

Subject:
- Dismissal While on Probation
- Preliminary Objections

ARBITRATION AWARD

BETWEEN:

MOUNTAIN VIEW ESTATES
(hereinafter called the "Employer")

AND:

NEWFOUNDLAND ASSOCIATION OF PUBLIC &
PRIVATE EMPLOYEES
(hereinafter called the "Union")

GRIEVOR:

Annette McDonald

COUNSEL:

For the Employer - Robert Regular
For the Union - Fred Oates

ARBITRATOR:

Patricia Kelsey

The Arbitration Hearing was held in Corner Brook, Newfoundland and Labrador, on October 5th, 2009. The parties agreed as follows:

1. The Arbitrator was acceptable.
2. Both parties had preliminary objections on which they wished to have a decision before the merits of the case could be considered.
3. The grievance procedure had been properly followed or any requirements were waived.
4. The Arbitrator would remain seized of the matter for ninety days (90) days following publication of the Award in the event the parties can not agree on the interpretation of the Award. The Arbitrator could take more than the thirty (30) days outlined in Article 9:03 to render a decision.
5. Witnesses were excluded from the Hearing.
6. In the event of a disagreement as to evidence given, the notes of the Arbitrator will prevail. The audio tapes will be erased following publication of the Award.

The parties disagreed that all parties likely to be affected by the outcome of the Arbitration have been notified. They also disagreed about whether issues of quantum needed to be addressed.

The following documents were entered by Consent at the Hearing:

Consent 1 - Collective Agreement between the parties signed October 27, 2005.

Consent 2 - Grievance Form of Annette McDonald dated March 10, 2009

Consent 3 - Letter to Annette McDonald dated March 12, 2009

Consent 4 - Fax to Mr. Fred Oates from Ms. Barbara Gillam dated March 16, 2009 with copy of above noted Grievance Form and attached note.

Consent 5 - Resume of Annette McDonald (Undated)

Consent 6 - Mountain View Estates: Employee Payroll Setup
Record of hours worked by Annette McDonald in January, February and
March, 2009

NATURE OF THE GRIEVANCE

The grievor, Annette McDonald, began work at MountainView Estates, a seniors home, as a Resident Assistant on January 23, 2009. She was informed through a letter dated March 12, 2009 that she was dismissed effective March 9, 2009. This falls within the Probationary period of four (4) months from the date of hire. (Article 10: Probation, Discipline and Personnel Files)

The Employer presented two preliminary objections regarding the arbitrability of this grievance: (1) based on the Grievance Form, and (2) given their interpretation of Article 10 of the Collective Agreement.

The Union presented a preliminary objection stating the dismissal was null and void as it was executed incorrectly with no Union representation provided to the unionized employee at a meeting between the grievor and the Employer on March 9th, 2009. Although the grievor was on probation at the time of the dismissal she does have Union rights under the Collective Agreement. The Union contends these rights were not acknowledged.

FIRST PRELIMINARY OBJECTION OF EMPLOYER

The Employer's first preliminary objection was that the Grievance Form was vague, inadequate and lacked substance to the extent the Arbitrator can not make a decision regarding the matter. The wording of the Grievance in Consent 2: "Violation of Article 10 and all other related Articles of the Mountain View Estates Collective Agreement" is so inadequate that the Employer can not know what it means. The Employer alleged he was not fully informed what the Union's specific claim of violation of the Collective Agreement was and therefore could not respond to their claim. The Employer contends the Grievance should have contained a brief description of the decision, act or omission that is the subject of the grievance, including all supporting facts known to the grievor; a request for determination; a clear statement of the full redress sought; a copy of all substantiating documents in the possession of the grievor; a description of the particulars and location of any other relevant document known to the grievor; and if any person can substantiate the grievance, a statement in writing from that person. The Employer states the Grievance Form itself is naked in information and the absence of substantive information puts him and the present Arbitrator in an untenable situation of having to try to figure out what the Union is upset about. Without this information the Employer contends they are denied their right to natural justice. Based on the lack of information in the Grievance Form the Employer feels there is a clear basis to dismiss the grievance. To provide any other preliminary objection regarding arbitrability would suggest the Arbitrator has already found the Form acceptable.

UNION'S RESPONSE TO THE EMPLOYER'S FIRST PRELIMINARY OBJECTION

The Union argues the wording of the present Grievance Form is the established, long-term, standard wording used in Grievance Forms in this Province for many, many years. The Union suggests that arbitrable authorities such as Brown and Beatty have insisted that arbitrators look not only at the specific Articles of a Collective Agreement in which a violation is alleged to have been made but must look at the Collective Agreement as a whole to appreciate the context in which those articles have been framed. The Union contends they did meet with the Manager to explain further what exactly their issues were. It is not the fault of the Union if the Manager did not explain these issues to the Employer's representative. The Union states that the Employer's representative was unwilling to discuss the matter and the Union had no choice but to ask the Department of Labour to appoint an Arbitrator to resolve their differences.

The Union states they have followed the Grievance Procedure as set out in Article 8:04 exactly. They did submit their grievance to the Manager as is required in Step 1. Then as required in Step

2 (Article 8:04) “failing settlement at Step 1” they referred the dispute to arbitration. The Union does not agree the Employer has been denied their natural justice and if they had been willing to discuss the issues they would have been able to learn the specifics of the dispute the Union was presenting. The Union was willing to explain the “Full redress” statement in the Grievance Form if the Employer had been willing to sit and discuss the matter. Again the Union states the term “Full redress” is the standard adjustment requested in the Grievance Form.

ORAL DECISION REGARDING THE FIRST PRELIMINARY OBJECTION

The Arbitrator explained she did find the Grievance Form valid as presented. It was typical of standard Grievance Forms with which she has dealt both directly and indirectly in the past. This Arbitrator was not prepared to dismiss this grievance based on this first preliminary objection of the Employer. The Employer was invited to provide the Arbitrator with a precedent case in which an Arbitrator had dismissed a case based on the lack of detail this Employer expected in writing on a Grievance Form. It was the Arbitrator’s understanding that parties clarified their positions in meetings following presentation of such Grievance Forms from which they then decided whether they needed a third party to arbitrate their differences.

SECOND PRELIMINARY OBJECTION OF THE EMPLOYER

The Employer’s second preliminary objection asserts this grievance is not arbitrable based on the Collective Agreement in Article 10:01 (b) titled Termination of Probationary Employee, which states:

“The termination of probationary employees for reasons of unsuitability or incompetence, as assessed by the Employer, is not subject to the grievance or arbitration process.”

Further, the Grievor was most definitely a probationary employee as defined in the Collective Agreement in Article 4:01 (n) and (o):

“(n) ‘Probationary Employee’ means a person who has worked less than the prescribed probationary period.

(o) ‘Probationary Period’ means a period of four (4) months from the date of hire.”

In the case at hand, the Grievor would remain a probationary employee until May 29, 2009. When she was dismissed on March 9, 2009, she was a probationary employee. It was stated in her letter of termination that she was being dismissed for being unsuitable as is allowed in Article 10:01 (b). This Article also asserts the dismissal can not be grieved or subject to the arbitration process. Based on this Article of the Collective Agreement the grievance should be dismissed.

