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Arbitrator and Mediator  
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IN ARBITRATION PROCEEDINGS PURSUANT TO  
COLLECTIVE BARGAINING AGREEMENT BETWEEN THE PARTIES

In the Matter of  
SEIU DISTRICT 1199  
and  
OHIO DEPARTMENT OF  
HEALTH  
Case No. 14-50-20100325-0010-02-12  
Grievant: Patrick Shope

ARBITRATOR'S  
OPINION AND AWARD

This Arbitration arises pursuant to the Collective Bargaining Agreement ("Agreement") between SEIU DISTRICT 1199 ("the Union") and THE STATE OF OHIO ("the Employer" or "the State"). SUSAN GRODY RUBEN was selected to serve as sole, impartial Arbitrator. There being no procedural impediments to a resolution of this matter, the Arbitrator's decision shall be final and binding pursuant to the Agreement.

Hearing was held May 3, 2011 in Columbus, Ohio. The Parties were afforded full opportunity for the examination and cross-examination of witnesses, the introduction of exhibits, and for argument. Both parties submitted timely post-hearing briefs to the Arbitrator.

APPEARANCES:

On behalf of the Union:

AMANDA M. SCHULTE, SEIU District 1199,  
Columbus, OH.

On behalf of the Employer:

DIDI ANEKWE, Deputy Director, Ohio Department of  
Health, Columbus, OH and VICTOR DANRIDGE,  
Labor Specialist, Ohio Office of Collective Bargaining,  
Columbus, OH.

ISSUE1

Did the Employer violate the Agreement when it removed the Grievant from employment on March 17, 2010? If so, what is the appropriate remedy?

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<sup>1</sup> The Parties were unable to agree on the formulation of the Issue. They agreed the Arbitrator would formulate the Issue.

RELEVANT PROVISIONS OF COLLECTIVE BARGAINING AGREEMENT

June 1, 2009 - May 31, 2012

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ARTICLE 6 - NON-DISCRIMINATION

6.01 Non Discrimination

Neither the Employer nor the Union shall unlawfully discriminate against any employee of the bargaining units on the basis of race, sex, creed, color, religion, age, national origin, political affiliation, union affiliation and activity, handicap or sexual orientation, or discriminate in the application or interpretation of the provisions of this Agreement, except those positions which are necessarily exempted by bona fide occupational qualifications due to the uniqueness of the job, and in compliance with the existing laws of the United States or the State of Ohio. In addition, the Employer shall comply with all the requirements of the federal Americans with Disabilities Act and the regulations promulgated under that Act.

The Employer and Union hereby state a mutual commitment to equal employment opportunity, in regards to job opportunities within the agencies covered by this Agreement.

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ARTICLE 9 - PROBATIONARY PERIODS

9.01 Initial Probationary Period

All newly hired employees shall serve a probationary period of one hundred eighty (180) days....

...Dismissal during an initial probationary period shall not be grievable.

...

9.02 Promotion, Demotion, and Lateral Transfer Probationary Period

...

C. Inter-Agency Transfer

Employees who accept an inter-Agency transfer pursuant to Article 30, shall serve an initial probationary period. If the employee fails to perform the job requirements of the new position to the Employer's satisfaction, the Employer may remove the employee. The employee has the right to grieve such decision....

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ARTICLE 30 - VACANCIES

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30.02 Awarding the Job (Transfers and Promotions and Demotions)

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"Inter-Agency Transfer" is defined as an employee requested movement to a posted vacancy in a different Agency....

...

...

ARTICLE 42 - GENERAL PROVISIONS

42.01 Orientation and Training

The Employer will continue to provide initial orientation/training programs. Except for emergencies, employees will complete their initial orientation/training program. Changes and improvements in initial orientation/training programs will be discussed in appropriate professional committees.

During initial orientation, a Union representative shall be allowed reasonable time to orient new bargaining unit employees to the Union.

