Kahn #5

ARBITRATION OPINION AND AWARD

EMPLOYER

-and-

UNION

July 18, 1998

Grievance: Union Representation

Subject: Probationary Employee -- Right to Union Representation

Statement of the Grievance: NATURE OF GRIEVANCE: Violations of Article 1, Article 2, Article 7, Article 10 and Article 30.

FACTS: On the above date, an employee of the Employer Fire Dept. and a member of the Union collective bargaining unit was involved in a disciplinary meeting with management that resulted in the termination of employment of the probationary employee member. This individual was not provided Union representation as required by the current Collective Bargaining Agreement. Additionally, the proper Union officers were not notified in writing, nor allowed to meet with the discharged employee. Furthermore, the employee was not afforded a hearing with the Employer Manager regarding his discipline, as the decision concerning the discipline of termination had already been predetermined by the Fire Chief only and without any hearing. The violations of the cited contractual provisions and due process violated the Unions rights to proper representation of an employee and member of Union.

SUGGESTED ADJUSTMENT(S):

1) The Employer is to abide by the Labor Agreement in following the Unions rights and Union members rights to proper representation and notification.

2) Since the disciplinary meeting violated the consistent standard of due process as laid out in the current Collective Bargaining Agreement, and an employee and member was not afforded contractually guaranteed representation, any actions taken by management with the respect to this particular incident regarding the employee as a result of the meeting must be voided.

Statement of the Award: The Grievance is denied.

BACKGROUND

The Union filed this grievance to protest the Employer's failure to have a Union representative present at a meeting it held with probationary Fire Fighter Employee 1 on January 2, 1998. The Union contends Employee 1 was entitled to have representation during this meeting. The Employer insists that under the circumstances it was not required by the Agreement to notify the Union of the meeting.

The facts are not in dispute. Employee 1 had been hired as a Fire Fighter on January 6, 1997 and would serve a one-year probation. Management summoned Employee 1 to a meeting with Deputy Chief Person 1 on January 2, 1998. He was given a letter from the Chief saying that he was being removed from employment. The letter states:

> A review of the evaluations prepared for the end of your probationary period has resulted in a determination that your performance in the position of firefighter is not considered

satisfactory.

> As a result, your employment with the Employer is hereby terminated effective today. You will be compensated for the remainder of your work shift today but are directed to return all Employer property and depart your assigned fire station immediately.

Employee 1 had authorized the check-off of Union membership dues at the time of his hiring. However, no Union representative was present at the meeting. Management did not offer to bring a Union representative in, and Employee 1 did not request one. Following the meeting, Person 1 telephoned the Vice President of the Union and told him of Employee 1's removal. The evidence is that the Employer had not terminated a probationary Fire Fighter for approximately twenty years. The Union timely filed the instant grievance to protest its lack of notification and opportunity to represent Employee 1 at the January 2 meeting.

Article 2 of the Collective Bargaining Agreement, NEW EMPLOYEES, §9, PROBATIONARY PERIOD, states:

> All original appointments shall be probationary and subject to a probationary period of one (1) year after appointment. At any time during the probationary period, the Employer Manager may remove an employee whose performance does not meet the required work standards. Any probationary employee who is so removed shall have no right to appeal such action to the Civil Service Board or the Grievance Procedure of Article 8.

Article 11, SENIORITY AND PROBATION PERIODS, §2.C, ACCRUAL OF SENIORITY, also addresses the status of original appointments:

> All original appointments shall be probationary and subject to a probationary period of one (1) year after appointment. ... At any time during the probationary period, the Employer Manager may remove ... an employee whose performance does not meet the required work standards. ...

Article 7, UNION STEWARDS AND OFFICIALS, §2.5, STEWARD REPRESENTATION, provides:

> Upon the request of an employee, a Steward shall be present and participate at any private meeting between a higher ranking officer and/or management representative, and the employee. If the meeting involves investigation into misconduct of the employee or management reasonably expects the meeting to result in disciplinary action to the employee, the Union President or Vice President (or their designee in writing) and the Steward shall be afforded the opportunity to be present, unless the employee waives such right to representation in writing prior to the meeting. In such cases where a waiver is signed, a copy shall be provided to the Union.

The Union views the January 2, 1998 meeting as having "result[ed] in disciplinary action", requiring the presence of Union officer(s) to represent Employee 1. It calls attention to a March 13, 1995 letter to Union Vice President, Person 2, from Person 3 in the Employer's Labor Relations Department, that discusses what constitutes "discipline". The pertinent portion reads:

> Following our telephone conversation concerning your letter of March 7, 1995, and as requested, I am writing to document the Employer's position regarding notice of disciplinary action in accordance with Article 10, Section 1 of the current Agreement.
>
> The Employer considers discipline to be either an oral warning, a letter of warning, a suspension, or a discharge. ... (Underlining added.)