Further, the Employer points out that the Article 10:01 (b) leaves the assessment of suitability and competence exclusively to the Employer.

The Employer continued with their second objection by reading from their prepared written document which is numbered and stated as follows.

24. In the event NAPE submits the same is arbitrable for it is guaranteed under section 86(1) of the *Labour Relations Act*, we submit that based on jurisprudence this section does not apply to the matter at hand.

25. Section 86(1) titled “**Arbitration Process**” states,

“86. (1) A collective agreement shall contain a provision for final settlement without stoppage of work, by arbitration or otherwise, **of all differences between the parties to or persons bound by the agreement** or on whose behalf it was entered into, where those differences arise out of the interpretation, application, administration or alleged violation of the agreement or a question as to whether a matter is arbitrable.” **Employer’s emphasis**

26. The Employer submits there is a right to arbitration or other procedures under statute when there are differences between the parties on interpretation, application, administration or alleged violation, however, in the matter at hand there are no differences based on Article 10:01 (b).

27. The Employer believes this position was recognized in **NAPE v Her Majesty the Queen in Right of Newfoundland and Labrador as represented by the Honorable The President of Treasury Board**, 2003 NLCA 35, para 16, (the Byrne case) where the Supreme Court – Court of Appeal stated,

“If an employee has a substantive right under a collective agreement about where there is a difference, any attempt to limit recourse to a procedure for final settlement of differences will be void as being contrary to statutory requirements.”

28. The decision cited one of the Canadian Labour Law Authorities, George W. Adams in **Canadian Labour Law** (2nd ed.) at paragraph 12.170 when he said of this question:

“The legal debate has contrasted the substantive and procedural rights of probationary employees, with emphasis on placing these rights in the context of the statutory language setting up the dispute resolution machinery. The legislation provides that the dispute resolution mechanism is to be available to settle ‘all differences’ between the parties. Thus there is a procedural right to arbitration whenever a ‘difference’ exists between the parties and any agreement between the parties to waive this procedural right is void as a contravention of the governing statutory provision. The offending article in the collective agreement may be modified by a labour tribunal or the arbitrator may simply refuse to give effect to it on the ground it is illegal and hence unenforceable. Thus, the probationary employee has a statutory guarantee of access to the grievance and arbitration procedure so long as it can be shown there is a ‘difference’ between the parties.

If a board of arbitrators reasonably concludes that a collective agreement confers on a probationary employee no right capable of giving rise to differences, then statutory

provisions like those in section 39(1) of the **Public Service Collective Bargaining Act** do not require a final settlement provision nor, in the absence of one, would they impose such a provision.” *Ibid.*, para 17

29. The Employer believes that following the above noted reasoning, then as long as there is a difference, then the grievor has a right to the arbitration but that in the case at hand the Collective Agreement does not give a substantive right to the probationary employee capable of giving rise to differences, therefore the matter is not arbitrable.

30. The Court of Appeal decision gives a comprehensive analysis of jurisprudence and found that it is important to assess the exact wording of the article to ascertain whether there is a substantive right to arbitration for a probationary employee. What was found is that in cases in which the sole discretion was given to the employer to make decisions regarding a probationary employee and which gave no recourse to the grievance procedure the same was not contrary to the legislation because there were no differences to be resolved. Paragraph 20 states:

“A finding that a probationary employee has no substantive right out of which differences can arise may result either from an examination of the whole collective agreement or from one clause. Examples of the former are found in **E.P.A.** and in **Leeming**. In **E.P.A.** the collective agreement provided (1) that employees who had completed their probationary period could only be dismissed for just cause, and (2) the company retained ‘the sole right to make decisions regarding the retention of any employee at any time during the probationary period.’ The combination of these two articles led the court to conclude that a provision that said: ‘probationary employees as defined in Article 9, may be dismissed without recourse to the Grievance Procedures’ was not contrary to the legislation because there were no differences to be resolved. That is, the probationary employees had no substantive right protecting them from dismissal. In **Toronto Hydro**, Linden J. illustrates how the parties might ensure that there was no real basis for arbitration by agreeing that ‘probationary employees may be discharged on the sole discretion of the employer.’ Arbitrator Easton in **Re The Queen in Right of Newfoundland and Newfoundland Association of Public Employees** (1987), 29 L.A.C. (3d) 336 found ‘as assessed by the Employer’ in the phrase ‘Dismissal due to unsuitability or incompetence as assessed by the Employer of probationary employees, and of part-time and temporary employees with less than six (6) months of service, shall not be subject to the grievance and arbitration procedures’ to be sufficiently like ‘sole discretion of the employer’ to establish that there were no ‘differences’ between the parties.” *Ibid.*, para 20

31. In this Court of Appeal decision, the pertinent section of the collective agreement was found to be arbitrable because probationary employees must be dismissed for incompetence or unsuitability but there were no words in the Collective Agreement which expressly or implicitly made that determination solely the decision of the employer therefore there had to be a method of final resolution of the differences. Paragraph 21 stated:

“As one would expect, the Correctional Officers’ Collective Agreement addresses the question of termination of employment, including layoff and dismissal. An examination of the whole of the Collective Agreement leads to the conclusion that for dismissal, as opposed to other forms of termination, generally there must be just cause. However, there are additional grounds stated for dismissal of probationary employees. They may be dismissed for incompetence or unsuitability. Dismissal for any of these reasons can give rise to differences between the parties as to whether there is just cause or whether the employee is incompetent or unsuitable. Unlike the cases discussed above, there are no words in this Collective Agreement which expressly or implicitly, make the determination of whether there was incompetence or unsuitability solely the decision of the employer. There must, therefore, be a method of final resolution of the differences. As a result, Article 28.01(a) to the extent that it attempts to limit final settlement procedure is in conflict with the statutory right to a final method of resolving differences and is inoperative.” **Ibid**, para 21

32. This is not the matter at hand, for the Mountain View Estates Collective Agreement is very clear that the discretion is solely within the Employer and therefore there cannot be any differences which require adjudication hence there is no right within the Collective Agreement which trumps Article 10:01(b) nor is there a statutory right for grievance and arbitration for there are no differences to be adjudicated upon from the employees perspective because all discretion in this matter lies with the Employer.

33. Not only do the legal authorities and jurisprudence say this is the interpretation which must be applied to the matter at hand, but the same is reinforced by virtue of Article 9:04 which states,

“The Arbitrator may not alter, modify or amend any provisions of this Agreement.”

34. To hold that a claim under Article 10:01(b) is arbitrable considering the explicit and clear wording of the same, then the arbitrator would not only be acting ultra vires their power and authority but furthermore would alter and modify a provision of the Collective Agreement.

35. The Employer submits the termination of the grievor is not arbitrable pursuant to Article 10:01(b) and therefore the matter should be dismissed.

