

In the Matter of the Arbitration)
)
 between)
)
 WASHINGTON FEDERATION OF)
 STATE EMPLOYEES)
 (Union))
 And)
)
 WASHINGTON STATE DEPARTMENT)
 OF EMPLOYMENT SECURITY)
 (Employer))

OPINION AND AWARD
GRADY MAXWELL
GRIEVANCE
AAA No. 75-390-00352-08

BEFORE: Kathryn T. Whalen, Arbitrator

APPEARANCES: For the Union

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I. INTRODUCTION

In February of 2008 the Washington Employment Security Department (Employer or ESD) terminated Grady Maxwell (Grievant or Maxwell) from his appointment as a WorkSource Specialist 4 with the ESD. In the termination letter, the Employer identified Maxwell's appointment as probationary. The Washington Federation of State Employees (Union or WFSE) filed a grievance challenging Maxwell's termination under the terms of the parties' 2007-2009 Collective Bargaining Agreement (CBA or Agreement).

This case is administered by the American Arbitration Association (AAA) and the Arbitrator was chosen pursuant to AAA procedures. A hearing was held on May 7, 2009 at the offices of the Washington Attorney General in Tumwater, Washington. Both parties were accorded a full opportunity to present evidence and argument in support of their respective positions. The hearing was transcribed by certified court reporter Rebecca Lindauer of Dixie Cattell & Associates. At the end of the hearing, the parties elected to file written closing briefs. The Arbitrator officially closed the record upon receipt of those briefs.

II. ISSUES

The parties agreed the issues for the Arbitrator are:

Was the separation of Grady Maxwell on February 6, 2008, from his employment with the Employment Security Department a probationary separation?

If it was not, what shall be the remedy?

Transcript (Tr.) 4, 5.

The State concedes that if Grievant's termination was not a probationary separation, the procedures for disciplinary separation were not followed;

therefore, it was not a valid separation. The Union agrees that if Maxwell's separation was probationary, it is not subject to the grievance procedure; therefore, this grievance should be dismissed. Tr. 5. The parties further agreed that should the Arbitrator address the issue of remedy, she may retain jurisdiction for a period of 90 days to resolve issues, if any, concerning the remedy awarded. Tr. 5.

III. CONTRACT PROVISIONS

ARTICLE 4 HIRING AND APPOINTMENTS

4.1 Filling Positions

The Employer will determine when a position will be filled, the type of appointment to be used when filling the position, and the skills and abilities necessary to perform the duties of the specific position within a job classification. * * *

4.3 Permanent Status

An employee will attain permanent status in a job classification upon his or her successful completion of a probationary, trial service or transition review period.

4.4 Types of Appointment

A. Non-Permanent

1. The Employer may make non-permanent appointments to fill in for the absence of a permanent employee, during a workload peak, while recruitment is being conducted, or to reduce the possible effects of a layoff. Non-permanent appointments will not exceed twelve (12) months except when filling in for the absence of a permanent employee. A non-permanent appointee must have the skills and abilities required for the position.

* * *

3. The Employer may convert a non-permanent appointment into a permanent appointment and the employee will serve a probationary or trial service period. * * *
* Time spent in the non-permanent appointment may count towards the probationary or trial service period for the permanent position.

4. The Employer may end a non-permanent appointment at any time by giving one (1) working day's notice to the employee.

* * *

D. Project Employment

1. The Employer may appoint employees into project positions for which employment is contingent upon state, federal, local, grant or other special funding of specific and of time-limited duration. The Employer will notify the employees, in writing, of the expected ending date of the project employment.

2. Employees who have entered into project employment without previously attaining permanent status will serve a probationary period. Employees will gain permanent project status upon successful completion of their probationary period.

* * *

3. The Employer may consider project employees with permanent project status for transfer, voluntary demotion, or promotion to non-project positions. Employees will serve a trial service period upon transfer, voluntary demotion, or promotion to a non-project position in a job classification that the employees have not previously attained permanent status.

4. When the Employer converts a project appointment into a permanent appointment, the employee will serve a probationary or trial service period.

* * *

4.5 Review Periods

A. Probationary Period

1. Every part-time and full-time employee, following his or her initial appointment to a permanent position, will serve a probationary period of six (6) consecutive months; * * *. Agencies may extend the probationary period for an individual employee as long as the extension does not cause the total period to exceed twelve (12) months.

