IN THE MATTER OF AN ARBITRATION

BETWEEN:

THE MINISTER RESPONSIBLE FOR THE PUBLIC SERVICE
(GOVERNMENT OF THE NORTHWEST TERRITORIES)

Employer

-and-

THE UNION OF NORTHERN WORKERS

Union

GRIEVANCE RE: POLICY GRIEVANCE
VOLUNTARY REASSIGNMENT PROBATION PERIOD
GRIEVANCE NO. 09-P-00782

BEFORE:	THOMAS JOLLIFFE, Q.C.
FOR THE EMPLOYER:	ERIN DELANEY
FOR THE UNION:	JOHN HAUNHOLTER
DATE OF HEARING:	JULY 4, 2012
HEARING LOCATION:	YELLOWKNIFE, NORTHWEST TERRITORIES

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The issue presented by the Parties in this policy grievance matter is a relatively discrete one. It is whether those bargaining unit employees already employed by the Government of the Northwest Territories who choose to accept a "voluntary reassignment" are subject to serving another probationary period at that point, unless waived by the Employer, or has the Employer been violating the collective agreement when it insists that they do. In their submissions, the Parties' respective counsel made reference to the collectively bargained language, the Human Resources Manual covering GNWT employees, and the *Public Service Act R.S.N.W.T. 1988,c.P-16*, insofar as they all deal with probationary periods.

Firstly, one notes the following collective agreement provisions:

Article 2

INTERPRETATION AND DEFINITIONS

2.01 For the purpose of this Agreement:

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(g) "Demotion" means the appointment by the Employer of an employee for reasons of misconduct, incompetence or incapacity, to a new position for which the maximum pay is less than that of his/her former position.

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(n) "Employer" means the Government of the Northwest Territories as represented by the Minister responsible for the Public Service Act or his/her designate.

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(y) "Probation" means a period of six (6) months from the day upon which an employee is first appointed to or promoted within the Public Service of the Northwest Territories except that for an employee first appointed to a position oat Pay Level 13 or higher, it shall be a period of one (1) year. An employee who is appointed to a position which has the same duties, as his/her previous position shall not serve an additional probationary period. If an employee does not successfully complete his/her probationary period on transfer or promotion the Employer will make every reasonable effort to appoint him/her to a position comparable to the one from which he/she was transferred or promoted.

(z) "Promotion" means the appointment of an employee to a new position where the position to which the employee is appointed is at a higher pay range than the position the employee formerly occupied.

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(ee) **"Transfer" means the appointment of an employee to a new position, that is evaluated within the same pay range as the employee's former position.**

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(ii) **"Voluntary Reassignment" is when an employee accepts a different position where the maximum rate of pay is less than his/her present rate of pay.**

It might also be observed on reading the collective agreement that the "Purpose of Agreement" language of article 1.02 includes the assurance that "... the parties are determined to establish, within the framework provided by law, an effective working relationship at all levels which members of the Bargaining Unit are employed."

Secondly, reference is made to the Human Resource Manual – 501 – Probationary Periods, language contained in the following paragraphs:

Introduction

1. **Probationary periods are an opportunity for the employing Department to determine if the employee is suitable for the position.**

2. **The Government is committed to ensuring that new employees have an opportunity to learn their job and to succeed.**

Application

3. **Thee guidelines and procedures apply to all employees, except those employed by the NWT Power Corporation.**

Definitions

4. **The Probationary Period, for an employee is indicated below:**

   a. **For all employees except teachers: on initial appointment to a position at pay level 12 or lower, six months; or on initial appointment to a position at pay level 13 or higher, 12 months; or on transfer or promotion, six months (the Deputy Head may further reduce or waive the probationary period). An employee who is appointed to a position which has the same duties, as his/her previous position shall not serve an additional probationary period.**

b. **For teachers: on appointment to a teaching position, two years, or until the employee has two years teaching experience in the Northwest Territories, unless specified otherwise; or on promotion, up to one year.**