UNION’S RESPONSE TO EMPLOYER’S SECOND PRELIMINARY OBJECTION

The Union notes the Grievance Form has been filed and there is more than one difference between the parties. The Employer admits there was no Union representative present when they discharged the grievor. The third page of Consent # 4 which was written by the manager states, “Spoke to Barb Gillam in the AM and suggested that I would get together with her and Annette and to do this discharge properly.” (Annette refers to the grievor.) The grievor had a substantive

right to have Union representation present when being disciplined, discharged or suspended under Article 10:02: Right to Be Represented:

An employee who is required to attend a meeting with the Employer dealing with discipline, discharge or suspension shall be advised that he/she has the right to be accompanied by a Union Representative.

This Article does not differentiate between probationary employees and permanent employees. In fact, Article 4:01 provides the definition of an “employee” in subsection (f):

“Employee” means any person employed in a position which falls within the bargaining unit.

The grievor in the present case was in a position that did fall within the bargaining unit and she therefore fits the definition of an employee.

A second difference between the parties relates to Article 10:03 regarding Discipline- Time Limits :

An employee who is disciplined, discharged or suspended shall be provided with written notification of such action within five (5) days of the incident. Such notification shall state the reason for the disciplinary action. If such procedure is not followed, the disciplinary action shall be null and void.

The grievor was terminated on March 9, 2009 verbally at a meeting. The Employer was supposed to give her a letter regarding her dismissal. There was a letter dated March 12, 2009, Consent # 3. The grievor received this letter on March 24, 2009 from the Employer directly in a meeting. The five (5) days are long gone and the Collective Agreement is violated.

A third difference between the parties relates to the arbitrary and unjust dismissal and unfair treatment of the grievor. Article 6 of the Collective Agreement addresses: No Discrimination

6:01 The Employer agrees that there shall be no discrimination with respect to any employee in the matter of hiring, wages, training, upgrading, promotion, transfer, layoff, recall, discipline, classification, discharge, assignment of work, or otherwise by reason of age, race, creed, colour, national origin, political or religious affiliation, sex, mental and physical disability or marital status, nor by reason of his/her membership or activity in the Union.

The Union did recognize that arguing dismissal of a probationary employee on arbitrary grounds could be difficult. However, the position that the present case is very different than the Byrne case is not hard to prove. In the Byrne case, op cit, referenced above by the Employer, there were no differences found.

There can be no argument that the grievor had a substantive right to be “advised” that she had the right to have a Union representative present with her when called to a meeting to be dismissed. To do otherwise is blatantly unfair and unjust. The letter of dismissal which was dated March

12, 2009 was not given to the grievor until March 24, 2009. It should be noted that the address on the dismissal letter to the grievor (Consent #3) was 34 Mt. Batten Road where the address on the grievor's Resume was 3 Mt. Batten Road (Consent # 5).

The Union presented jurisprudence regarding the dismissal of probationary employees. They began with reference to Chapter 2 of **Canadian Labour Arbitration**, Brown & Beatty which addresses the issue of the "Jurisdiction of the Arbitrator". Paragraph 2:1100 states in part:

"Most grievance arbitrations are rooted in a statutory provision such as s.48(1) of the *Labour Relations Act*, 1995 in Ontario

Not only does such a provision require that all disputes be submitted to an arbitrator but, as well, it requires him to initially determine all questions of his jurisdiction.

.....

As to whether the parties to a collective agreement can expressly agree to absolutely preclude access to arbitration, there has traditionally been some division of opinion. Some arbitrators have taken the view that any express limitation as to the arbitration of a dispute is illegal and therefore inoperative.

Another arbitrator has proposed the following test for determining whether a non-grievability provision bars arbitration:

- (i) Have the parties to a collective agreement created a general, stand-alone employment right which, but for the agreement's non-grievability provision, would have entitled the employee(s) in question to grieve the employer's decision? If there is no such right, then the non-grievability provision is a valid and complete defence to any grievance from the employees or excluded class of employees on the particular issue.
- (ii) If a right has been found to be created, then the second issue to determine is whether this right is substantive or only procedural in nature? If it is only procedural, then the non-grievability provision acts as an effective bar. If, however, the right in question is deemed to be substantive, then the dispute between the employer and the union becomes a 'difference' as per s. 57(1) of the *Canada Labour Code*. Consequently, the non-grievability provision is invalid to the extent that it curtails the pursuit of a grievance respecting this difference.

Others have respected language in agreements expressly precluding the arbitration of certain issues and on that basis they have declined jurisdiction. Necessarily, however, for such a provision to be effective, clear language to that effect would be required.

The question of the extent to which agreement can limit arbitration has played itself out in connection with collective agreement limitations on a probationary employee's right to contest his or her dismissal. One position has been to respect the prohibition but to retain jurisdiction to inquire into allegations of arbitrary, discriminatory, or bad faith conduct by the employer.

The Union in this present case argues the Employer has been arbitrary in this dismissal particularly in regard to process and substantive rights agreed upon in the Collective Agreement.

The Union continued to present jurisprudence related to probationary employees with a reported case from Alberta, **Re Newell (County No.4) (Public Works Employees) and Canadian**

Union of Public Employees, Local 1032 (Dyck Grievance) 81 L.A.C. (4th) 83, 1999, Moreau, Johanson and Fagnan. The first issue in this case was with regard to whether or not the grievor was a probationary employee when he was dismissed. Having determined that he was a probationary employee, the Board then, “made a finding that the grievance could still proceed to arbitration but only for the limited purposes of examining whether the termination was motivated by bad faith.” The language of the Collective Agreement in this Alberta case is noted to be distinctly different from that of the present case. In the referenced case, “The Employer may release a probationary employee at any time during the probationary period and such release shall be deemed to be for just cause.” This is dealt with further at Paragraph 14 of the Award:

“The next issue the parties asked us to address concerns the matter of whether or not the grievor can still pursue a grievance in light of our finding that he only has probationary status. That point has been canvassed in numerous awards as well as the leading arbitration texts. The debate has swung back and forth over the years but the current approach favors allowing arbitral review in cases involving the discharge of a probationary employee even when the discharge is deemed to be for just cause (Article 10.3) but only for the limited purposes of examining whether the evaluation process meets a fairness test. The point was dealt with in the Algonquin case at p. 140:

‘I therefore agree with the conclusion of the Divisional Court in the Metro Toronto case, supra, as adopted in Consolidated –Bathurst, supra, that, even where there is no express limitation on the college’s right to discharge probationary employees, there is an obligation on the college not to act “in bad faith in the sense that the decision was motivated by unlawful considerations” and not to act in such a manner as to preclude the probationary employee from “doing the best”. ... I consider that the breach of such an obligation represents a “difference” between the parties which must be settled by arbitration pursuant to s. 46(1) of the colleges Collective Bargaining Act.’ ”

The Union next presented **Re Toronto (City) and C.U.P.E., Loc. 79 (Newman) (2002) O.L.A.A. No. 1028. 113 L.A.C. (4th) 151, Springate.** This case provides an example of precedent in which the Employer had objected to the arbitrability of the termination grievance based on the grievor’s probationary status and the collective agreement language that gave the employer the exclusive right to discharge a probationary employee. The arbitrator “ruled orally that the grievance was arbitrable but only with respect to whether in discharging the grievor the employer had acted in a manner that was arbitrary, discriminatory or in bad faith.” This concept is discussed again at Section 24 of the Award where Springate references a Divisional Court decision where it was “reasoned ...that the collective agreement contained an implied term that neither party should conduct itself in a way that was in bad faith, arbitrary, discriminatory or unfair”. At Section 28, “Union counsel contended that the allegations set out in the letter discharging the grievor were untrue. He argued that for the employer to discharge the grievor on the basis of untrue allegations was the height of arbitrariness and unfairness and from this could be concluded that the employer had been motivated by bad faith.”