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FACTS

At the time of his March 17, 2010 removal, the Grievant had been employed by the State of Ohio for approximately 14-1/2 years. In mid-2009, he requested and received an inter-agency transfer, as reflected in the following written consent he signed:

INTER-AGENCY TRANSFER SEIU/DISTRICT 1199 CONTRACT

I, Patrick D. Shope, do hereby consent to an inter-agency transfer from the position of Human Services Program Consultant at the Ohio Department of Mental Health to the position of Human Services Program Consultant at the Ohio Department of Health, effective October 25, 2009. I understand that I will serve an initial probationary period of 180 days and that if I fail to complete the probationary period satisfactorily, I will be subject to removal in accordance with Article 9.02 C of the SEIU/District [1]199 Contract. I have been informed by the Position Manager about the effect this move will have on my hourly rate of pay and benefits.

        /s/                  
Employee Signature

        9-30-2009                  
Date

The Grievant began work at the Department of Health on October 25, 2009. He received a "Mid probationary" Employee Performance Evaluation on January 29, 2010, covering the period October 25, 2009—January 25, 2010.

The Evaluation was written by his immediate supervisor, Saveh Shirvani. For his "Overall Rating," the Grievant received the lowest mark - "Well Below."

Specifically, in the "Results" section of the Mid-Probationary Evaluation, where he received a "Well Below," the Grievant's supervisor wrote:

Pat's work needs significant amount of checking by the supervisor and even though he has asked input from other consultants, and has met with the supervisor on a weekly basis to touchbase[sic] on various assignments, he is unable to submit quality and timely work products. Examples include the completion of the PHER Report and the PHEP Standards.

Pat also failed to complete an assignment related to development of a checklist for reviewing PHEP budget revisions and presenting it to the team.

Pat was assigned to complete the editing of PHEP standards in a two week time period in Dec. He failed to complete the assignment, took additional time (2 wk) to complete & submitted a substandard product.

In the "Relationships" section of the Mid-Probationary Evaluation, where he received a "Below," his supervisor wrote:

Pat has exhibited discourteous, sarcastic and impatient behavior towards the supervisor, other office employees and his co-workers at times. Examples include inappropriate expression of impatience and hostile behavior during the Standards work towards the supervisor and secretary. He has also exhibited impatient behavior while consulting with other unit staff during the review of budget revisions. Patrick continues to fail to copy the supervisor when corresponding with the local subgrantees despite being asked several times. He also has difficulty responding when under pressure.

In the "Innovation/Initiative/Improvement" section of the Mid-Probationary Evaluation, where he received a "Below," Ms. Shirvani wrote:

Pat has completed the required GMIS, OPHCS and ICS trainings and is scheduled to complete the HSEEP training next month.

At times, he fails to review his own work in order to assure accuracy, despite numerous reminders from the supervisor. He failed to complete the budget revision checklist assignment.

At this time, he is unable to work independently and has not volunteered for any additional work.

He does not take appropriate actions when given specific instructions. i.e. the Standards work, budget revision checklist, correspondence with local sub-grantees, following up with SMEs, scheduling monitoring site visits, completion of ICS 201 for the PHEP unit and the PHEP funding sheet.

In the "Work Habits" sections of the Mid-Probationary Evaluation, where he received a "Below," his supervisor wrote:

Pat has needed reminders regarding completion of sign-in & sign-out sheets, leave requests, and flex schedules. He has also been reminded on completing the time and accountability sheets accurately and keeping his Outlook electronic calendar current.

Having received one "Well Below," which correlates in the Evaluation to 0 points, and three "Below"s, which correlate in the Evaluation to 1 point each for a total of 3 points, the Grievant was given his "Overall Rating" of "Well Below," which is given to employees who receive 0-3 total points,

adding up the points from each of the 4 sections.<sup>2</sup>

Six weeks later, on March 17, 2010, the Grievant was removed. His supervisor testified he was removed at that time because:

He hadn't shown progress. The same issues from the first evaluation were continuing. I didn't feel he was going to improve in the final six weeks.<sup>3</sup>

The Union filed a grievance on the Grievant's behalf. The grievance states in pertinent part:

Statement of Grievance

Removal from position and termination of employment during probationary period following inter-agency transfer was inappropriate as Grievant was not provided sufficient training or guidance in the performance management process to successfully meet objectives and goals during probation.