Thirdly, reference is made to the following *Public Service Act* sections:

Power of Minister to appoint	**16. Subject to subsections 16.1(1) and 17(2) and (3), the Minister has the exclusive right and authority to appoint persons to positions in the public service.**
Appointments by competition	**17. (1) The Minister may make appointments by competition to positions in the public service.**
Appeal of Minister's decision	**(2) Pursuant to the regulations, a Staffing Review Officer may hear an appeal of an appointment by competition under subsection (1).**
Minister to revoke anointment	**(3) Where a Staffing Review Officer grants an appeal , the appointment made under subsection (1) shall be revoked by the Minister.**

Probation	**20. (1) Subject to subsection (2), where an employee is not appointed from within the public service, the employee is on probation after he or she has taken up the duties of his or her position for such period as may be established by the Minister for that position.**
Minimum period	**(2) The period established as a probationary period under subsection (1) must not be less than six months.**
Appointment from within public service	**(3) Subject to subsection (4), where an employee is appointed from within the public service, the employee is on probation for six months after he or she has taken up the duties of his or her position.**
Period reduced or waived	**(4) The Minister may, if he or she considers it appropriate, reduce or waive the probationary period referred to in subsection (3).**
Extension of probationary period	**(5) The Minister may, in accordance with the regulations, extend the probationary period of an employee that is established under subsection (1) or referred to in subsection (3).**

Testimony:

The testimony explaining the Employer's position, said to require that employees taking voluntary reassignments serve a probationary period, unless specifically waived in individual circumstances, came from one witness, Blair Chapman. During his career in the GNWT he has held the positions of Senior Labour Relations Officer, Manager of Labour Relations, and Director of Human Resources. He admits to having close familiarity with the collective agreement provisions, Human Resources policy and directive, and the *Public Service Act* insofar as it pertains to appointments into positions within the Public Service. In his testimony, Mr. Chapman recalled that the current article 2.01(ii) was first negotiated into the 2005 -2009 collective agreement in order to encompass a situation where the Parties had recognized it to be in some employees' best interest to have the flexibility of moving into lower rated positions, receiving less pay in return for the personal benefit to be derived, whatever it might be, of moving down a notch in terms of the expected job responsibilities. It might also be a situation where an employee was looking at "building a skills inventory" broader than that already possessed which would require taking a lower evaluated position for a time. The voluntary reassignment category was considered by management to capture an employment decision made by the employee certainly quite distinct from being demoted, which under article 2.01(g) contemplated their being assigned to a new position for reasons of misconduct, incompetence, or incapacity, by definition. He said that one's ability to request a voluntary reassignment was also considered an employment option distinct from taking a transfer which under article 2.01(ee) meant taking a position at the same pay rate as the former position, by definition. Obviously, such a move did not constitute a promotion.

At the same time, according to Mr. Chapman, the Employer in making its human resources decisions considered it important for any employee moving into a set of differently described duties,

accepting an appointment into a lesser rated position, perhaps quite unlike those duties which he or she had been fulfilling to that point in their vacated higher rated position, to demonstrate over a suitable period of time the necessary skills and ability to do the job. The person might well require appropriate time to receive mentoring, training and assessment in order to reach the standard required in the reassigned position, new to that person, albeit lower paying, otherwise both the employee and Employer could be at risk, thought to be unfair to both.

During the course of his testimony, Mr. Chapman mentioned that any employee can make a request for voluntary reassignment at any time, an appointment into a lower rated position, having presumably assessed their personal circumstances, although it would be up to the department manager to determine whether the person should be allowed to do so during the probationary period attaching to the currently held position wanting to be vacated. It might well come about as a matter of accommodating the individual in some way, although that prospect might include disability accommodation considerations as a process unto itself. On the whole, by his description, the concept of "voluntary reassignment" has been considered applicable to an employee driven request seeking to locate elsewhere within the Public Service into a lesser rated job with the great majority of requests requiring going through the competition process unless it were situation of direct appointment requiring Cabinet approval. It is not a matter of seeking consent from the Union or fashioning anything outside relying on the negotiated language of the collective agreement. It has been initiated by the employee with the co-operation of the Employer. It amounts to fashioning a permanent employment change unless one is later able to transfer to another position, which might well be the case with a person looking for alternative skill sets before again taking on more responsible duties. Being voluntarily reassigned does not alter the person's ability to take his years of service with him into the new position, as would be the case with any move within the Public Service, not being a severance of the employment relationship. Indeed, section 20 of the *Public*

