

IN THE MATTER OF THE ARBITRATION	)	ARBITRATOR'S
	)	
BETWEEN	)	OPINION
	)	
STATE OF WASHINGTON	)	AND
DEPARTMENT OF CORRECTIONS	)	
	)	AWARD
"DOC" OR "THE EMPLOYER"	)	
	)	
AND	)	
	)	
TEAMSTERS LOCAL UNION NUMBER 117	)	
	)	<b>***GRIEVANT REDACTED***</b>
"LOCAL 117" OR "THE UNION"	)	DISCHARGE GRIEVANCE

HEARING: November 8, 2006  
Spokane, Washington

BRIEFS: Employer's received: December 18, 2006  
Union's received: December 18, 2006

HEARING CLOSED: December 18, 2006

ARBITRATOR: Timothy D.W. Williams  
2700 Fourth Avenue, Suite 305  
Seattle, Washington 98121

REPRESENTING THE EMPLOYER:  
Angela Roberts, Labor Relations Consultant  
Maggie Miller-Stout, Superintendent  
J'Anna Young, Human Resource Consultant  
John Whitehead, Human Resource Manager

REPRESENTING THE UNION:  
Spencer Nathan Thal, General Counsel  
**\*\*\*GRIEVANT REDACTED\*\*\***, Grievant  
Joseph Kuhn, Business Representative

APPEARING AS WITNESSES FOR THE EMPLOYER:

Catarina Erickson, Sergeant  
Richard Weson, Correctional Unit Supervisor  
Maggie Miller-Stoutt, Superintendent

APPEARING AS WITNESSES FOR THE UNION:

Mary Girard, Correctional Officer  
Darren Kelly, Response & Management Officer  
**\*\*\*GRIEVANT REDACTED\*\*\***, Grievant  
Joseph Kuhn, Business Representative

**EXHIBITS**

**Joint**

1. Collective Bargaining Agreement, 2005-2007
2. Grievance statement, 10/11/05
3. Letter of discharge, 10/4/05
4. Request for Secretary review of probationary separation, 10/11/05
5. Probationary Separation Review, 12/27/05

**Employer**

1. Letter RE: C/O **\*\*\*GRIEVANT REDACTED\*\*\***, 8/9/05
2. Procedural Objection to Grievance Panel, 11/9/05
3. Opposition to Procedural Objection, 11/10/05
4. Grievance Resolution Panel findings, 12/28/05

**Union**

1. Letter of recommendation from Sgt. Randy Bolinger, 12/10/04
2. Recommendation to Interview Panel from Sgt. Michael Azzinnaro, 10/15/04
3. Memo RE: Officer D. Brock, 10/26/04

4. Grievant's statement detailing incidents occurring at the end of March, 2005
5. E-mail from **\*\*\*GRIEVANT REDACTED\*\*\*** to Catarina Erickson, 5/23/05
6. E-mail from **\*\*\*GRIEVANT REDACTED\*\*\*** to Catarina Erickson with attached note, 6/18/05
7. E-mail from **\*\*\*GRIEVANT REDACTED\*\*\*** to Jill Hanson, 6/15/05
8. E-mail from Jill Hanson to **\*\*\*GRIEVANT REDACTED\*\*\***, 6/17/05
9. Grievant's statement detailing incidents occurring 6/17/05
10. E-mail from **\*\*\*GRIEVANT REDACTED\*\*\*** to Catarina Erickson, 6/18/05
11. E-mail from **\*\*\*GRIEVANT REDACTED\*\*\*** to Catarina Erickson, 6/20/05
12. E-mail from **\*\*\*GRIEVANT REDACTED\*\*\*** to Catarina Erickson, 6/22/05
13. Grievant's statement detailing incidents occurring 6/24/05
14. Employee Development and Performance Plan for **\*\*\*GRIEVANT REDACTED\*\*\***, 6/28/05
15. Grievant's statement detailing incidents occurring 8/5/05
16. Grievant's statement detailing incidents occurring 8/10/05
17. Temporary Assignment Change Notice, 8/16/05
18. Grievant's statement detailing incidents occurring 9/28/05
19. E-mail chain terminating 10/4/05
20. Grievant's statement detailing incidents occurring 10/4/05
21. Grievant's statement detailing meeting with Maggie Miller-Stout and Darin Kelly, occurring 10/04/05
22. Recommendation from David Jansen, 10/11/05
23. Memo of support signed by staff
24. Table of grievance statistics
25. Joseph Kuhn's notes RE: phone interview, 3/21/06
26. Catarina Erickson's timeline of incidents with Grievant from 4/12/05-9/21/05

