IN THE MATTER OF THE ARBITRATION	)	ARBITRATOR'S
	)	
BETWEEN	)	OPINION AND AWARD
	)	
AMERICAN FEDERATION OF STATE,	)	
COUNTY AND MUNICIPAL EMPLOYEES)	)	
LOCAL 2975, COUNCIL 75	)	
	)	
"AFSCME 75" OR "THE UNION"	)	
	)	
AND	)	
	)	
CITY OF CORVALLIS	)	
	)	TRISH STEARN
"CITY" OR "THE EMPLOYER"	)	GRIEVANCE

HEARING:

November 6, 2012
Corvallis, Oregon

HEARING CLOSED:

November 30, 2012

ARBITRATOR:

Timothy D.W. Williams
830 NE Cesar E Chavez Blvd
Portland, OR 97232

REPRESENTING THE EMPLOYER:

James Brewer, Attorney
Kris DeJong, Administrative Division Manager
Linda Weaver, HR Manager
Mary Steckel, Public Works Director

REPRESENTING THE UNION:

Jennifer Chapman, Attorney
Justin St. James, Co-counsel, AFSCME Representative

APPEARING AS WITNESSES FOR THE EMPLOYER:

Linda Weaver, HR Manager

APPEARING AS WITNESSES FOR THE UNION:

Jim Steiner, AFSCME Representative
Kevin Loso, Union President
Alice Grycza, Union Steward

EXHIBITS

Joint

1. Collective Bargaining Agreement, September 25, 2008 and June 30, 2011
2. Memorandum of Understanding (One Year Extension)
3. Oral Reprimand (Administrative Specialist Position)
4. Grievance (RE: Admin Specialist Reprimand)
5. Just Cause Grievance

Employer

1. Collective Bargaining Agreement
2. City's reduction-in-force Notice to Stearns (5/11/11)
3. 2002 Employee Frequently Asked Questions: Reduction in Force.
4. 2010 Employee Frequently Asked Questions: Reduction in Force.
5. 2012 Employee Frequently Asked Questions: Reduction in Force.
6. City of Corvallis/AFSCME Reduction in Force Handbook.
7. City's Summary and Employee Files on Reduction in Force, past 18 months.
8. 2009 City Employee Handbook
9. Stearns Signed Receipt of Employee Handbook.
10. E-mail from Assistant City Manager Volmert to Loso and Steiner.
11. Termination Letter to Stern (2/3/12).
12. E-mail Exchange between City Manager Patterson and AFSCME Representative Steiner re: Probation Extensions
13. City Administrative Policy AP 92-3.01 (includes transfer for employees)
14. Past AFSCME/City of Corvallis Collective Bargaining Agreements (2005 & prior).

Union

1. Termination Letter
2. Personnel Action Forms
3. Employee History
4. Notice of reduction or Layoff
5. AFSCME Workforce Reduction Interest Form
6. Skills and Experience Inventory
7. Email confirming bump (June 2011)
8. Email conversation (December 2011)
9. Email from Mary Steckel (January 2012)
10. AFSCME Employees by Seniority (August 2011)

11. `AFSCME Employees by Seniority (1/18/12)
12. Quarterly Vacancy Report (3/15/12)
13. Quarterly Vacancy Report (6/15/12)
14. Personnel Action Forms (other employees)
15. Layoff Letters (other employees)
16. City of Corvallis Reduction in Force Handbook

BACKGROUND

City of Corvallis, (hereafter "City" or "the Employer") and the AFSCME Local 2975, Council 75 (hereafter "ASFSCME Local 2975" or "the Union") agreed to submit a dispute to arbitration. A hearing was held before Arbitrator Timothy Williams in Corvallis, Oregon on November 6, 2012. The Parties stipulated that the grievance was timely and properly before the Arbitrator to be decided on the merits of the case. 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 in a digital format as a part of his notes. A copy of the recording was sent to each Party as an attachment to an e-mail message.

At the close of the hearing, the Parties were offered an opportunity to give closing oral arguments or to provide arguments in the form of post-hearing briefs. Both parties chose to provide written arguments which were timely received by the Arbitrator. Thus the award, in this case, is based on the written evidence, the testimony provided during the hearing and the Parties' arguments.

