BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

COLUMBIA COUNTY COURTHOUSE AND HUMAN SERVICES EMPLOYEES' UNION, LOCAL 2698-B, AFSCME, AFL-CIO

and

COLUMBIA COUNTY

Case 247
No. 65385
MA-13208

(Cheryl Kohlhagen Grievance)

Appearances:

Mr. David White, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite "B", Madison Wisconsin 53717-1903, on behalf of the Union.

Mr. Joseph Ruf, Columbia County Corporation Counsel, 120 West Conant Street, P.O. Box 63, Portage, Wisconsin 53901-0063, on behalf of the County.

ARBITRATION AWARD

Columbia County Courthouse and Human Services Employees, Local 2698-B, AFSCME, AFL-CIO (herein the Union) and Columbia County (herein the County) have been parties to a collective bargaining relationship for many years. At all times pertinent hereto, the Union and the County were parties to a collective bargaining agreement covering the period January 1, 2004 to December 31, 2006, and providing for binding arbitration of certain disputes between the parties. On December 13, 2005, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over the discharge of Cheryl Kohlhagen (herein the Grievant). The Undersigned was appointed to hear the dispute and a hearing was conducted on February 21, 2006. The proceedings were transcribed and the transcript was issued on March 6, 2006. The County filed its initial brief on April 13, 2006, and the Union filed its initial brief on April 19, 2006. The parties filed reply briefs on April 27, 2006, whereupon the record was closed.

ISSUES

The parties stipulated to a statement of the issue and remedy, as follows:

Was the Grievant, Cheryl Kohlhagen, a probationary employee at the time of her discharge?

In the event the Arbitrator finds that the Grievant was probationary at the time of her discharge, the grievance shall be denied. If, however, the Arbitrator finds that the Grievant was not probationary at the time of her discharge, the grievance shall be sustained and a traditional make whole remedy will be awarded.

PERTINENT CONTRACT LANGUAGE

ARTICLE 6 – PROBATIONARY PERIOD

6.1 All newly hired employees shall serve a six (6) month probationary period. The Employer and employee may agree in writing to an extension of the probationary period for an additional three (3) months. During said probationary period, they shall not retain any seniority rights and shall be subject to dismissal without prior notice or recourse to the grievance procedure. Probationary period shall be interrupted by a leave of absence.

6.2 Upon completion of said probationary period, employees shall be granted seniority rights from the date of original hire. All employee benefits shall be retroactive to the date of the most recent hire for employees who have completed their probationary period. All employees shall earn sick leave at a rate of one (1) day per month during the probationary period and shall be able to use sick leave during the probationary period.

BACKGROUND

Cheryl Kohlhagen, the Grievant herein was, at all times pertinent hereto, a part-time employee of Columbia County. She was initially hired as a Clerk Typist in the District Attorney's Office and, relative to that hire, received the following letter, dated September 30, 2004, from the County Human Resources Director:

Dear Cheryl,

Congratulations on being appointed to the Clerk Typist I position with the Columbia County District Attorney's Office. I wish to confirm, in writing, that your starting datre is Monday, October 4, 2004. You will work 20 hours per week at an hourly rate of $12.33. This is a part-time position, represented by AFSCME, AFL-CIO, Local 2698-B. There is a required 6 (six) month training period for all newly hired employees. Upon satisfactory completion of this period, you will receive a salary adjustment.

> Please stop in the Human Resources Office at 9:00 a.m. on October 4, 2004 to review the benefits available to you and complete the necessary paperwork for enrollment of your benefit selection. Please bring your social security card and WI driver's license with you as a copy is required for personnel records.
>
> Best wishes as you assume your new responsibilities.
>
> Sincerely,
> Brent Miller
> Human Resources Director

Approximately three months after she had begun working for the District Attorney's Office, and thus prior to completion of her probationary period, Ms. Kohlhagen saw a public job posting on the internet for a part-time Accounting Aide in the County Accounting Department, which she applied for. The County had previously posted the position internally, pursuant to the requirements of the collective bargaining agreement, but no internal candidates for the position posted for it. She was interviewed for the position and, in early February 2005, was informed that she would be offered the position, to commence on February 28. She informed the District Attorney, who requested a letter of resignation, effective February 25, which Ms. Kohlhagen provided on February 11. Subsequently, Ms. Kohlhagen received the following letter relative to her new position, dated February 14, 2005:

