IN RE THE ARBITRATION BETWEEN
LOCAL 1184, AMERICAN FEDERATION
OF STATE, COUNTY, AND MUNICIPAL
EMPLOYEES ON BEHALF OF MS.
MAGNOLIA BOTERO,

AFSCME/Botero,

and,

SCHOOL BOARD OF MIAMI-DADE
COUNTY,

School Board.
_____/

FMCS Case No. # 15-53756-3
Issue: Non-Reappointment of
Magnolia Botero

ARBITRATOR'S OPINION AND AWARD

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Applicable Collective Bargaining Agreement ("CBA"):

Contract between Miami-Dade County Public Schools and the American Federation of State, County, and Municipal Employees, Local 1184, effective July 1, 2012, through June 30, 2015.

Arbitration Hearing Dates:

June 25, 2015, and October 8, 2015.

Witnesses for School Board:

Dennis Carmona, Executive Director, Operations and Records; Treska Rodgers, Executive Director, Non-Instructional Staffing; Anamarie Moreiras, Administrative Director, Central Region (former principal, South Miami K-8 School); Rexford Darrow, retired principal, South Miami Elementary School; Dr. Jimmie Brown, Administrative Director, Office of Professional Standards.

Witnesses for AFSCME/Botero:

Victor Aponte, Union Steward, AFSCME Local 1184; Terry Haynes, Union Steward, AFSCME Local 1184; Magnolia Botero, Grievant; Sherman Henry, former president and chief negotiator, AFSCME Local 1184.

JURISDICTION

In this matter, Local 1184, American Federation of State, County, and Municipal Employees ("AFSCME," or "Union"), protests and grieves Miami-Dade County School Board's ("Board" or "School Board") June 18, 2014-separation/non-reappointment of bargaining unit custodian Magnolia Botero ("Botero" or "Grievant"). Botero's last day of work was June 30, 2014. To remedy School Board's action, AFSCME requests the undersigned to forthwith order Botero's reinstatement to her former custodian position with all back pay and employee benefits.

Following Board's July 9, 2014-denial of Botero's grievance,[1] it was thereafter moved to

[1] In relevant part, School Board's July 9, 2014-grievance denial stated as follows:

July 9, 2014

This letter is in response to your correspondence to Ms. Enid Weisman, Chief Human Capital Officer, formally appealing action taken by the School Board of Miami-Dade County at the June 18, 2014-School Board meeting. In accordance

arbitration and submitted to the undersigned, as the agreed arbitrator, for final resolution. Transcribed arbitration hearings were held at Board's Miami offices on June 25, 2015, and continued to October 8, 2015, wherein, the parties were accorded the full opportunity to call, examine, and cross-examine witnesses and submit all other evidence pertinent and material to the case. Comprehensive written post hearing closing arguments were received by the undersigned on February 5, 2016. Additional time was agreed to by the parties for the undersigned to complete this opinion and award.

RELEVANT CBA LANGUAGE

ARTICLE V/*DEFINITIONS (in relevant part)*

Terms used in this Agreement shall be defined as follows:

* * *

Section 29. **Full-Time Permanent Employees** -- Those employees covered under this Contract who are regularly scheduled to work more than 30 hours per week on either a 10-month or 12-month basis.

* * *

Section 31. **Part-Time Permanent Employees** -- Those employees covered under this

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with Miami-Dade County Public Schools (M-DCPS), and American Federation of State, County, and Municipal Employees (AFSCME) Collective Bargaining Agreement ("CBA"), Article XI, Section 4.D, Ms. Magnolia Botero, . . . , was non-reappointed for performance related issues. Since non-reappointments are not subject to grievance/arbitration procedures, per CBA Article XI, Section 2, the Notice of Appeal you sent on June 27, 2014 is not actionable.

With regard to your concern that [Ms. Botero] has been employed by M-DCPS in excess of five years and is, therefore, no longer subject to non-reappointment, please note that the above-referenced contract section pertains specifically to **permanent unit members**; also referenced as **full-time** permanent in Article V, Section 29. You correctly assert that Ms. Botero has been continuously employed by M-DCPS for 19 years. However, she did not become subject to the non-reappointment process until September 25, 2009, when she accepted a full-time custodial position. Therefore, Ms. Botero was subject to non-reappointment on June 18, 2014.

