

**ARBITRATION DECISION NO.:**

553

**UNION:**

OCSEA, Local 11, AFSCME, AFL-CIO

**EMPLOYER:**

Ohio Industrial Commission

**DATE OF ARBITRATION:**

June 14, 1994

**DATE OF DECISION:**

August 3, 1994

**GRIEVANT:**

Union

**OCB GRIEVANCE NO.:**

17-00-(92-05-11)-0000-01-04

**ARBITRATOR:**

Nels Nelson

**FOR THE UNION:**

Carol Bowshier, Advocate

Kim A. Browne, Second Chair

**FOR THE EMPLOYER:**

Georgia Brokaw, Advocate

Michael P. Duco, Second Chair

**KEY WORDS:**

Length of Probationary Period

Backpay

**ARTICLES:**

Article 6 - Probationary Employees

§ 6.01 - Probationary Periods

Article 25 - Grievance Procedure

§ 25.03 - Arbitration Procedures

Article 36 - Wages

§ 36.05 - Classifications and Pay Range Assignments

**FACTS:**

During negotiations for a new collective bargaining agreement, the state changed the probationary period for "Disability Claims Adjudicator 1, Reclamation Inspector 1 and all Attorney classifications" to a one year period. The union's classification specialist filed a grievance on May 11, 1992. In the grievance, the union charged that the state, by creating a one-year probationary period for District Hearing Officer (DHO) 1 and 2, violated Article 6 of the contract between the State of Ohio and OCSEA. Furthermore, the union charged

that Article 36.05, which requires that the union be given notice for any changes in classification, was violated.

### **UNION'S POSITION:**

The union argued that the state's imposition of a one-year probationary period for the DHO 1 and 2 classifications violated the plain language of Article 6. The union pointed out that Section 6.01 states that the probationary period for classifications paid at grades 29-36 shall be 180 days. The union noted that DHO 1 is paid at grade 34 and DHO 2 is paid at grade 35. Furthermore, the union's Executive Director Paul Goldberg, who functioned as chief spokesperson during contract negotiations, testified as to the intent behind this language. Mr. Goldberg stated that under the terms of Section 6.01 of the contract, the capital "A" in attorney indicates that the one-year probationary period applies only to classifications with "Attorney" in their title. Therefore, since the DHO 1 and 2 classifications do not have "attorney" in their titles, the one-year probationary period does not apply.

The union also argued that the state violated Section 36.05 of the contract. The union maintained that Section 36.05 requires the state to notify the union 45 days in advance of any change in a pay range or class specification. The union requested that the grievance be granted and that persons improperly subjected to a one-year probationary period have their wage step movement accelerated. Furthermore, it was requested that affected employees be compensated for lost pay, seniority, vacation, and any other benefits lost as a result of management's misinterpretation of the contract.

### **EMPLOYER'S POSITION:**

The state maintained that the DHO 1 and 2 classifications fall in the category of "all Attorney classifications" so they carry a one-year probationary period. The state argued that under Section 6.01 of the contract, the probationary period is one year for all classifications where an employee is required to be an attorney. The state accused the union of arguing form over substance and pointed out, for example, that a Utility Attorney Examiner in the Public Utilities Commission conducts hearings and issues decisions just like the DHO's do. The state also noted that the union's position is that the Utility Attorney Examiner has a one-year probationary period while the DHO's do not, simply because the word "Attorney" appears in the job title. The state asserted that the union's position amounted to saying that an individual's job title is more important than the duties performed. In addition, the state contended that it had shown that a one-year probationary period is necessary to evaluate the performance of the DHO'S. The state asked the arbitrator to deny the grievance and uphold its action in requiring a one-year probationary period for the DHO 1 and 2 classifications.

### **ARBITRATOR'S OPINION:**

The arbitrator believed that the language at issue was clear. The use of the capital "A" in the phrase "all Attorney classifications", which was taken from Section 6.01 of the contract, indicates that the reference is to the job titles including the word "Attorney" in their job classification title. Since DHO 1 and 2 do not include the word "Attorney", they have a 180-day probationary period. The arbitrator also recognized that the union's position may be focusing on form over substance. The word "Attorney" may appear in one job title and not another, but the probationary periods may be different. The arbitrator noted that collective bargaining agreements sometimes contain provisions that appear illogical. Despite that fact, arbitrators are bound to enforce the clear language of the contract. Furthermore, Article 36 of the contract states that classifications and pay ranges may be modified through the Office of Collective Bargaining. Although Section 36.05 allows the state to change the length of the probationary period, the contract also requires that the state give notice to the union 45 days in advance, which was not done. Therefore, the grievance was upheld and the state must reduce the probationary period for DHO 1 and 2 to 180 days.