Service Act specifically contemplates appointments being made from within the Public Service. What distinguishes it from a lateral transfer for the Employer, is that the employee is no longer seen to be performing the same basic duties at the same rate of pay, and might even include going back into a job classification the person had previously been performing at some time in the past, although that situation might persuade the Employer to consider waiving another probationary period. By Mr. Chapman's description it could even include the person applying to become a term employee, by way of illustrating the flexibility available to employees feeling too uncomfortable in their current situation,

Argument:

In its seeking a declaration at this point that applying a probationary period to an employee accepting voluntary reassignment breaches the collectively bargained obligations of the Employer, the Union contends that this new category of stepping a person down in job responsibilities constitutes a unique circumstance not explicitly addressed in any probation language supporting the Corporation's position. It should be recognized, Mr. Haunholter said, that only during an employee's initial probationary period, not yet completed, would a voluntary reassignment at that point trigger a probationary period to be applied.

In one reviewing the collective agreement, according to Mr. Haunholter, it is crucial to observe that the article 2.01(y) definition of "probation" includes a six months period of time from first appointment to or promotion within the Public Service; no reference there to a situation of taking on lesser paying duties as a reassignment at some point serving to trigger another probationary period. Indeed, it might be seen as significant that the article 2.01(ii) definition for "voluntary reassignment" speaks of one "accept(ing) a different position" with less pay, without it referencing the need for a formal appointment necessarily to be triggered. Interestingly there is no

express definition for "position" contained elsewhere in article 2.01. By the Union's understanding, he said, it would not be a promotion, or a transfer, or a demotion, all of which are covered by specific defining subparagraphs of article 2.01. Certainly, at some point in the past, the employee would have already had his or her appointment to the Public Service which is when the probationary period obligation would have been satisfied. The reassignment action, he said, as distinct from a transfer, demotion or promotion, all defined within article 2.01, could well include taking on either long-term or short-term duties, might even include taking a term situation, but in any event it does not have to be considered as one accepting another formal *Public Service Act*, section 17 appointment. It should be considered doubtful, he said, that the Parties could have intended a probationary period attaching to one performing lower rated job duties, where we know by express language that a person taking a straight transfer into a situation with the same duties, has no such obligation under article 2.01 (y). Were such an intention to exist, he said, it should be founded on clear and unmistakable language affecting as it does an employee's job security. It is not enough to say that it might have been an oversight. To accept the Employer's current position, by Mr. Haunholter's description, would require "unilateral importation" of nonexistent language. As written, there should be found no requirement in the contractual language for creating a re-newed probationary period covering voluntary reassignments.

In support, the Union provided a number of cases speaking to the significance of following the language of the collective agreement concerning applying periods of probationary employment, even to the point of arbitrators determining that newly negotiated language dealing with extending the probationary period of employees should not be retroactively applied to affect the current probationary periods already being served despite the contract having retroactive effect in other areas. Such is the recognized need for employees to appreciate the significance and duration of their stated probationary periods at time of hire. See for example *Air Canada and Air Canada Pilots*

Association (Kizlyk Grievance), [1999] C.L.A.D. No. 113 (Frumkin). In further support, Mr. Haunholter cited *Thunder Bay Hydro Electricity Distribution Inc. v. International Brotherhood of Electrical Workers Local 339 (Siciliano Grievance)* (2005), 136 L.A.C. (4th) 310 (Marcotte) dealing with a situation where the arbitrator determined that an employee's temporary demotion from lead hand as a disciplinary response while a probationary employee denied the opportunity for the employer to properly assess the individual in the context of the lead hand position and was a self-defeating response to the misconduct. It was determined to be an inappropriate response in addition to the valid five day suspension. Notably, therein at para. 48 the arbitrator remarked on the significance of the probationary period as follows:

