

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

THE CITY OF NEW YORK,

DECISION NO. B-20-74

Petitioner,

DOCKET NO. BCB-178-74

-and-

DISTRICT COUNCIL 37,
AFSCME, AFL-CIO,

Respondent.

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DECISION AND ORDER

On May 8, 1974, Respondent, the certified representative of a unit of hospital aides, filed a request for arbitration (A-373-74), asserting that on July 30, 1973, and again on August 27, 1973, the Health and Hospitals Corporation had posted improper notices of vacancies in the title of Operating Room Technician at the Francis Delafield Hospital. The Union contended that the notices were violative of Article XIV (Vacancies) of the hospital aides contract, that they did not contain sufficient information regarding the vacancies, and that hence two named employees, John Wilder and John Herbert, did not file applications for the openings.

On June 4, 1974, the City filed a petition challenging arbitrability of the grievance, alleging that the grievants named therein, Wilder and Herbert, were not unit employees represented by DC 37 under the hospital aides contract, that they were in fact already employed in the civil service title of

Operating Room Technician, and that as operating Room Technicians they were represented by DC 37; Local 144, SEIU; and Local 237, IBT, jointly, as part of a consolidated technician unit. Additionally, the City maintained that the grievance should be dismissed because the Respondent had been guilty of laches in prosecuting the grievance.

On July 11, 1974, DC 37 requested leave to amend the request for arbitration to delete the names of Wilder and Herbert and to replace them as grievants with "Angelina Manning, Nurse's Aide, and others similarly situated." The Union declared it had erred in naming Wilder and Herbert in the original grievance and in the request for arbitration, but contended that its proposed amendment "quite obviously has no substantial effect on the issues to be arbitrated" and that the City and the Health and Hospitals Corporation would not be adversely affected by such amendment.

The City, however, did object to the proposed amendment, charging that "substantial harm will be done to the City's rights and to labor relations if the change is permitted." The Union, in a letter dated August 6, 1974, then suggested that if the proposed amendment were denied by the Office of Collective Bargaining, "it would be in the interests of justice to remand the grievance to the initial Step I for the purpose of permitting Delafield Hospital to pass on the amended grievance."

On August 26, 1974, the Office of Labor Relations replied that "although it is unfortunate" that the Union erred in naming Wilder and Herbert, the proposed amendment and the alternative proposed by the Union that the grievance be remanded to Step I, were unacceptable to the City. It again called on the OCB to deny the Union's application to amend the request for arbitration. "In no case will the City agree to an amended grievance. Absent such an agreement, OCB has no authority to remand an amended grievance to Step I. Under the circumstances, the Union must file a new request for arbitration."

On October 29, 1974, the Union withdrew its earlier suggestion that the grievance be remanded to Step I, reverting, in effect, to its position that the request for arbitration be amended and, as so amended, be submitted to a neutral for final and binding arbitration.

Background

The hospital aides contract which ran from July 1, 1971, to June 30, 1974, was signed on January 5, 1972, Under Article 1, §1 (Union Recognition and Unit Designation), the following titles are covered.

Dietary Aide	Beautician
Housekeeping Aide	Hospital Aide (EEA)
Institutional	Patient Aide (EEA)
Institutional Barber	Patient Aide (EEA-6)
Nurse's Aide	Nurse's Aide (Handicapped Children)

At the time the contract became effective there was no civil service title of Operating Room Technician (hereafter ORT), only the house title of ORT, for which Nurse's Aides received an assignment differential. The contract, at Article XIV (Vacancies), provides:

"All vacancies for positions in the titles covered by this agreement carrying special assignment differentials such as oxygen technician, operating room technician, ambulance technician, etc., shall be posted (as soon as the vacancy is known) on bulletin boards in the area of the general office of the hospital where the vacancy exists. Such posting shall continue for a period of five (5) days before the position is filled.

"Selection shall be made in accordance with established agency policy, with consideration being given to the employee applicants' qualifications in relation to job specifications for the title, attendance, punctuality, work performance records, and seniority.