2. The Employer may separate a probationary employee at any time during the probationary period. The Employer will provide the employee five (5) working days' written notice prior to the effective date of the separation. However, if the Employer fails to provide five (5) working days' notice, the separation will stand and the employee will be entitled to payment of salary up to five (5) working days, which the employee would have worked had notice been given. Under no circumstances will notice deficiencies result in an employee gaining permanent status. The separation of an employee will not be subject to the grievance procedure in Article 29.

* * *

5. If the Employer converts the status of a non-permanent appointment to a permanent appointment, the incumbent employee will serve a probationary period. However, the Employer may credit time worked in the non-permanent appointment toward completion of the probationary period as defined in Subsection 4.5.A.

ARTICLE 27 DISCIPLINE

27.1 The Employer will not discipline any permanent employee without just cause.

Joint Exhibit (Ex.) 1.

IV. FACTUAL SUMMARY

The ESD contracts with the Washington Department of Corrections (DOC) to provide pre-employment competencies to inmates. Employer Ex. 2. Basically, ESD personnel help inmates get ready to seek employment. ESD receives compensation from DOC for these services through periodic interagency agreements. Employer Ex. 2; Tr. 13, 16.

The ESD hired Grievant in December 2005¹ as a WorkSource Specialist 4. Maxwell's job was to provide classes ("Job Hunter" and "Getting it Right") to inmates located in the correctional facility on McNeil Island. Transportation to and from McNeil Island is by boat at scheduled times. During the time of his employment, Grievant was the only ESD employee at the site; other personnel there were employed by the DOC. About the same time Grievant was hired, the ESD hired two other employees as WorkSource Specialist 4's to perform the same work as Maxwell at other correctional facilities.

Terry Weber, Program Coordinator 3, was Grievant's immediate supervisor. Maxwell maintained contact with Weber typically via email and sometimes by telephone conference. A DOC manager supervised Maxwell on-site at the McNeil Island facility.

Weber became Program Coordinator 3 about a month before Grievant was hired. Weber reported that when he, Maxwell and other WorkSource Specialists were hired, their positions were temporary. According to Weber, Maxwell's position was advertised as a non-permanent position. Weber described all of their jobs, his own included, as "temporary project" positions. Tr. 14. Weber understood that they had little job security; with only 24 hours notice necessary prior to job termination.

On August 10, 2006, Maxwell received a document titled Performance and Development Plan (PDP). Tr. 64; Union Ex. 5. This 3-page document describes Grievant's position and how it is linked to the mission of the ESD. The document

¹ The Union references Grievant's hire date as January 2006. Whether Grievant was hired in December 2005 or January 2006 is not critical to my decision.

has five designated parts: (1) performance expectations, (2) training and development needs/opportunities, (3) organizational support, (4) interim reviews and (5) performance feedback. The first two parts of this document have written commentary within a designated area; the three later parts do not.

Weber filled out the commentary on this PDP, which was his first. He checked a box on the form that says “trial service.” Weber believed this meant there was a six-month trial service for a non-permanent position. Weber and Maxwell signed the bottom of page two which acknowledged that performance expectations and training and development needs had been discussed. The third page, designated for performance feedback (which has no written comments) is not signed by an evaluator or Grievant, but is signed at the bottom by reviewer Debra Latimer with the written comment “[t]his is a trial service evaluation.” Union Ex. 5.

Michelle Castanedo is the Deputy Assistant Commissioner for the HR Division. In this capacity, she is the chief HR person at ESD. She has worked there for two years and two months. According to Castanedo, a PDP tells employees what their job is—their performance expectations. It is given to permanent and non-permanent employees alike. Part 5 is the evaluation piece. This particular PDP for Maxwell was not an evaluation because Part 5 was not filled out and there was no employee signature in the designated area that indicates performance was discussed with Grievant. Tr. 84; Union Ex., p. 3.

Castanedo described that PDP’s are filled out and given to employees in phases. Grievant’s August 2006 PDP was a position description that told

Grievant of the Employer's expectations for his job. In Castanedo's opinion, despite Latimer's written comment on the last page, this PDP was not a trial service evaluation. Tr. 85.

In the summer of 2007, a new ESD Director, James Walker, arrived. Walker made a concentrated effort to turn the temporary ESD jobs to permanent ones.