SUMMARY OF THE FACTS

The grievance in this case is between the American Federation of State, County and Municipal Employees, Local 2975 Council 75 (AFSCME, on behalf of Grievant Patricia (Trish) Stearns, and the City of Corvallis (the City). The Parties are bound by a collective bargaining agreement (CBA), effective September 25, 2008, through June 30, 2011, extended by mutual agreement until June 30th, 2012, under which the present grievance arose. The following is a brief summary of the events that led up to the filing of the grievance. It is based on both documentary and testimonial evidence presented during the hearing.

The grievant began her employment as a Computer Support Specialist II in the Finance Department MIS division on January 2, 2008. She became a regular full-time employee after completing her probationary period. In May 2011, the City notified Stearns that it would have to eliminate her position due to budget cuts, and provided Stearns with information about her bumping and recall rights (U-4). There were no other Computer Support Specialist positions in the City's Finance Department MIS division for Stearns to fill, nor were there any lower classifications available in the same division (U-5).

Stearns provided the City with the completed forms necessary to exercise her bumping rights, which included a

skills and expertise inventory (U-7). After consideration of this information, the City placed Stearns into an Administrative Specialist position at Public Works on July 6, 2011, which at the time was filled by a less-senior employee named Simon Tatum.

Stearns was given probationary evaluations, as was the custom and practice of the City since 2002. It was found that Stearns had not been performing at the expected level (J-3). In spite of being placed on a performance improvement work plan and though she participated in weekly meetings and training, the Grievant did not progress sufficiently in meeting the requirements of the work plan (J-3). On November 7, 2011, Stearns was issued an oral reprimand and the performance work plan was extended (J-3). On November 11, the Union grieved the reprimand and the work plan on behalf of Ms. Stearns (J-4).

Attempting to resolve the dispute, the Union and the City agreed to create a different work plan that was measurable and achievable, and that the Grievant would be given another 30 days to complete the new work plan successfully (U-8). The Employer determined that Stearns was unable to do so and was terminated on February 3, 2012 (U-1). The City agreed that the Grievant could still exercise recall and rehire rights, but the parties disagreed about whether Stearns still had the right to bump into another position.

Pursuant to the terms of the CBA, the Union grieved Stearns' termination. The Parties were unable to settle the matter, and ultimately submitted it before Arbitrator Williams on November 6, 2012.

STATEMENT OF THE ISSUE

As noted above, the Parties agreed on the following statement of issue:

1. Did the City violate the Collective Bargaining Agreement by terminating Trish Stearns without just cause on February 3, 2012?

2. Sub issues include:

    a. When a regular status employee bumps into another classification, must that employee serve another probationary period under the Collective Bargaining Agreement?

    b. If the answer to #1 is yes, what contractual rights does an employee retain after being placed on a second probationary period?

    c. Is a regular status employee entitled to more than one "bump" under the Collective Bargaining Agreement?

During a pre-hearing conference the Parties discussed with the Arbitrator the matter of remedy. In grievance arbitration, remedy becomes an issue only if the arbitrator sustains the grievance. The Arbitrator, in the instant dispute, explained to the Parties his practice of deferring evidence and argument with regard to potential remedy until after the decision on the merits of the grievance. This approach is preferred because in the event that the grievance is denied there is no reason to

place evidence and argument regarding remedy on the record. If the grievance is sustained, then question of remedy can be given back to the Parties for negotiation with a final step of submitting any unresolved dispute over the matter of remedy to the Arbitrator. Thus, as part of the decision on its merits, the Arbitrator's practice is to provide the parameters for a remedy and retain jurisdiction over remedy. The Parties indicated to the Arbitrator that this approach was mutually acceptable.

APPLICABLE CONTRACT LANGUAGE

COLLECTIVE BARGAINING AGREEMENT, Effective 2008-2011

Article 8

Section 8.4

Step Five ….The power of the Arbitrator shall be limited to the interpretation and application of the express terms of this Agreement and he/she shall have no power to alter, add to, subtract from or otherwise modify the terms of this Agreement as written. The Arbitrator's decision shall be final and binding on the Parties. The losing Party shall bear all costs of the arbitration.

ARTICLE 25
PROBATIONARY PERIOD

Section 25.1. The probationary period is an integral part of the employees' selection process and provides the City with the opportunity to upgrade and improve the department by observing the employee's work, training and aiding employees in adjustment to their positions, and providing an opportunity to reject any employee whose performance fails to meet work standards.

