NYSNA, 2 OCB2d 6 (BCB 2009)

(Arb) (Docket No. BCB-2731-08) (A-12924-08).

***Summary of Decision*:** HHC challenged the arbitrability of a grievance alleging that it violated the parties' collective bargaining agreement by deeming a grievant's letter as a resignation rather than as a voluntary demotion. The Board accepted HHC's argument that the status or propriety of a "voluntary demotion" is excluded from the scope of arbitration under the collective bargaining agreement, and granted the petition on that claim. As HHC withdrew its challenge to the wrongful discipline claim under a different section of the collective bargaining agreement, the Board ordered the parties to proceed to arbitration on that issue. **(*Official decision follows*).**

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration

-between-

THE NEW YORK HEALTH AND HOSPITALS CORPORATION,

Petitioner,

-and-

NEW YORK STATE NURSES ASSOCIATION,

Respondent.

DECISION AND ORDER

On December 8, 2008, the New York City Health and Hospitals Corporation ("HHC") filed a petition challenging the arbitrability of a grievance brought by the New York State Nurses Association ("NYSNA" or "Union") on behalf of Lauren King ("Grievant"). The Union's request for arbitration, dated November 7, 2008, alleged that, by deeming as a resignation Grievant's letter submitting to a voluntary demotion, HHC violated the parties' collective bargaining agreement ("Agreement"), specifically, Article VI, § 1(B), concerning a claimed violation, misinterpretation,

or misapplication of the rules and regulations of the employer, more particularly Rule 7:4:1 of the HHC Rules and Regulations, and also Article VI, § 1(D), concerning wrongful disciplinary action against Grievant. HHC argued that the request for arbitration should be denied because the Union has failed to establish a nexus between the subject of the grievance and the Agreement, inasmuch as the Agreement specifically excludes the cited rule from the contractual grievance procedure. HHC initially argued also that the request for arbitration should be denied because the Union assertedly failed to demonstrate that HHC wrongfully disciplined Grievant; however, by letter dated January 28, 2009, HHC withdrew its challenge to arbitrability with respect to the wrongful discipline issue.

The Board grants the petition as to the claim that Article VI, § 1(B), of the Agreement, has been violated by HHC's interpretation of Grievant's letter tendering her voluntary demotion as a resignation; however, since HHC's challenge to the wrongful discipline claim under Article VI, § 1(D), of the Agreement has been withdrawn, the parties can proceed to arbitration on that issue.

BACKGROUND

Grievant was appointed to the title of Head Nurse by HHC on February 26, 2007, and worked in the Emergency Services unit of Lincoln Medical and Mental Health Center ("Lincoln").

At an unspecified date in July 2008, Grievant met with a supervisor to discuss an allegation of excessive absenteeism. Grievant was accompanied by Elizabeth Lindsey, RN, then Vice President of Grievant's bargaining unit. Lindsey, in an affidavit in opposition to the instant petition challenging arbitrability, stated that the supervisor offered Grievant the opportunity to step down from her position as Head Nurse to become a Staff Nurse, telling Grievant that, if she did not accept

the offer, the matter would be referred to Labor Relations. Lindsey's affidavit does not specify the nature of any action that Labor Relations would take. The affidavit states that Grievant asked for time to consider the offer and that the supervisor gave her until July 21, 2008, to reach a decision.

Lindsey further stated that, on or about July 17, 2008, she again accompanied Grievant to the supervisor's office for another meeting, this time also with the Associate Director of Leadership Development. She asserted that the Associate Director asked Grievant to accompany her to still another office at which time the Associate Director instructed Grievant how to write a letter that would effectuate a voluntary demotion from Head Nurse to Staff Nurse. At that time, Lindsey stated, Grievant submitted to the Associate Director a handwritten letter stating the following:

> I, Lauren King, RN, resign as Head Nurse of Tour I in Lincoln Emergency due to family matters; I am also requesting a transfer to another HHC hospital or another dep[artmen]t within Lincoln Hospital.

(Pet., Ex. 2).

The Union admits that Grievant submitted a handwritten letter stepping down as Head Nurse and requesting a transfer but denies that it was a "letter of resignation." (Ans. ¶ 3). In her affidavit in opposition to the instant petition, Lindsey stated that the letter was submitted "with the understanding that [Grievant] would be placed into a Staff Nurse position in the Emergency Department." Lindsey also reiterated the transfer request to either another hospital or a different department within Lincoln.