Springate’s Award also referred to statements made by the then Professor Bora Laskin at an arbitrators’ conference:

“The grievance documents are, so to speak, the ‘pleadings of the court lawsuit, but whereas rules of procedure govern the particularity of the statement of a cause of action (as well as the defense) in a lawsuit, and provide an orderly scheme for amendments, the labour arbitrator has no such formal code of control, save as one may be found in the particular collective agreement. In my submission, it is better that he be left fairly free to help the parties, if necessary, to pinpoint the issues in the grievance claim. The expedition and informality sought through arbitration would be lost if the written grievance form became the sovereign talisman, and if formal motions to amend had to be made.

Finally, the Union in the instant case referred to a local Unreported case **Re the Newfoundland and Labrador Association of Public and Private Employees and Grace Sparkes House, Government of Newfoundland and Labrador, (2005) Oakley**. As can be seen at page 2 of that case, the employer objected to the arbitrability of the grievance for the same reason the Employer in this case is objecting, given that their Article 11.01 (c) has language the same as that of the instant case with regard to the employer’s right to assess and discharge a probationary employee for unsuitability and incompetence.

Arbitrator Oakley at page 19 of the Award is faced with the same question that arises in the present case:

“The issues before the Arbitration Board are: (1) is the grievance arbitrable? And (2) if the grievance is arbitrable, then what is the standard of review to be applied by the Board when reviewing the Employer’s decision to dismiss a probationary employee.”

Having examined jurisprudence at length, Oakley refers at page 42 of his Award to Brown & Beatty, **Canadian Labour Arbitration**, 3rd edition at Paragraph 7:5020 to consider the appropriate standard of review of the Employer’s actions:

“Another group of arbitrators, also seeking a middle ground between the two extreme standards articulated in the earlier awards, have adopted a different approach. For them , although it follows from the very purpose of the probationary status that an employer must, in deciding whether to retain the services of a probationer, have an opportunity beyond the initial hiring process to consider matters, including questions of compatibility and potentiality, which go beyond those which would justify the discharge of a senior-rated employee, it does not follow that arbitrators are required to defer completely to the employer’s judgment on such matters of suitability. Rather, these arbitrators would require the employer to prove that the basis on which, the standards against which, and the resulting conclusions upon which, it relied to terminate a probationary employee as unsuitable were reasonable and proper. In the words of one arbitrator in establishing that its decision to terminate a probationer was not arbitrary, discriminatory, or in bad faith, the employer

... must verify that the employee had been given a fair opportunity to demonstrate whether or not ...[she]... possesses the appropriate qualifications and suitability for permanent employment and that the employer had made a fair assessment of [her] qualifications and suitability for permanent employment.

The decision of Arbitrator Oakley's Board is stated at page 45:

“The Employer's preliminary objection is denied. The grievance is arbitrable. The Arbitration Board may review the Employer's assessment of the Grievor as to unsuitability or incompetence under Article 11.01 (c) to determine whether the Employer's decision was reasonable and not arbitrary, discriminatory or made in bad faith. The Arbitration Board may review the Employer's actions generally, under the term of the Collective Agreement implied by arbitral principle, to determine if those actions were arbitrary, discriminatory or made in bad faith.”

The Union concluded that this present case is similar Oakley's case and this Arbitrator must find the same result upon review of the authorities, the precedents and the Collective Agreement.

EMPLOYER'S RESPONSE:

The Employer re-iterated that the Byrne case reviewed by the Court of Appeal, *op cit*, did not give the Employer the sole and exclusive assessment of unsuitability or incompetence as does the Collective Agreement in the instant case. The grievor in this present case does not have the substantive right referred to at Paragraph 19 of the Court of Appeal case that gives rise to a difference between the parties. It is the Employer's contention that the Union is misapplying the interpretation of the law and the jurisprudence. The Union's reference in Brown and Beattie regarding the jurisdiction of the arbitrator states at Paragraph 2:1100, “Most grievance arbitrations are rooted in a statutory provision such as s. 48(1) of the *Labour Relations Act*, 1995 in Ontario” The Employer notes this reference does not say “all” grievance arbitrations.

In the Newell County case presented by the Union there are points raised such as one at Paragraph 8 where Palmer and Palmer are quoted as saying, “The employer has the right to lay down certain standards which it expects a probationary employee to meet. The probationary period is then provided to allow the employer to determine whether these standards have been met and in view of the investigation whether they will continue to be met.” Then later in Paragraph 11 Arbitrator Moreau states: “The leading texts and case law in this area of probationary employees point to the importance of carefully reviewing the collective agreement to determine what rights and privileges are available to the employee.” Again the Employer in this present case points to the clarity in the language of Article 10.01(b).

The Employer was unclear why Arbitrator Springate in the referenced case was limited in his scope without closer analysis of the case. The limitation was noted in the second paragraph: “At the hearing I ruled orally that the grievance was arbitrable but only with respect to whether in discharging the grievor the employer had acted in a manner that was arbitrary, discriminatory or in bad faith.”

While the case between NAPE and the Grace Sparkes House (Oakley) dealt with language similar to the instant case, the Employer asserts that his reference to the decision of the Court of Appeal regarding the Byrne case should carry more weight than that of an arbitrator.

The Employer suggests the Union's attempt to make the discharge null and void based on lack of Union representation at the March 9, 2009 was an error which the Employer tried to correct as soon as she learned she was in error. This is clear from the Consent # 4, March 16, 2009 note written by Ms. Baker, the manager. The correct process was followed as soon after as could be arranged. The Employer states there is no evidence yet in the Hearing of any arbitrariness on the part of the Employer and the only consideration for the Arbitrator so far is whether or not the matter is arbitrable.

UNION'S PRELIMINARY OBJECTION:

The Union argues that Union representation is a substantive right under Article 10.02 Right to be Represented of the Collective Agreement. It states:

“An employee who is required to attend a meeting with the Employer dealing with discipline, discharge or suspension shall be advised that she/he has the right to be accompanied by a Union Representative.”

Based on the Union's reference to Brown and Beatty and the jurisprudence noted above the discharge must be null and void. The Union was not given the opportunity to make representation to try to fix the presenting problem.

The Union called their first witness, Barbara Baker. Ms. Baker is the Manager of Mountain View Estates, a seniors' home. She oversees the staff, tends to residents' needs and manages the day-to-day operations. She has been in this position for two (2) years. She administers the Collective Agreement. Prior to becoming the Manager of the residence, Ms. Baker was an assistant to the previous manager, a non-Union position, and a resident assistant prior to that. She was never in the Union herself. The Union became involved with the residence after she was a resident assistant. Ms. Baker met with the grievor on March 9, 2009 at approximately 1:00 p.m. The purpose of the meeting was to discharge her. Ms. Baker had called the grievor at her home earlier that day to come to the meeting. She did not advise the grievor what the meeting was about. Prior to the meeting she did not advise the grievor of her right to have Union representation with her at the meeting, as agreed in Article 10:02. Ms. Baker did not think she had to involve the Union with the decision to discharge a probationary employee as she understood Article 10:01(b) to indicate. Ms. Baker thought the grievor did not become a Union member till after her four months of probation. As the payroll for employees is done in St. John's, Ms. Baker was not certain when Union dues started to be taken from employees' checks. Nothing else related to this matter happened that day with Ms. Baker.