Section 25.2 Length of Probationary Period. New fulltime employees will be required to serve a probationary period, not to exceed six (6) six months from date if hire or movement into a classification for which they have not demonstrated full proficiency. New part-time employees shall serve a probationary

period, not to exceed nine (9) months from date of hire or movement into a classification, for which they have not demonstrated full proficiency. Park Seasonals shall serve a probationary period not to exceed six (6) months if working fulltime or nine (9) months if working part-time. Employees promoted or transferred to a different classification for which they have not demonstrated full proficiency shall serve a probationary period of six (6) months regardless of their fulltime, seasonal, or part-time status.

All probationary employees will receive a documented evaluation at least every three (3) months. The evaluation shall occur no later than ten (10) working days after a completion of each three (3) month evaluation period. Employees who fail to qualify for a job to which they were transferred or promoted, shall have the right to return to their previously held position, provided they have served the probationary period in the previously held position.

Section 25.3 Reduction or Extension of Probation. The City retains the right to move an employee from probationary to regular status prior to the six (6) or nine (9) month period specified above, for exceptional performance and as approved by the Department Director and Personnel. The City retains the unilateral right to extend any employee's probationary period for a length of time not to exceed a total twelve (12) months probationary period. The City can notify a probationary employee at any time that it is extending his/her probation. If the City recognizes prior to recruiting for the position that an extended probationary period is expected, it shall to the extent practical, notify applicants through the recruitment process. A probationary employee may have a Union advisor present at a meeting to discuss extension of probation. Supervisors shall inform employees of this opportunity.

Section 25.4. The Union recognizes the right of the City to terminate new employees on probationary status for any reason without appeal.

ARTICLE 27
REDUCTION IN FORCE LAYOFF

Section 27.3 Bumping. Employees with at least one year seniority who have received notice of a layoff shall have the right to bump into another classification provided that the bumping employee possesses the necessary qualifications. In no case shall an employee be eligible to bump into a higher

classification unless the position is vacant. An employee exercising the right to bump shall displace the least senior employee in the classification who is not clearly superior in qualifications, occupational skills, and abilities required for the position. Employees who bump into a lower classification shall suffer no loss of pay until the beginning of the next pay period at which time their salary shall be adjusted to the step in the new range closest to their former salary. Employees with less than one year's seniority shall have no bumping rights.

Section 27.4 Recall. Those employees who are left with no job to bump into shall be laid off from employment and shall be eligible for recall to their classification for a period of twenty-four (24) months without loss of seniority. Employees who have bumped into a lower paying job or a job with fewer hours shall retain recall rights for a period of twenty-four (24) months. Employees on the recall list shall be responsible keeping Personnel notified of their mailing address. Recall shall be on the basis of seniority with senior employees being recalled before junior employees and before any new hires or transfers, provided the employee possesses the qualifications for the position. Park Seasonal employees shall be recalled each season by order of seniority. In the case of the Park Seasonal annual rehiring process, employees from the prior season who received a satisfactory performance appraisal at the conclusion of the season shall be notified of the next season's Park Seasonal openings and shall be offered their same position, or if there are no openings for their same position other park seasonal positions for which they have demonstrated the necessary qualifications. This process shall be completed before the City offers a position through an open recruitment. If there are fewer positions offered by the City than there are qualified returning Park Seasonals who have indicated an interest in returning to the City for the season, that situation shall constitute a layoff for the seasonal positions and shall be conducted in accordance with the provisions of Section 27.3 and this section.

POSITION OF THE UNION

The Union argues that the City violated the CBA by terminating Ms. Stearns without just cause.

There is no contractual support for the City's argument that employees bumped into different classifications must serve a new probationary period. The word "probation" is not used in Article 27.3, which describes the agreed upon bumping process. The only place in the contract that "probation" is mentioned is in the context of three types of employees: new employees, promoted employees, and transferred employees. The Grievant did not fit into any of these categories.

The City has sometimes used the words "transfer" and "bump" interchangeably, however, the City's administrative policy defines "transfer" as "the movement of an employee from one division or department to another at the same job." Most bumps, including the one in this case, do not include keeping the same job. In addition, transfers are usually voluntary, while bumps are usually a result of undesired budget reductions.

Because just cause is a cornerstone of most CBA's, one would expect concessions and exceptions to employee just cause rights to be crystal clear. The fact that the contract does not provide for probationary periods for bumps is significant in this way.