Weber reported that Maxwell was notified he was hired to a temporary project; and that Grievant learned about the 2007 efforts to convert their jobs to permanent ones via monthly telephone conferences held with staff. Weber remembers Walker telling staff of his efforts to convert their positions from temporary project to permanent project positions during such conferences. Tr. 18.

Grievant denies being told that he was working on a temporary project. Maxwell remembers being called by another Coordinator 3 (not Weber) and told he was hired subject to a background check. He started work about two days later. Grievant did not receive written notification about his appointment/position.

Grievant reported that he participated in monthly staff telephone conferences when he could; but at times he could not. Sometimes he did not participate due to his transport to work by boat during the time of the call. On other occasions, there were problems with his phone connection. When he did participate, Grievant denies being told about any changes to the status of his employment. To the extent necessary, the testimonial differences between Weber and Grievant will be discussed later in this decision.

Eric Kindvall currently is Director of Program and Operations for the Washington State Service Corps. He previously held the position of a Human Resource Consultant 4 (HR Consultant). As a HR Consultant, Kindvall was responsible for providing consulting services to Offender Services of ESD. He began this job at the end of November or early December of 2007. Kindvall replaced Tammy Crawford who left the HR Consultant position for another job.

In early December of 2007, Kindvall found an Employee Personnel Recommendation form that indicated a conversion of Maxwell's WorkSource Specialist 4 position to a permanent project position. Employer Ex. 3. At that time, Kindvall took the form to the position manager so that the conversion would be entered into the HR administrative system and officially processed. Tr. 33. Kindvall explained that although the administrative processing had not been done when Kindvall found the form, the approval date of the conversion was August 16, 2007 as shown on the form and by Crawford's authorizing HRM signature. With Kindvall's follow-up actions, the August 16, 2007 effective date was entered into the administrative system.

When Kindvall found the conversion form for Grievant, he also found similar conversion forms for the two WorkSource Specialist employees working at other correctional facilities. He ensured that these forms were entered into the administrative system as well with the same effective date as Grievant's. Tr. 35, 39.

According to Kindvall, the August 16, 2007 conversion initiated a six-month minimum probationary period for Grievant and for the other two ESD

employees. Castanedo confirmed Kindvall's testimony about the effective date of the conversion. She also identified her own initials below the authorizing signature of Crawford's on Grievant's conversion form with the note "Okay" and the date of August 18, 2007. Employer Ex. 3/Union Ex. 4; Tr. 87.

According to Weber, there were performance issues with Grievant that Weber reported to his supervisors.² Tr. 76. By letter dated February 6, 2008, the Employer notified Maxwell that his probationary appointment was being terminated as of February 6, 2008. Kindvall drafted the letter which was signed by Assistant Commissioner of the WorkSource Operations Division. The letter advises that pursuant to the Collective Bargaining Agreement (Article 4.5.A.2) probationary separations are not grievable. Employer Ex. 5; Union Ex. 2.

Grievant was surprised to receive the termination letter. He did not believe he was still on probation after being employed for two years. Tr. 66.

On February 20, 2008, the Union filed a grievance on behalf of Maxwell alleging that Grievant was not in probationary status and that the Employer violated Article 4.3, 4.5 and Article 27.1 of the parties' Collective Bargaining Agreement. The grievance requests that the Employer rescind Maxwell's termination letter, reinstate him to his former position and make him whole for all lost wages and benefits. Union Ex. 3.

The ESD denied the Union's grievance on the grounds that Grievant was still probationary as of the date of his termination and that his separation is not subject to the grievance procedure. Employer Ex. 6.

² The limited issue before me concerns whether or not Grievant was a probationary employee at the time of his termination. I do not address or make findings regarding any alleged performance issues.

Later, by letters dated March 26, 2008, Kindvall notified the other two WorkSource Specialists who were converted to permanent status on August 16, 2007, that they had successfully completed their probationary periods. Employer Ex. 7.

V. Parties' Positions

A. Union

Grievant was not a probationary employee and was terminated without just cause. The Employer failed to document that Maxwell's hire was anything other than the status quo—an appointment to a permanent position.