Section 2 of Article I states:

"The terms 'employee' and 'employees' as used in this agreement shall mean only those persons in the unit described in Section 1 of this Article."

When the hospital aides contract was signed Wilder and Herbert were Nurse's Aides employed in the then house title of ORT. On July 9, 1972, as part of a reclassification and upgrading program initiated by the Health and Hospitals Corporation, a new, unique, civil service title of ORT was created by the Civil Service Commission within the Corporation. Wilder and Herbert were among the Nurse's Aides at Delafield who, after the completion of technician training, were reclassified to the new civil service title of ORT. They received an increase in pay

when so reclassified, but no longer received the special assignment differential they enjoyed as Nurse's Aides. Moreover, in their new titles they were no longer part of the hospital aides unit. On July 18, 1973, the Board of Certification certified DC 37 as representative of a hospital technician unit consisting of upgraded former Nurse's Aides (Decision No. 58-73), including the ORT title. On December 18, 1973, in Decision No. 98-73, the Board combined the hospital technician unit represented by DC 37 (of which Wilder and Herbert were part) with a laboratory technician unit represented by Local 144, SEIU, and a medical technician unit represented by Local 237, IBT, and certified the consolidated unit to DC 37, Local 144 and Local 237 jointly.

The vacancies for ORT at Delafield occurred in the period July - October, 1973, at a time when the title was no longer a house title (as contemplated in the hospital aide contract), when Wilder and Herbert were already ORTs, and when the ORT title was represented by DC 37 under a separate certification. The hospital aides contract was not formally amended when some of the Nurse's Aides covered by it were reclassified to ORT. A successor contract to the expired hospital aides agreement is now in negotiation. Both the Nurse's Aides and the ORTs are non-competitive titles requiring merely a qualifying examination.

The Union in its arbitration request cites only the alleged improper postings of July 30, 1973, and August 27, 1973. There were, in fact, three vacancies

among the ORTs at Delafield. One of them, a temporary vacancy which opened up in October 1973 as a result of an incumbent's being on leave of absence, was concededly not posted by the hospital. No applications were filed by Delafield employees for the two posted vacancies, and accordingly, the institution hired applicants from outside the institution.

The Union took the first step in the contractual grievance process in early November 1973, that is, within the 120 days after the grievance arose, which the contract prescribes for a Step I grievance. On November 21, 1973, Harry Kaufman, Director of Personnel and Labor Relations at Delafield, issued a written Step II decision denying the grievance. He declared that Wilder and Herbert had demonstrated no personal grievance since they were already working in the ORT title, and that as to the third "grievant," a Practical Nurse named Aytes, she was not in the unit represented by Local 420, DC 37. He added:

"The first two positions were posted. We cannot account for the reason that the postings were not seen by 'employees.' The third and last position is a leave of absence job. The person responsible for posting was under the impression that it was not necessary to post this L.O.A. position. Her impression has been corrected and in the future all positions will be posted when required.

"In Delafield Hospital, Operating Room, Technicians are hired by and under the supervision of the Nursing Department. Obviously, the Nursing Department was satisfied with the background and skills of the three people it hired in August, September and October of this year and this is the prerogative of management to make that decision.

"We believe this response should clarify the situation regarding the three Operating Room Technicians' positions and that no further action will be sought."

The Union, however, took a Step III appeal to the Office of the Director of Labor Relations of the Health and Hospitals Corporation. At a hearing held on January 21, 1974, before Ms. Lynne R. Stumer, Assistant Director of Labor Relations of the Hospitals Corporation, the Union maintained that the two job postings for the permanent positions were inadequate in that they did not contain sufficient information regarding the vacancy, setting forth only the title of the positions which were open. The Union argued that lacking other information, eligible employees of the hospital did not file applications for the positions. The Union requested that all three incumbents - the temporary, for whom there had been no posting at all, and the two permanents for whom there had, allegedly, been inadequate posting - be removed from their positions, that all the vacancies then be properly posted, and that preference in selection be given to the various hospital employees who applied. At the same

time, the Union requested certain changes in the method of posting vacancies.