Ms. Baker was asked to consider the meaning of Article 12:01 (a) regarding Seniority Defined, which states:

“Subject to 12:03, seniority for all employees shall be based on their last date of hire.”

The next day, March 10, 2009, the grievor and the Union Shop Steward, Barbara Gillam, came to see the Manager, Ms. Baker to ask her to sign the Grievance Form. Ms. Baker asked the grievor to leave the building. She did not agree to sign the Grievance Form that day as she believed that Article 10:01(b) barred the probationary employee from the grievance and arbitration process. Ms. Baker agrees she was upset with the grievor but did not think she screamed at her. Although Ms. Baker had previously had to discipline employees and always provided for Union representation those incidents were with employees past their probationary period. She never had to deal with discipline or discharge of a probationary employee before this instant case.

On March 11, 2009 Mr. Oates of NAPE called Ms. Baker to inform her that she had handled the process incorrectly and in discharging the grievor for the reason given. On March 13, 2009 Ms. Baker called the Shop Steward, Ms. Gillam, to try to set up a meeting to do the process correctly. Ms. Baker believes that possibly Ms. Gillam was not working on the 13th, 14th, and 15th of March. On March 16th, Ms. Baker (Manager) spoke to Ms. Gillam (Shop Steward) in the morning and Ms. Gillam would attempt to contact the grievor to attend a meeting with the Employer in order for the discharge to be handled in the correct manner. Ms. Baker met with Ms. Gillam at approximately 9:00 that evening without the grievor present at which time both Ms. Baker and Ms. Gillam signed the Grievance Form dated March 16, 2009, at the "First Reply to Grievance" section and entered as Consent # 4.

On March 24, 2009 Ms. Baker (Manager) and Mr. Jerry Kirby, an employer representative, met with the grievor, Ms. Annette McDonald, Ms. Gillam (Shop Steward), and Mr. Fred Oates, Employee Relations Officer with NAPE. The letter of termination, dated March 12, 2009, was given directly to the grievor at this meeting. As well, Ms. Baker signed and dated the "Second Reply" section of the Grievance Form with the response, "No violation - Collective Agreement, March 24/09" There was some discussion regarding the grievor's termination due to unsuitability as stated in the letter.

The Union objected to the evidence of Ms. Baker regarding any meetings or discussions after the March 9th dismissal meeting between her and the grievor in which there was no Union representation. The arbitrator ruled the Employer could explain how they tried to rectify their error after learning of it. Any information regarding the specific reasons for the dismissal would not be considered in the preliminary objections.

The Employer objected to the Union's question of when the grievor did get her letter of dismissal which was written on March 12, 2009. The arbitrator allowed this evidence to be given. The Employer expressed concern the Union was trying to introduce Article 10:03 with regard to time limits with discipline. Ms. Baker explained that she had a delivery person, Mr. Tom Robinson, to deliver the discharge letter. Ms. Baker did not realize that the grievor did not receive her dismissal letter as the deliverer allegedly left it in the mailbox of the address on the letter – unfortunately the wrong address. It was only at the March 24, 2009 meeting that Ms. Baker learned the grievor had not actually received the letter.

The Union's second witness was the grievor, Ms. Annette McDonald. Ms. McDonald worked at Mountain View Estates for approximately two (2) months at the time of her dismissal. She

agreed the Consent # 4 was the Grievance filed on her behalf. Ms. McDonald explained she received a call at home from Ms. Baker, the Manager, on March 9, 2009 to come for a meeting that day with Ms. Baker. Neither in the phone call or at the meeting did Ms. Baker advise her she should or could bring a Union representative with her. The meeting discussed a problem the Employer had with the grievor and advised her orally she was dismissed.

On March 10, 2009 the grievor and Ms. Gillam, the Shop Steward, went to the Residence to ask Ms. Baker to sign the Grievance Form. After Ms. Baker refused to sign it, the grievor left the Residence. The grievor could not recall if she had a telephone conversation with the Shop Steward between March 13th and March 16th. She recalled there was a message on the phone from Ms. Gillam saying, "Annette give me a call", but was not sure what date the message was left. She was later asked to attend a meeting with the Employer and the Union on March 24, 2009. At that meeting Ms. Baker gave the dismissal letter to Mr. Oates. She and Mr. Oates read the letter together. This was the first time the grievor saw the letter. It was clear from the letter that she was dismissed. There was discussion as well about her status as a probationary employee and although the Union hoped to resolve the matter, there was no resolution.

The Employer called Ms. Barbara Gillam, the Shop Steward, as a witness. Ms. Gillam explained that she was working on the morning of March 10, 2009. The grievor came in around 8:30 a.m. to meet with her as Shop Steward. Together they approached Ms. Baker to ask her to sign the Grievance Form. Ms. Baker refused to sign it. Ms. Gillam thought it was possibly March 11th or 12th that Ms. Baker asked her, as the Shop Steward, to try to contact the grievor. When Ms. Gillam could not reach the grievor she met with Ms. Baker alone to sign the Grievance Form on March 16th, 2009. Ms. Gillam thought it was done correctly by having both of their signatures. She also thought that the grievor should not come on the premises as she had been told on March 10th by Ms. Baker to leave the building. Ms. Gillam explained she does not have a lot of experience as a Shop Steward and she understood she needed the Form signed by both parties. Once this was done she thought the discharge was done properly. Ms. Gillam attended the meeting of March 24, 2009. At that meeting Mr. Oates asked Ms. Baker why the grievor was let go. After that was discussed the grievor left the meeting and the remaining people chatted for a while. There was no resolution with regard to getting the grievor back to work. Although Ms. Gillam knew the letter of dismissal was given to Mr. Oates she did not actually see the contents of the letter herself.

The Union insists that at any meeting related to discipline, discharge or suspension with any employee, whether on probation or temporary, part-time, full-time, or permanent the Employer must advise the employee that s/he has the right to Union representation. This right is paramount and substantive as per Article 10:02, without which the Employer's dismissal is to be null and void. The Union contends that once that mistake was made on March 9, 2009 it could not be rectified. The Union does not concede that the dismissal on March 24, 2009 with Union representation, corrected the error.

The Union referred to specific sections of Brown and Beatty from Chapter 7 on Discipline. Highlighted was Section 7:2100 Disciplinary Procedures; Section 7:2130 Union Representation; Section 7:2140 Non-compliance; Section 7:5000 Probationary Employees; and Section 7:5020 Employment Security. Additionally the Union provided the following seven cases to support

their preliminary objection stating that there are hundreds of cases on this issue and this is just a sample of them.