* * *

s/ Ana M. Rasco
Ed. D.
Assistant Superintendent

Contract who are regularly scheduled to work 30 or fewer hours per week on either a 10-month or 12-month basis. The number of regularly-scheduled working hours shall be finalized for the school year no later than the last working day in October.

ARTICLE VII/*GRIEVANCE PROCEDURES (in relevant part)*

* * *

Section 4. **Arbitration**

POWERS: . . . [t]he arbitrator shall have no right to amend, modify, nullify, ignore, or add to the provisions of this Agreement.

ARTICLE XI/*DISCIPLINARY ACTION (in relevant part)*

* * *

Section 2. **Dismissal, Suspension, Reduction-in-Grade**

Permanent employees dismissed, suspended, or reduced in grade shall be entitled to appeal such action to an impartial Hearing Officer or through the grievance/arbitration process as set forth in Article VII [entitled *Grievance Procedures*] of the Contract. (Emphasis Added).

* * *

Non-reappointments are not subject to the grievance/arbitration procedures. (Emphasis added).

* * *

Section 4. **Types of Separation**

Dissolution of the employment relationship between a **permanent unit member** and the Board may occur by any of four distinct types of separation. (Emphasis Added).

A. Voluntary . . .

B. Excessive Absenteeism/Abandonment of Position . . .

C. Disciplinary -- The employee is separated by the employer for disciplinary cause arising from the employee's performance or non-performance of job responsibilities. Such action occurs at any necessary point in time.

D. [U1] [2] **Non-reappointment -- The employee is separated by management's decision not to offer another annual contract.** (Emphasis Added). However, such non-reappointment shall not be in lieu of discipline

[2] The said "U" is short for "unnumbered." Thus, for brevity hereinafter, the said "U1" is short for "unnumbered paragraph 1 of Section 4-D of Article XI"; the said "U2" is short for "unnumbered paragraph 2 of Section 4-D of Article XI"; and the said "U3" is short for "unnumbered paragraph 3 of Section 4-D of Article XI."

or lay-off. Employees whose performance has been deemed marginal by the supervising administrator, who have been counseled during the school year concerning performance, and have failed to perform acceptably shall not be reappointed. (Hereinafter, for identification and clarity, "U1").

[U2] Such-employees and the Union shall be put on written notice of possible non-reappointment. Counseling and written notice of non-reappointment shall be provided in a timely manner. This action shall not be arbitrary or capricious, but based upon reason for the best interest of the employer. (Hereinafter, for identification and clarity, "U2").

[U3] **AFSCME, Local 1184 bargaining unit members employed by the School District in excess of five years shall not be subject to non-reappointment. Such employees may only be discharged for just cause.** (Emphasis added). (Hereinafter, for identification and clarity, "U3").

E. Layoff . . .

* * *

OVERVIEW OF THE CASE & RELEVANT CBA LANGUAGE

The instance grievance centers on those AFSCME represented employees/bargaining unit members (including Grievant Magnolia Botero), whom Board employs on a year-to-year basis for each school year. These employees are uniformly called or deemed by the parties as "annual contract employees" (a/k/a/ "annual employees" [3]). As suggested by their name, nor do the parties dispute, that as a condition of their initial and then ongoing employment, that all annual contract employees must agree to and sign Board-generated annual employment contracts at the beginning of each school year.

As is specifically relevant to this matter, Section 4 of Article XI recognizes that for non-disciplinary reasons Board may separate (i.e., terminate the employment) of an annual contract employee by means of a contractual process the parties call or deem "non-reappointment." As stated

[3] While not specifically defined in the CBA's Article V/*Definitions,* "Annual [contract] employees" are recognized in Sections 3 & 4-A of Article IX/*Working Conditions.*

in the first sentence of unnumbered paragraph U1 of Article XI's Section 4-D, a non-reappointment occurs at the time an "[annual contract] employee is separated by management's [i.e., School Board's] decision not to offer [that annual contract employee] another annual [employment] contract."

Additional key non-reappointment terms, conditions, and language stated in the CBA are as follows:

- The third sentence of U1 of Article XI's Section 4-D, which states that ACE employees:

  > [w]hose performance has been deemed marginal by the supervising administrator, who have been counseled during the school year concerning performance, and have failed to perform acceptably **shall not be reappointed**. (Emphasis added).