#### BACKGROUND

The Washington State Department of Corrections (hereafter "DOC" or "the Employer") and the International Brotherhood of

Teamsters, Local 117 (hereafter "Local 117" or "the Union") agreed to submit a dispute to arbitration. A hearing was held before Arbitrator Timothy D.W. Williams in Spokane, Washington on November 8, 2006. The issue of arbitrability was raised by the Employer at the filing of the grievance and continuously during the processing of the grievance. Article 9.5 of the Parties collective bargaining agreement (CBA) provides the following instructions to the arbitrator in the event that the question of arbitrability is raised:

The arbitrator will hear arguments on and decide issues of arbitrability before the first day of arbitration at a time convenient for the parties, immediately prior to hearing the case on its merits or as part of the entire hearing and decision-making process.

In the instant case, the Arbitrator directed the Parties to present their case on arbitrability and the merits as part of the same proceeding. The Arbitrator further indicated that he would bifurcate his decision the first part of which will deal with the question of arbitrability and, should the matter be found arbitrable, the second part will focus on the merits of the case. With this understanding, the hearing proceeded.

At the hearing the parties had full opportunity to make opening statements, examine and cross examine sworn witnesses, introduce documents, and make arguments in support of their positions. The Arbitrator made an audio recording of the hearing, but informed the parties that the tape was intended as a part of his personal notes and should not be considered an

official transcript of the proceedings. As a courtesy, digital copies of the Arbitrator's recording were sent via e-mail to each party.

At the close of the hearing the parties were offered an opportunity to file post-hearing briefs. Both parties accepted and the briefs were timely received by the Arbitrator. Thus the award, in this case, is based on the evidence and argument presented during the hearing and on the arguments found in the written briefs.

#### **SUMMARY OF THE FACTS**

The Washington State Department of Corrections (hereafter "DOC" or "the Employer") and the International Brotherhood of Teamsters, Local 117 (hereafter "Local 117" or "the Union") are parties to a collective bargaining agreement effective from July 1, 2005 through June 30, 2007. The grievance in the instant dispute arose under and is subject to that agreement.

The Grievant was hired by the Employer initially as a part-time Correctional Officer in November, 2003. Following more than a year of service in this position, she applied for and received employment as a permanent Corrections Officer. She began her 12 month probationary service period in this capacity in January of 2005, assigned to R-unit under Correctional Sergeant Catarina Erickson, on the swing shift.

After a few months of employment, the Grievant received a performance evaluation that contained a statement she believed inappropriate, and she declined to participate in it on the advice of a Union shop steward. This evaluation was eventually completed. On June 15, 2005 the Grievant requested a transfer for an open position outside of R-unit. This request was denied on June 17 via e-mail from Jill Hanson, which noted "[y]our supervisor did not agree with your request to be permanently re-assigned to 2678" (Union Exhibit #8). On August 16, 2005 the Grievant was reassigned to the same shift as Sergeant Erickson.

Shortly thereafter, the Grievant put forth an overtime claim and brought Union representation to the meeting that followed. On October 4, 2005, the day following the meeting, the Grievant was issued a letter from Superintendent Maggie Miller-Stout informing her of her termination under Article 15.7 of the CBA.

The same day, Union business representative Joseph Kuhn issued on behalf of the Grievant a request for a review of her probationary separation (per Article 15.7.A.6 of the CBA) and a formal grievance (Grievance No. 70-05 AHCC), stating in pertinent part:

The Union protests Management allowing inappropriate items to be placed in [the Grievant's] supervisor's file. The Union also protests Management's retaliation against [the Grievant] after involving the union in her attempt to resolve issues with her supervisor.

(Joint Exhibit #2)

An investigation of the separation was held by Lois Bergstrom, Regional HR Manager for the Employer, and a report upholding the action was issued on December 27, 2005.

The Employer responded to the grievance with a formal procedural objection to their Grievance Resolution Panel dated November 9, 2005, which stated in pertinent part:

The grievant failed to abide by all defined procedural requirements in filing this grievance. Additionally, the probationary separation is not subject to the grievance procedure and is being reviewed through the Probationary Separation Review process. Therefore this procedural objection should be upheld and the grievance considered waived.