By letter dated August 7, 2008, Doreen Dutchak, Associate Director of the Emergency Services unit at Lincoln, informed Grievant that she was in receipt of Grievant's letter and acknowledged that the resignation would be effective that day. The Associate Director of

Emergency Services at Lincoln also stated that Grievant could check job listings on HHC's website if she were still interested in transferring to another HHC facility.

On or about August 22, 2008, the Union filed a grievance, under § 1(B) of the Agreement, alleging violation, misinterpretation, or misapplication of the rules and regulations of the employer, specifically Rule 7:4.1 of the HHC Rules and Regulations pertaining to the consent required for instituting voluntary demotions, and also alleging wrongful disciplinary action under § 1(D) of the Agreement.[1] Specifically, the grievance stated the issue as follows:

> Employee as discussed with [her supervisor] elected to step down from her position as a Head Nurse, which was agreed to by the [supervisor]. As per Personal [*sic*] Rules and Regulations, she put

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[1] Article VI (Grievance Procedure) of the Agreement, at § 1(B), defines a grievance as:

> A claimed violation, misinterpretation or misapplication of the rules and regulations, written policy or orders of the Employer applicable to the agency which employs the grievant affecting terms and conditions of employment; provided disputes involving the Rules and Regulations of the New York City Civil Service Commission or the Rules and Regulations of the Health and Hospitals Corporation with respect to those matters set forth in the first paragraph of Section 7390.1 of the Unconsolidated Laws [of New York] shall not be subject to the grievance procedure or arbitration. . . .

Article VI of the Agreement also defines a grievance, at § 1(D), as "[a] claimed wrongful disciplinary action taken against an employee."

HHC asserts that voluntary demotions are among the topics covered in the first paragraph of 7:4:1 of § 7390.1 of the Unconsolidated Laws of New York which provides, in relevant part, as follows:

> The corporation shall, upon ten days written notice appropriately posted in the health facilities, promulgate rules and regulations consistent with civil service law with respect to policies, practices, procedures relating to position classifications, title structure, examinations, appointments, promotions, [and] voluntary demotions. . . .

> that decision in a letter. Subsequently, approximately 2 weeks later the Employer terminated her employment without just case.

(Pet., Ex. 4). As relief, the grievance sought to:

> [R]einstate grievant to the following original position as Head Nurse in Adult Emergency Room, full back pay to date, no loss of bargaining unit or HHC seniority, pension accrual, sick time benefits, personal, holiday and annual leave; make nurse whole.

(*Id.*).

By letter dated September 8, 2008, the Associate Director for Labor Relations at Lincoln wrote to Union Representative Ilene Sussman, advising the latter that Grievant had resigned from her position rather than been the subject of any wrongful disciplinary action and that the matter was dismissed. By letter dated September 22, 2008, the HHC Associate Director of Labor Relations, Ann Rozakis, rejected the Union's request for a Step II hearing on the same grounds. She also noted that HHC Rules and Regulations are not subject to the contractual grievance procedure. By letter dated October 29, 2008, the OLR Step III Review Officer rejected the Union's request for a Step III hearing on the same grounds as the two previous determinations. On November 7, 2008, the Union filed the request for arbitration. The Union articulated the nature of the issue to be arbitrated as:

> Grievant discussed with [her supervisor] and voluntarily elected to step down from her position as Head Nurse, as per Personal Rules and Regulations, she put that decision in a letter. Subsequently and approximately two (2) weeks later, the Employer terminated her employment without just cause.

(Pet., Ex. 8).

As at the lower steps of the grievance procedure, the relief sought is reinstatement with back pay with full restoration of benefits and leave bank credit.

POSITIONS OF THE PARTIES

HHC's Position

Having withdrawn its challenge to arbitrability with respect to the disciplinary issue which the Union asserts arises from Article VI, § 1(D), of the Agreement, HHC nonetheless continues to maintain that HHC Rules and Regulations are excluded from the grievance arbitration procedure, including the rule pertaining to voluntary demotions at issue in this case. HHC challenges the Union's request for arbitration on whether there has been a violation of Article VI, § 1(B), of the Agreement, as it relates to HHC Rule 7:4:1 with regard to voluntary demotions, because any question concerning the status or propriety of a voluntary demotion is excluded from the grievance-arbitration process under that section of the Agreement. As the cited rule is the only one at issue, the Union cannot establish a nexus between the subject matter of the dispute and a proper basis for arbitration. Additionally, HHC maintains that Grievant's letter of July 17, 2008, to her supervisor stated in Grievant's own handwriting that she was voluntarily resigning due to family matters. HHC also points to the Union's own assertion in the request for arbitration that Grievant's decision to step down from her position as Head Nurse was voluntary on her part. Accordingly, HHC contends that this portion of the request for arbitration must be denied.