Contract Article(s) and Section(s) allegedly violated, including but not limited to:

Article 9.02(C) Probationary Periods, Article 6.01 Non-Discrimination & Article 42.01 Orientation/Training.

PARTIES' POSITIONS

Union's Position

The standard for removal under Article 9.02(C) is found in Article 8.01: "Disciplinary action may be imposed upon an employee only for just cause." The State did not have just cause to terminate the Grievant's employment.

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<sup>2</sup> To receive an overall rating of "Meets," an employee must receive a minimum of 10 points total.



The State met none of the seven tests of just cause. Even if the standard of review for the Grievant's removal is whether the Employer acted arbitrarily, capriciously, or discriminatorily, the grievance must be granted because the State did act capriciously, arbitrarily, and discriminatorily in its removal of the Grievant.

### Employer's Position

When an employee accepts an inter-agency transfer, he or she assumes a great risk. This fact is spelled out in Article 9.02(C) which states in part:

Employees who accept an inter-Agency transfer pursuant to Article 30, shall serve an initial probationary period. If the employee fails to perform the job requirements of the new position to the Employer's satisfaction, the Employer may remove the employee."

The Grievant's supervisor determined the Grievant had not satisfactorily performed the job requirements of his new position satisfactorily. This decision was not capricious, arbitrary, or discriminatory.

### OPINION

The Union contends Article 9.02(C) is silent regarding the standard of

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<sup>3</sup> The Parties stipulated the State is not required to wait the full 180 days of a probationary period before

proof required for the removal of an inter-agency transfer probationary employee. Thus, the Union contends, these employees “should be treated like normal employees with the right to removal only for just cause.”<sup>4</sup>

But Article 9.02(C) is not silent regarding the standard of proof required for the removal of an inter-agency transfer probationary employee. Article 9.02(C) expressly provides in pertinent part:

Employees who accept an inter-Agency transfer pursuant to Article 30, shall serve an initial probationary period. If the employee fails to perform the job requirements of the new position to the Employer’s satisfaction, the Employer may remove the employee.

(Emphasis added.)

Words in a collective bargaining agreement have meaning. Neither party to a collective bargaining agreement has the luxury of ignoring contract language when it does not reflect that party’s view of a particular situation. Here, the Union understandably wants to support the seniority rights of a long-term employee by stating an inter-agency transfer probationary employee can be removed pursuant to the Agreement only for just cause. But that is not what the Parties agreed to; in Article 9.02(C), they agreed an inter-agency transfer probationary employee can be removed if the State

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taking an employment action.

<sup>4</sup> Union’s Brief at p. 5, *citing Pacific Power & Light Co.*, 89 LA 283, (Sinicropi, 1987), *referred to in Elkouri, How Arbitration Works*, 6<sup>th</sup> ed. at p.934 fn. 49: “where no standard of proof was set forth in the contract, probationary employees were entitled to same rights as other employees.”

determines the employee has failed “to perform the job requirements of the new position to the Employer’s satisfaction.”

As explained in the section on probationary employees in Elkouri, How Arbitration Works, 6<sup>th</sup> ed. at p. 934:

...where the provisions of a collective bargaining agreement mentioned probationary employees, but were unclear as to whether the employees were included under a just cause clause, the arbitrator held that “the weight of arbitral authority supports the proposition that Management has broad, if not almost unlimited, discretion where probationary employees are concerned.”<sup>5</sup> Some arbitrators, however, have set aside the discharge of a probationary employee if management’s action was “arbitrary, capricious, or discriminatory”; thus, “the question in such a case goes to the good faith of the Company, not to the merits of its conclusion.”<sup>6</sup> A few arbitrators have gone further and required a showing of fairness or even just cause.