- U3 of Article XI's Section 4-D which states that:

  > AFSCME, Local 1184 bargaining unit members employed by the School District in excess of five years shall not be subject to non-reappointment. Such employees may only be discharged for just cause.

  and,

- The last sentence of Article XI's Section 2, which states that Board "Non-reappointments are not subject to the CBA's grievance/arbitration procedures." [4]

In addition to being applicable to employees/bargaining unit members who have achieved the status of an annual contract employee, the undersigned further finds that the non-reappointment terms, conditions and language stated in U1, U2, and U3 of Article XI's Section 4-D also apply to "permanent employees." Such finding is based upon the language stated in Section 4/*Types of*

[4] On the other hand, separate and apart from non-reappointments, the first sentence of the same Section 2 of Article XI advises and states, in summary, that if a permanent Board employee is "dismissed, suspended, or reduced in grade" [i.e., demoted], the said permanent employee "shall be entitled to appeal such action to an impartial Hearing Officer or through the grievance/arbitration process."

Separation of Article XI's above quoted introductory first sentence which plainly states that the "Dissolution of the employment relationship **between a permanent [bargaining] unit member** and the Board may occur by **any of four distinct types of separation.**" Indeed, on its face, one of the "**four distinct types of separation**" is and/or constitutes all of the non-reappointment terms, conditions, and language stated in Article XI's Section 4-D. (Emphasis added).

The CBA's Article V/*Definitions* further divides permanent employees into full-time and part-time permanent employees. Full-time permanent employees are defined in Section 29 of Article V as "Those employees covered under this Contract who are regularly scheduled to work more than 30 hours per week on either a 10-month or 12-month basis"; whereas, Section 31 of Article V defines part-time permanent employees as "Those employees covered under this Contract who are regularly scheduled to work 30 or fewer hours per week on either a 10-month or 12-month basis."

SUMMARY OF GRIEVANT BOTERO'S EMPLOYMENT HISTORY

- Botero commenced working for School Board on March 27, 1995, in various part-time/hourly work positions.
- On September 25, 2009, Botero was promoted to both an annual contract employee and to a full-time permanent employee. Thus, from September 25, 2009, and continuing to her June 2014-non-reappointment, Botero, as a contractual annual contract employee agreed to and signed a Board-generated annual employment contract for each school year, and as a contractual full-time permanent employee, she was regularly scheduled to work in excess of 30 hours per week.
- That since Botero's March 27, 1995-date of hire, up to her September 25, 2009-promotion, she accrued fourteen and one half years of employment/service.
- That based upon Botero's charged unacceptable performance issues, on June 18, 2014, Board non-reappointed Botero by not renewing her annual custodian employment contract for the then upcoming 2014-2015 school year. [5] And,

[5] Botero's specific unacceptable performance issues which resulted in her non-reappointment are described in Principal Anamarie Moreiras' April 10, 2014-memorandum. In relevant part, it stated as follows:

- Since Botero's September 25, 2009-promotion, and continuing to her last day of work on June 30, 2014, she remained in the status of an annual contract employee and a full-time permanent employee, and accrued an additional four and one half years of employment/service. Thus, as of June 30, 2014, Botero had accrued a total

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MEMORANDUM **April 10, 2014**

TO: **Magnolia Botero, Custodian**
FROM: **Anamarie G. Moreiras, Principal South Miami K-8 Center**
SUBJECT: **PROFESSIONAL RESPONSIBILITIES**

This memo serves to remind you of your professional responsibilities as a full time night custodian at South Miami K-8 Center, and to review the School Board Policy 4210, Standards of Ethical Conduct, and the job description of Custodian as per Miami-Dade County Public Schools.

On Tuesday, August 20, 2013, the administrative team met with the custodians to distribute the Custodial Handbook and review the policies and procedures for custodians. The Custodial Handbook included job descriptions, job responsibilities and a highlighted map of the school indicating each custodian's assigned area to be cleaned on a daily basis. You were present, signed in at this meeting, received the Custodial Handbook, and did not have any questions or concerns.

