IN THE MATTER OF ARBITRATION

BETWEEN

STATE OF OHIO DEPARTMENT OF YOUTH SERVICES
INDIAN RIVER JUVENILE CORRECTION FACILITY

AND

THE STATE COUNSEL OF PROFESSIONAL EDUCATORS OEA/NEA

Before: Robert G. Stein
CASE# 35-04-20100318-0007-06-10

Grievant: Jenny Krase (termination)

Principal Advocate(s) for the EMPLOYER:

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INTRODUCTION

This matter came on for hearing before the arbitrator pursuant to the collective bargaining agreement ("Agreement") (Joint Exh. 2) between the State of Ohio ("Employer" "Management" or "ODYS") and State Counsel of Professional Educators/OEA/NEA ("SCOPE" or "Union"). That Agreement is effective from calendar years 2009 through 2012 and includes the conduct which is the subject of this grievance.

Robert G. Stein was selected by the parties to arbitrate this matter as a member of the panel of permanent umpires, pursuant to Article 6, Section 6.01 of the Agreement.

A hearing on this matter was held on April 18, 2011 at 9:00 am at the Indian River /ODYS facility in Massillon, Ohio. The parties mutually agreed to that hearing date and location, and they were each given a full opportunity to present oral testimony, documentary evidence, and arguments supporting their respective positions. The hearing, which was not recorded via a fully-written transcript, was subsequently closed upon the parties' submissions of closing arguments.

The parties have both agreed to the admission of eleven (11) joint exhibits and two (2) joint stipulations:

1. Grievant was hired by the Department of Youth Services on 11/10/08.

2. Grievant was given a probationary termination from position on no. 20076864.

The parties did not agree on a statement of the issue to be resolved. Each party submitted the following:

SCOPE DEFINTION OF THE ISSUE:

Was the Grievant, Jenny Krase properly removed from her position of Teacher Special Education/Intervention Specialist? If not, what shall the appropriate remedy be?

EMPLOYER DEFINTION OF THE ISSUE:

Did Management violate Article 19 of the SCOPE Contract when the Grievant was terminated effective 3/9/10?

If not the grievance is denied on the basis of substantive arbitrability. If so, what shall the remedy be?

ARBITRATOR'S DEFINITION OF THE ISSUE:

Based upon the parties' proposed definitions the arbitrator defines the issue as follows:

Did the Employer violate the Collective Bargaining Agreement when it determined the Grievant was a probationary employee and terminated her employment on March 9, 2010? If not, what shall the remedy be?

RELEVANT CONTRACT PROVISIONS (Per Grievance and Briefs)

Article 1----Bargaining Unit
Article 2----Non-Discrimination
Article 4---Association Rights
Article 5-—Grievance Procedure
Article 8----Performance Evaluation

Article 12 –Personnel Files
Article 16---Position Descriptions
Article 17—Transfers and Promotions
Article 19—Probationary Period
Article 25—Service Credit

BACKGROUND

Jenny Krase ("Krase" or "Grievant") worked for the Employer (at Indian River JCF) from the dates of November 10, 2008 until her notice of probationary removal on March 9, 2010. (See Joint Exhs.) The Grievant was initially hired as either an external interim employee or in an intermittent position on November 10, 2008 and subsequently her status changed to full time permanent employee either on March 12, 2009 or April 12, 2009. The uncertainty of dates is at the heart of this dispute regarding whether the Grievant was on or was not on probation during the time of her termination on March 9, 2010. (See Joint Exhs. and Briefs)

As noted from the parties' differing versions of the issue in this case, the dates of hire, the status of the Grievant on the dates, documentation associated with the hiring of the Grievant, the various communications provided to the Grievant (either received or not received), and of course, the controlling language of the Agreement were claimed by one or both of the parties to be critical to the outcome of this case.

The Union filed grievance number 35-04-20100318-0007-06-10 on behalf of Krase, alleging the Employer's violation of several sections of the Agreement. (Joint Exh. 4) Because the matter remained unresolved after passing through the preliminary stages of the grievance procedure, it has been submitted to the arbitrator for final and binding resolution.

SUMMARY OF THE EMPLOYER'S POSITION

The Employer argues that the termination of the Grievant's employment was the appropriate remedy to be imposed and is not subject to the grievance procedure under the provisions contained in Article 19 of the Agreement. The Employer argues that during the hearing it *provided un-rebutted evidence to establish these facts:*

1. *"The "CONSENT" document referred to above (Jt. Ex. 6) is specific to OCSEA bargaining unit members, and it was given to her in error.*
2. *Management caught the mistake and provided the Grievant with a written rescission of the "CONSENT" document approximately one month prior to her removal.*
3. *The Grievant did not file a grievance or raise a complaint with Management after having received the rescission notice.*
4. *The Grievant did not present any evidence that she had relied on the "CONSENT" document to her detriment."*

The Employer asserts that a probationary removal is not a form of discipline and that said removal is not subject to review through the grievance procedure. In the instant matter the Grievant was removed after 331 days of her 365 day probationary period. Moreover, while there were errors made by management in this case, said errata were not relied upon by the Grievant to her detriment, argues the Employer.