> 48 **As indicated by the Union and Mr. Anderson in his testimony, it is generally accepted in the labour relations context that a probationary period serves the purpose of providing the employer and the employee with an ability to assess the employee's ability and suitability for a position. As stated in Brown and Beatty, supra, at para. 7:7500:**
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> > **...virtually all arbitrators now accept the rationale for, and legitimacy of the probationary status as being like an apprenticeship, a learning experience and a period of time during which the employer is free to assess the full potential and capability (viz., the suitability of such persons in the broadest sense) of both new employees and employees who have not worked for a period of time in the particular position.**

In *Re Sudbury and District Association for the Mentally Retarded and C.U.P.E., Local 2599* (1984), 13 L.A.C. (3d) 385 (Egan), also cited by Mr. Haunholter, it was a situation where the contractual language allowed any transferred employee to move from unit to unit carrying the full protective shell of seniority. Prior to transfer, the aggrieved employee had been a non-probationary employee in the part-time bargaining unit. She converted her part-time seniority into full-time under the collective agreement, with the issue being whether she was should be considered a "newly hired employee"under the probationary language of the collective agreement and thereby subject to serving another probationary period. She had applied for the available position under the job posting

provisions of the full-time collective agreement, but at no time had there been any severance of the employment relationship. On the arbitrator's careful review of the language of the collective agreement, in context, he determined that the path to satisfactory employment in a full-time position was not the same for a part-timer moving into the job duties as a new employee. While the newly hired employee was stated to be on probation, under the collective agreement, the transferred employee was stated to be on a trial period. He found no intention within the collective agreement that the transferee was to have probationary status, remarking that they easily could have used appropriate language "if the parties had intended the transferee was to have probationary status with the concomitant risk of discharge without just cause" as was the potential situation facing any probationary employee under the contract language.

Along the same lines, arbitrator George Anderson in *Re Corporation of City of Calgary and C.U.P.E., Local 38* (1980), 28 L.A.C. (2d) 379, dealt with a situation involving the temporary demotion of a social worker supervisor due to funding difficulties, where the employer had attempted to re-impose a probationary period upon return to the supervisory position. On his review of the contractual language, he determined that the employer requiring an additional probationary period violated the collective agreement. Similarly, in *Re Krueger Air (Canada) Industries and Sheet Mental Workers International Association, Local 540* (1984), 15 L.A.C. (3d) 7 (Solomatenko), the arbitrator dealt with a situation where an employee was eventually called back into bargaining unit work following a period of time working outside the bargaining unit in customer services, but no quit had occurred at any point. He determined that the employee's position was not sustainable that the employee was somehow returned to bargaining unit work as a probationary employee. In so concluding, on his review of the issue, he stated that "to find that the griever is again a probationary employee would require the clearest language in the collective agreement stipulating that an employee is subject to a probationary period merely by the fact of transferring back into bargaining

unit work. No such language exists here".