1. Re: Calgary Board of Education and C.U.P.E., Loc.40 (1991) 63 L.A.C.(4th) 319 (Smith)
2. Re: Justice Institute of British Columbia and B.C.G.E.U. (1991) 21 L.A.C. (4th) 256 (Larson)
3. Re: Delta Toronto East Hotel v. Hotel Employees Restaurant Employees Union, Local 75 (2001) 98 L.A.C. (4th) 31 (Swan)
4. Re: Hotel Fort Garry and Canadian Brotherhood of Railway, Transport and General Workers (1993) 33 L.A.C. (4th) 320 (Peltz)
5. Re: Alberta v. Alberta Union of Public Employees (2007) 163 L.A.C. (4th) 289 (Joliffe, Tidsbury and Bartee)
6. Re: Toronto Parking Authority v. Toronto Civic Employees' Union, Local 416 (2007) 167 L.A.C. (4th) 222 (Knopf)
7. Re: Newfoundland and Labrador Association of Public and Private Employees v. Her Majesty the Queen in Right of Newfoundland (Department of Works, Services and Transportation) (2000) Unreported (Oakley, March, and Horlick)

In concluding the Union requests the grievor be re-instated to her position at the Mountain View Estates with all benefits of the Collective Agreement including salary and to her probationary period be deemed as over which would be the situation had she not been incorrectly dismissed.

EMPLOYER'S RESPONSE

The Employer wants the Arbitrator to stick to the facts of the case. It is conceded that on March 9, 2009 the manager did not offer the grievor Union representation but this was with no mala fides as the manager truly believed a probationary employee could be dismissed based solely on the Employer's assessment of that employee. The Employer suggests there is a significant difference between discipline and dismissal and that difference is relevant in this present case. While the Employer considers it wrong to treat an employee incorrectly, he suggests it is equally egregious for the Union to punish the Employer for an honest mistake in which there was no bad faith. It was clear from the evidence of Ms. Baker that as soon as she learned from the Union she had followed an incorrect procedure she immediately set about in good faith to attempt to correct her honest mistake. She took steps to rectify the situation by going through the Shop Steward rather than through direct contact with the grievor. The Employer notes the manager was trying to do this quickly with an awareness of the Time Limits outlined in the Collective Agreement at Article 10:03. The Employer notes it is important to consider the context of the situation in that the grievor was a part-time employee, she was not a full-time employee. She was there on a call-in basis and therefore was not scheduled to work every day. The Employer believes the

issue of Union representation was corrected in good faith on March 24, 2009 when the grievor was given her letter of dismissal directly in the presence of two Union representatives. While attempts were made to reconcile the differences between the Union and the Employer these were unsuccessful. The Employer suggests the Union is “going over the wall” to ask for full reinstatement of the grievor to her position with salary, benefits and probationary status to be completed. The Employer states the most the Employer could be punished for their honest mistake would be to have the grievor re-instated to her position on March 9, 2009 till her correctly carried out dismissal on March 24, 2009.

The Employer asks the Union’s preliminary objection be dismissed based on fairness and natural justice.

CONSIDERATIONS:

The Arbitrator must deal with Preliminary Objections of both parties to this dispute. The Arbitrator must decide (1) if the grievance is arbitrable and (2) if it is arbitrable, whether the dismissal stands or are there grounds to find the dismissal null and void?

The Employer’s first preliminary objection was dealt with orally at the Hearing on October 5, 2009. The Employer alleged the Grievance Form was so vague and inadequate that it lacked sufficient substance for the Arbitrator to know what the dispute was, if in fact there was any dispute, for which she had to make a ruling. As explained in the oral decision reported above, the Arbitrator was not prepared to dismiss the grievance without hearing more information. The Form appeared typical to those with which this Arbitrator had previously experienced.

One of the cases referenced by the Union addresses the issue of grievance documents. Professor Bora Laskin is quoted in the Springate Award, op cit, in Paragraph 31:

“The grievance documents are, so to speak, the ‘pleadings’ of the court lawsuit, but whereas rules of procedure govern the particularity of the statement of a cause of action (as well as the defense) in a lawsuit, and provide an orderly scheme for amendments, the labour arbitrator has no such formal code of control, save as one may be found in the particular collective agreement. In my submission, it is better that he be left fairly free to help the parties, if necessary, to pinpoint the issues in the grievance claim. The expedition and informality sought through arbitration would be lost if the written grievance form became the sovereign talisman, and if formal motions to amend had to be made. After all, we are not concerned in labour arbitration with meticulous definition of issues for jury, nor are we concerned with tactical maneuvers designed to protract proceedings or to compound costs.”

Further along in this same Paragraph Mr. Justice Brooke in the Court of Appeal is quoted as stating:

“No doubt it is the practice that grievances be submitted in writing and that the dispute be clearly stated, but these cases should not be won or lost on the technicality of form, rather on the merits and as provided in the contract and so the dispute may be finally and fairly resolved with simplicity and dispatch.”

The Arbitrator agrees with the opinions of Mr. Justice Brooke and then Arbitrator Bora Laskin to dismiss the grievance based solely on dissatisfaction with the Grievance Form would be incorrect. Article 9:03 states, “The Arbitrator shall determine his/her own procedure, but shall give full opportunity to all parties to present evidence and make representations.” To dismiss the grievance based on the lack of specific and detailed information on the Grievance Form would not give full opportunity for either party to explain their positions within the context of the Collective Agreement.

The Employer’s second preliminary objection is based on the insistence there are no differences between the parties giving the Arbitrator the authority to intervene in the matter. Article 10.01 (b) gives the Employer the sole and exclusive power to determine suitability and competence of a probationary employee. This same Article clearly states the probationary employee has no recourse to grieve that assessment. As the Union agreed to this Article in the Collective Agreement there is nothing for the Arbitrator to hear. The Arbitrator agrees this section of Article 10:01(b) is very clear and unambiguous. However, it does not stand alone. Within the same Article the very next clause, 10.02, is equally clear and unambiguous. Article 10:02 gives the Employer the responsibility to advise an employee, regardless of their status, probationary, part-time, full-time or senior, of their right to Union Representation when “required to attend a meeting with the Employer dealing with discipline, discharge or suspension.” To ask an Arbitrator to attend to an Employer’s rights in one clause of an Article but not their responsibilities in another clause of the same Article would not be reasonable.

It is a fact that the grievor did eventually have Union representation in a second meeting, that held on March 24th, (15) fifteen days after the oral dismissal of March 9th, 2009, at which time she was given her letter of dismissal. The Employer would have the Arbitrator ignore the clause of Article 10:03 regarding Time Limits, which dictates the employee (regardless of probationary status) “who is disciplined, discharged or suspended shall be provided with written notification of such action within five (5) days of the incident. Such notification shall state the reason for the disciplinary action. If such procedure is not followed, the disciplinary action shall be null and void.” The Employer’s errors in Article 10 are believed to have been honest errors. The manager did not realize her responsibility to have Union representation for the dismissal of a probationary employee and she sent the letter of dismissal to the wrong address. The Employer contends the end result of the dismissal would not have changed even if the grievor had Union Representation at the March 9th meeting where she was orally advised she was dismissed. This suggests a lack of appreciation or understanding of the importance of Union representation which will be further discussed in the Union’s preliminary objection.