### **AWARD:**

The state shall adjust the date of completion of the probationary period for any DHO 1 or 2 who was required to serve a one-year probationary period to reflect a 180-day probationary period. Such employees

shall be made whole for any lost pay, vacation, and or other benefits tied to the length of service.

**TEXT OF THE OPINION:**

**ARBITRATION DECISION**

August 3,1994

In the Matter of:

**State of Ohio, The Ohio Industrial  
Commission**

and

**Ohio Civil Service Employees Association,  
AFSCME Local 11**

**Case No.:**

17-00-(92-05-11)-0000-01-14

**Union Grievance**

**APPEARANCES**

**For the State:**

Georgia Brokaw, Advocate  
Michael P. Duco, Second Chair  
Sue Newell, Labor Relations Officer  
Mary D. Stevenson, District Hearing Officer Supervisor  
Gary Johnson, Witness

**For the Union:**

Carol Bowshier, Advocate  
Kim A. Browne, Second Chair  
Paul W. Goldberg, Executive Director  
Sandra F. Bell, Representative  
Ronald A. Fresco, Witness

**Arbitrator:**

Nels E. Nelson

**BACKGROUND**

Prior to 1992 the collective bargaining agreement provided for a probationary period of 120 to 180 days for all classifications. During the negotiations for the 1992-94 agreement the state proposed changing Article 6, Section 6.01 of the collective bargaining agreement by increasing the probationary period for "Disability Claims Adjudicator 1, Reclamation Inspector 1 and all Attorney classifications" to one year. It claimed that more time was necessary to evaluate employees who were hired, promoted, or transferred to these classifications. After some discussion the union agreed to the language proffered by the state.

Following the signing of the new contract, the state proceeded to implement the new probationary

periods. On March 6, 1992 Francis Flynn, the Deputy Director of the Office of Collective Bargaining, sent a memo to Gall Lively, the Administrator of Classification and Compensation, directing her to change the classification specifications to reflect a one-year probationary period for "Disability Claims Adjudicator 1, Reclamation Inspector 1 and all Attorney classifications which includes any classification when license to practice law is required." Lively sent a memo to personnel officers of state agencies increasing the probationary period for Disability Claims Adjudicator 1, Reclamation Inspector 1, Attorney 1, Attorney 2, Attorney 3, Utilities Attorney Examiner 1, Utilities Attorney Examiner 2, and Utility Attorney to one year effective January 1, 1992. When Sue Newell, a labor relations officer, saw the memorandum and noted that District Hearing Officer 1 and 2 in the Industrial Commission were not listed, she contacted the Office of Collective Bargaining to tell them that their attorneys had not been included. On April 27, 1992 a memo was issued increasing the probationary periods for DHO 1 and 2 to one year.

On April 30, 1992 Carol Bowshier, the union's classification specialist, saw a copy of the April 27, 1992 memo. She filed a grievance on May 11, 1992 on behalf of the union charging that the one-year probationary period for DHO 1 and 2 was in violation of Article 6 which states that the probationary period for classifications paid at grades 29-36 would be 180 days. The grievance also alleged a violation of Article 36.05 because the revised specifications for DHO 1 and 2 were not submitted to the union. It requests that revised specifications be rescinded and that all affected employees be made whole.

When the grievance was not resolved it was appealed to arbitration. The hearing was held on June 14, 1994 and the record was closed at the conclusion of the hearing. Due to an injury and subsequent surgery the Arbitrator requested an extension in time for rendering his decision.

### **ISSUES**

The issues as agreed to by the parties are as follows:

Was the length of the probationary period for the Industrial Commission District Hearing Officer 1 and 2 classifications increased from six months to one year in accordance with the language in Article 6.01. If not, what shall the remedy be?

Were the specifications revised in accordance with Article 36.05? If not, what shall the remedy be?

### **RELEVANT CONTRACT PROVISIONS**

#### Article 6 - Probationary Employees

##### 6.01 - Probationary periods

All newly hired and promoted employees shall serve a probationary period. The probationary period shall be one hundred twenty (120) days for classifications paid at grades 1 to 7 and grades 23 to 28 or one hundred eighty (180) days for classifications paid at grades 8 to 12 and grades 29 to 36. However, the Disability Claims Adjudicator 1, Reclamation Inspector 1, and all Attorney classifications shall have a probationary period of twelve (12) months from the effective date of hire or promotion.

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#### Article 25 - Grievance Procedure

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##### 25.03 - Arbitration Procedures

The arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement, nor shall he/she impose on either party a limitation or obligation not specifically required by the expressed language of this Agreement.

\* \* \*

## Article 36 - Wages

\* \* \*

### 36.05 - Classifications and Pay Range Assignments

The employer, through the Office of Collective Bargaining, may create classifications, change the pay range of classifications, authorize advance step hiring if needed for recruitment or other legitimate reasons, and issue or modify specifications for each classification as needed. The Office of Collective Bargaining shall notify the Union forty-five (45) days in advance of any change of pay range or specifications. should the Union dispute the proposed action of the Employer and the parties are unable to resolve their differences, they shall utilize the appropriate arbitration mechanism.