(Employer's Exhibit #2)

The Union responded with their own opposition to the procedural objection dated November 10, 2005, in which they claimed the right to a 21 day period of time following separation from employment in which the Grievant can properly bring forth a grievance.

The grievance was not processed through the steps of the grievance procedure due to the Employer's procedural objection. However, the parties remained unable to resolve the matter and the grievance was submitted to arbitration.

#### **STATEMENT OF THE ISSUE**

The question of arbitrability was raised by the Employer and can be stated as follows:

1. Is grievance No. 70-05 AHCC properly before the Arbitrator?

The parties stipulated to the following additional issue statements:

2. Did the Employer violate Article 2.6 of the CBA when it separated **\*\*\*GRIEVANT REDACTED\*\*\*** from employment?

3. If so, what is the appropriate remedy?

**APPLICABLE CONTRACT LANGUAGE**

COLLECTIVE BARGAINING AGREEMENT, 2005-2007

\* \* \* \* \*

**ARTICLE 2**

**UNION RECOGNITION, UNION SECURITY, DUES DEDUCTION**

\* \* \* \* \*

**2.6 Non Discrimination**

There will be no discrimination against any employee because of lawful Union membership activity or status, or non-membership activity or status.

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**ARTICLE 9**

**GRIEVANCE PROCEDURE**

\* \* \* \* \*

**9.5 Authority of the Arbitrator**

The arbitrator will have the authority to interpret the provisions of this Agreement to the extent necessary to render a decision on the case being heard. The arbitrator will have no authority to add to, subtract from, or modify any of the provisions of this agreement, nor will the Arbitrator make any decision that would result in a violation of this Agreement. The arbitrator will be limited in his or her decision to the grievance issues(s) set forth in the original grievance unless the parties agree to modify it. The Arbitrator will not have the

authority to make any award that provides an employee with compensation greater than would have resulted had there been no violation of the Agreement. The arbitrator will hear arguments on and decide issues of arbitrability before the first day of arbitration at a time convenient for the parties, immediately prior to hearing the case on its merits or as part of the entire hearing and decision-making process. If the issue of arbitrability is argued prior to the first day of arbitration it may be argued in writing or by telephone, at the discretion of the arbitrator. Although the decision may be made orally, it will be put in writing and provided to the parties. The decision of the Arbitrator will be final and binding upon the Union, the Employer and the grievant.

**9.6 Arbitration Costs**

The expenses and fees of the arbitrator, and the cost (if any) of the hearing room will be shared equally by the parties. If the arbitration hearing is postponed or cancelled because of one party, that party will bear the cost of the postponement or cancellation. The costs of any mutually agreed upon postponements or cancellations will be shared equally by the parties. If either party desires a record of the arbitration, a court reporter may be used. If that party purchases a transcript, a copy will be provided to the arbitrator free of charge. If the other party desires a copy of the transcript, it will pay for half of the costs of the court reporting fee, the original transcript and the arbitrator's copy. Each party is responsible for the costs of its representatives and witnesses. Grievants and their witnesses will not be paid for preparation for, travel to or from, or participation in arbitration hearings, but may use leave for such activities.

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**ARTICLE 15  
HIRING AND APPOINTING**

**15.15 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.

\* \* \* \* \*

**15.17 Review Periods**

A. Probationary Period

1. Length of Probationary Period  
Every part-time and full-time employee, following his or her initial appointment to a permanent position will serve a probationary period. Employees initially appointed into the following job classifications will serve a twelve (12) month probationary period due to the need to complete job-specific training programs:
  - a. Correctional Officer 1 and 2;
  - b. Correctional Counselors 1, 2 and 3;
  - c. Correctional Mental Health Counselors 1, 2 and 3;
  - d. Classification Counselors 1, 2 and 3.All other newly hired employees will serve a six (6) month probationary period.
2. Calculation of Probationary Period  
The probationary period will begin on the first day of an employee's probationary appointment. An employee who transfers or is promoted prior to completing his or her initial probationary period will serve a new probationary period. The Appointing Authority may grant day-for-day credit for time already served in probationary status.
3. Conversion of Non-Permanent Appointments  
If an employee in a non-permanent appointment is subsequently appointed permanently to the same or similar position, the Employee may count time worked in the non-permanent appointment towards the probationary period for the permanent position.
4. Extension of Probationary Period  
The Employer may extend an employee's probationary period on a day-for-day basis for any day(s) that the employee is on leave without pay or shared leave except for leave taken for military service.
5. Separation  
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, in the Employer

fails to provide five (5) working days notice, the separation will stand and the employee will be entitled to payment of salary for five (5) working days, which time the employee would have worked had notice been given. Five-day notice deficiencies will not result in an employee gaining permanent status.