On Friday, September 13, 2013, you texted the principal and said you were leaving early because you were tired. This was not authorized.

During the week of September 23, 2013, you did not clean a primary classroom because the chairs were not up, Both, Ms. Gallego, Assistant Principal, and I visited the classroom on your schedule to confirm the lack of cleaning.

On Wednesday, October 9, 2013, you did not vacuum the Media Center nor mop the Media Center office. The top shelves in the Media Center have not been dusted. Both, Ms. Gallego, Assistant Principal, and I visited the Media Center on your schedule to confirm the lack of cleaning.

On October 11, 2013, you were given a memo of Professional Responsibilities delineating the areas of concern and lack of job completion.

On October 15, 2013, you left the work site early and without approval.

On November 19, 2013, you were told by both your Head and Lead Custodians that the Media Center Foyer and the staircases in the MLC building assigned to you had to be properly cleaned and swept in preparation for the Principal Today visit. You did not comply.

On January 15, 2614, assignments to fill in for absent custodians were distributed to all evening custodians. You were told by your Head Custodian that you were to throw away garbage only in your area and sweep and throw away garbage in six classes: C-6, C-7, P-3, P-4, P-5 and P-6 due to the consecutive absences of two other custodians.

On January 16, 2014, complaints were received from six teachers whose classes had not been swept. You had been told to fulfill that task.

On both April 8, 9 and 10, 2014, the Media Center foyer, north hallway was found to be filthy and full of dirt and leaves along with the cubbies not being cleared of trash nor cleaned.

Your schedule clearly states your daily duties between 1:30 pm-2:00 pm. These duties have not been fulfilled consistently. There is paper continuously in your area and it is not picked up during the allotted time to do so. Twice, this administrator has asked you not to place the vacuum cleaner on top of the water bucket. You continue to do so. You have been asked to use the new, more powerful vacuum cleaner to vacuum your areas and you have refused to do so because of its "weight." This vacuum cleaner is on the approved M-DCPS Vendor list.

Failure to comply with your professional responsibilities may result in disciplinary action.

of nineteen years of employment/service as a School Board employee.

SCHOOL BOARDS MOTION TO DISMISS THE INSTANT GRIEVANCE AS NOT BEING ARBITRABLE; ISSUE FOR RESOLUTION; & SUMMARY OF THE PARTIES' OPPOSING POSITIONS & ARGUMENT REGARDING BOARD'S MOTION TO DISMISS

Board's Motion to Dismiss & Issue for Resolution

At the commencement of the June 25, 2015-arbitration hearing, Board moved to forthwith dismiss the instant grievance on grounds it is not arbitrable. The undersigned ruled that he would receive and consider documentary evidence and testimony on Board's motion, and AFSCME's opposition to same, and, thereafter, issue his decision prior to reaching or ruling on the merits of the grievance. Thus, the only issue before the undersigned to resolve in this Opinion and Award is the following:

> Whether AFSCME Local 1184, on behalf of Grievant Magnolia Botero, is contractually entitled to challenge Botero's June 2014-separation/non-reappointment under the just cause and grievance arbitration provisions of the collective bargaining agreement?

Summary of School Board's Position & Argument

First, stresses Board, as is contractually authorized by the first sentence of unnumbered paragraph 1 (i.e., "U1") of Section 4-D of Article XI, on June 18, 2014, it non-reappointed Botero by not renewing her annual custodian employment contract for the then upcoming 2014/2015-school year. And second, by Botero being contractually non-reappointed, the undersigned arbitrator has no jurisdiction to hear the merits of the instant grievance per the clear contract language of the last sentence of Article XI's Section 2 which states, "Non-reappointments are not subject to the grievance/arbitration procedures." Thus, before reaching the merits of the instant grievance, and since Botero's non-reappointment is "not subject to the CBA's grievance/arbitration procedures,"

Board requests the undersigned arbitrator to forthwith dismiss the instant grievance in its entirety on the grounds it is not arbitrable.

In further support of its motion, Board also argues, in summary, as follows:

1. That when a full-time custodial position became available, Botero applied for the position and was promoted to a full-time employee/custodian on September 25, 2009.