The Union contends that Person 3' letter confirms its position, namely, that (1) discharge constitutes discipline, (2) Employee 1 had been discharged at the January 2, 1998 meeting, i.e. "the meeting ... result[ed] in disciplinary action" and hence, the Employer improperly deprived the Union of its right to represent Employee 1 at the meeting.

Person 3 testified about the circumstances leading to the March 13, 1995 letter. He said the parties had been debating whether letters of instruction constituted discipline and he wrote the letter to say they were not. The Employer maintains the decision to terminate Employee 1 had been taken prior to the meeting, the sole purpose of the meeting was to convey that decision to him, and no discussion took place.

DISCUSSION AND FINDINGS

The issue in this case is whether the Department violated the Agreement when it did not afford to a Union officer and the Steward an opportunity to be present at the meeting with Fire Fighter Employee 1 held for the purpose of advising him of his termination.

The Agreement (Article 2, §9) provides that newly appointed employees must serve a one-year probation. Management may remove a probationary employee whose performance does not meet required work standards during that year, and the thus separated employee has no appeal rights.

A candidate for Fire Fighter must pass certain screening tests in order to be considered for the appointment. Once appointed, the probationary employee, during the first year, is provided training to enable him to acquire the knowledge and skills essential to performing the full range of fire fighter duties. During the year, supervisors observe the probationary employee's performance for evidence of, at first, his potential and then later, his actual growing mastery. Hence, when Department supervisors make a yearend appraisal of a probationary employee, their evaluation is the final step in the hiring/training progression. This the time when they must make a judgment that the person has become a fire fighter. The new employee's probation must be seen as an extension of the hiring process.

Viewed in this light, the determination that an employee has not passed probation becomes more clearly not a matter for taking disciplinary action but rather, a decision that the employee should not continue as a fire fighter because he has not been able to learn the essential skills at the level of proficiency required for a long term career. The action does not constitute

discipline because no misconduct is involved.[1] Instead, the judgment of several senior officers is being used for purposes of making certain only those fully capable of "meet[ing] the required work standards" will be retained.

The purpose for having union representation at the kinds of meetings prescribed in Article 7 is two-fold. If an investigation is involved, the union acts as a quasi-attorney, to advise the employee on appropriate responses, to protect against possibly intimidating tactics, and of course, to assert the employee's rights. Further, the union representative learns early on just what is at issue, the allegations, the evidence, etc., information essential to possible grievance processing. If disciplinary action is the subject of the meeting, the union advocate has familiarity with the applicable contract, work rules, history of other disciplines and can argue for the employee based on such knowledge. When management has an unreviewable right to separate a probationary employee, as it does in this case, with no requirement for any preliminary conferring or counseling, the union's role is limited. This may explain the Agreement's silence with respect to representation of a probationary employee. (The twenty-year gap since the last failure of a probationary employee may also explain the omission.)

Because the January 2, 1998 meeting between Person 1 and Employee 1 was neither intended to be an investigation into misconduct by the employee nor a meeting from which management reasonably expected that disciplinary action would result, it cannot be said that the Department was obligated by Article 7 to bring in Union officers to represent Employee 1. Employee 1's evaluation and the consequent decision to terminate his employment are by terms of the Agreement (Article 2, §9) non-reviewable. No misconduct-leading-to-discipline was

[1]I do not mean to say there are no circumstances when discipline is imposed for below-standard job performance, but it involves employees who have passed probation and are presumed to know their job. When they demonstrate otherwise, some element of misconduct is inferred. The less than satisfactory performance is attributed to inattention, negligence, or more serious, to knowing or intentional wrongdoing.

involved. I do not mean this analysis to recommend lack of notice or opportunity for discussion between the parties, including the employee, when dismissal of a probationer is contemplated or decided upon. Valuable information could be disclosed. The probationer, considering implications for future employment opportunities, might choose to resign rather than be discharged. However, in the present circumstances, I find neither a practice nor a contractual requirement for notification and representation. Hence, no violation of either Employee 1's or the Union's rights under the Agreement is established.

AWARD

The Grievance is denied.

RUTH E. KAHN, ARBITRATOR

Grievance Data:	Date:
Grievance Filed:	January 15, 1998
Case Heard:	May 5, 1998
Briefs Exchanged:	June 26, 1998

[2]At the arbitration hearing the Union questioned the omission of a score from Employee 1's evaluation sheets, asserting the matter could have been raised by a Union representative, on January 2. The Employer brought in an employee who explained why the omission had no impact on Employee 1's overall grade. The explanation appears to have answered this particular Union challenge.