Brown testified that she received unemployment compensation for six months and has not worked since 11/1/86.

The Union also cross examined Management witnesses. Mr. Adamaszek testified that Brown's score on the test was calculated over a five minute period and that the formula used to evaluate her is the same as the formula used for all other employees.

Adamaszek went on to say that the Department of Administrative Services decided to test for this job because there were a large number of provisionals in the Typist 2 position. Adamaszek testified that DAS does not take any actions to make sure that a test relates to the specific job held by a provisional; rather, they look at job classifications, not specific positions. He went on to say that there were classifications for which the Department of Administrative Services had not given tests over the last two years. He went on to say that in those situations where provisional employees are not tested, they become permanent at the end of two years.

Adamaszek also testified that certain provisional employees who are certified against are retained and that if an individual is promoted, they are not tested and cannot be certified against.

Ms. Judy DeVore, on cross, testified that she did not supervise Lois Brown and that she was a Personnel Officer in the district which has about 491 employees. She said she did not know how many were provisionals and that some provisional employees were certified if no tests were given within two years or if they changed job clusters. She went on to say that some clericals have not taken tests because of no postings within two years.

DeVore said that she was aware of the position description noted in Joint Exhibit #6 and that it had not been updated since 1981. She went on to say that the jobs are updated when the specifications for the job are changed or if the Department of Administrative Services requests a change.

DeVore acknowledged that the job description should accurately portray the job.

DeVore testified that she, herself, was a Typist 2 and then went into Personnel and she never took any exam because none were given within a two year period and, therefore, she became certified. She testified that no other employees were certified against while she was a personnel officer.

DeVore also testified that she was aware that some employees who were certified against were offered other jobs.

Mr. Jack Fantine, on cross, testified that he was Brown's immediate supervisor and that Mr. James Pollack was the Administrative Assistant. He went on to say that he did not supervise Brown on a day to day basis and that Brown knew her duties and she knew what to do and did not need supervision.

Fantine testified that Brown typed IOC's and in a month, she might type six and that she might type some requisitions when his secretary was on vacation one month a year.

Fantine said that Brown typed when his secretary was absent and he had no problems with Brown on that score.

Fantine testified that he thought Brown typed perhaps one day out of five based on his hands-on observation. He acknowledged that he could have dismissed her during her probationary period.

Fantine testified that Brown's main job duties were posting mechanic time and billing other agencies for gas and oil.

On re-cross, Fantine said that he had been an equipment supervisor for six years and had never taken a test.

2. ARGUMENT

The Union argues that Section 43.05 of the Contract states that all rights and duties of both parties are in the Collective Bargaining Agreement and, therefore, by implications, no rights outside the Collective Bargaining Agreement exist. The Union goes on to say that the parties can add to Civil Service Law if they feel it is appropriate.

The Union asserts that it negotiated Article 6 which identifies a probationary period of 120 to 180 days and that is a trial period. After an employee has completed that trial period, asserts the Union, the employee is permanent. The Union goes on to say that during their probationary period, employees cannot grieve and then after completing that period, they are permanent.

The Union argues that certifying against an employee is an Employer unilateral method of termination which conflicts with Article 6 and prohibits the Union from challenging the reason for the Employer's certifying against a particular employee.

The Union goes on to say that the Employer agreed to just cause and that the test given Brown did not relate to her job. In addition, the Union claims that the Civil Service exam has no relationship to the Employer's evaluation of the employee. Moreover, Brown, in this case, was not notified that failure to pass a Civil Service exam could result in job loss. The Union asserts that not all provisional employees take the Civil Service exam and after two years, if they have not taken an exam, they become certified. The Union notes that all the Employer witnesses were certified without ever having taken a Civil Service exam.

The Union also filed a post hearing reply brief in which it notes that 4117.10(A) states, in part, that:

> Where no agreement exists or where an agreement makes no specification about a matter, the public employer and public employees are subject to all applicable state or local laws or ordinances pertaining to the wages, hours, and terms and conditions of employment for public employees.