Permanent status is obtained under the Collective Bargaining Agreement after employees serve a sixth-month probationary period (unless extended to no longer than twelve months.) Because Grievant was hired into a permanent position, he could have been a probationary employee at most up to the end of 2006.

Grievant received an August 2006 PDP that indicated he was "trial service" status. This is the only example of Maxwell being put on notice that he was anything other than permanent. Even so, a trial service period would last six months and could not exceed 12 months. He still would have achieved permanent status any time after August, 2007 and had the right to file a grievance. The trial service designation further led Maxwell to believe he was in a permanent, as opposed to project, position. Kindvall testified that Grievant would not be in trial service if he was a non-permanent employee.

The CBA allows for project positions. Still, the Employer did not provide Grievant with written notification that he was in project employment as required by Article 4.4(D) (1) of the Agreement. Either the Employer violated this provision or Maxwell was not hired as a project employee.

Grievant testified he did not receive a copy of the Employer's contract with DOC. Even if he had, it does not notify Maxwell that his employment status would change subject to the contract and the contract does not contain any provision with regard to the status of ESD employees. There were no other indicators that Grievant's employment was being renewed on a yearly basis.

Although Maxwell had no notification or reason to believe he was a probationary employee after he worked for ESD for two years, even if he was, the Employer still violated the CBA by terminating him. The Agreement indicates that when the Employer converts a project appointment into a permanent position, employees will serve a probationary or trial service period. Maxwell, however, was never notified of this conversion and could not testify about when the change might have occurred.

The Employee Personnel Recommendation form (Union Ex. 4; Employer Ex. 3) which purports to show a conversion is incomprehensible because it does not give a clear conversion date. The document further lacks credibility. It incorrectly indicates dual-language pay for the position and Kindvall, having found lost paperwork, decided arbitrarily to make permanent status effective on August 16, 2007. The Employer's lack of reasonable explanation and failure to

maintain adequate chain of custody of the document is unacceptable and caused great harm to Grievant.

Even if the conversion form was effective, it should have been effective when the Hiring Authority signed it (July 25, 2007) or when it was received by HR (August 3, 2007). Then Maxwell would have completed his probationary period prior to February 6, 2008.

Maxwell was not hired as a non-permanent employee under the terms of the CBA. If he was, however, the Employer still violated the CBA by terminating him. Maxwell was not hired for any of the reasons designated by the CBA for non-permanent employees and such appointments are not to exceed 12 months. Maxwell was hired in January 2006. If converted to a permanent appointment after one year as required by the CBA, he would have been done with probationary status by December 2007.

The Employer has tried to create an employment status wholly inconsistent with the CBA, and in doing so, has caused Maxwell to suffer a very serious consequence. While the Union carries the burden in contract violation cases, the Employer here can put forth no reasonable explanation for its actions. There is no way the Employer could have Maxwell in a probationary status for two years.

B. The Employer

Grievant was hired into a non-permanent project position under Articles 4.4(A) 1-4 and 4.4(D) 1-5. Weber testified without contradiction that Maxwell's position was advertised as a non-permanent position and explained the "project"

nature of it. ESD hires WorkForce Specialists to fill positions made possible by an interagency agreement with DOC. The ability to fund such positions is dependent upon DOC's decision on an annual basis. Weber was hired under the same program shortly before Maxwell.

Maxwell was hired in December 2005. His non-permanent position continued until Walker decided to convert non-permanent employees having learned from DOC the program would continue for another year. This decision was communicated to all affected employees through monthly telephone conferences.

The most important document in this case is perhaps Employer Ex. 3 (Union Ex. 4) which shows the change of Maxwell's classification from non-permanent to permanent. The action was effective August 16, 2007 after Walker's recommendation in July, 2007. The effective date is critical because it triggers the contractual six-month probationary or trial service period. This means Maxwell was inside the probationary period at the time of his termination on February 6, 2008.

At hearing the Union suggested the new probationary period was "pretextual." In order for such a theory to hold true there would have had to have been a conspiracy among numerous people which is not shown by the evidence. The pretext theory also is rebutted by the testimony of Kindvall and Castanedo.

The clear evidence supports the more reasonable view that Employer Ex. 3 is what it purports to be—a personnel action form proposed by Walker and approved by Crawford in the summer of 2007. It got lost in the shuffle of

Crawford's departure and until Kindvall's arrival as HR consultant to the WorkSource program. This is consistent with Kindvall's testimony that a number of similar actions were taken with respect to other WorkSource employees; and with Weber's testimony of staff telephone conferences in the summer of 2007. There was no trickery or deceit here; there was just somewhat less-than-perfect process of implementing personnel actions.