> Dear Cheryl,
>
> Congratulations, I am pleased to confirm your appointment to the position of Accounting Aide with the Columbia County Accounting Department. You will assume your new duties and responsibilities effective February 28, 2005. This is a part-time position and is represented by the Courthouse Union Contract, AFSCME, AFL-CIO, 2698-B. This position is in Range 2, you will be on Step 1 at an hourly rate of $14.05 per hour. You will have a required 6 (six) month training period. Upon satisfactory completion of this period, you will receive a salary adjustment.
>
> I would like to clarify a few issues relating to your employment. Your original hire date with Columbia County was October 4, 2004 when you were hired as a Clerk Typist I in the District Attorney's Office. Your six month training period had yet to be completed when you were selected for the Accounting Aide position, consequently you will serve a 6 month training period as an Accounting Aide with the Accounting Department. Your salary adjustment will be awarded in relation to your February 28 hire date. October 4, 2004 will be your original hire date, union seniority date and benefit date to accrue your annual vacation.

Should you have any questions please contact Human Resources. Best wishes as you assume your new responsibilities with Columbia County.

Sincerely,
Joseph Ruf III
Human Resources Director

As indicated, Mr. Ruf's letter made no explicit reference to Ms. Kohlhagen's probationary status, nor did she inquire about it. At the hearing in this matter, Ms. Kohlhagen testified that she believed her probationary period would end on April 4, 2005, six months from her original date of hire, and that the reference to the additional six month training period in the letter was a separate matter.

As an Accounting Aide, Ms. Kohlhagen was directly supervised by the Assistant Comptroller, Cathy Karls. As such, it was Ms. Karls' responsibility to conduct three and six month performance reviews of Ms. Kohlhagen during her probationary period, pursuant to the County's Personnel Policies. On May 23, 2005, Ms. Karls presented Ms. Kohlhagen with her three month evaluation, which was critical of her performance and which Ms. Kohlhagen refused to sign, as was her right. On May 25, 2005, Ms. Kohlhagen was summarily dismissed without explanation.

On June 21, 2005, the Union filed a grievance on Ms. Kohlhagen's behalf, alleging that the County had failed to provide her with the training it had promised and had fired her without just cause. The County denied the grievance and took the position that Ms. Kohlhagen was still on probation in her Accounting Aide position at the time of her dismissal and, therefore, the just cause standard did not apply. The matter thereafter proceeded through the contractual process to arbitration.

POSITIONS OF THE PARTIES

The County

The County asserts that the Grievant had not completed her six month probationary period at the time she was terminated. Since she was still on probation, she was subject to dismissal without prior notice or recourse to the grievance procedure. The Grievant was a probationary employee as a Clerk Typist in the District Attorney's Office and would have completed her probation on April 4, 2005, unless the probation was extended, which could potentially have been until July 4, 2005. Instead, while still on probation, she applied for and received a different position in the Accounting Department, whereupon she resigned her position with the District Attorney. This new position also had a six month probationary period, of which she was informed. Her acceptance of that condition is evidenced by her acquiescence to it without question. The purpose of the probationary period is to permit the employer to adequately evaluate the employee before she attains permanent status. The bargaining unit contains a wide disparity in positions, from semi-skilled to paraprofessional, so

to say that an employee can move between multiple positions during the probationary period and requiring the employer to make a retention decision within six months disregards the realities of the situation.

The term "probationary period" in this context is synonymous with "training period." Because the contract does not define the term, it is reasonable to assume it was intended to have its typical meaning. A recognized employment law reference has equated a probationary period with a training period. [See: Backer, et al, *Wisconsin Employment Law*, Sec. 10.7, (3rd ed. 2004)] In this case, the term "training period" was used in the hiring letter the Grievant received for the job with the District Attorney and the job with the Accounting Department. As testified to by the Grievant's supervisor, the County has always used the terms probationary period and training period interchangeably. The Grievant saw them as different things after she took the Accounting job because she thought she had completed probation and would merely be getting an additional six months of training. Her testimony that she was not confused about the terminology in her initial hire letter, but became so when the same language was used in her second hire letter is not credible.

The Union's argument that the Grievant was promoted or transferred is not supported by the record. Promotion and transfer are management prerogatives under the collective bargaining agreement, subject to the seniority rights of the employees under Article 7. Had she been promoted, she would still have been subject to a six month probationary period under the County's Personnel Policies. Nevertheless, under Section 6.1, the Grievant was not eligible for seniority rights and so could not be promoted. The Grievant was not eligible for promotion until April 4, 2005. Were she promoted then, she would have been subject to a sixty day trial period, which still would have been in effect when she was terminated on May 25. The Union's position, however, would give her greater protection than that afforded by the contract and to so find would exceed the power of the arbitrator.