The Union goes on to say that the key phrase is "specification about a matter". Article 43.01 of the Contract, notes the Union, states in part that:

> To the extent that this Agreement addresses matters covered by conflicting State statutes, administrative rules, regulations or directives in affect 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 argues that Section 43.05, in which both parties specifically stated that they expressed all rights and duties in the Agreement, limits the Employer's rights. The Union goes on to say that 43.05 implies that the Employer has no rights outside the Collective Bargaining Agreement. Moreover, the Union asserts that the parties have added terms and conditions to existing Civil Service laws in their Contract.

The Union points out that it negotiated a probationary period under Article 6 of the Contract which specifies the probationary period shall run for either 120 or 180 days and it goes on to say that after the trial period, an employee becomes permanent.

The Union also points out that probationary employees cannot grieve until they finish their probationary period and that is another illustration of the permanency of an employee who completes his or her probationary period.

The Union also goes on to argue that the certification against is a unilateral Employer method of terminating an employee and that conflicts with Article 6. The Union cannot challenge the reason for certifying against.

The Union points out that the Employer agreed in this arbitration to a just cause basis for terminating Lois Brown and that differs from certifying against. The Union asserts: 1) that the test, itself, did not relate to Lois Brown's job; 2) that, in fact, the Civil Service exam had no relationship to the Employer's evaluation of Lois Brown; and 3) that the grievant was never notified that a failure to pass a Civil Service exam would result in her termination. Moreover, the Union notes not all provisional employees take Civil Service exams and after two years, they become certified and that all the Employer witnesses in this Hearing were so certified without taking a Civil Service exam.

The Union also points out that in a true civil service system, one would take a test and then be hired whereas in this State, the civil service exams are antiquated and people are hired in many cases and then may or may not take a test.

For these reasons, the Union asked that the grievance be sustained and that the grievant be made whole including lost medical expenses.

V. DISCUSSION AND AWARD:

The issue agreed to by the parties is whether Management had just cause to dismiss a provisional employee who took and failed a Civil Service exam.

Management based its termination of Brown on Civil Service procedures which pre-date union representation and the Collective Bargaining Agreement effective July 1, 1986. In the past, if a person was hired without having taken a Civil Service exam for the job classification and thus, was not selected from a civil service eligibility list, that employee was hired on a provisional basis. The non-certified employee remained in provisional status until either a civil service exam was given for the job classification or until he was automatically certified by virtue of having been employed for two years without any civil service exam having been given for his particular classification. If a competitive civil service exam was given within the first two years of employment, provisional employees were required to take it and the provisional employees who passed were certified and those who failed were subject to termination. The State argues that the Contract (Joint Exhibit #1) did not alter its right to require non-certified employees to take Civil Service exams and to determine the impact of such tests. Given its assertion that the Contract does not override Civil Service law, it argues that failing a civil service exam is just cause for terminating a provisional employee.

The Union argues that the Collective Bargaining Agreement has an impact on the effect of the State's Civil Service process on

provisional employees who have completed their contractual probation period of either 120 or 180 days in their job classification (see Article 6 of Joint Exhibit #1). If a Civil Service competitive exam for a particular job classification is given after a provisional employee has completed his probationary period and that employee fails the test, the Union claims that any resultant management move to terminate is not automatic, but it must meet the standards of "just cause" proscribed by the Contract for employees who have completed their probationary period. It claims that in the case of Lois Brown, there was no just cause for her termination.

Thus, a conflict exists between the Contract and Civil Service law. This question is not unusual and is faced by many states with longstanding Civil Service laws followed by much more recent collective bargaining statutes. Which prevails, the Contract or Civil Service Law, or is there a possible accommodation between the two statutes?

Pertinent Contract language is as follows:

> Article 6 - Probationary Employees
>
> 6.01 - Probationary Periods
> 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 upon the length that exists for the classification at the effective date of this Agreement. However, the Reclamation Claims Inspector shall have a probationary period one one (1) year and the Disability Claims Examiner 1 shall have a probationary period of nine (9) months.
> The Employer will not modify the duration of a probationary period of a classification(s) without mutual consent.

> Article 24 - Discipline
>
> 24.01 - Standard
> Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action. ...
>
> Article 43.01 - Duration
>
> 43.01 - First Agreement
> The parties mutually recognize that this is the first Agreement to exist between the Union and the Employer under ORC Chapter 4117. 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 ORC Chapter 4117, this Agreement shall take precedence and supersede all conflicting State laws.