Maxwell was in fact converted from non-permanent to permanent project status on August 16, 2007 which triggered a six-month probationary period. When events in January 2008 occurred which gave ESD reason to separate him, there was no need to do anything other than a probationary separation. Under Article 4.5.A.2 of the CBA, such separations are not subject to the grievance procedure in Article 29. This case should be dismissed.

VI. OPINION

The Arbitrator concludes the separation of Grady Maxwell from his employment with the Employment Security Department was a probationary separation. The following is my reasoning.

In grievance arbitration, an arbitrator's authority is defined by and limited to matters the parties have agreed may be submitted to arbitration. Here, the parties have submitted a limited, threshold contract interpretation question involving Grievant's employment status: whether he was a probationary or permanent ESD employee upon his separation from employment.

The basic goal of contract interpretation is to determine and give effect to the intent of the parties as expressed in the written contract. Arbitrators are

controlled in the first instance by the contract language. Arbitrators look to bargaining history, past practice and other extrinsic evidence as necessary if the contract language is unclear. Elkouri & Elkouri, *How Arbitration Works*, 448 (6th Ed. 2003). The Union bears the burden of establishing a contract violation by a preponderance of the evidence. My decision in this case turns on express contract language of Article 4 when considered as a whole and as applied to the particular facts and circumstances.

The first section of Article 4, Article 4.1, describes generally the authority of the Employer in hiring and making appointments. Article 4.1 provides that the Employer will determine when a position is to be filled and the type of appointment to be used. Subsequent sections detail matters such as permanent status, types of appointments, and probationary and trial service review periods.

Article 4.4 details two types of appointment or positions: non-permanent and project. In this case, the Employer contends that Grievant's initial appointment was both a non-permanent and project position. The Union argues that contrary to the Employer's claim, Grievant was hired into a permanent appointment that carried a probationary period he completed before his termination. The evidence convinces me Grievant was hired as a non-permanent (or temporary) project employee.

Weber testified that Grievant's position was advertised as non-permanent. He explained the position was a temporary project position based upon the inter-agency contract with DOC, which was of finite duration. The Employer submitted an example of the interagency agreement between ESD and DOC for the time period October 1, 2006 through June 30, 2007. Employer Ex. 2.

Weber reported that in addition to Grievant, Weber, himself, was hired into the same temporary project status as were other WorkSource Specialists. Weber's testimony was supported by Kindvall. Documents prepared by Kindvall show that two WorkSource Specialists served a probationary period at the same time as Grievant. Employer Ex. 7.

In addition to the above evidence, the ESD submitted the Employee Personnel Recommendation form that explicitly shows conversion of Maxwell's non-permanent position to a permanent project position with the approved effective date of August 16, 2007. Kindvall explained it was not entered into the HR administrative system until December 2007 when he found it, but the August conversion action was still effective as indicated on the form. Kindvall's testimony was confirmed by Castanedo's testimony.

There is no basis in the record to doubt the testimony of Weber, Kindvall or Castanedo; nor is there a sound reason to question the validity of supporting documentation. This evidence shows that Grievant was not hired into a permanent position; but rather a non-permanent, project position.

The Union argues that the conversion form is incomprehensible because it does not give a clear conversion date. WFSE also points out that the form incorrectly indicates dual-language pay for the position and argues Kindvall arbitrarily set the August 16, 2007 effective date when he found the form months later. According to the Union, the Employer failed to provide a reasonable explanation or maintain an adequate chain of command of the document.

I disagree with the Union. Employer Ex. 3/Union Ex. 4 plainly identifies in a bold box the “Approved Effective Date” of the conversion to a permanent project position as August 16, 2007.

To be sure, there are a number of dates on the form. For example, there is a typed proposed effective date of 6/25/07 at the top of the form that is crossed out by a line through it. There also are hand-written dates that indicate: when Walker signed the change from “NP” to “Perm Proj” (July 25, 2007); when the form was received by HR (August 3, 2007); Castanedo’s “okay” (August 18, 2007); and when it was received in ESD payroll (December 21, 2007). All of these dates are consistent with the testimony of Weber, Kindvall and Castanedo about the sequence of events that occurred during this time period. These dates do not make the document unclear as to the effective date for the conversion because August 16, 2007 is clearly identified as the only effective date.