In this case, the City's position on employees who bump needing to serve a probationary period means that the City can terminate a bumping employee for "any reason without appeal" (J-1, p.39). The Union is troubled because that interpretation

effectively puts the employee at new hire status, and that bumping employees could lose whatever job security they'd earned after years of service. If this were to be enforced, an employee who transfers or promotes keeps the rights of return and just cause, but an employee who bumps does not. The Union contends that there is no evidence that this result is what the parties intended in the CBA.

In addition, adopting the City's interpretation could have other results not intended or anticipated for the parties. E.g. the City could eliminate the position of an employee with 20 years of seniority. That employee could bump into a lower classification, but that right would be subject to the City determining whether he or she had the necessary qualifications. The City could fire said employee "for any reason" three months or as little as three days after the bump occurred. Alternately, the City could exercise its right to extend the probationary term up to 12 months, meaning the 20 year employee could be terminated for any reason up to 355 days after the bump.

To the extent that the agreement is ambiguous, it should be interpreted to avoid absurd results like the ones listed above, and in a way that enables the parties to get the benefit of their bargain. The Union argues that the most logical way to ensure that result in this case is to find that senior employees

who bump into new classifications do not have to serve a probationary period in which they can be terminated without just cause for any reason.

If the Arbitrator concludes that probation is required for bumping employees, what should that probation look like? The Union posits that this kind of probation ought to look quite different than that of new hires, and ought to look like that of transferred and promoted employees. The CBA does not allow the City to terminate transferred or promoted employees "for any reason" during their secondary probationary period because they are entitled to just cause. The only employees eligible to bump are those who have at least one year of employment with the City on their record. These are not new employees.

The Union posits that the following should happen if a bumping employee has to serve a probationary period (which the Union disputes): During the probationary period, the City cannot terminate or discipline the bumping employee unless it had just cause. The City can still remove the bumping employee from the new position and place him or her back into the previously held position. If this position no longer exists, the employee should be entitled to layoff and recall rights as per Article 27.

The Union argues that nothing in article 27 says that an employee with at least one year of seniority is limited to one

bump per year, per career, or time period. It says that all employees who are laid off and have seniority have the right to bump. Because, as it has been agreed upon by the City that Stearns was not terminated for just cause, she should have been given the right to bump or transfer to a position more compatible with her skill-set.

Regarding the City's reliance on the FAQs that it issued between 2002 and 2012, the Union considers them extrinsic evidence and argues that the clearest evidence of the parties' intent is in the plain language of the CBA. The plain language does not allow for a second probationary period for senior employees that bump. Additionally, the FAQ's were not bargained based on joint communication between City and Union. Thirdly, the FAQ's, though posted on the City's website, were not part of any formal document issued to laid-off employees. Fourth, the parties have agreed that the bargaining history is silent on the key issues. The FAQ's cannot substitute for real evidence of the parties' intents when they negotiated the terms at issue. Indeed, Union witnesses testified that they disputed several aspects of the FAQ's.

Though the City argues that it has been in the practice of placing other employees on probation when they've been bumped, the Union believes this argument is irrelevant. For one, the contract language in dispute is clear, and therefore it is

unnecessary to look to past practice as a means of interpretation.

In addition, Stearns was the first and only employee who was terminated after she failed probation for her new position. The Union had never dealt with these circumstances prior, and had no reason previously to file a grievance on this particular issue. Finally, the Union wishes to point out that employee Joan Extrom bumped into an Admin Specialist position about the same time as Stearns. Extrom was unable to perform all of the functions of that position, but she was allowed to transfer into a different position. Stearns was not permitted to bump or transfer after the City determined she was not a good fit. Rather, she was terminated.

The Union wishes to also point out that past practice hurts the arguments of the City because it also treated Stearns as though she were a regular-status employee when it issued a work plan, an oral reprimand to her, and then accepted a grievance.

For all the reasons described above, the Union respectfully requests that the Arbitrator order the City to make the Grievant whole, that the City should pay the Arbitrator's fees and expenses as per Article 8.4 of the CBA, and that the Arbitrator offer any other relief that he deems equitable and just.