In ORC Chapter 4117, Section 10(A) talks about the scope of agreement:

> 4117.10(A) An agreement between a public employer and an exclusive representative entered into pursuant to Chapter 4117. of the Revised Code governs the wages, hours, and terms and conditions of public employment covered by the agreement. If the agreement provides for a final and binding arbitration of grievances, public employers, employees, and employee organizations are subject solely to that grievance procedure and the state personnel board of review or civil service commissions have no jurisdiction to receive and determine any appeals relating to matters that were the subject of a final and binding grievance procedure. Where no agreement exists or where an agreement makes no specification about a matter, the public employer and public employees are subject to all applicable state or local laws or ordinances pertaining to wages, hours, and terms and conditions of employment for public employees.

Lois Brown was employed by ODOT as a provisional employee since October 1, 1985 in a job classified as a Typist 2 position. When ODOT received a notice in March of 1986 that a civil service

exam was to be given in June for the typist 2 classification, it informed Brown that she must take this exam. Brown testified that she was not told that she would be fired if she failed this exam and that she had the impression that she should not be concerned about it and would be "taken care of". Brown acquiesced but failed the test. Thus, Management moved to terminate her after receiving the results of the test in October 1986 even though Brown had worked for 120 days and was no longer a probationary employee.

Did the State have just cause to terminate Brown? The answer is no for two reasons. First, there is nothing in Brown's situation which fits the usual finding that there is just cause for termination. Secondly, the State did not prove that it had just cause to terminate the grievant because it was required by law to do so.

First, let us deal with Brown's specific circumstances. It is clear from the testimony and evidence that 1) she was doing her job in a satisfactory manner and 2) her job duties required minimum typing. The testimony and evidence indicate that Brown carried out the work assigned to her in more than adequate fashion as attested to by supervisor Fantine. She had passed the probationary period and her evaluations were good.

Brown's job as she attested to and as corroborated by testimony from Mr. Fantine is that she carried out a number of duties, none of which involved much typing, if at all. While Fantine testified that Brown typed perhaps one day a week; he

acknowledged that he did not observe her on a daily basis. Brown testified that she typed only about ten minutes per month. There is absolutely no reason to disbelieve either one. It is not that Fantine's testimony is not credible; rather, his own statement that he did not spend time observing the employee with respect to typing time is such that Brown's testimony must be accepted. Whether she typed ten minutes a month, or one day a week, is not the issue; rather, it is that the job that she held did not incorporate the duties of a Typist 2 position.

As described in Management Exhibit #1, Typist 2's were employees who are under general supervision from higher level clerical personnel or office management and who did production typing from written or oral instructions or from dictating machine. The tasks performed by Brown did not include production typing and were not done under general supervision of higher level clerical personnel. Brown, on direct examination, indicated that certain postings required pencil and that they could not be carried out on a typewriter. The job duties carried out by Brown are not consistent with the Typist 2 position.

To terminate an employee on the grounds that this particular employee was unable to pass the typing portion of the Typist 2 exam when her job duties did not require typing is a serious misconstruction of the capabilities of this employee to perform her actual job. The job duties of Brown were carried out in more than adequate fashion as was attested to by not only Brown, but by her employer. Brown conducted herself in a fashion which was more

than acceptable to her employer as he so testified and while she was a provisional employee and subject to a Civil Service exam, it is also true that many other provisional employees were never certified against and became permanent as a result of not being required to take a test within a two year period. If, however, the test had been consistent and had been a true and reliable measure of what Brown's job duties were, her failure to carry out her typing in acceptable fashion may be a sufficient basis to deny the grievance. But, in this case, the examination was not a reliable or valid indicator of Brown's job duties and, therefore, her inability to type at a typist 2 proficiency in a job, which, according to her and to her superior's testimony, did not require a great deal of typing and hardly any of a production nature, is not just cause to terminate her.

The second reason for denying the grievance is that the State's argument that it is legally bound to terminate any provisional employee who failed the civil service test is not in harmony with the Contract and it has not shown that the Contract takes second seat to the civil service procedures. The State's claim that Brown's removal was necessary in order that it comply with State Civil Service law conflicts with Contractual protections provided employees and there are several reasons why the Contract must prevail.