In a previous case, COLUMBIA COUNTY, CASE 220, NO. 61710, MA-12040 (McLaughlin, 2004), the arbitrator found an extension of a probationary period was effective if the employee, in effect, acquiesced in it, regardless if the agreement was in writing. Here, the County's Feb. 14 hire letter was, in effect a three month extension of the employee's probationary period, which she accepted. Applying Arbitrator McLaughlin's reasoning, therefore, it must be concluded that the Grievant acquiesced in the extension by her acceptance of the new position. Thus, the County appropriately extended the Grievant's probation with her knowledge and consent and the grievance must fail.

The Union

The Union asserts that the County never advised the Grievant that its reference to a training period in her hiring letters was intended to be synonymous with a probationary period and she believed them to be different things. The contract language is clear that all new employees are subject to a six month probationary period, which may be extended by written agreement for three months. The Grievant was hired on October 4, 2004. Since there was no

written extension agreement, her probationary period ended on April 4, 2005. It is the County's burden to establish the existence of a written extension, which it failed to do. Thus, she was non-probationary when she was released on May 25, 2005.

The February 14 hiring letter (Co. Ex. 7) makes no reference to a probationary period or an extension, but only refers to a training period. There is no reference to the term "training period" in the contract. The Grievant testified that she did not infer that the terms meant the same thing, nor should she have been expected to. The County cannot be excused for using confusing language to refer to such an important topic. By clouding the issue it confused the Grievant and abused its rights under the contract to manage and dismiss probationary employees without reference to the just cause standard. The County could have extended her probation and chose not to. It should not be allowed to claim an extension after the fact to justify terminating the Grievant without just cause.

The County in Reply

The Union ignores the complex facts of the case and focuses on the simplistic argument that since six months had passed since the Grievant's initial hire she was no longer on probation. This requires a finding that a probationary period is merely an arbitrary passage of time without reference to anything that might occur during the interim. Nevertheless, the record establishes that when the Grievant was terminated on May 25, 205 she was still on probation. The County also notes the irony that the Union's case relies on a strict interpretation and adherence to contract language when the Union apparently does not feel bound to strictly adhere to the briefing schedule in this case, as appear from the untimely submission of its brief.

The Union's argument is based on three main premises: 10 that the probationary period is a mere passage of six months, 2) that there was no written extension as provided by contract and 3) that although the Grievant was not confused by her initial hire letter in October 2004, she was hopelessly confused by her hire letter of February 2005, which used identical language. None of these arguments have merit.

The Union does not deny that a probationary period is defined as six months in length, or that a separate hiring event after a termination justifies a separate probationary period. Yet, the Union wants the arbitrator to disregard the contract and the facts because the grievant claims she was confused by the terminology used in her hire letter. The Union asserts that he County had only 5 weeks to evaluate the Grievant in her Accounting Aide position, instead of six months, and cold only extend her probation by a written agreement, although he contract does not define or describe such an agreement. The question of the definition of an extension agreement was settled in COLUMBIA COUNTY, *supra*. Here, the extension was referenced as an additional training period in the February hire letter and the Grievant acquiesced in it by accepting the job. Finally, the confusion argument is undercut by the fact that the language of the two letters was identical. Further, the Grievant's apparent inability to calculate a six month time period calls into question her fitness for a job in an accounting department

The Union in Reply

The County's argument that the Grievant was subject to a new probationary period because she terminated her previous job and took a new one in illogical and is not grounded in the contract language or the facts of the case. The contract defines seniority as the length of employment from the most recent hire date. The City's Feb. 14 letter establishes October 4, 2005 as the Grievant's original hire date and seniority date, so Feb. 28 was not a new hire date, but merely the date she stared a new position. Such does not merit a new probationary period.

The County claims the Grievant knew she would have a new probationary period. While her knowledge, or lack thereof, in irrelevant, the notion of a new probationary period is not supported in the contract. It is also not true that the Human Resources Department ever informed her that she would have a new probationary period.

The County claims that the probationary period is undefined. This is not true. It is defined by length, by the exemptions that the County enjoys from just cause requirements for discharge and by the potential for extension. It is, however, not defined by purpose. Relevant reference texts, however, make it clear that the period exists to give the employer an opportunity to see whether the employee is fit for the job, similar to a trial period. This is not the same as a training period, which simply refers to training in job duties without contractual implications. Here, however, if the Grievant had been in a trial period she could have returned to her former job. Since she was deemed to be on probation, she was terminated.

It is irrelevant that the County thinks the terms training period and probationary period are synonyms. Further, the County mischaracterizes the Grievant's testimony with respect to whether she was confused by the use of terms. She understood that when she was first hired she had a six month probationary period, but never testified that she understood the reference to a training period in her letter to be a reference to probation. Given that training and probation are not the same, it was reasonable for her to assume that she would have a training period in the Accounting Department separate from the issue of probation.