POSITION OF THE CITY

The City argues that it did not violate the CBA and acted within its rights when it terminated the Grievant on February 3, 2012. The City gave Stearns multiple opportunities to improve her performance, but she was unsuccessful. Though the reasons for Stearns' termination were not just cause or disciplinary, they were valid under the plain language of the CBA as set forth in Article 4 and Article 32.

Section 4.1 of the contract states that "[t]he rights of the employees within the bargaining unit and the Union are limited to those specifically set forth in this Agreement; and the City retains all prerogatives, functions, and rights not specifically limited by the terms of the Agreement." The Parties also agreed in Article 35, section 35.2, that "[a]ll terms and conditions of employment not covered by this Agreement shall continue to be subject to the City's direction and control."

The contract provided for Stearns' bumping into another classification and displacing a less-senior employee, and the contract also provides that even if Stearns had seniority, her right to bump depended on her being qualified for the new position. Section 27.2 provides an order for layoff, but states that this order is not solely or principally based on seniority, but is based on "seniority and qualifications." Even if Stearns

was indeed qualified for the position, the contract provides that she could only bump employees who were not clearly superior to her in qualifications, skills and abilities.

There is no language in the CBA regarding the specific process, methods and conditions for bumping into a new position if it is not a transfer. Pursuant to Article 4 and section 35.2 of the contract, because there are no specific terms in the CBA stating that employees have the right to bump into a new position without having to successfully complete a probationary period in that position and because the City retains the right to determine qualifications needed for new employees, transfers and promotions, the City retains the right to determine if such a period is needed, and what happens if the employee is unsuccessful.

Section 25.2 of the CBA is silent on the length of a probationary period for a bump, but deems the probationary period for a transfer to be six months. The same section sets out the evaluation process and timing during probation, and what happens to employees when they transfer or are promoted, but then fail probation: They return to their previously held position. Assuming a bump is a way to describe a transfer that resulted in a reduction in work force, then Article 25 would apply, and a probationary period is required for bumping

employees who have not demonstrated competency in the new position.

Nowhere in the contract is an employee specifically granted multiple rights to bump, nor does the contract grant employees the right to avoid probation when bumping into a new position. Section 27.3 uses the singular "right" and the singular "bump" when talking about a singular employee. If under Section 27.3 of the CBA an employee were to have the right to more than one bump, a laid-off employee would simply bump into any opening (including unfilled higher classifications). There is no specific language in 27.3 or 27.5 that multiple bumping is a right granted to employees or the Union. The City argues that multiple bumping on the part of a single employee could create a costly, time-consuming, disruptive and stressful domino effect that could very well impact work and services to the public. This effect would be amplified immeasurably if employees were able to bump less-senior employees multiple times. Adding multiple bumping rights to the CBA would seriously impair the City's right to direct and supervise all its operations and to assign and distribute work and work duties, which are specific management rights.

The City did not act in an arbitrary manner in this case, nor did it violate the CBA by terminating Stearns without just cause. The Grievant was returned to the position she had before

she was bumped, and she was returned to laid-off status within the recall period, but only retained the rights allowed to her by the CBA.

The City retains the rights, under the CBA, to determine whether the Grievant was qualified for the new job at all, and to determine whether the incumbent who she displaced was clearly superior in qualifications, skills and abilities, even though he was a less-senior employee.

When the City required Stearns to successfully complete probation in the new position, it satisfied its obligation to treat all employees fairly. There is no evidence that the parties re-negotiated longstanding terms of past practice of the probationary period in a new position, nor is there any evidence that the Union objected to this practice until this grievance was filed. Permitting Stearns to be the only employee able to exercise more than one bumping right, without any basis in the CBA, would be unfair to other employees. Allowing her to stay in the Admin Specialist position would be unfair both to Mr. Tatum, who was displaced, and to other employees who did complete their probation upon a transfer or a bump.

The City acted in alignment with its duties when, in its exercise of management rights, it followed an established practice and interpretation in requiring Patricia Stearns to successfully complete a probationary period in the

Administrative Specialist position. When she failed to successfully complete the probation, the City correctly placed Stearns back in the position she had prior to being bumped. Because that position no longer existed, it was correct for the City to return Stearns to laid-off status within the recall period. When she bumped into the Administrative Specialist position, Stearns exhausted her single right to bump. At this point, the Grievant retains her rights under the CBA for laid-off employees, so she retains a two-year right for recall and eligibility for rehire.