The parties agreed in 43.01 that the Agreement takes precedence and supersedes conflicting State laws except ORC Chapter 4117 and the rules, regulations, and directives in that

statute. That statute in Section 10(A) provides that the public employer and employees are bound to state and local laws pertaining to wages, hours, and terms and conditions of employment for public employees only in situations where there is no agreement or when an agreement exists but it makes no specifications about a matter. If an agreement exists and it specifies a matter, the Contract takes precedence.

Does the Contract between the State and OCSEA specify about the "matter" in dispute? The State argues that the Contract makes no specification about its use of and reliance on Civil Service Law and procedures and thus, the Employer is legally bound to apply that law. The Union argues that the Contract does specify concerning the matters of probation and terminating employees for just cause and if that conflicts with the Civil Service procedures, then the Contract, according to Chapter 4117.10(A), takes precedence.

Although the Agreement may not have precisely articulated a specification about the civil service procedures, it did make a specification regarding probation periods (Article 6) for newly hired or promoted employees. Terminating an employee after his probationary period is a term and condition of employment subject to final and binding arbitration for grievances. The Contract is specific about this term and condition of employment and makes specification about the reasons an employee can be terminated after he has worked beyond his probationary period. He cannot be terminated for any reason except for just cause.

The Contract's provision of a probationary period does not replace or supersede civil service competitive exams for hiring and promoting, but it does restrict the procedural implementation and consequent impact on employees' jobs in that it is the responsibility of the Employer to implement civil service procedures in such a way that the Contract is not violated. The probation period means that the risks and burden of hiring a person not on an eligibility list has shifted from the employee to the employer. If such a provisional employee works successfully beyond the contractual probation period but fails a civil service exam, the Employer has the burden of taking actions to follow civil service laws within the constraints of the Contract. The Contract protects the employee from having to assume the total burden or risk of termination.

The Employer has options other than terminating the employee. Failing a civil service exam may mean removal from the job classification, but management can initiate procedures for a job audit and change the job's classification which is an obvious response to Brown's failure to pass a typing 2 test for a job that does not require typing. If the job is accurately classified, the employee might be offered a job in another classification. In general, making civil service procedures to be in harmony with the contract might mean management relying less on hiring persons who are not on eligibility lists to fill vacant positions, more frequent civil service exams, and scheduling exams on some other

timetable other than when there is a pile-up of provisional employees in a particular classification.

In any event, there are several avenues open to the employer which allow it to adhere to civil service laws without violating the protections the Contract provides to all employees. The protection that after serving a probation period, an employee will not be terminated except for just cause is as valid for an employee who was not hired from an eligibility list as it is for one hired from an eligibility list. While failing an exam may support termination in conjunction with other factors such as proof of deteriorating job performance or that no acceptable alternative is available, in and of itself, failing an exam is not just cause because the critical factor is whether the employee is performing up to snuff as indicated by employer evaluations. The claim that the law requires automatic termination of non-probationary, provisional employees who fail a civil service exam for their job classification does not override the fact that the Contract protects permanent employees from being discharged without cause.

In short, once a probationary employee becomes permanent under the Contract, he also may be viewed as provisional. If the employee fails a civil service exam which clearly describes that employee's job, the Employer may terminate for just cause. Thus, the Civil Service and the Contract are compatible in that failing an exam which accurately describe a job may be argued by the

Employer as just cause to terminate an employee under the Collective Bargaining Agreement.

However, in the Brown situation, there are two fundamental reasons to sustain the grievance. First is that the job duties of Lois Brown did not fit the civil service exam and thus, her failure was not sufficient just cause to support termination. Second, the contract in 43.01 indicates that when civil service policies and procedures conflict with Contractual provisions, the Contract does not become inoperative or mute but it prevails. It is up to the Employer to insure that civil service procedures are in harmony with Article 6 and Article 24.10 of the Contract.

It is ruled that Lois Brown be reinstated to her former job and that the employer take the initiative to re-classify the duties of that job. Lois Brown shall be awarded net back pay which shall be calculated on the basis of the new classification less any unemployment compensation or interim earnings from the effective date of her discharge.

The arbitrator is unable to rule on whether or not Brown is to be reimbursed for any medical costs she might have incurred because of her decision to drop her husband's medical insurance in favor of the medical insurance coverage benefit her employment provided. There were no data presented on the question.

John E. Drotning
Arbitrator

Cuyahoga County, Ohio
March 12, 1989