Near the middle of the form, there is a reference to “Dual-language” and then to the right of this reference there are boxes to indicate “Full-time” or “Part-time”. The box for “Full-time” is checked. The form is unclear about the relationship, if any, between dual-language and full-time. Most importantly, on its face, this part of the form has no bearing on the effective date.

I also disagree with the Union that the Employer failed to provide an adequate explanation for the different dates on the form and that ESD failed to maintain a proper documentary chain of command. As described above, I find the explanation of Kindvall, as confirmed by Castanedo, as credible and plausible.

The Union contends that the form should have been effective when the hiring authority, Walker, signed it on July 25, 2007 or when it was received by HR on August 3, 2007. According to WFSE, then Maxwell would have completed his probationary period prior to February 6, 2008.

There is no basis in the record to show that the Employer used anything other than its usual procedures for effecting a conversion. There is no indication that staff involved falsified the conversion document, lacked good faith or treated Grievant differently from others similarly situated. To the contrary, the evidence shows that two other WorkSource Specialists were converted to permanent status on the same date as Grievant. I conclude there is no evidentiary reason to disregard the express effective date for the conversion to permanent project status; that is, August 16, 2007.

The Union argues that Grievant received an August 2006 PDP that indicated he was "trial service" status and that this document is the only example of Maxwell being placed on notice that he was anything other than permanent. WFSE contends that based upon this document Grievant would have achieved permanent status any time after August, 2007 and had the right to file a grievance.

The Union is correct that the August 2006 PDP indicates that it is a trial service PDP. Nevertheless, Weber credibly testified that he believed at the time there was a six-month trial service period for a non-permanent position. This was the first PDP he had filled out.

Also, as Castanedo testified, the PDP form is not entirely filled out. Part 5, which is the performance feedback portion of the form, is blank and not signed by the evaluator or Grievant. Castanedo's explanation that the PDP is given to employees to provide them with their performance expectations—and that this was not an evaluation—is plausible and consistent with the absence of the any evaluative commentary in the designated performance feedback section.

I do not find the trial service comments on the PDP sufficient to overcome the other evidence, described above, that shows Grievant gained permanent project status effective August 16, 2007.

The Union claims that the trial service designation on the PDP led Maxwell to believe he was in a permanent, as opposed to project, position. In its post-hearing brief, WFSE also argues that while the CBA allows for project positions, the Employer did not provide Grievant with written notification that he was in project employment as required by Article 4.4.D.1 of the CBA. Further, WFSE contends Grievant received no notification of the conversion of his position; Grievant testified he did not receive a copy of the Employer's contract with DOC; and even if he had, it does not notify Maxwell of his employment status and that his status would change.

All of these Union arguments concern either the Employer's failure to notify, or adequately notify, Grievant of his status as anything other than a permanent employee—especially after he worked for the Employer for two years.

I agree with the Union that the record shows that the Employer did a poor job of notifying Grievant (at least in writing) of his employment status. Weber

testified that Grievant was told of his status verbally; Grievant denies that he was or does not recall it. I believe both Weber and Grievant were sincere in their testimony. For reasons explained below, their differing testimony does not influence my decision.

The fatal problem with all of the Union's notice arguments lies with the language contained in Article 4, read together and as a whole.

Pursuant to Article 4.1, the Employer is the party that holds the authority to determine the type of appointment at hire. Under Article 4.4, if the Employer decides to convert a non-permanent or project position to a permanent appointment, the contract explicitly recognizes the requirement of a trial or probationary period which commences upon the Employer's conversion of the position. Article 4.4.A.3 provides:

*The Employer may convert a non-permanent appointment into a permanent appointment and the employee will serve a probationary or trial service period. * * **
(Emphasis added.)

Similarly, Article 4.4 D. regarding project employment states:

2. Employees who have entered into project employment without previously attaining permanent status will serve a probationary period. Employees will gain permanent project status upon successful completion of their probationary period.
4. *When the Employer converts a project appointment into a permanent appointment, the employee will serve a probationary or trial service period.*
(Emphasis added.)