In a Step III decision dated January 30, 1974, Ms. Stumer determined that the two permanent vacancies were properly posted, that the outside individuals chosen for the jobs were the only applicants, and that the Union's request that the incumbents be removed be denied. As to the temporary vacancy, however, Ms. Stumer required the hospital to post the vacancy with no undue delay, the individual then occupying that position to remain pending selection from among the applicants responding to the posting. Simultaneously, Ms. Stumer noted that the parties had agreed that thenceforward postings of notices were to include title, salary range and job description; that a copy of the posting was to be given to the Local 420 Chapter Chairman; and', that, upon request, applicants would be informed of the reason they were not chosen for a vacancy. Ms. Stumer's letter of decision makes no reference to the fact that the grievants named in the grievance were not in the unit covered by the 1971-74 hospital aides contract or that they already held the title of ORT.

The Union appealed the Step III decision to the OLR. On April 25, 1974, Ms. Estelle M. Karpf, Chief Review Officer of OLR, in a Step IV decision denied the grievance as follows:

"Operating Room Technician is no longer a house title for Nurse's Aides receiving an assignment differential for performing certain operating room duties. Effective 7/9/72, a separate title of 'Operating Room Technician' was created within the Health and Hospitals Corporation; thus, the provision in the hospital aides contract cited by the Union has no application to the matter complained of.

"While the contract provision cited is not applicable, I find that the postings complained of were in accord with the spirit of the posting provision of the hospital aides agreement."

On May 3, 1974, the Union appealed Ms. Karpf's decision by filing its request for arbitration (A-373-74). On June 3, 1973, the OLR filed the instant petition challenging the arbitrability of the grievance. It maintained that the named grievants, Wilder and Herbert, are not now unit employees covered by the hospital aides contract, and, in fact, are covered by a technician's contract certified to DC 37; Local 144, SEIU; and Local 237, IBT, jointly; that the grievants already hold the civil service title of Operating Room Technician that the respondent union was guilty of laches in filing the grievance; and that the City and the Union never agreed that Article XIV of the hospital aides contract would apply to employees in the civil service title of Operating Room Technician; and that none of the terms of the contract governed advancement to Operating Room Technician.

Issues

The pleadings and papers present two questions for determination by the Board:

1. Was the Union's mistake in naming the unaggrieved Wilder and Herbert as grievants, repeated through all the steps of the grievance procedure, a fatal defect which calls for dismissal of the request for arbitration on the ground that, as originally presented, the grievance is not arbitrable?

2. If so, should the Board grant the Union's request for permission to amend it so as to name persons actually aggrieved?

Article IX of the hospital aides contract defines the term "grievance" in part as follows:

"(A) A dispute concerning the application or interpretation of the terms of this bargaining agreement."

Clearly, this provision limits recourse to the grievance machinery to grievants who are covered by this contract. Wilder and Herbert, however, were not, the Union concedes, covered by the hospital aides contract when the grievance was filed; after they acceded to the civil service title of ORT they were no longer within the unit encompassed by the contract, and at the time of the filing of the grievance they were represented in another unit. Hence, the unamended grievance, which the Union did not correct at the pre-arbitration steps of the grievance machinery, is

patently not arbitrable in the form presented. The Union's request to amend the grievance at the arbitration step is plainly a recognition that, in the form in which it was presented in the earlier steps, the grievance is not arbitrable.

The remaining matter for the Board to determine is whether to grant or deny the Union's application for leave to amend the request for arbitration by deleting the names of Wilder and Herbert and substituting therefore "Angelina Manning, Nurse's Aide, and others similarly situated." The effect of such an amendment would be to change what was originally an individual grievance of Wilder and Herbert into a group grievance involving all those Nurse's Aides at Delafield Hospital who were unable to bid for the ORT vacancies in July and August 1973, because of the alleged failure to post adequately.