On its face, the City's practice of placing bumping employees on probation always created a foreseeable risk for employees in that if they did not successfully complete the probation, there would be no position for them to return to. If the Union had disagreed with the City's interpretation, it was apparently sitting on its hands about it, or has capriciously changed its own interpretation of the CBA. Nothing in the CBA reserves the right to employees or the Union to hold a known dispute about the meaning of the agreement until that disputed meaning causes actual harm to an employee.

When an employee is laid off, under the provisions in Section 27.1 of the CBA, the parties are required to meet and create a support plan for employees being laid-off. In this case, the City notified the Union, and the Union refused to

meet. Had the Parties met, that would have been an easy and appropriate time to dispute or discuss concerns about the City's plan for the Grievant.

For all of the reasons described above, and because article 8 of the CBA limits the Arbitrator to the interpretation and application of the express terms of the contract as it is written, the City respectfully requests that the Arbitrator deny the grievance, find the Union to be the losing party, and order the Union to pay the Arbitrator's fees and expenses as per Article 8 of the CBA.

ANALYSIS

The Arbitrator's authority to resolve a grievance is derived from the Parties' collective bargaining agreement (CBA) and the issue that is to be decided. The arguments of the Parties focus on the language from Article 25 dealing with probationary periods and the language of Article 27 dealing with layoff. The Arbitrator will discuss both of these provisions as part of this analysis.

At issue is the question of whether the City violated "the Collective Bargaining Agreement by terminating Trish Stearns without just cause on February 3, 2012." The Arbitrator notes that in a labor grievance arbitration the employer carries the burden of proof in a matter of discipline or discharge. Where the issue in dispute involves a claim by the Union that a

provision(s) of the collective bargaining agreement has been violated, the Union carries the burden of proof. In the instant case, the matter in dispute is not discipline or discharge but rather it is a claim that the City misapplied the provisions found in Article 25 resulting in the Grievant improperly losing her employment. The Parties stipulated to the following statement of fact:

> The City did not terminate Stearns because it had just cause to do so. The City terminated Stearns because she did not successfully complete her probation as an Administrative Specialist. The Union disputes whether Stearns was properly placed on probation as an Administrative Specialist.

The City executed a layoff per Article 27 and the Grievant bumped into an Administrative Specialist position. When the Grievant moved into the Administrative Specialist position, the City placed the Grievant on probation per Article 25 of the CBA. The City determined that the Grievant did not pass probation and terminated her employment, placing her on layoff. The Union's claim is that the Grievant should never have been put on probation when she bumped into the Administrative Specialist position. In advancing this claim, the Union carries the burden of proving that the provisions of Article 25 do not apply when an employee exercises his or her rights under Article 27. The Union, to prevail, must provide a preponderance of evidence to establish a violation of the terms of the CBA.

The Arbitrator carefully reviewed the audio recording of the hearing, studied the submitted documents and gave full consideration to the arguments provided in the Parties briefs. Ultimately the Arbitrator determines that the Union has provided sufficient evidence to prove its claims and thus the grievance is sustained.

The Arbitrator emphasizes that, while he carefully reviewed all of the points raised by the Parties in their briefs, he has chosen to focus the analysis on the arguments and evidence that he found weighed most heavily on the final decision. The fact that a contention or point is not discussed does not mean that it was not considered. It does mean that it was not determined to be a major factor in arriving at the conclusion that the grievance should be sustained. The reasoning and the primary factors that led to this conclusion are laid out in the following multipoint analysis.

First, the heart of this dispute is the language found in Article 25 establishing a probationary period. From a global perspective, Article 25 has four primary tenants.

1. The probationary period is assigned to "new full time employees," "new part-time employees" and "employees promoted or transferred to a different classification."
2. The probationary period is a time for an employee to demonstrate their ability to perform the duties of the position and a time for the City to assist in this process through training activities, mentoring, and frequent performance evaluations.

3. Section 25.3 makes it clear that successful completion of the probationary period moves the employee into regular employment status[1] with the City.
4. Failure to successfully complete a probationary period results in: 1) new employees being terminated (Section 25.4) and transferred/promoted employees returned "to their previously held position."

Second, regular employment status is significant because it ensures that all of the provisions of the CBA are fully applicable to the employee. The Parties in the instant dispute acknowledge that the Grievant had attained regular employment status. They stipulated that "Stearn's successfully completed her probationary period, and became a regular full-time employee thereafter."