6. Separation Review

The separation of an employee will not be subject to the grievance procedure in Article 9. However, the employee may request and will receive a review of the separation by the Secretary or designee. Such review must be requested within fourteen (14) calendar days from the effective date of the written separation notice. This request, however, will not act as a suspension of the designated separation date.

**POSITION OF THE UNION**

The Union begins its argument by asserting the arbitrability of its grievance. The explicit language of Article 2.6 of the CBA bans "discrimination against any employee because of lawful Union membership activity or status, or non-membership activity or status" (Joint Exhibit #1). As probationary employees are covered under other articles of the CBA, they cannot be argued to be excluded from this bar on Union discrimination. Moreover, merely because the probationary employee is not covered by the just cause provision in matters of discharge, that does not absolve the Employer of the need to satisfy Article 2.6. Though there is a means for contesting probationary separations outside of the grievance procedure, the separate issue of discriminatory violation of the contract remains an arbitrable matter, and thus

the grievance is properly before the Arbitrator. To this point, the statutory public policy interest in resolving contract disputes through arbitration is illustrated via several court decisions, both in Washington courts and in the United States Supreme Court. As there is no language barring the arbitration of cases of alleged Union discrimination, the presumption of arbitrability must be upheld.

Furthermore, to interpret the protections of Article 2.6 as inapplicable to the probationary employee would be dangerous, as it would 1) weaken the resolve of any prospective Union members among the probationary workers, due to the fact that they could be discriminated against based upon their activity with impunity and 2) render the bargained language of the Article meaningless in some respect.

Upon the specific allegations of violation, the Union remarks upon the mass of evidence pointing to the Grievant's protected Union activity as the true motivation behind her separation. She was denied any explanation for the separation, an action which belies the Employer's later claims of insufficient job performance as grounds. Indeed, no compelling evidence was brought forth save for the testimony of the Superintendent that the Grievant's work was anything but exemplary. To the contrary, the Union has brought forth several exhibits which testify to the esteem with which she was held by her peers and many supervisors.

Also giving credence to the theory of Union discrimination is the fact that this separation was handed down one day after the Grievant engaged in protected Union activity by reviewing her file and putting forth an overtime claim, both with Union representation. Previous legal authority is cited to show that the Union's burden in proving Union discrimination rests only on showing that "union animus was a substantial motivating factor in the employer's decision to take adverse action against the employee." Further authority establishes that the Union need only prove that discrimination was a cause of separation, not the sole cause. No mitigating evidence is provided by the Employer against this beyond the hearsay testimony of Superintendent Miller-Stout.

Beyond the issues of timing and of a lack of evidence for poor performance on the part of the Grievant raised above, argues the Union, the evidence points to a clear motivation for the Employer to act based on the Grievant's Union activity. It has been demonstrated that the Grievant, in her Union-backed challenges to the management over a host of issues, faced an increasingly exasperated and hostile employer. Nor is the anti-Union sentiment localized upon the Grievant. Documentary evidence is introduced which shows the staggeringly disproportionate number of grievances filed at the specific facility in which the Grievant was employed, as well as testimonial evidence which details the poor reception received by

Union representatives by management in the course of their dealings. In fact, the Employer was found to have committed unfair labor practices during the time of the Grievant's separation from employment. This evidence, contends the Union, clearly shows that in an environment hostile to Union activity, the Grievant's protected actions provided the motivation for her eventual separation.

For the reasons listed above, the Union requests that the grievance be upheld and that the Grievant be reinstated in full and be made whole in every way. Furthermore, they ask that appropriate interest be applied to this award to compensate the Grievant for the loss of that money's use between the time of separation and the instatement of this award.

#### **POSITION OF THE EMPLOYER**

The Employer begins its argument by noting that the terms of the Collective Bargaining Agreement (CBA) specifically prohibit probationary employees from advancing the issue of their separation from employment to the grievance procedure. They argue that a separate process exists for such arguing such cases, and that the grievance procedure is not the appropriate (or bargained) arena to do so.