2. That prior to September 25, 2009, Botero held only hourly and part-time positions.

3. That upon being promoted on September 25, 2009, Botero received her first annual employment contact.

4. That non-reappointments have been consistently applied only to full-time Board employees.

5. That hourly employees do not receive annual contracts. [6]

6. That when Botero became a full-time employee on September 25, 2009, she also became an annual contract employee subject to the CBA's non-reappointment process for five years.

7. That since on or about September 13, 2013, through January 15, 2014, Botero had performance issues which her then supervisor, Principal Anamarie Moreiras, commenced documenting in November 2013.

8. That Principal Moreiras recommended that Botero not be offered an annual contract for the following 2014-2015 school year, which in turn, resulted in Board's June 2014-decision to non-reappoint Botero.

9. That AFSCME claims that Botero was not subject to being non-reappointed since she had worked as a Board employee more than five years, and that all of her nineteen years of employment, whether hourly, part-time or full-time, count toward the five-year non-reappointment process.

10. That AFSCME ignores the uncontroverted evidence of the case that only full-time Board employees receive annual contracts and are subject to the non-reappointment process (Carmona, Tr. 169-173; Rodgers, Tr. 223).

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[6] The same was similarly confirmed by AFSCME's witness, Mr. Sherman Henry, who served as AFSCME's Local 1184's President and Chief Negotiator for twenty years. When asked if a "temporary hourly employee" gets an annual contract, Henry replied "no." (Tr. 504-505).

11. That if an annual contract employee (such as Botero), is non-reappointed, there is no recourse for the Board's action under the CBA because non-reappointments are not subject to the CBA's grievance/arbitration process.

12. That non-reappointments have been consistently applied only to employees who have obtained the status of a full-time employee because hourly or part-time employees do not receive annual employment contracts. (Carmona, Tr. 169-173; Brown, Tr. 416-418) (*Also see* footnote #6 above).

13. That once Grievant was hired as a full-time employee, her status changed to an annual contract employee who could only be separated from her employment by the types of separations listed under Article XI, Section 4 (i.e., voluntary, excessive absenteeism, disciplinary, non-reappointment, and layoff).

14. That AFSCME's sole argument is that the first sentence of U3 of Article XI's Section 4-D does not differentiate between full-time and part-time employees. Therefore, according to AFSCME, the term "bargaining unit members," in U3's first sentence means all employees, including hourly, part-time and full-time employees. However, AFSCME's argument ignores the introductory first sentence to Section 4 of Article XI which specifically references "permanent employees."

15. That Section 4-D of Article XI, must be read as a whole with all of Article XI's Section 4 to understand they apply only to permanent full-time employees. AFSCME cannot cherry pick words and phrases in an attempt to circumvent the clear exclusion of non-reappointments from the grievance/arbitration procedures.

16. Accordingly, because (1) Grievant was newly hired as a full-time employee in September 2009, she was subject to non-reappointment per U3's five-year contractual window until September 2014; and (2), since Botero was non-reappointed in June 2014, which date is within U3's five-year window, the arbitrator should sustain/award Board's motion to dismiss the instant grievance on the grounds that Botero's non-reappointment is not subject to the CBA's grievance/arbitration procedures.

Summary of AFSCME's Opposing Position on behalf of Grievant Botero

It is AFSCME's opposing position that Board's motion to dismiss be denied since Botero's June 2014-separation fails to qualify as a contractual non-reappointment per the five-year language of the first sentence of unnumbered paragraph 3 (i.e., "U3") of Article XI's Section 4-D (i.e., "AFSCME, Local 1184 bargaining unit members employed by the School District in excess of five years shall not be subject to non-reappointment."). And that being the case, argues AFSCME further,

Board, per the second sentence of unnumbered paragraph 3 (i.e., "U3") of Article XI's Section 4-D, can only "discharge" Botero "for just cause," which, in turn, gives her full access to the CBA's grievance/arbitration procedures.

In support, AFSCME, in summary and in relevant part, contends and argues further as follows:

1. That because Botero, had completed more than five years of service as a bargaining unit employee, she was not subject to U3's five-year non-reappointment process.

2. It is immaterial that Botero has less than five years of service as a full-time custodian because U3's language does not make that distinction with respect to its five-year non-reappointment time limit. The said first sentence of U3 only refers to five years as a "bargaining unit member," not five years of service as a permanent, full-time bargaining unit member.