Suffice to say the Employer’s reference to the Court of Appeal case **NAPE v Her Majesty the Queen in Right of Newfoundland and Labrador as represented by the Honorable The President of Treasury Board**, 2003 NLCA 35, para 16, is helpful in guiding the Arbitrator to find the matter between the parties in this instant case is arbitrable given the differences between

the parties on their interpretation of the Collective Agreement, particularly Article 10. The Arbitrator has a responsibility to assess those differences and to consider the importance of the entire Article within the whole Collective Agreement, not just one part of the Article.

If the Arbitrator was able to decide the arbitrability based on Article 10:01 (b) alone, if the Collective Agreement had been honored with regard to Union Representation and if Time Limits for written notification had been met then there may be little room for interpretation any different than that upon which the Employer relies. However, given these mistakes, albeit honest, the Arbitrator was left to question whether there was an arbitrary, honest misunderstanding taken that lead the Employer to dismiss the grievor. The Union has suggested there was arbitrariness that led the Employer to believe the grievor was unsuitable or incompetent. Article 6 with reference to No Discrimination does not allow for arbitrary discrimination. Without going to the merits of the case, the Arbitrator has no evidence of this other than the Employer recognizing their rights and not their responsibilities. If these other issues negating the Grievor's rights had not happened there would be no reason to question whether the decision to dismiss was arbitrary and the Union would bear the burden of proving this allegation. This Arbitrator supports the position taken in the Toronto City and C.U.P.E. case heard by Arbitrator Springate, op cit, in which he states at paragraph 29:

“At the hearing I noted that because the grievor was a probationary employee the employer is not required to demonstrate that it had reasonable cause to discharge him. In light of the decided cases, however, including the judgments of the Division Court in the *Metropolitan Toronto* case involving Mr. Soldano and the *Brampton Hydro* case, it is apparent that an employer's discretion to terminate the employment of a probationary employee must be exercised in a manner that is not arbitrary, discriminatory or in bad faith. Accordingly, I ruled orally that it is open to the union to challenge the grievor's discharge as having been arbitrary, discriminatory or in bad faith.”

Arbitrator Springate also referenced the case Re Metropolitan Toronto (Mun) and C.U.P.E., Loc 79 (1984), 18 L.A.C. (3rd) 52 (J.D. O'Shea). The grievor in that case was a probationary employee and the Employer had the exclusive right to discharge probationary employees. O'Shea found in his decision:

“Since the employer is not required to affirmatively establish any reason for discharging a probationary employee, the employer can not be required to bear the onus of leading evidence in this case. The grievor has the burden of affirmatively establishing that the actions were in bad faith or otherwise unlawful or that the employer's actions precluded the grievor from doing her best. Unless such matters are affirmatively established by the grievor, there will be no case for the employer to meet and the grievance will be dismissed.

In the present case the Arbitrator has no knowledge of the merits of the case and whether the Union has any evidence to support their contention of arbitrary behavior on the part of the Employer. It would be incumbent then for the Union to prove such arbitrariness given the

language of Article 10:01(b) Termination of Probationary Employee and Article 6 No Discrimination.

Having found the matter is arbitrable the next question before the Arbitrator is whether the discharge of the grievor should stand or be null and void. If the Arbitrator followed the clear, unequivocal clause in Article 10:03 “If such procedure is not followed, the disciplinary action shall be null and void.”, there would be no choice but to declare the dismissal null and void. The term “shall” is generally found to be mandatory and not just directory in most arbitral jurisprudence. The Arbitrator does not have the power to alter or amend this provision. (Article 9:04).

Palmer and Palmer in Collective Agreement Arbitration in Canada Third Edition discuss the effect of time limits at length in Chapter Five. At paragraph 5.50 they state:

“Until very recently, mandatory provisions were distinguished from directory provisions primarily by the existence of wording that expressly provided for the consequences of non-compliance and the existence of the word ‘shall’ was not in and of itself, determinative...

The rationale supporting these cases would appear to stem from the ‘fact of life’ that the parties may use the word ‘shall’ to stress the importance of undertaking a certain act but the word says very little about their intentions should the act not be executed in a timely fashion. In other words, to choose ‘shall’ over ‘may’ does not mean the parties consider non-compliance completely fatal. An arbitrator should therefore, at the very least, look to the purpose and importance of the obligation in the circumstances and this importance is most clearly visible when a specific penalty for non-compliance exists.”

In this instant case, the penalty for non-compliance is clear, the disciplinary action “shall be null and void”. The evidence is accepted that while the dismissal letter was written and thought to have been delivered to the grievor within five (5) days it was delivered to the wrong home address. This was an honest mistake by the Employer who was well aware of the requirement to provide “written notification” to the discharged employee within a specific time frame. The Employer feels they should not be punished for this honest mistake.

The Union did not spend as much time in the Hearing addressing the issue of Time Limits as the issue of Union Representation. It was agreed by the Employer that the time limit requirement had not been met. There was no difference with regard to the fact, only the consequence of the fact. The Union did argue vehemently that the lack of Union Representation at the original meeting between the manager and the grievor on March 9th, 2009 is the most serious grounds upon which the discharge must be found null and void. The Union provided seven (7) reference precedent cases that addressed the issue and as can be surmised, each of these seven cases references even more cases. Some of the referenced cases are the same. Additionally, the Union referenced pertinent sections of Brown and Beatty.

This Arbitrator was particularly influenced by a point of view expressed in a number of the cases. In the Unreported case of Re: Newfoundland and Labrador Association of Public and Private Employees v. Her Majesty the Queen in Right of Newfoundland (Department of Works,

Services and Transportation (2000) (Oakley, March and Horlick), the Board was faced with discharge of two employees who had not been on probation but were discharged without Union Representation. Oakley, like other arbitrators, refers to the discussion of the purpose of Union representation rights as presented in the case Re Canadian National Railway co. and B.L.E. (1993), 35 L.A.C. (4th) 88 (M.G. Picher):

“Union representation in disciplinary interviews, now widely accepted, serves a number of purposes. At the most basic level, the employee has the benefit of a third person who can serve as a witness to the exchange between the employee and the employer. The right of union representation also gives to the employee several other benefits. Firstly, the union officer who attends may gain a more immediate understanding of a dispute between the employer and the employee, and thereby be better informed to handle a subsequent grievance. Additionally, a union representative may provide assistance to the employee in the form of objective and considered advice during the course of the interview. Union representation can also, at times, permit the input of an experienced person whose thoughts or suggestions, whether they relate to issues of fact or the interpretation of the collective agreement, may give the employer pause, and assist in ultimately sorting out the question under investigation in a manner that is mutually satisfactory. Also, the presence of a union representative may safeguard against the making of concessions of agreed interpretations of the collective agreement or practices in the work place which go beyond the individual employee’s case, and which could adversely affect the larger interests of the union and its membership. These are but the most obvious consequences of representation by a union representative in a disciplinary interview conducted under the terms of many contemporary collective agreements.”