The Arbitrator emphasizes that achieving regular employment status for a public sector employee is a significant fact partly because it grants the employee what the Supreme Court has called a "constitutionally protected property interest" in employment (470 U.S 543, 1493). The property interest is created when a public sector employee is tenured or can only be fired for cause (470 U.S 543, 1490 & 1495). Supreme Court decisions related to due process and property interest in employment are, of course, not an issue before this Arbitrator. He references the above case known as *Loudermill* only to emphasize the significance of

[1] There is no actual sentence in Article 25 stating that regular employment status is granted upon successful completion of the probation period. However, it is inferred from the fact that there is a point in time when a new employee is no longer on probation and the logical conclusion from the specific language that grants the City the "right to move an employee from probationary to regular status prior" to the designated completion date.

the Parties stipulation that the Grievant had achieved regular employment status. Regular employment status assures the employee that he or she can only be discharged for cause; "no regular employee shall be disciplined without just cause" (Article 29). And, because the employee can only be discharged for cause, he or she has a property interest in employment which requires due process in order to take it away.

Third, the City's basic contention is that when a laid off employee, such as the Grievant, bumps into a position in a different classification per the terms of Article 27, that the employee loses regular employment status until such time as he or she passes a probation period per Article 25 for the position into which they bumped. The City acknowledges that the language of Articles 25 and 27 is silent on this point but relies on past practice and the claim that the silence defers the question to Article 4 on Management Rights.

After carefully considering all of the City's arguments in support of this position, the Arbitrator is not convinced. The CBA expressly grants regular employment status; the CBA is not silent. Article 4 is clear that management rights are "rights not specifically limited by the terms of this agreement." The evidence clearly establishes that there is no provision in the CBA that places an employee, who bumps into another classification per Article 27, on probation with the resulting

loss of regular employment status – discharge without cause status. Without question, the Parties could have negotiated such a provision but it is not to be found in the either the CBA or any other mutually executed document. Article 8 is clear in asserting that the Arbitrator cannot "add to, subtract from or otherwise modify the terms of this Agreement as written." As written, bumping into a classification as a result of a layoff does not remove regular employment status from a member of the bargaining unit.

Additionally, the Parties have indicated that they know how to negotiate a memorandum of understanding (MOA) if there was a mutual desire to do so. The current CBA contains an MOA at page 55 that both Parties have signed. An MOA is a tool the Parties can use to modify or add to the terms of the CBA. The Arbitrator emphasizes that the Employer's *Frequently Asked Questions* (FAQ) publication is a unilateral instrument and not a substitute for an MOA. An FAQ cannot modify an express term of the CBA.

The Arbitrator also takes note of the testimony of HR Manager Linda Weaver who on cross examination was asked whether a laid off employee with 20 years of seniority that had bumped into a new classification could be terminated without cause within 3 days. Her first response was that such an action would not be the City's practice. When pressed with whether the City

would have the right to do so, she responded that she was unable to answer the question.

From the Arbitrator's perspective, Ms. Weaver had difficulty with this question because a response consistent with the language of the CBA is inconsistent with the City's basic argument. Article 25 specifically provides that the "Union recognizes the right of the City to terminate new employees on probationary status for any reason without appeal" [emphasis added]. The 20 year employee would not be a new employee nor was the Grievant in the instant case a new employee. Yet the Employer is contending that it has the right to discharge without cause which can be done at any time during the probationary period.

Fourth, the language of Article 25 specifically provides for a probation period when a regular status employee is transferred or promoted. The language, however, carefully protects the regular employment status of a transferred or promoted employee by designating that the employee returns to his or her prior position if he or she fails the probation period. Unlike with transfer or promotion, the language of Article 25 does not specifically place a bumping employee on probation. Likewise, the language of Article 27 does not provide that the bumping employee must serve a probationary period.

Part of the reasoning, as the Arbitrator understands it, behind the City's case is that the overall practice of the City, reinforced by the above language related to transfer and promotion, is that employees moving into a new classification all serve a probationary period. Whether a new employee or an existing employee, contends the City, the fact that they have assumed a new position logically necessitates an adjustment period (probation period) and the accompanying right of the City to remedy a determination that the selection was a bad fit.