3. That even if the Arbitrator were to hold that a bargaining unit member must be employed in a permanent status for more than five years in order to avoid the non-reappointment process, the record is clear that Botero has been a permanent part-time bargaining unit member since at least 2004, if not earlier. And, no matter how many School Board witnesses claim there is no such thing as a part-time permanent custodian, the CBA states otherwise, and the CBA controls.

4. That in order for Botero to meet Section 31 of Article V's definition of a part-time permanent employee, she need only demonstrate that for each week she was "regularly scheduled to work thirty hours or fewer."

5. That Principal Anamarie Moreiras, the School Board's own witness, readily admitted that Botero worked "25 or 30 [hours], depending, weekly . . . " (Tr. 380). According to Moreiras, hourly custodians are not supposed to work more than thirty hours per week. (Tr. 315-316). Botero also testified that she worked around six hours per day. (Tr. 279). Since Botero was "regularly scheduled" to work thirty or fewer hours per week, that makes her a "part-time permanent employee" within the meaning of the collective bargaining agreement's Article V-Section 31.[7]

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[7] AFSCME alternatively argues and requests that the undersigned deny School Board's motion to dismiss for the following reasons:

> That even if the Arbitrator were to hold that . . . [U3's] five-year threshold applies only to service as a permanent custodian, and even if the Arbitrator were to hold that Botero was never a permanent custodian before 2009, the School Board still failed to comply with the collective bargaining agreement's procedures and conditions for a non-reappointment [stated

6. Thus, having completed more than five years of service as an AFSCME, Local 1184 bargaining unit member, Grievant Botero was not subject to U3's five-year non-reappointment process. And that being the case, argues AFSCME further, the School Board, in accordance with U3's second sentence could only separate/discharge Botero "for just cause."

ARBITRATOR'S FINDINGS

The undersigned finds the preponderance of the evidence shows, establishes, or proves the following facts and circumstances of the instant grievance:

1. That on March 27, 1995, Grievant Magnolia Botero first became a School Board employee.

2. That on September 25, 2009, Botero, for the first time in her career, was promoted to the status of both a contractual annual contract employee, and a full-time permanent employee. As an annual contract employee, Botero agreed to and signed Board-generated annual employment contracts at the beginning of each school year. As a full-time permanent employee/bargaining unit member, per Section 31of the CBA's Article V, she was regularly scheduled to work more than 30 hours per week.

3. That at no time prior to September 25, 2009, did Botero qualify for, nor did she obtain the status of a contractual annual contract employee, or a contractual Article V-Section 29 full-time permanent employee.

4. That since Botero's March 27, 1995-date of hire, up to her September 25, 2009-promotion, she accrued fourteen and one half years of employment/service.

6. That since Botero's September 25, 2009, promotion, and continuing to her last day of work on June 30, 2014, and while in the status of both an annual contract employee and a full-time permanent employee, Botero accrued an additional four and one half years of employment/service.

7. That on June 18, 2014, Board contractually non-reappointed Botero by not offering her another annual employee contract for the then upcoming 2014-2305 school year. And,

8. That Botero's non-reappointment on June 18, 2014, became effective on her June 30,

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in unnumbered paragraphs 1 and 2 (i.e., "U1" &"U2") of Section 4-D of Article IX]. Specifically, the School Board never gave Botero, or AFSCME timely notice that Botero was being considered for "possible non-reappointment," it improperly substituted the non-reappointment process for discipline, and the School Board used the non-reappointment process in an arbitrary and capricious manner.

2014-last day of work.

What remains to resolve the instant grievance, accordingly, is the disputed applicability and/or meaning and intent of the first sentence of U3's five-year time limitation language which states "AFSCME, Local 1184 bargaining unit members employed by the School District in excess of five years shall not be subject to non-reappointment."

ARBITRATOR'S GRANTING OF SCHOOL BOARD'S MOTION TO DISMISS

As AFSCME argues and contends, there is no question that as written, and standing alone, the first sentence of U3's disputed five-year language only refers to five years as an "AFSCME, Local 1184 bargaining unit member[ ]" and not five years in the status of a full-time permanent bargaining unit member, or in the status of a part-time permanent bargaining unit member, nor in the status of an annual contract employee/bargaining unit member. It is further undisputed, likewise, that when non-reappointed on June 18, 2014, and having been employed by Board since March 27, 1995, that Botero had completed well in excess of the required five years of employment stated in U3's first sentence. The undersigned, however, is compelled to grant Board's motion for the following reasons.