In further support Mr. Haunholter cited arbitrator Chertkow's award in *Re Northwest Territories and Union of Northern Workers* (1989), 5 L.A.C. (4th) 1 dealing with the employer's decision to extend the probationary period for a further six months following a departmental reorganization, resulting in an eventual rejection on probation. In his review of the factual circumstances, the arbitrator observed that any job is not frozen in a job description unless specific contract language supports that proposition, and that job content can be so fundamentally altered in order to create what amounts to a new job. It might well require one to look at the core functions in order to determine whether a new job has been created sufficiently distinct from the existing one. In considering the matter at hand, he stated at para. 52 that the *Public Service Act* "does not bar the employer from negotiating an agreement with its unionized employees which restricts its authority to extend probation for newly hired employees," going on to determine that there was no language in the interpretation and definition language of the collective agreement authorizing the employer to extend the period of probation in the manner done. He went on to state at para. 54 that "in the absence of express language [by reference to the collective agreement of the day] which would empower the employer to carry out the course of action and having found that the provisions... of the *Public Service Act* [by reference to a section worded similarly to the current section 20 *but* no language akin to current subsection (5) allowing the Minister to extend the probationary period without limitation] do not assist the employer, the union's position must be upheld". Likewise, Mr. Haunholter submitted, The Union takes the view with respect to the language now addressing voluntary reassignments that the *Public Service Act*, specifically article 20(3), does not serve to assist the Employer as the collective agreement simply does not contemplate additional probationary time for an employee moving into duties requiring a lesser rate of pay.

The point of the case law, including the *NWT and UNA* award by Mr. Haunholter's

submission, is that where employees have maintained the employment relationship, after having gone through a probationary period following commencement of employment, sometimes years previously, it would take clear and unequivocal contract language to provide an employer with the authority to place the same continuously employed individual back into probationary status merely by bidding into another job without any severance of the employment relationship, which language was said not to exist here with respect to the "voluntary reassignment"option available to bargaining unit employees.

Of behalf of the Employer, Ms. Delaney submitted that while the collective agreement Interpretation and Definition language of article 2.01 presumably might be considered "silent" on application of a probationary period to employees taking voluntary reassignments, it is nevertheless a process of one working through the language as a whole and understanding the probationary requirement in context, also having due regard to the *Public Service Act* requirements. The collective agreement in article 2.01(y) can be seen to initially address the requirement for a probationary period covering any person "first appointed to or promoted within the Public Service...", but also dealing with employees appointed to positions having the same duties they had been working which situation is expressly said not to require serving an additional probationary period. She pointed out that the article 2.01(y) language concludes by directing the Employer to make every reasonable effort to appoint the failed probationary employee "to a position comparable to the one from which he/she was transferred or promoted", thereby certainly contemplating a wider application for probationary involvement than new hires, but failing to make any express reference to the newly created category of voluntarily reassigned employee negotiated into the 2009 collective agreement which by definition is not a promotion, or transfer, or demotion, but a different, lower paying, position by reference to article 2.01(ii). The pre-existing article 2.01(y) language has remained the same. Contextually speaking, she said, the Employer takes the view that just as with

any transfer, the parties would contemplate that the newly created voluntary reassignment should require a probationary period to be applied. Certainly the contractual language does not expressly prevent that result. At the worst, the collective agreement is silent on the issue.

However, unlike the employers in numbers of private sector awards, the GNWT Public Service, as an employer, can certainly have access to specific provisions in the *Public Service Act,* especially where the negotiated contractual language is silent on an issue. In support she cited the Brown and Beatty, *Canadian Labour Arbitration, (4th ed. looseleaf)* for the description contained at para.4:2100 concerning the object of construction being to look for the intention of the parties. They point out, as have many arbitrators over the decades, that the parties are presumed to have intended what they have written and that one looks to the express provisions contained in the collective agreement as opposed to implying certain rights which are not found there to exist on the chosen words. However where the collective agreement is silent but statute made law is presumed to be incorporated. They remark as follows:

> **When faced with a choice between two linguistically permissible interpretations, however, arbitrators have been guided by the purpose of the particular provision, the reasonableness of each possible interpretation, administrative feasibility, and whether one of the possible interpretations would give rise to anomalies. But where a collective agreement is silent on an issue, yet a legislative provision is presumed to be incorporated and must be applied by the arbitrator, such a provision 'must be interpreted on its own terms and not in light of the understanding of the parties' [to cite Coca-Cola Bottling Co (2003) 117 L.A.C. (4th) 238 (Marcotte)].**