Based on these claims, the Employer requests that the Union's grievance be denied in its entirety.

SUMMARY OF THE UNION'S POSITION

The Union makes several arguments in its defense of the Grievant and rather than simply reiterating the content of its brief, the arbitrator shall attempt, using excerpts from the brief, to capture the essence of its case. Arguing that the Employer has the burden in this matter and must provide a quantum of proof sufficient to sustain its case, SCOPE asserts that the facts in this case clearly demonstrate that the Grievant was not on probation at the time of her termination. The Grievant became a full-time "permanent" employee on December 22, 2008 and as a result completed her probation on the strength of the testimony and evidence submitted in the form of Union Exh. 1, and the Joint Exhibits submitted in this case, argues the Union.

The Union also avers that if the evidence does not support a full-time starting date of December 22, 2008, other evidence submitted into the record supports the logic that the Grievant's full-time starting date was February 17, 2009, causing her termination date of March 9, 2010 to fall outside of the one year, or 365 day probationary period. The Union points out that on February 17, 2009 the Grievant received her step increase, and according to the terms of the Agreement she could have only received said increases if she was classified or designated by the Employer as a full-time employee. The Union also argues that Management failed to maintain accurate, reliable, and dependable records regarding the Grievant's employment with the Department.

Based on the Union's claim that the Employer has failed to meet its burden of establishing that it did have just cause to impose the Grievant's discharge, the Union requests that its grievance be affirmed, that the Grievant be restored to her position with ODYS, and that she be made whole regarding her wages, benefits, and seniority, with the arbitrator retaining jurisdiction to confirm the implementation of the award.

DISCUSSION

As noted by The Supreme Court of Ohio in *Skivolocki v. East Ohio Gas Co*. (1974), 18 Ohio St.2d 244, paragraph one of the syllabus, "The Agreement must be given a just and reasonable construction which carries out the parties' intent, as evidenced in the contractual language."

The arbitrator here is a creature of the contract from which he derives his authority, and he must confine his decisions. Although he may use his expertise in interpreting and applying the contractual provisions, the arbitrator may not substitute his own sense of equity and justice because his award must by grounded in the Agreement's terms. Article 6, Section 6.05, of the Agreement specifically identifies the following recognized limitations to the arbitrator's authority:

> *"The arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement; nor shall the arbitrator impose on either party a limitation or obligation not specifically required by the express language of this Agreement."*

It is generally-recognized that neither party to an agreement should be able to gain through arbitration what it was unable to successfully assert in prior negotiations or bargaining. Ultimately, "[i]t is not for the arbitrator to question whether the parties made a good bargain." *Int'l Union of Operating Eng'rs, Local 3 and Premier Chems.*, 00-1 Lab. Arb. Awards (CCH) P 3245 (Calhoun 1999). What is recognized by this arbitrator and his colleagues is that the bargain struck in negotiations must be recognized and enforced during the Agreement's tenure.

Article 19 of the Agreement is clear regarding the length and conditions surrounding an initial probationary period and the limitations placed upon a probationary employee to challenge her termination during such period. 19.01 states;

"Each employee in the bargaining unit shall serve a probationary period of one (1) year following an original appointment, or promotion to a permanent position." [emphasis added]

In 19.02 an employee on probation does have the right to meet with Management for the purpose of discussing the reasons for the termination. The third step answer to the grievance by the Employer addresses the fact that during her probation the Grievant was placed on an Improvement Plan. The answer states the following:

"Management contends that the Grievant was given an Improvement Plan on November 3, 2009, that was very detailed and outlined what was expected of her for the duration of her probationary period. The Improvement Plan included competency requirements, steps and actions for improvement and evaluation tools to check on improvements. The evaluation tools stated that the Grievant will meet with the Principal one time per week, meet with the Assistant Principal one time a month and provide the following documentation: weekly lesson plans, documentation of communication with Social Worker/Unit Administrator, documentation of research data and samples of student work. None of these evaluation tools were done or submitted as directed in the Improvement Plan."