Furthermore, the language of the CBA is explicit in stating that the "Employer may separate a probationary employee at any

time during the probationary period." (Joint Exhibit #1, Article 15.7.A.5) No just cause provision is at play in the treatment of the probationary employee, as illustrated by the specific right of the Employer to separate the employee at any time and by the language of Article 8, which restricts the just cause requirement solely to permanent employees.

The Employer next notes that the general presumption of arbitrability is defeated, per Supreme Court decision, when a specific clause in the bargained contract language prohibits arbitration in a given situation. This language is present in the instant matter, as the Union was well aware. This is illustrated by both the fact that they chose to both follow the appropriate protocol by requesting a review of the separation and that they, with the Grievant, participated in this process even while they pressed forward on this improper grievance. The Employer notes that this process culminated in the decision of Ms. Lois Bergstrom that the separation was proper.

For the reasons above, the Employer asks that the Arbitrator find this grievance inarbitral, as the Union has already proceeded with this matter through the proper and bargained language of the CBA and been denied. To bring this grievance through the arbitration procedure when explicit language barring such an action is present in the CBA would constitute a substantial alteration of the terms of the contract on the part of the Arbitrator, which is also prohibited.

Leaving aside the issue of arbitrability, the Employer begins its defense against the substance of the grievance by placing the burden of proof upon the Union to show that Article 2.6 of the CBA was violated. As the party bringing forth claims of discrimination, they bear the charge of supporting those claims with evidence. It is the Employer's contention that no such evidence was offered, indeed, all the testimony to that effect amounted only to opinion and speculation.

The specific claim of Union animus on the part of the Employer in particular is unsupported by anything more compelling than personal opinion. The Union's witnesses differed substantially in their estimations of the size of the supposed grievance backlog between the Union and the Employer, while no credible evidence was supported to back either of these numbers.

The allegations of the filing of numerous Unfair Labor Practice complaints against the Employer are similarly unsubstantiated, as is the claim of a disproportionately high number of grievances against the Employer. The document introduced as Union Exhibit 24 is, the Employer argues, a weak piece of evidence lacking even the most basic forms of identification or citation. Upon cross-examination, the Union witness that produced the evidence was unable to explain any more specific information about the data.

Next, the Employer lays out precisely why the Grievant's separation was appropriate. In a correctional facility, teamwork

and communication are of the utmost importance. It is the Employer's contention that the Grievant was deficient in several necessary areas for successful employment; chief among these deficiencies were her poor relationship with her supervisor and her refusal to cooperate with the Employee Performance Evaluation. Indeed, testimony demonstrated that the Grievant had previously been recommended for dismissal in August of 2005. Ultimately, this recommendation was not carried out, based largely on the intervention of Sergeant Erickson, who believed that she could encourage the Grievant to amend her behavior. Sadly, even after being reassigned to work directly with Sergeant Erickson, the Grievant's performance and skills had not improved, thus she was separated from employment.

To the Union's anticipated claim that the Grievant was not properly allowed to review her supervisory file, the Employer affirms that there is no evidence to prove that that was the case. Despite claims to the contrary, testimonial and documentary evidence proves that the Grievant was approached by Sergeant Erickson for meetings. Both the Grievant and shop steward Darren Kelly offered conflicting testimony as to the dates upon which the Grievant viewed the file and the status and resolution of Mr. Kelly's separate grievance regarding the matter.

The Employer also notes that Mr. Kelly's testimony that his attempts to resolve the matter were met with a pre-termination

hearing is similarly unsupported by evidence. First, the grievance was filed on October 11, not the same day as testified; second, the meeting was not a pre-termination, as such a term implies that a just cause standard was present in the action. The meeting was simply to inform the Grievant of the separation... there was no "hearing" element.

Finally, the Employer points out that the contention that its actions were motivated by the Grievant's Union activity is baseless as well. Superintendent Miller-Stout's testimony explicitly that denies any ill will against the Union was present in her decision to separate the Grievant. She further testified that her extensive experience in the field gave her a particular respect for the importance of appropriate behavior and compliance with supervisory demands, especially in the work of a probationary employee. As the Grievant had been shown time and again to not express those qualities, her separation was justified.