Here, the Agreement it is not unclear what standard is required to remove an inter-agency transfer probationary employee. Even if it were unclear, Elkouri shows us the “weight of arbitral authority” gives management “broad if not almost unlimited, discretion where probationary employees are concerned.”

This Arbitrator declines to go with the “weight of arbitral authority” on this point. The State does not have unfettered discretion to remove an

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<sup>5</sup> Bridgestone (U.S.A.), 88 LA 1314, 1316 (Nicholas, Jr., 1987).

<sup>6</sup> Ex-Cell-O Corp., 21 LA 659, 665 (Smith, 1953), *quoted in* County of Haw, 87 LA 349, 354 (Brown, 1985). See also Giant Food, 77 LA 1276, 1281 (Seibel, 1981); San Jose Mercury News, 48 LA 143, 145 (Burns, 1966); Bergen Mach. & Tool Co., 44 LA 301, 304 (Buckwalter, 1965); Pullman-Standard, 40 LA 757, 762-63 (Sembower); Standard Oil Co. of Cal., 38 LA 350, 351-52 (Ross, 1962); North Am. Aviation,

employee. Rather, this Arbitrator finds the soundest approach is whether the State's action was "arbitrary, capricious, or discriminatory." This Arbitrator cannot go to the third theory listed in Elkouri, "fairness or even just cause" because the Parties' Agreement does not make just cause the standard for removing an inter-agency transfer probationary employee. Rather, the express contractual standard is whether an employee in that status has failed "to perform the job requirements of the new position to the Employer's satisfaction." As explained in Elkouri:

Of course, the collective bargaining agreement may deal expressly with the discharge of probationary employees, for example, by requiring cause or by affirmatively not requiring it.<sup>7</sup>

Here, the Parties "deal[t] expressly with the discharge of probationary employees."

It is clear from the record the Grievant and his supervisor did not have a positive experience working together. But that is not a basis for concluding the removal was arbitrary, capricious, or discriminatory. The record in this case is not comparable to that of William Reed at ODRC, where the Grievant's colleagues testified for the Union voluminously about their supervisor's discriminatory treatment of them.<sup>8</sup> Here, no colleagues testified.

Rather, the Grievant's supervisor made a sufficient showing in both the

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<sup>7</sup> 19 LA 565, 569 (Komaroff, 1952).

Grievant's Mid-Probationary Employee Performance Evaluation and in her testimony that the Grievant's attention to detail while he was a probationary employee at ODH was insufficient to be considered satisfactory. Moreover, the record does not establish the Grievant's Mid-Probationary Employee Evaluation was arbitrary, capricious, or discriminatory. The Evaluation presents examples where the Grievant did not satisfactorily meet the standards of his new position. While the Grievant has some legitimate disagreements with his Evaluation, enough of the Evaluation is objectively accurate to show the State's lack of satisfaction with his performance at ODH.

While it is true the Grievant, until his transfer to ODH, had received positive evaluations, the fact of the matter is Article 9.02(C) permits the State to consider only his performance in his "new position" during his inter-agency transfer probationary period in determining whether his performance is "satisfactory."<sup>9</sup>

#### AWARD

For the reasons set out above, the grievance is denied.

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<sup>7</sup> How Arbitration Works, 6<sup>th</sup> ed., at p. 935.

<sup>8</sup> Case Nos. 28-05-061030-0212 & 0213-02-12 (Ruben, 2007), *cited* in the Union's brief at p. 3 fn. 1.

<sup>9</sup> The Union's contention the State treated an inter-agency transfer probationary "the same as an Article 9.01 new probationary employee" (Union's Brief at p.4) is inaccurate. The Parties bargained for inter-agency transfer probationary employees' right to grieve, unlike new probationary employees who do not have the contractual right to grieve. Nor does the record establish a case of disability discrimination as contended by the Union.

DATED: August 11, 2011

Susan Grody Ruben  
Susan Grody Ruben, Esq.  
Arbitrator