Under section 17 of the *Public Service Act*, Ms. Delaney said, it should be clear enough that whether or not a job situation is generated through competition or direct appointment, promotion, lateral transfer, or into a lesser rated position in the nature of a voluntary reassignment, there is always an appointment to a described position having occurred. Mr. Chapman's evidence was delivered in the context of that long-time and continuing reality. Where the appointment is from within the Public Service, under section 20(3), the employee is subject to a probationary period of

six months, unless waived under subsection (4). Under subsection (5) the probationary period may be subject to extension. This would be the case, Ms. Delaney submitted, even where there is no break in service, no change in benefits, and certainly including situations where an employee is moving into fundamentally different duties and thereby has no access to the "same duties"exception contained in article 2.01(y). Were one to consider the voluntary reassignment language in the context of the probation obligations facing other employees taking different positions, the only express exception listed under article 2.01(y) is that pertaining to "same duties", but arguably not for every kind of job movement which presumably could well involve not performing anything like the same duties although maintaining the same pay range, or not. It would be incongruous, she said, to interpret the language, in context, as requiring no additional probationary period for voluntary reassignments into lesser rated positions under article 2.01(ii).

Ms. Delaney also submitted that the Employer does not take issue with the guiding principles to be taken from the case law, summing up her observation that "it is all a matter of the language" in one reviewing the negotiated contractual obligations, but keeping in mind the interaction here with the *Public Service Act.* There is no reference in any private sector case law to any such legislated requirements concerning appointments to positions and the concomitant ability to apply a probationary period, as contained therein. In dealing with arbitrator Chertkow's analysis in the cited *NWT and UNW* award, Ms. Delaney submitted, the factual circumstances are entirely different, there being no doubt that the parties having negotiated inclusion of the voluntary reassignment language are contemplating employees moving into positions of a different basic character than previously worked, the type of situation which one might expect would require a probationary period to be applied. Further, it is not as if the Employer has been acting contrary to the Human Resources Manual–501–Probationary Periods, provisions which have existed for some years, and do not suggest that an existing employee moving into the different duties associated with a voluntary

reassignment should be relieved from serving an additional probationary period. The definitions contained therein should be seen to fall in line with the long-standing article 2.01(y) and are at the worst simply silent with respect to the newly created contract language contemplating employees accepting voluntary reassignments into lesser paying jobs, which is to say taking a formal appointment to another position than previously held. In all, she said, the Employer should not be prevented from applying a probationary period to employees taking voluntary reassignments from within the Public Service, as there is no express prohibiting language contained in the collective agreement and the *Public Service Act* is clear enough respecting the Minister's authority under section 20.

Conclusion:

As I mentioned at outset, the singular issue presented here is whether a currently employed bargaining unit member accepting a "voluntary reassignment," does so on the basis of the Employer requiring another probationary period to be served, where not waived, or does it amount to the Employer violating the collective agreement, with reference to the current wording of article 2.01(ii) first negotiated into the 2005 - 2009 collective agreement placed alongside the pre-existing, unchanged, probation language contained at article 2.01(y).

Having considered the testimony of the sole witness in this matter, Blair Chapman, and the Parties' respective counsels' informative and detailed arguments, on my review of the issue it is necessary to make certain observations, realistically not considered to be in dispute, which bear on the result. **Firstly**, the "probation" language of article 2.01(y), negotiated in its present form well prior to the 2005- 2009 collective agreement which incorporated the article 2.01(ii) "voluntary reassignment" language, makes no express reference to that defined employment change possibility occurring. **Secondly**, article 2.01(ii) incorporating the "voluntary reassignment" language makes no