The Arbitrator finds this a persuasive argument and one that makes good sense. The difficulty, however, is that it fails to address the basic problem related to removing regular employment status from an employee who bumps into "another classification." The Parties carefully insured that regular employment status was not removed from an employee transferring or being promoted. Again, the Arbitrator wants to emphasize his conclusion that the absence of specific language indicating a protection of regular employment status for an employee bumping into a different classification cannot be used as a basis to conclude that management has a unilateral right to remove what has been granted by the language in Article 25 (regular employment status).

Moreover, the Arbitrator finds persuasive the Union's argument that even without a probation period there are some

protections for the City with regard to assuring a good fit when an employee bumps into a new classification. For one thing, the City is assured of at least one year of experience with the employee because employees with less than a year of seniority have no bumping rights. For a second, the City does not have to grant a bump if the junior employee filling the position has superior "qualifications, occupational skills, and abilities required for the position."

Fifth, the Arbitrator does not find at all persuasive the Employer's contention that the Union's case is undermined by the fact that it should have raised these issues many years earlier. The simple fact is that, until the Grievant's case, the City had never discharged without cause an employee who bumped into another classification. As previously noted, the probationary period has a significant positive side to the extent that it requires the Employer to extend a helping hand towards ensuring that the employee is successful in a new position. There is no reason for the Union to object to this help. Moreover, as with transfers and promotions, extending the help does not automatically insure the right of the City to take the adverse action of separating an employee from his or her employment upon a determination that the probation period was not passed. From this Arbitrator's perspective, what has gone on in the past has little if any influence on the present case because it is the

first opportunity for the Union to challenge the Employer's contention that it has the management right to remove regular employment status from an employee who bumps into another classification.

Finally, the Arbitrator's review of the language of Article 27 leads to the conclusion that there is no limitation on the number of bumps that an employee can exercise. Employees, in regular employment status, lose their employment when they are either discharged for cause or are placed on layoff when there is no bump to be exercised.

CONCLUSION

The issue before the Arbitrator is whether the City of Corvallis terminated the Grievant's employment for just cause. However, this is not a case related to a disciplinary matter but rather to a question of probation for an employee who bumps into another classification under a layoff procedure. The Parties stipulated that under the CBA the Grievant had achieved regular employment status. The Arbitrator emphasizes his conclusion that regular employment status for a public sector employee is of substantial contractual and constitutional significance. Thus, any provision that results in an employee losing regular employment status must be clearly stated and established by a mutually executed document. The fact that the CBA is silent as to whether an employee bumping into another classification is to

be placed on probation is not sufficient for the City to remove regular employment status under the management rights clause (Article 4). Because of her regular employment status, the Grievant could only be discharged for cause or laid off when there was no position into which she could bump. As a result of these conclusions the Arbitrator is sustaining the grievance.

An award is entered consistent with the above analysis. The Parties are directed, under the Arbitrator's authority, to negotiate an appropriate remedy.

IN THE MATTER OF THE ARBITRATION	)	ARBITRATOR'S
	)	
BETWEEN	)	AWARD
	)	
AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES) LOCAL 2975, COUNCIL 75	)	
	)	
"AFSCME" OR "THE Union LOCAL 2975"	)	
	)	
AND	)	
	)	
CITY OF CORVALLIS	)	
	)	TRISH STEARN
"CITY" OR "THE EMPLOYER"	)	GRIEVANCE

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

1 The City did violate the Collective Bargaining Agreement by terminating Trish Stearns without just cause on February 3, 2012.

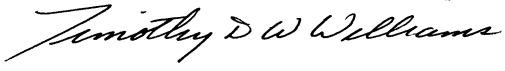
2 When a regular status employee bumps into another classification per Article 27, the employee does not serve another probationary period under the Collective Bargaining Agreement

3 Article 27 does not limit the number of bumps to which a regular status employee is entitled.

4 The grievance is sustained and the Parties are directed to negotiate a remedy consistent with the above conclusions that the Grievant could only be discharged for cause and that she was entitled to more than one bump so long as there were available positions into which she was eligible to bump. The Arbitrator retains jurisdiction for a period of 60 days to resolve any issues over remedy.

5 Article 8 of the Collective Bargaining Agreement states "the losing Party shall bear all costs of the arbitration." The City is declared the losing party and the Arbitrator's fees will be so assigned.

Respectfully submitted on this, the 28th day of December, 2012 by



Timothy D.W. Williams
Arbitrator