First, the undersigned fully credits the following two overlapping parts of Board's argument in support of its dismissal motion. First (for identification, "Board's Argument One") that U3's five year language should not be read by itself, or in isolation - or, in the Board's specific words "cherry pick[ed])"; and second, (for identification "Board's Argument Two"), that "An Arbitrator has no power to ignore what the parties have agreed to."

Both of Board's Arguments, the undersigned take notice, are similar to basic and long standing contract interpretation principles which the precedent setting Elkouri & Elkouri treatise,

HOW ARBITRATION WORKS, (BNA Books 6th ed. 2003), at pages 462-464, explain, in relevant part, as follows:

> Board's Argument One
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> The primary rule in construing a written instrument is to determine, not alone from a single word or phrase, but from the instrument as a whole, the true intent of the parties, and to interpret the meaning of a questioned word, or part, with regard to the connection in which it is used, the subject matter and its relation to all other parts or provisions [of the written instrument]. [*E.g., Riley Stoker Corp.*, 7 LA (BNA) 764, 767 (Arbitrator Platt, 1947)]. (*Elkouri*, p. 462).
>
> * * *
>
> Sections or portions [of a CBA] cannot be isolated from the rest of the agreement and given construction independently of the purpose and agreement of the parties as evidenced by the entire document . . . The meaning of each paragraph and each sentence must be determined in relation to the contract as a whole. [*E.g., Great Lakes Dredge & Dock Co.,* 5 LA (BNA) 409, 410 (Arbitrator Kelliher, 1946)]. (*Elkouri*, p. 463).
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> * * *
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> Board's Argument Two
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> If an arbitrator finds that alternative interpretations of a clause are possible, one of which would give meaning and effect to another provision of the contract, while the other would render the other provision meaningless or ineffective, the inclination is to choose the interpretation that would give effect to all provisions. [*E.g.*, *Fire Fighters (IAFF)*, 112 LA (BNA) 663 (Arbitrator Lubic, 1999)]. In the words of one arbitrator:
>
> > It is axiomatic in contract construction that an interpretation that tends to nullify or render meaningless any part of the contract should be avoided because of the general presumption that the parties do not carefully write into a solemnly negotiated agreement words intended to have no effect. [*John Deer Tractor Co.,* 5 LA (BNA) 631,632 (Arbitrator Updegraff, 1946)].
>
> The principle extends not only to entire clauses, but also to individual words. Ordinarily, all words used in an agreement should be given effect. The fact that a word is used indicates that the parties intended it to have some meaning, and it will not be declared surplusage if a reasonable meaning can be given to it consistent with the rest of the agreement. It is only when no reasonable meaning can be given to a word or clause, either from the context in which it is used or by examining the whole agreement, that it may be treated as surplusage and declared to be inoperative. [*E.g., American Shearer Mfg. Co.*, 6 LA (BNA) 984, 985-986 (Arbitrator Myers, 1947)]. (*Elkouri*, pp. 463-464).

In line with Board's Argument Two immediately above, the undersigned also takes notice of the above quoted "POWERS" language stated in the CBA's Article VII/*Grievance Procedures*, Section 4/*Arbitration*. As relevant to this case, it plainly warns and prohibits the parties' grievance

arbitrators that they "[s]hall have no right to . . . **nullify [or], ignore** . . . the provisions of this [Collective Bargaining] Agreement." (Emphasis added).

Applying the above contract interpretation principles and the text of the CBA's Article VII-Section 4 to the specific facts and circumstances of the instant case, the undersigned further finds as follows:

That for the reasons stated in Board's Argument One contract interpretation principle, the undersigned finds that the disputed first sentence of U3 (i.e., that "AFSCME, Local 1184 bargaining unit members employed by the School District in excess of five years shall not be subject to non-reappointment."), cannot be read alone, nor isolated from the rest of Article XI's overall language. Thus, the undersigned further finds that when U3's first sentence is read and interpreted in conjunction all of Article XI's non-reappointment terms, conditions and language that the said first sentence of U3 applies to those AFSCME, Local 1184 bargaining unit members (such as Botero in this matter), once the employee has achieved the status of both an annual contract employee, **and** a full-time or a part-time permanent employee. (Emphasis added). Here, the record shows, nor do the parties dispute, that Botero first achieved the status of both an annual contract employee and a permanent employee on September 25, 2009.