### **UNION POSITION**

The union argues that the state's imposition of a one-year probationary period for DHO 1 and 2 violates the plain language of Article 6. It points out that Section 6.01 states that the probationary period for classifications paid at grades 29-36 shall be 180 days. The union notes that DHO 1 is paid at grade 34 and DHO 2 is paid at grade 35.

The union contends that the state never qualified its proposed Section 6.01 language requiring a one-year probationary period to include all classifications which require admission to the Ohio Bar. It states that Paul Goldberg, the union's Executive Director and chief spokesperson during the negotiations for the 1992-94 contract, testified that the capital "A" in attorney indicates that the one-year probationary period applies only to classifications with "Attorney" in the title. The union indicated that Goldberg stated that the state failed to communicate its understanding of Section 6.01 to the union. It stresses that the state is bound by the language that it crafted rather than some undisclosed intent.

The union rejects the state's contention that Flynn's March 6, 1992 memo supports the state's position. It acknowledges that the memo states that the probationary period for any classification which requires a license to practice law should be increased to one year. The union asserts that it is simply a self-serving attempt to obtain through administrative action something that it was unable to obtain in negotiations.

The union contends that the April 3, 1992 memo from the Department of Administrative Services to the personnel directors of state agencies supports its position. It points out that the memo increases the probationary period to one-year for Disability Claims Adjudicator 1, Reclamation Inspector 1, and for those classifications with "Attorney" in the title. The union emphasizes that the memo does not increase the probationary period for DHO 1 and 2.

The union maintains that the probationary period for a number of professional positions comparable to DHO 1 and 2 do not require a one-year probationary period. It indicates that the Transportation Engineer, Veterinarian, Veterinary Toxicologist, Veterinary Pathologist, and Sanitation classifications involve the use of subjective reasoning and require licensure but have six-month probationary periods. The union claims that equity requires that the one-year probationary period for DHO 1 and 2 be rescinded.

The union charges that the increase in the probationary period for DHO 1 and 2 is a pretense because functional training, supervision, and performance review are achieved within a six-month period. It observes that Sandra Bell, a DHO 2, testified that as a DHO 1 she received ten weeks of training followed by 16 to 18 weeks where she first observed hearings and then conducted hearings under observation after which she took hearings on her own. The union notes that Ronald Fresco stated that he received three months training after which he got a memo informing him that he was a "full-fledged" DHO and that he was expected to perform the same assignments as other DHO'S.

The union argues that the state also violated Article 36, Section 36.05. It maintains that this section requires the state to notify the union 45 days in advance of any change in a pay range or class specification. The union points out that Bowshier receives notices regarding changes in pay ranges and/or class specifications and responds for the union. It notes that she stated that in the instant case she received no notice 45 days in advance from the state. The union claims that in any event the state cannot change the probationary period for DHO's because it would conflict with Article 6, Section 6.01 of the collective bargaining agreement.

The union concludes that its grievance must be granted. It requests that the state re-implement a six-month probationary period for DHO 1 and 2 and similarly situated classifications which require an individual to be a member of the Ohio Bar but do not include "Attorney" in the classification title. The union further asks that those improperly subjected to a one-year probationary period be made whole by adjusting their probationary period to accelerate their wage step movement and to compensate them for lost pay, seniority, vacation, and any other benefits tied to length of service.

### **STATE POSITION**

The state argues that under Article 6, Section 6.01 the probationary period is one year in all classifications where an employee is required to be an attorney. The state points out that Gary Johnson, the state's chief spokesperson, testified that during negotiations the parties discussed increasing the probationary period for "all attorney type people." It notes that he acknowledged that this might not be reflected in the negotiation notes but that he explained that a lot of the discussions took place in small groups with the mediator where no notes were made. The state claims that if the meaning of the language was not clear, Goldberg could have asked for clarification.

The state maintains that a one-year probationary period is necessary for DHO'S. It points out that Mary Stevenson, a DHO supervisor, testified that the training for a DHO, which includes lectures, readings, and visits to the Bureau of Workers' Compensation and the Attorney General's office, takes 16 weeks. The state indicates that the training period sometimes is extended in order to bring an individual's performance up to an acceptable level. It stresses that after an individual assumes the work of a DHO, his or her work is still closely monitored.

The state accuses the union of arguing form over substance. It points out, for example, that a Utility Attorney Examiner in the Public Utilities Commission conducts hearings and issues decisions just like the DHO'S. The state notes that the union's position is that the Utility Attorney Examiner has a one-year probationary period while the DHO's do not, simply because "Attorney" appears in the job title. It asserts that the union position amounts to saying that an individual's job title is more important than the duties performed.