Article 4.5 concerning probationary periods reiterates the above requirement upon a conversion or change into permanent status:

If the Employer converts the status of a non-permanent appointment to a permanent appointment, the incumbent employee will serve a probationary period. However, the Employer may credit time worked in the non-permanent appointment toward completion of the probationary period as defined in Subsection 4.5.A. (Emphasis added.)

Joint Ex. 1; Article 4.5. A

As previously explained, I am convinced the Employer in exercising its appointment authority, hired Grievant to a non-permanent project position. The Employer then, again exercising its appointment authority, converted Grievant's status to a permanent project position effective August 16, 2007. Any notice deficiency of the Employer concerning Grievant's employment status—written or verbal—is not a proper basis for the Arbitrator to change the date of Grievant's permanent status. Such an act would be remedial—after-the-fact—not because I concluded that Grievant was hired as a permanent employee in the first place.

The conclusion that a notice deficiency is not a proper basis to award permanent status is buttressed by additional contract language contained in Article 4.5. Article 4.5.A.2 provides:

The Employer may separate a probationary employee at any time during the probationary period. The Employer will provide the employee five (5) working days' written notice prior to the effective date of the separation. However, if the Employer fails to provide five (5) working days' notice, the separation will stand and the employee will be entitled to payment of salary up to five (5) working days, which the employee would have worked had notice been given. Under no circumstances will notice deficiencies result in an employee gaining permanent status. The separation of an employee will not be subject to the grievance procedure in Article 29. (Emphasis added.)

Joint Ex. 1, Article 4.5. A. 2.

While the intended reach of the above italicized language is not altogether clear, this language indicates that notice deficiencies are not to be used as a remedy to grant permanent status.

WFSE contends Maxwell was not hired for any of the reasons designated by the CBA for non-permanent employees and his appointment exceeded 12 months which also is inconsistent with the contractual language concerning non-permanent appointments. The Union also argues that the Employer has attempted to create an employment status wholly inconsistent with the CBA, and in doing so, has caused Maxwell to suffer a very serious consequence.

The Union is correct that the evidentiary record does not identify a reason for Maxwell's appointment that falls within the non-permanent appointment article of the CBA. The CBA provides that the Employer "may make non-permanent appointments to fill in for the absence of a permanent employee, during a workload peak, while recruitment is being conducted, or to reduce the possible effects of a layoff." Article 4.4.A.1.

Still, as discussed above, the undisputed evidence shows that Grievant's initial appointment was not simply a non-permanent appointment—but a project position based upon interagency contract. The parties' CBA expressly recognizes that the Employer may make such project appointments.

The testimonial evidence (Weber) and documentary evidence (Employer Ex. 3/Union Ex. 4) indicate that the ESD did not utilize the appointment provisions of the CBA in an "either/or" way. Rather, the Employer approached Grievant's initial appointment as a hybrid of Article 4.4.D.A (Non-permanent) and

Article 4.4 D.D (Project Employment). The Employer's actions here do not neatly fit into either of the CBA's appointment provisions without problem. Yet, there is no language that expressly prohibits "temporary" project appointments. The Agreement is unclear regarding how the appointment provisions are to interact or relate, if at all. It is beyond my authority to add to, subtract from, or modify the Agreement. Article 29.3.D.1.a.

To summarize, the CBA is clear in these important respects: (1) the Employer holds the authority to make appointments, (2) the Employer may make non-permanent appointments and/or project positions, and (3) with respect to both non-permanent and project employment, when a position is converted into a permanent appointment, the employee will serve a probationary period.

Maxwell's position was converted from non-permanent to a permanent project appointment effective August 16, 2007. After-the-fact and as a remedy, I do not find possible notice deficiencies as an appropriate basis to deem Grievant's position as a permanent appointment. Based upon the totality of Article 4 and the facts at hand, I cannot say the Employer hired Grievant to a permanent position—and that is the limited issue before me.

For these reasons, I must conclude Grievant's separation on February 6, 2008 was a probationary separation. In arriving at this conclusion, I have considered all of the facts, arguments and authorities submitted by the parties even if not specifically mentioned in my decision.

The Union's grievance will be denied and dismissed. Pursuant to Article 29.3 E.1 of the CBA, the expenses and fees of the Arbitrator will be shared equally by the parties.