Positions of the Parties

The Union, while conceding that Wilder and Herbert were erroneously named as grievants since they have in no way been aggrieved, maintains that the requested amendment to substitute for them the names of other grievants who were Nurse's Aides at Delafield Hospital at the times of the postings for the ORTs, "has no substantial effect on the issues to be arbitrated," and that the City will not in any way be disadvantaged by such an amendment. The City replies that to permit the Union to amend its grievance at the arbitration stage would substantially harm the City by depriving it of the exercise of "contractual and legal rights with regard to the grievance process,"

would harm sound labor relations "because the City would never be sure at any step of the grievance procedure whether it had made a decision with regard to the correct grievants," and would render the prior steps of the grievance process a nullity. The City asserts that the Union was aware that it erred in naming Wilder and Herbert as grievants since Step II (November 1973), yet it did nothing to correct the mistake prior to requesting arbitration. It calls on the Board to take cognizance of the inordinate time taken by the Union to amend the grievance, and then only after having unsuccessfully gone through all the pre-arbitration steps of the grievance process. The City, therefore, calls on the Board to deny the request to amend and to relegate the Union to beginning the grievance process over again from the very start with new grievants, and, after going through all the pre-arbitration steps, to filing a new request for arbitration.

The Union responds that the substantive issues involved in the grievance are the same whether Wilder and Herbert are named as grievants or any other persons in the Nurse's Aide title at the times of the alleged improper postings. It maintains that the amendment is purely procedural; that the hospital was in no way misled or deceived as to the nature of the grievance because of the erroneous naming of Wilder and Herbert as grievants, and that the City was aware during all the pre-arbitration steps that the Union acknowledged its mistake in naming Wilder and Herbert. It points out that the grievance step decisions preceding the request for arbitration, all of them unfavorable to the Union, were based on the merits of the substantive

issues involved, not on the misnaming of grievants; and that the Union only moved formally to amend the grievance when the City challenged arbitrability on the ground of the Union's mistake in naming Wilder and Herbert.

Discussion

The written decisions at Steps II, III and IV do not make clear what issues and arguments were advanced there, but Kaufman's Step II decision explicitly calls attention to the Union's error in naming Wilder and Herbert as grievants. Notwithstanding the misnaming of grievants, however, it is apparent that the City did, in fact, consider other issues involved: the adequacy of the postings and the applicability of Article XIV of the contract after the ORTs became a separate title represented in another bargaining unit. However, such voluntary consideration of additional matters at the pre-arbitration steps does not imply that the basic defect in the grievance was condoned by the City or was considered by it to be nugatory. To permit the Union to correct this defect at the arbitration stage, and to permit it in arbitration to litigate as a group grievance what were litigated as individual grievances at the earlier steps, would have the practical effect of bypassing the earlier grievance stages and negating their essential purpose.

The primary function of arbitration as the terminal point of a grievance machinery is to provide: (1) a process for the orderly disposition of disputes, and, (2) a foundation for stable labor-management relations. The entire grievance procedure is a medium for the orderly and prompt elimination of sources of friction which unavoidably arise in the work situation. It encourages a more careful consideration of disputes at each step and their voluntary adjustment at various levels of authority.

Under the grievance process, the parties are required to follow certain definite steps which offer the possibility of self-adjustment by the parties, before any matter can be submitted to final and binding arbitration by an outside neutral. Ideally, sound, effective, and speedy grievance procedure entails the clear formulation of the issues at the earliest possible moment, adequate opportunity for both parties to investigate and argue the grievance under discussion, and encouragement by the parties of their representatives to explore and conclude settlements at the lower steps of grievances which do not involve broad questions of policy or of contract interpretation. Obviously, none of these elements is achievable if easy amendment of the grievance at the penultimate moment, i.e., at the arbitration step, were to be permitted.

Accordingly, we shall deny the Union's application to amend the request for arbitration, and we shall dismiss the instant grievance with leave to the

Union, however, to file a new group grievance involving the fundamental question he-rein, whether Article XIV of the hospital aides contract requiring the posting of notices for vacancies in ORT is binding and effective notwithstanding the creation of the separate civil service title of OFT and the certification of the title as part of another appropriate bargaining unit.