The state rejects the union's comparison of the DHO classification to the classifications of Transportation Engineer, Veterinarian, Veterinary Toxicologist, Veterinary Pathologist, and Sanitarian which have six-month probationary periods. It acknowledges that they are professional positions but stresses that the job duties are different from the DHO'S. The state indicates that it did not propose changing the probationary periods for these classifications.

The state argues that the Arbitrator can uphold its increase in the probationary period for DHO's under Article 36, Section 36.05. It claims that this section gives it the authority to modify class specifications, including the length of the probationary period, subject to the right of the union to request arbitration. The state contends that it has shown that a one-year probationary period is necessary to evaluate the performance of the DHO'S.

The state asks the Arbitrator to deny the grievance and uphold its action in requiring a one-year probationary period for the DHO 1 and 2 classifications.

### **ANALYSIS**

The instant dispute involves the length of the probationary period for the DHO 1 and 2 classifications. Article 6, Section 6.01 states:

"All newly hired and promoted employees shall serve a probationary period. The probationary period shall be one hundred twenty (120) days for classifications paid at grades 1 to 7 and grades 23 to 28 or one hundred eighty (180) days for classifications paid at grades 8 to 12 and grades 29 to 36. However, the Disability Claims Adjudicator 1, Reclamation Inspector 1, and all Attorney classifications shall have a probationary period of twelve (12) months from the effective date of hire or promotion."

The union position is that since DHO 1 is in the pay range 34 and DHO 2 is in the pay range 35, the probationary period for both is 180 days. The state maintains that the DHO 1 and 2 classifications fall in the category of "all Attorney classifications" so they have a one-year probationary period.

The Arbitrator believes that the language at issue is clear. The use of the capital "A" in the phrase "all Attorney classifications" indicates that the reference is to the job titles including the word "Attorney." Since DHO 1 and 2 do not include the word "Attorney," they have a 180 day probationary period.

The Arbitrator acknowledges that the negotiators for the state may have had in mind that a one-year probationary period should apply to all classifications where an employee is required to be an attorney. However, Goldberg testified that this intent was not communicated to the union. Furthermore, the language proffered by the state does not convey what it claims that it intended. The union accepted the language of the state based upon its clear meaning and the Arbitrator cannot change the clear meaning of that language.

The Arbitrator also recognizes that the union's position may be focusing on form over substance. It appears that Utility Attorney Examiners and DHO's perform essentially the same functions. Because "Attorney" appears in one job title but not in the other job title, the probationary periods are different. The Arbitrator, however, notes that collective bargaining agreements sometimes contain provisions that appear illogical. Despite that fact Arbitrators are bound to enforce the clear language of the contract.

The state argued that the Arbitrator should uphold the change in the probationary period for DHO's under Article 36, Section 36.05. It states:

"The Employer, through the Office of Collective Bargaining, may create classifications, change the pay range of classifications, authorize advance step hiring if needed for recruitment or other legitimate reasons, and issue or modify specifications for each classification as needed. The Office of Collective Bargaining shall notify the Union forty-five (45) days in advance of any change of pay range or specifications. Should the Union dispute the proposed action of the Employer and the parties are unable to resolve their differences, they shall utilize the appropriate arbitration mechanism."

The Arbitrator must reject the state's contention. First, it is not clear to the Arbitrator from the language of Section 36.05 that the union agreed to allow the state to change the length of the probationary period. Second, Article 6, Section 6.01 sets out the length of the probationary periods for jobs in various pay ranges subject to certain special cases. Third, even if Section 36.05 allowed the state to change the length of the probationary period for the DHO'S, it did not comply with Section 36.05. The contract requires that the state give notice to the union 45 days in advance. In the instant case there was no advance notice to the union.

The union argued that the grievance applied not only to the DHO's but also to all similarly situated employees. The Arbitrator must disagree. The grievance makes no reference to any classification other than DHO'S. The requested remedy to make "all affected employees" whole would appear to refer to all DHO's who were required to serve a one-year probationary period. However, it would appear that the analysis of this case would apply to other classifications where an employee must be an attorney but "Attorney" does not appear in the job title.

Based upon the above analysis, the Arbitrator must uphold the grievance. The state will be directed to reduce the probationary period for DHO 1 and 2 to 180 days. It will also be instructed to adjust the date on which employees completed the probationary period and make them whole for any lost pay, vacation, and/or other benefits tied to length of service.

### **AWARD**

The state shall adjust the date of completion of the probationary period for any DHO 1 or 2 who was required to serve a one-year probationary period to reflect a 180 day probationary period. Such employees shall be made whole for any lost pay, vacation, and/or other benefits tied to the length of service.

NELS E. NELSON  
Arbitrator

August 3, 1994  
Russell Township  
Geauga County, Ohio