Neither party highlighted or challenged this information that was submitted in the record. Therefore, it is reasonable to conclude that the Grievant during her probationary period, regardless of what date one considers as her probationary start date, was having performance problems severe enough to warrant a detailed Improvement Plan. In addition, the Grievant testified she was under a performance Improvement Plan, and stated, "I believe I completed whatever the performance plan called for..." According to Joint Exh. 4 the Employer

had a much different opinion. The Improvement Plan, which included competency requirements, action steps, evaluation tools and the submission of detailed documentation to assess improvement was given to the Grievant on November 3, 2009. The Improvement Plan also called for the Grievant to make weekly and monthly reporting requirements. The details of said plan strongly suggests that the Employer did not believe her one year probationary period was ending in approximately one month and nineteen (19) days on December 22, 2009 as the Union asserts. The lack of evidence indicating any disagreement with the requirements of the plan by the Grievant regarding the time remaining on her probationary period, also suggests that on November 3, 2009 the Grievant was not raising any concerns with not having sufficient time to demonstrate satisfactory improvement to effectively meet the requirements of the plan and successfully complete her probationary period. It is also noted that according to her testimony the Grievant had not seen Joint Exhs. 9, or 10, the documents that the Union relies upon in making its arguments that the Grievant's probationary period ended on either December 22, 2009 or at the latest February 17, 2010.

In Joint Exh. 8 the Employer attempts to correct one of the mistakes it made in the administration of this case. In a letter addressed to the Grievant dated February 12, 2010, the Employer admits it made an error eleven months earlier and indicates that the correct date for the start of

the Grievant's probationary period was April 12, 2009 and that she was not to be given any credit for previous time spent as an Intermittent Teacher at Indian River. (Joint Exh. 8) It is clear from the record that Krase received this notification. During her testimony she stated she did not agree with the dates in Joint Exh. 8 and did not know what to do when she went to see her Union representative. She stated he advised her that he did not see a problem since she was off of probation and had not suffered any adverse employment actions to this point. But in essence, the potential of adverse action was clearly communicated to the Greivant in the form of the Improvement Plan and its detailed requirements. Reasonably one would think this alone would raise concerns with the Grievant. An employee who receives a detailed Improvement Plan, in the general parlance of human resources, definitely has serious performance issue(s) to address.

Whether the Grievant's local Union representative knew all the facts in the Grievant's case is not known, but depending upon which date the Union argues the Grievant's probationary period ended, the advice supposedly given to the Grievant by her local Union representative did not serve her best interests. The Grievant knew she was under requirements of an Improvement Plan, understood the consequences of not successfully completing her probationary period, yet chose to remain silent. If the Grievant at the time believed she had completed her

probationary period on December 22, 2009 or that it was ending on February 17, 2010 she should have filed a grievance or at least formally raised this issue with the Employer to clarify her status and/or reconcile the requirements Management was placing on her during the time remaining in her probationary period. Remaining silent was a detrimental option in this case. The Grievant did not challenge the Employer's position on its clarification of her starting date (and by operation of Article 19.01, her probation period) and the effects of being misled for eleven months by Management representative Ms. Paula Schiro regarding her prior service as being an interim (and not intermittent), and shortening her probationary period (Joint Exh. 6).

By failing to challenge and grieve this long-standing contradiction in position by Management, the Grievant accepted Management's correction/clarification of her employment terms, and her continued probationary status until April 11, 2010. The Grievant testified that the discrepancies and/or errors contained in Joint Exhs. 9, 10, while affecting pay, were unknown by her until after her removal. Therefore, it is not plausible that she relied upon them to her detriment in this case. Moreover, the evidence and testimony supports the Employer's position that the Grievant most likely received Joint Exh. 7 in April of 2009. The Grievant's testimony in denying that she received the letter sent by Ms. Schiro was not credible, particularly since it contained the requirement

that the Grievant needed to complete her paperwork in regards to benefits.

The Union advocate in this case did a very thorough job of reconstructing documentation, particularly related to the joint exhibits that created the possibility that the Employer's errors in documentation are relevant to its case. However, the evidence and testimony do not support that line of argumentation. With the exception of Joint Exh. 6, which was subsequently corrected by the Employer, albeit late, and not challenged by the Grievant, there is no evidence that the Grievant detrimentally relied upon any personnel documentation maintained by the Employer, even though it contained numerous errors.

In accordance with the terms contained in Article 19 the Grievant's termination on March 9, 2010 occurred while she was still on probation and therefore is not subject to review under Article 5 of the Grievance Procedure.

AWARD

The grievance is denied. However, due to the circumstances of the Employer's numerous errors in managing the Grievant's employment record, the Grievant shall have the option of converting her probationary termination to a voluntary resignation within thirty (30) calendar days from the date of this Award.

Respectfully submitted to the parties this 1st day of July 2011.

Robert G. Stein, Arbitrator