The undersigned also finds that for the reasons stated in Board's Argument Two and Article VII's Section 4 "POWERS" language, to find in favor of AFSCME's argument that Botero is not subject to being reappointed, the same would cause or require the undersigned arbitrator to either render meaningless, or nullify, and/or ignore the following Article XI non-reappointment terms, conditions, and language:

1. The last sentence of Section 2 of Article XI which states that "Non-reappointments are not subject to the grievance/arbitration procedures." And,

2. The third sentence of U1 of Section 4-D of Article XI which states that "Employees whose performance has been deemed marginal by the supervising administrator, who have been counseled during the school year concerning performance, and have failed to perform acceptably shall not be reappointed."

The undersigned, however, chooses to resolve Board's motion to dismiss by appropriately giving effect to all of Article XI's non-reappointment terms, conditions, and language, and to fully comply with the above quoted language in Section 4 of Article VII which strictly prohibits arbitrators from issuing a decision which either nullifies or ignores any of the CBA's provisions.

Thus, based upon the voluminous record as submitted, and all of the above, the undersigned further finds and rules that:

1. U3's five year window/time period commences as of the date a bargaining unit employee has initially obtained the status of both an annual contract employee, and a permanent employee (whether full-time or a part time), and continues for five years thereafter.

2. Thus, in this matter, U3's five-year window/time period for Botero commenced on September 25, 2009, when she was promoted to the status of both an annual contract and a permanent employee, whereas, Botero's five-year window/time period ended five years later, i.e., on or about September 26, 2014.

3. That within U3's five-year window/time period, Board may non-reappoint an annual/permanent employee by not offing the employee another annual employment contract. However, the non-reappointed employee (nor AFSCME, on the employee's behalf), in accordance with the last sentence of Section 2 of Article XI (i.e., that "Non-reappointments are not subject to the grievance/arbitration procedures.") is contractually barred or prohibited from challenging, or protesting, or grieving the employee's non-reappointment under or pursuant to the CBA's grievance/arbitration procedures.

4. On the other hand, per the second sentence of U3 (i.e., "Such employees may only be discharged for just cause."), should Board decline or fail to non-reappoint an annual/permanent employee within five years after the date the employee has obtained the status of both an annual and a permanent employee, only then does the second sentence of U3 trigger, or comes into play. In other words, only then, may the employee be discharged or separated, or removed by Board for just cause.

Regarding the instant matter, since the record shows that Board's June 18, 2014, non-reappointment of Botero was obviously prior to September 26, 2014, the undersigned further finds as follows:

5. That in accordance the last sentence of Article XI's Section 2, Botero (and/or AFSCME on her behalf) is contractually barred and prohibited from challenging, or protesting, or grieving her June 18, 2014, non-reappointment under, or pursuant to the CBA's grievance/arbitration procedures.

6. That School Board's threshold motion to dismiss is sustained/granted in its entirety on the grounds that the instance grievance is not arbitrable. Stated differently, the undersigned finds that as required by the last sentence of the CBA's Article XI, Section 2, the instant grievance which protests and grieves Botero's June 18, 2014, non-reappointment, is not subject to the parties' collectively bargained grievance/arbitration procedures. And that being the case, all other issues and/or arguments raised by the parties in this matter, including those stated in footnote #7 above are moot. Thus,

7. In response to the above stated issue in this matter, the undersigned finds that AFSCME Local 1184, on behalf of Grievant Magnolia Botero, is not contractually entitled to challenge Grievant Botero's June 2014-separation/non-reappointment under the just cause and grievance arbitration provisions of the collective bargaining agreement.

AWARD

Based upon the record as submitted, and all of the above, the instant grievance is dismissed in its entirety on the grounds it is not arbitrable.

Signed and emailed to the parties' representatives this 25th day of July 2016.

Martin A. Soll

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Arbitrator