For the reasons listed above, the Employer asks that the grievance be denied on the grounds that the Union has not met its burden in proving that the Employer exercised Union discrimination in separating the Grievant from employment.

## ANALYSIS

The Arbitrator's authority to resolve a grievance is derived from the parties' collective bargaining agreement (CBA) and the issue that is presented to him. The issues, as set forth earlier in this document include:

1. Is grievance No. 70-05 AHCC properly before the Arbitrator?
2. Did the Employer violate Article 2.6 of the CBA when it separated **\*\*\*GRIEVANT REDACTED\*\*\*** from employment?
3. If so, what is the appropriate remedy?

The Arbitrator begins his analysis of the issues in dispute by noting that the Employer, from the outset, has raised the question of arbitrability. The Arbitrator additionally notes that Article 9.5 of the Parties collective bargaining agreement (CBA) provides that the question of arbitrability may be decided by the Arbitrator prior to the hearing or as part of the decision following a hearing on both the arbitrability question and the merits of the case. In the instant case, the question of arbitrability was heard as part of the whole case and thus this analysis begins by looking specifically at arbitrability and proceeds to the merits only if the substance of the grievance is found to be arbitrable.

### Arbitrability

The Arbitrator begins the analysis of the Employer's contention that the decision to dismiss the Grievant, a

probationary employee, is not arbitrable by noting that there is substantial judicial and arbitral support for the position sometimes called *presumptive arbitrability* (see Elkouri and Elkouri, Sixth Edition, Pages 277 to 290). The doctrine of presumptive arbitrability simply states that any doubts over whether the matter is arbitrable should be resolved in favor of arbitration. Dismissal of the grievance without hearing and deciding the matter on its merits should occur only when it is absolutely clear that the parties have determined that a matter should not be arbitrated. This Arbitrator fully endorses this doctrine and the analysis for the instant case continues in light of it.

Since it is the Employer that questions the presumption of arbitrability, it carries the burden of proof on this matter. In response to this burden, the Employer points to the specific language related to the rights of a probationary employee to contest his or her dismissal as found in Article 15.17,A,6, which reads:

The separation of an employee [probationary] will not be subject to the grievance procedure in Article 9.

Employer argues that the presumption of arbitrability is overcome when it can be demonstrated that the Parties have specifically agreed on language restricting the arbitration procedure. That restriction is clearly found in the above language and thus the Employer has met its burden to prove that matter is not arbitrable.

The Union's position is that Article 2.6 prohibits the Employer from discriminating against an employee based on Union activity. The Union contends that it is not raising a just cause discharge question but rather has assumed the burden of proving that the Employer violated Article 2.6 when it dismissed the Grievant. In the Union's view, there is clear evidence that the dismissal was not for performance related reasons but simply because she insisted on her full rights as a Union member. There is nothing in the language of Article 2.6, notes the Union, that extends its protections only to regular employees.

Having carefully reviewed the evidence provided by the Parties, the arguments presented both at hearing and in the briefs and having taken the time to study PERC decisions and arbitral authority, the Arbitrator arrives at the conclusion that the Employer's case to overcome the presumption of arbitrability is sufficiently strong to meet that objective. The reasoning for this conclusion is set forth in the following three point discussion.

First, Elkouri and Elkouri, 6<sup>th</sup> Edition, at page 469 set forth the general principle that specific language in the CBA is to be given the weight over general language. There is no question that the language of Article 15.17,A,6 from the CBA covers probationary employees and is specific when it states that "the separation of an employee will not be subject to the grievance procedure in Article 9."

The Arbitrator finds that Article 2.6 is general language and that there is nothing in this language which specifically indicates that the prohibition against using the grievance procedure for probationary dismissal is to be ignored in the event that the dismissal is determined to have violated the terms of Article 2.6. The original grievance document claims that the dismissal of the Grievant was retaliatory and seeks reinstatement. Clearly, therefore, the matter at dispute is the dismissal and whether or not it violated Article 2.6. Thus, it is the Arbitrator's conclusion that regardless of any questions about the appropriateness of the dismissal and whether it involved retaliation for Union activity, the dismissal is not properly the subject for a grievance and ultimately arbitration.