It is also clear that the Grievant was promoted. She did not have any seniority, so could not seek promotion on that basis, but beyond that her move to the Accounting Department was a promotion. The only things to which probationary employees aren't entitled under Section 6.1 are just cause rights and seniority rights. Under the principle of *expressio unius est exclusio alterius*, all other employment rights exist, including the right to be promoted.

COLUMBIA COUNTY, cited by the County, can be distinguished. There, the employer expressly gave the employee a written notice of extension and explicitly referred to probation, not training. The only issue was the effect of the employee not signing the document. The arbitrator merely held that signing was not necessary for the extension to be valid. Here, there was no document extending the Grievant's probation. Had there been, the Grievant could have elected to stay in her former job. The Union is seeking to enforce the contract, whereas the

County is trying to expand its rights. There is no basis for the County's position and the grievance should be sustained.

DISCUSSION

The sole issue submitted to the Arbitrator by the parties is whether or not the Grievant, Cheryl Kohlhagen, was a probationary employee when she was terminated from her employment on May 25, 2005. The significance of the point is that, as a non-probationary employee, Ms. Kohlhagen would have had contractual rights protecting her from discharge without just cause. As a probationary employee, however, Ms. Kohlhagen would not have just cause rights and would be subject to summary termination, which is what happened to her. Thus, the parties agreed that if she is found to have been non-probationary she is entitled to a traditional make whole remedy.

I begin with the relevant contractual provision, Article 6 of the contract, which defines (to the extent that the contract does so) an employee's probationary period. Section 6.1 describes the probationary period as being six months in length, but also provides that the probationary period may be extended for an additional three months, if the Employer and employee so agree in writing. The provision further provides that while on probation the employee does not accrue seniority rights or have recourse to the grievance procedure upon dismissal. Section 6.2 states, in pertinent part, that seniority rights date from an employee's original date of hire and employee benefits shall be retroactive to the most recent date of hire for employees who have completed their probationary period. I will return to the implications of this language below.

When Ms. Kohlhagen was initially interviewed for a job with the District Attorney's office in September 2004 she was told by the District Attorney that all new hires must serve a six month probationary period. She later received a letter of hire from the County Human Resources Director, dated September 30, 2004, which referred to a mandatory six month "training period" and stated she would receive a wage adjustment upon its satisfactory completion. The letter did not specifically refer to a probationary period. Later, on December 30, 2004, she applied for, and was ultimately hired for, a new position in the Accounting Department. She was interviewed for the position by the Assistant Comptroller, Catherine Karls, and both women testified that the subject of Ms. Kohlhagen's probationary status was not discussed during the interview process. She received another letter of hire from the Human Resources Director, dated February 14, 2005, which, again, referenced a six month mandatory "training period," to be followed by a wage adjustment upon successful completion, but which, again, made no explicit reference to probation. The letter further indicated that October 4, 2004, the date she was hired by the District Attorney's office, would be her effective date of hire for purposes of union seniority and accrual of employee benefits. She was given a start date of February 28, 2005.

The County appears to argue in the alternative that either the hire of Ms. Kohlhagen in February 2005 subjected her to a new six month probationary period, or that, by taking the

position with the Accounting Department subject to the terms of the Human Resources Director's February 14 letter, she effectively agreed in writing to a three month extension of her probation, as required by Article 6, Section 6.1. Under either scenario, when Ms. Kohlhagen was terminated on May 25, 2005, she would have still been on probation and unable to grieve the discharge. For the reasons set forth below, I cannot agree with the County's position.

The first question is whether the hire of Ms. Kohlhagen in February 2005 triggered a new probationary period, which would have remained in effect until August 28, 2005. I am not persuaded that it did. The contract language is instructive on this point. Nowhere does Article 6 refer to multiple probationary periods, nor does it appear to anticipate the possibility of a probationary employee taking a new position with the employer during the probationary period. However, it does state that seniority dates from an employee's original date of hire and that employee benefits accrue from the date of most recent hire for employees who have completed probation. The February 14, 2005 letter of hire clearly states that Ms. Kohlhagen's original date of hire was October 4, 2004 and, furthermore, that her vacation benefits would also accrue from that date. It is clear from that language that in the County's view Ms. Kohlhagen's date of hire for seniority and benefit purposes was October 4, 2004 and, what is more, it represented that fact to the employee and the Union. I dismiss the notion that by formally resigning her position from the District Attorney's office before she took the Accounting Department position, Ms. Kohlhagen thereby severed her employment, making the date she began her Accounting job the effective beginning of a second probationary period. The testimony reveals that she only turned in a letter of resignation at the request of the District Attorney and not with any understanding or intention of severing her continuous employment with the County. Under the language of Article 6, absent a written and mutually agreed extension, the probationary period runs for six months after the date of original hire for seniority purposes. Benefits, on the other hand, are calculated from the date of most recent hire. According to the February 14 letter, however, in Ms. Kohlhagen's case those dates coincided. There is no language in the contract permitting a second probationary period, nor is there evidence in the record of an existing practice of doing so, therefore, I find that, barring an extension, Ms. Kohlhagen's probation was due to expire on April 4, 2005.