In Decision No. B-12-71 (City of New York v. New York City Local 246, SEIU, AFL-CIO), which dealt with the filing of waivers as a precondition to proceeding to arbitration, the Board distinguished three categories of grievances:

1. Union grievances, in which the Union is clearly the only identifiable grievant. This type of grievance involves a contract interpretation or application, and generally applies to all employees in the bargaining unit and probably to future employees as well.
2. Group grievances, which do not necessarily apply to all employees in the bargaining unit, but rather to a number of employees in the unit who are similarly affected by an alleged violation.
3. Individual grievances, in which one or more identifiable individuals claim a violation of contractual rights.

The Board held in Decision No. B-12-71 that the processing of a union grievance requires the filing of no waivers by individual employees, only a waiver by the union. As to a group grievance, the Board declared,

some, by their very nature, might require individual waivers signed by individual employees as well as a waiver signed by the union, while in other situations only a union waiver might be required. The Board declared it would decide these on a case-by-case basis.

The claimed right of certain unit employees (the Nurse's Aides) to bid for posted vacancies in the ORT non-competitive title, is the underlying right which the Union seeks to enforce in the instant grievance. It is a right which is clearly not personal or unique to any particular employee, whether at Delafield Hospital or elsewhere. All Nurse's Aides, present or future, employed at all nineteen City hospitals, are affected in their advancement opportunities if Article XIV is interpreted¹ as having become inoperative when the separate ORT title was created and the new title certified in a different unit. Hence, the right alleged to have been violated is a right, possessed by a large general group of employees within the bargaining unit, to have preference in advancement to a title outside the unit. A grievance seeking to enforce such a right, we find and conclude, is a group grievance, and the Union alone has standing to bring the grievance.²

¹ Although the hospital aides contract expired on June 30, 1974, and no successor contract has yet been negotiated, the terms of the expired contract continue in full force and effect under the status quo provision, S1173-7.0, NYCCBL.

² We note that §4 of Article IX of the hospital aides contract permits the Union to go directly to Step IV of the grievance procedure:

"Any grievance of a general nature affecting a large number of employees, and which concerns the claimed misinterpretation, inequitable application, violation, or failure to comply with the provisions of this agreement, shall be filed at the option of the Union at Step IV of the grievance procedure, without resort to previous steps,"

The Board has held that where a decision upholding the arbitrability of a grievance may result in an award affecting employees in another unit certified to a different bargaining representative, provision shall be made for notice to, or the interpleading of, the other union (Decisions Nos. B-20-70, B-7-70, B-1-71). Since the rights of ORTs represented jointly by DC 37; Local 237, IBT; and Local 144, SEIU, in the consolidated technicians unit are, or may be, involved in such a group grievance as we have previously held to exist, the joint representatives are a proper party to any arbitration which the Union may bring on such a group grievance, and they should be afforded an opportunity to be heard before the arbitrator. We shall, therefore, provide that a copy of this Decision and Order be served on the joint representatives of the ORTs, and that said joint representatives may apply to intervene, or may be interpleaded as a party by the City, in the event that the Union does, in fact, bring a group grievance as herein permitted.

O R D E R

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

ORDERED, that the Union's application to amend its request for arbitration be, and the same hereby is, denied; and it is further

ORDERED, that the City's petition challenging arbitrability be and the same hereby is, granted; and it is further

ORDERED, that the Union's request for arbitration be, and the same hereby is, denied, without prejudice, however, to the filing of a group grievance alleging a violation of Article XIV of the hospital aides contract.

DATED: New York, N.Y.
November 25, 1974.

ARVID ANDERSON
C h a i r m a n

WALTER L. EISENBERG
M e m b e r

ERIC J. SCHMERTZ
M e m b e r

THOMAS J. HERLIHY
M e m b e r

EDWARD SILVER
M e m b e r

JOSEPH SOLAR
M e m b e r

EDWARD F. GRAY
M e m b e r