Second, Elkouri and Elkouri, 6<sup>th</sup> Edition, at page 934 undertake an evaluation of arbitral authority related to the discharged of probationary employees. At the outset and as a general principle they note that "probationary employees may be discharged for any reason not otherwise unlawful [Emphasis Added]." The Union claims, in the instant case, that the Employer's actions dismissing the Grievant violated Article 2.6 of the CBA. The Arbitrator notes that Article 2.6 simply parrots Washington statute which provides the same protection (*Chapter 41.56, RCW - Public Employees' Collective Bargaining*). Basically, as a matter of statute, an employee cannot be discriminated against because of Union activity.

The Arbitrator further notes that the Parties collective bargaining agreement also contains prohibitions in Article 1 with regard to other forms of discrimination. Specifically, Article 1.2 spells out the fact that the employee who believes that discrimination has occurred can either pursue the matter statutorily through either the EEOC or HRC. In the alternative, the employee can file a grievance. However, the employee may not pursue the matter both through a grievance and by way of statute.

The Arbitrator concludes that Article 15.17,A,6 also prohibits the use of the grievance procedure in the event that a dismissed probationary employee has reason to believe that dismissal was a matter of race, gender or other matter addressed by nondiscrimination statute. Obviously, that does not mean the employee is without recourse. The employee is free to pursue the matter by way of the statutory process. Similarly, the Grievant in the instant case could have pursued the matter based on her statutory protections.

The grievance procedure, including the right to pursue a matter to arbitration, is a creature of the CBA and subject to the terms of the CBA. The Parties' agreed that probationary dismissal was not subject to the grievance procedure. The language provides for no exceptions. The Arbitrator is bound to honor this language.

As, the Arbitrator is unpersuaded that an exception to the prohibitions of Article 15.17,A,6 should be read into the

requirements of Article 2.6. The Union's arguments with regard to public policy and contract language interpretation are not convincing for a number of reasons. For one, as noted above, there were other venues by which the matter could have been pursued.

Additionally, the Union is free to file Article 2.6 grievances on behalf of probationary employees so long as the grievance does not involve dismissal. For example, the evidence indicates that the Grievant on a number of occasions attempted to transfer to a position that would involve a different supervisor. Her existing supervisor, for reasons unexplained, refused to support this effort and she was barred from pursuing the transfer. In this Arbitrator's view, the Union might very well have been able to make a reasonable case that the refusal to support the transfer request constituted discrimination for Union activity. Such a grievance would have been subject to the grievance procedure.

Finally, while the Arbitrator has some sympathy for the fact that this decision will result in a non-evaluation of the merits of the case, that fact is a reflection of the language of the CBA that the Parties mutually agreed to. Moreover, that language is subject to change at the bargaining table. What the Arbitrator does not have the authority to do, however, is either to ignore the language or to modify it. The Arbitrator believes that to agree with the Union on the issue of arbitrability would require

that he do one or the other. He will not do so, and thus he will find for the Employer.

### Merits

Having found the subject matter of the grievance not arbitrable, the analysis will cease at this point.

### **CONCLUSION**

The Union grieved the dismissal of the Grievant, a probationary employee, claiming a violation of Article 2.6, a provision prohibiting discrimination on the basis of Union involvement. While the Arbitrator agreed with the Union that there was nothing in the language of Article 2.6 that denies the Grievant the protections found therein, the language of article 15.17 clearly and specifically bars the Grievant from using the grievance procedure to contest her dismissal. Arbitration is the final step in the grievance procedure. Thus the grievance procedure including arbitration is not the venue by which the Grievant can challenge the Employer's decision to remove her from service. The grievance, therefore, it found non arbitrable. An award will be entered consistent with these findings and the conclusion.

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"DOC" OR "THE EMPLOYER"	)	
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AND	)	
	)	
TEAMSTERS LOCAL UNION NUMBER 117	)	
	)	<b>***GRIEVANT REDACTED***</b>
"LOCAL 117" OR "THE UNION"	)	DISCHARGE GRIEVANCE

After careful consideration of all oral and written arguments and evidence, and for the reasons set forth in the Opinion that accompanies this Award, it is awarded that:

1. Grievance No. 70-05 AHCC contests the dismissal of a probationary employee and thus per article 15.17 is not properly before the Arbitrator.
2. The grievance is denied on the basis that the matter involved is not arbitrable under the terms of the Parties collective bargaining agreement.
3. Per article 9.6 of the collective bargaining agreement, the Arbitrator's fees shall be split evenly between the parties.

Respectfully submitted on this the 26th of January, 2007, by,

Timothy D.W. Williams  
Arbitrator