The Employer in the instant case argues there is a relevant difference between having union representation present for a disciplinary meeting as opposed to a meeting discharging an employee, especially a probationary employee, in which case even if the Union representative had been present the Employer would have succeeded in discharging the employee with no access to grievance or arbitration. The Arbitrator finds no circumstance that would support a lesser need for Union representation at a discharge meeting than a disciplinary meeting, if anything the need would be even greater given the greater consequence to the employee. Discharge from a position is an extreme disciplinary decision, referred to by some as the capital punishment of labour relations. Further, we can not go back in time to know with certainty that the outcome would have been the same. As arbitrator Picher suggested the Union representative may have been able to engage the manager in a discussion that may have led her to give the employee a chance to correct whatever it was that inclined her to dismiss the probationary employee. To suggest the manager had a totally closed mind on the issue presenting would not be consistent with the very first Article upon which this Collective Agreement is founded, Article 1:01:

“It is the purpose of the parties of this Agreement to maintain and improve harmonious relations and to settle conditions of employment among the Employer, the employees and the Union.”

While the grievor did have Union representation on March 24, 2009 the parties at this point were possibly already entrenched in their positions. It was not possible to know whether anything the grievor or Union representative might have said on March 9th may have led the manager to give the grievor a second chance, particularly since she would still have been on probation. Arbitrator Swan in the Delta Toronto East Hotel case, op cit, discusses this idea at paragraph 21 of that Award:

“...the Employer asserts that the grievor suffered no prejudice. The Employer’s assertion in this regard is unusual. It states the decision to terminate the grievor’s employment had already been taken ... and that therefore nothing that the grievor or a union representative could say on his behalf could possibly have done any good. If such an argument were accepted, the Employer could completely avoid the obligations it has taken on in the first paragraph of clause 12.6 in every case, simply by making its decision in advance of, or instead of, affording the employee the representational rights bargained for. For an employer to say that nothing said to it could possibly change its mind is simply to deny the right specified in the collective agreement. As a matter of the reasonable interpretation of the collective agreement, an employer cannot be permitted to assert that arguments which it has never provided the opportunity to be made would not have affected its decision.”

Swan goes on at paragraph 23 to quote another arbitrator (Charney) in another case who refers to an Award by Brandt in the Re: Saville Food Products Inc. and United Food and Commercial Workers, Local 1105-P (1985), 20 L.A.C. (3rd) 114 (Brandt):

It appears to me that it misses the point to say that the presence of a union steward would have made no difference in that the grievor’s interests can be well taken care of in the grievance procedure. It is conceivable that such a presence could have made a difference and could have altered the company’s view before the company became committed to a decision from which it would be more difficult to back down in the face of union attack.

Given the weight of Article 10:01(b) in the present case, the probationary employee is particularly vulnerable and may be seen as being in particularly time-sensitive and crucial need of union representation.

The question of whether the right to union representation is a substantive right is addressed in the cases provided by the Union. Given the language of this Collective Agreement there can be no doubt that this is substantive. Even in reviewing the Employer Nominee’s Dissent in the Oakley, March and Horlick Award (2000) referenced it was worth noting (p.7 of the Dissent) that the Employer’s nominee found the language of the Collective Agreement of that case, in which it was stated “ at their request, the employee is entitled to have a representative of the Union attend the meeting” less forceful than the language of this instant case. He referred to language such as that of this Collective Agreement as “much more specific and substantive”. In concluding his Dissent, Mr. Horlick provided the following quote: (p.11)

“The majority of the court in *Canada Safeway* concludes that to justify the drastic remedy of declaring discipline or dismissal to be void *ab initio*, an arbitrator would have to find

support for that remedy in the language of the Collective Agreement. In short, it must be something which the parties to the Collective Agreement specifically contemplated.”

In this instant case, the Arbitrator finds the language of Article 10.02 did specifically contemplate the right of an employee to Union representation although it did not say if the Employer failed to offer the employee that right then the discipline, discharge or suspension would be “null and void”. This remedy was specifically used for the consequence of not following the time limits.

Returning to the Award by Arbitrator Swan, *op cit*, he states at Paragraph 26, 27 and 28:

“All of the cases relied upon by the Employer are cases where the right bargained for was something far less than a right to union representation... The right bargained for by the Union is one which arbitrators repeatedly found to be a substantive right, fraught with prejudice to the grievor if denied.

Once an employee has been terminated, there are significant disincentives to reversing that decision. There are issues of management solidarity, questions of managerial authority, and financial consequences which increase day by day as the employee remains away from work without pay. To deny the right of representation at the time the parties have bargained for it means that it is denied forever. It is for that reason, in my judgment, that arbitrators have regularly treated denial of such a critical right as depriving the employer of the right to rely upon the disciplinary events to found any discipline.

That is why arbitrators have typically found that a termination after such a denial is void from the outset, and cannot be cured by either the grievance procedure or, for that matter, even by a full adversarial hearing before an arbitrator.

I do not come to this conclusion lightly, but to accept any of the employer’s arguments in this case would render the right which the Union has bargained for its members hollow and useless. Collective Agreements must be given a reasonable interpretation based on the words which the parties have used to describe their own bargain.”

With respect to the Employer’s suggestion that the most the Arbitrator could do was re-instate the grievor to her position from March 9, 2009 until March 24, 2009 when she was provided with her Union representation, the Arbitrator must disagree. Given the denial of her substantive right at the time of her dismissal on March 9, 2009 and given the lack of written notification of that dismissal till March 24, 2009, the Arbitrator cannot turn a blind eye to either or both of the Collective Agreement rights. However, while the Union requests the grievor should be finished with her probationary status the Arbitrator cannot agree to this. Given there has been no discussion of the merits of the case upon which the grievor was being discharged, the Arbitrator is concerned that if this was a behavior or action that was totally incongruent with her work at the residence for seniors then the Employer must have the remainder of her probationary time that has not passed to assess this. Probationary periods serve an important purpose as described in *Brown and Beatty, op cit*, at Paragraph 7:5000:

“...the legitimate interests of the employer in attempting to secure the most competent, compatible and suitable workforce it can acquire. One cannot reasonably expect an employer to be able to assess the full capabilities and potentiality of a job applicant from

a brief interview, an application form, references and the like. Rather he must be entitled to an opportunity to view the new hire in the particular context of his own work environment. That is the purpose of the probationary period. It is ... a legitimate purpose.”

The Arbitrator has no reason to believe there would be any bad faith held against the grievor. The denial of the rights accorded her in the Collective Agreement were done through either ignorance (did not realize the probationary employee had Union representation rights) or bad luck (sending the dismissal letter to the wrong address). If there was arbitrariness on the part of the Employer, the Arbitrator has no evidence of it without going to the merits of the case. The arbitrariness appears more in choosing to recognize one clause of one Article of the Collective Agreement over other clauses and Articles. The Arbitrator must consider all of the Collective Agreement.

DECISION

The Employer’s preliminary objections are denied. The grievance is arbitrable. The Union’s preliminary objection is upheld and the grievor should be re-instated with full redress to her position at that point of her probationary status where she would have been from the March 9, 2009 dismissal date.

DATED this _____ day of December, 2009.

Patricia Kelsey
Arbitrator