The County argues that the terms "probationary period" and "training period" were interchangeable and that the Grievant knew or should have known from the February 14 letter that her new position in the Accounting Department would require an additional six month probationary period. Given the additional reference to her date of hire for seniority and benefit purposes, however, this is not at all clear. More importantly, though, what the Grievant did or did not understand the letter to mean is not dispositive with respect to how contract language is to be interpreted and applied. The contract must be interpreted on its own terms, subject to past practice, bargaining history and rules of construction and the employer cannot either create, expand, or restrict contract rights via unilateral communication with a prospective employee. The contract does not use the terms "probation" and "training" interchangeably and Union Representative White denied any understanding of the same on the Union's part. Under the circumstances, therefore, the County belief that the terms are synonymous, standing alone, carries little weight.

The County's alternative theory is that Ms. Kohlhagen, by accepting the position with the Accounting Department according to the terms of the February 14 letter, in effect agreed to an extension of probation under the terms of Section 6.1. The County points out that, under COLUMBIA COUNTY, CASE 220, NO. 61710, MA-12040 (McLaughlin, 2004), such an agreement need not be signed by the employee, but needs only to be in writing. The County asserts, therefore, that the February 14 letter was a notice of probation extension and that Ms. Kohlhagen tacitly agreed to it by accepting the position. Again, I disagree.

It should first be noted that COLUMBIA COUNTY does hold that an extension agreement need not be signed by the employee, but beyond that it is distinguishable from this case. There, the document in question explicitly stated that it was an extension of probation. Further, the Grievant testified that, although she did not sign the document, she did agree to the extension. Neither of those significant facts exist here. The February 14 letter makes no reference to an extension of probation whatsoever, but only refers to an additional six month training period. If, as noted above, Ms. Kohlhagen's probation was due to expire on April 4, by contract an extension could only be for a maximum of another three months, or until July 4. However, a six month "training period" from February 28 would last until August 28. Thus, I am unable to find a way to interpret the February 14 letter in such a way that the reference to a six month training period could reasonably be construed as notice of a three month probation extension. Further, Ms. Kohlhagen's testimony belies any suggestion that she understood such to be the case or agreed with it.

The County argues with some force that sustaining the grievance puts it in a difficult position, because, under these circumstances it would have to evaluate an employee and make a retention decision in little more than a month. The implication is that, without the ability to piggy back probationary periods, similarly situated employees will be more likely to be let go before they can establish their ability to perform their jobs adequately. The fact is, however, that this was a problem of the County's making. It had several options available to it, any of which could have avoided this situation, and availed itself of none of them. It could have informed the Grievant directly that if she took the Accounting Department job it intended to extend her probation for three months. This would have provided additional time for evaluation before a retention decision needed to be made. If she did not agree to the extension, the County could have withdrawn the offer or told her that she would only have until April 4 to either prove her competence in her new position or face dismissal. It could also have informed her and the Union in explicit terms that it believed it had contractual authority to impose an additional six month probationary period on her, at which point the Union could have challenged the action in a timely fashion. Under any of those scenarios, the Grievant would have known the ground on which she stood and could have made an informed decision as to whether to take the new position or keep her job with the District Attorney. This is not akin to a situation where a non-probationary employee transfers or is promoted to a new job and has a two month trial period in the new position. In that instance, if the employee does not succeed she can return to her former position. Here, the consequence of failure was termination and the Grievant was entitled to be apprised of that fact in unambiguous terms when she took the position. Given the tenuous nature of probationary status, the least the contract requires is

clarity and an employer that chooses to couch significant matters in ambiguous terms does so at its peril.

For the reasons set forth above, and based upon the record as a whole, I hereby enter the following

AWARD

The Grievant, Cheryl Kohlhagen, was not a probationary employee at the time of her discharge. The County shall, therefore, make her whole for any losses directly arising from her termination.

Dated at Fond du Lac, Wisconsin, this 21st day of September, 2006.

John R. Emery /s/
John R. Emery, Arbitrator

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