express reference to having any probationary period attaching thereto, although in that respect it does not vary from any of the definitional language setting out other categories of job change, i.e. article 2.01(g) dealing with "demotion", article 2.01(z) dealing with "promotion" and article 2.01(ee) dealing with "transfer". Nevertheless, both the possibility of transfer and promotion are contemplated by article 2.01(y) in its reference to a probationary period being applied, or not, and what occurs when an employee is not successful. It may well be that the parties simply neglected to update article 2.01(y) at the time of their incorporating a definition for employees taking voluntary reassignments, but that possibility is not determinative of anything. **Thirdly,** It is necessary to interpret the collective agreement in conjunction with the *Public Service Act* as the parties committed themselves to have established their relationship "within the framework provided by law" to cite article 1.02, with the Employer being defined under article 2.01 as the GNWT represented by the Minister responsible for the *Act*. As I have noted in previous awards between these parties, I accept that there is an interplay between the collective agreement and the *Act* which cannot be ignored. See for example *UNW and Northwest Territories (MacDonald Grievance)*, [2004] C.L.A.D. 542. **Fourthly,** any Human Resource dicta, needless to say, must be viewed as having to fall in line with relevant statutory and contractual requirements.

In considering this interpretation problem, strictly speaking, neither the collective agreement, nor the *Act*, prohibit the possibility of a person working in a job assignment, performing an ongoing scheduled set of assigned duties, for a short or even a relatively long period of time, without always having received a formal appointment into a position reflecting that assignment. The collective agreement carefully defines an "indeterminate employee"under article 2.01(m)(ii) as "a person employed for an indeterminate period", and under subparagraph (vii) defines "term employment" without any reference to creating a formalized position as a person employed for a fixed period in excess of four months, which Mr. Chapman suggested might be a possibility on one seeking

voluntary reassignment. Nevertheless, article 2.01(ii), on its face, operates when an employee "accepts a different position"at less pay, with the concept of receiving an appointment to a "position" undoubtably having a distinct meaning under the *Public Service Act*. Plainly, section 16 contemplates the Minister having the exclusive right and authority to appoint persons to positions in the Public Service, while section 17 specifies that the Minister "may make appointments" by competition, not ruling out direct appointments certainly. Section 20(3) of the *Act* addresses the requirement for employees being appointed from within the Public Service having to serve a six months probationary period, unless reduced or waived, even subject to extension under subsection (5).

It is apparent that articles 2.01(y) and 2.01(ii) are silent with respect to the issue of probation being applicable to voluntary reassignments. It is accordingly necessary to look at the nature of that term as understood by the parties through the defining language they have used. An employee's voluntary reassignment, does not occur when he/she starts performing in a range of different duties, even at a lesser rate of pay were that to occur, but only by operation of article 2.01(y), when the employee "accepts a different position where the maximum rate of pay is less than his/her present rate of pay." The *Public Service Act* is careful in its use of the words "appoint", "appointed" and "appointments", into positions all coming within the exclusive right and authority of the Minister, a more careful usage perhaps than the collective agreement which only defines an indeterminate employee under 2.01(m)(ii) as a person employed for an indeterminate period, and does not contain a fixed definition for position under article 2.01. It is accordingly the formal act of making an accepted appointment to a position in the Public Service which triggers the section 20 probation language under the *Act*, and which is clear on its face as to what occurs at that point. There is nothing in the collective agreement to which I have been referred which serves to reduce or avoid the *Public Service Act* probation requirements following an employee's formal appointment from

within the Public Service even into a position qualifying as a voluntary reassignment.

It would be my conclusion that in circumstances where an employee, following exercise of the Minister's exclusive right and authority to appoint persons to positions in the Public Service, has accepted a different position by operation of that authority where the maximum rate of pay is less than his/her present rate of pay, a voluntary reassignment has occurred by reference to article 2.01(ii) which is subject to the probation language under section 20 of the *Public Service Act*. I do not see that any language contained in article 2.01(y) of the collective agreement can be read as disputing that result, it not expressly referencing the concept of voluntary reassignment. There is no conflict here between the *Act* and the collective agreement on this requirement. Accordingly, a declaration is to issue that the Employer has not violated the collective agreement by applying a six months probationary period under section 20(3) of the *Act* following an employee's formal appointment from within the Public Service into a voluntary reassignment position, which results in this policy grievance being decided in the Employer's favour.

DATED at Calgary, Alberta this 3rd day of October, 2012.

Thomas Jolliffe, Q.C.