Union's Position

The Union does not contest that a voluntary demotion is not arbitrable under the Agreement, being one of the matters delineated in § 7390.1 of the Unconsolidated Laws of New York, which are excluded from the grievance-arbitration process. The issue that the Union seeks to arbitrate is not voluntary demotion but rather HHC's treatment of Grievant's letter as a resignation instead of as a voluntary demotion as was intended. The Union acknowledges that the demotion was done

voluntarily and that it was submitted pursuant to Rule 7:4:1, but the Union maintains that HHC's interpretation of the voluntary demotion as a resignation was a punitive act, and, therefore, HHC has placed Grievant's separation from service within the ambit of wrongful discipline and within the arbitration process. Thus, the Union asserts that it has articulated a reasonable relationship between the cited sections of the Agreement, both § 1(B) and § 1(D) of Article VI, and the actions at issue in the underlying matter.

DISCUSSION

As we have often reaffirmed, the NYCCBL reflects a legislative policy in favor of arbitration:

> It has long been the stated policy of the NYCCBL to favor and encourage arbitration to resolve grievances. Therefore, the presumption is that disputes are arbitrable, and that doubtful issues of arbitrability are resolved in favor of arbitration. However, the Board cannot create a duty to arbitrate where none exists, nor can we enlarge a duty to arbitrate beyond the scope established by the parties.

Local 924, DC 37, 1 OCB2d 3, at 7 (BCB 2008); *see also SBA*, 79 OCB 15, at 5 (BCB 2007); *CWA, Local 1180*, 1 OCB 8, at 6 (BCB 1968).[2]

[2] Section 12-302 of the NYCCBL provides:

> Statement of policy. It is hereby declared to be the policy of the city to favor and encourage the right of municipal employees to organize and be represented, written collective bargaining agreements on matters within the scope of collective bargaining, the use of impartial and independent tribunals to assist in resolving impasses in contract negotiations, and final, impartial arbitration of grievances between municipal agencies and certified employee organizations.

Section 12-309(a)(3) of the NYCCBL provides this Board with the unique authority as an administrative body "to make a final determination as to whether a dispute is a proper subject for grievance and arbitration procedure established pursuant to section 12-312 of this chapter." NYCCBL § 12-312 promulgates the parties' rights and responsibilities in arbitrations and the

This Board has established the following two-pronged test:

> (1) whether the parties are in any way obligated to arbitrate a controversy, absent court-enunciated public policy, statutory, or constitutional restrictions, and, if so (2) whether the obligation is broad enough in its scope to include the particular controversy presented. In other words, whether there is a nexus, that is, a reasonable relationship between the subject matter of the dispute and the general subject matter of the Agreement.

OSA, 79 OCB 22, at 10 (BCB 2007) (citations and internal quotation marks omitted); see also *SSEU*, 3 OCB 2, at 2 (BCB 1969).

HHC argues that it is not obligated to arbitrate any question arising under Rule 7:4:1, citing Article VI, § 1(B), of the Agreement. Indeed, the Union has acknowledged that a question concerning the status or propriety of a voluntary demotion is excluded from the grievance-arbitration process under that section of the Agreement. Since the Union has not successfully identified any rule that could have been misapplied other than Rule 7:4:1, we find that the Union cannot satisfy the first prong of the arbitrability test on this claim. Accordingly, we grant the petition only as to the claim that Article VI, § 1(B), of the Agreement, has been violated.

As HHC has withdrawn its challenge to the Union's contention that the "termination of [G]rievant's employment," in HHC's words, constituted wrongful discipline in violation of Article VI, § 1(D), of the Agreement, the parties may proceed to place this claim before an arbitrator.

Board's role in administering an arbitration panel. *See New York State Nurses Ass'n*, 69 OCB 21, at 7-8 (BCB 2002) (in depth discussion of public sector arbitration and the Board's role therein).

ORDER

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 petition filed by the Health and Hospitals Corporation of the City of New York, docketed as No. BCB-2731-08, challenging the arbitrability of a request for arbitration filed by the New York State Nurses Association, docketed as A-12924-08, on behalf of Lauren King, RN, hereby is granted as to the claim that Article VI, § 1(B), of the Agreement has been violated by HHC's deeming Grievant's July 17, 2008, letter to constitute a resignation, and it is further

DETERMINED, that so much of the petition, docketed as No. BCB-2731-08, as originally challenged the arbitrability of the claim, on behalf of Lauren King, RN, that Article VI, § 1(D), of the Agreement was violated by the termination of Grievant's employment, has been withdrawn, and it is further

ORDERED, that the request for arbitration filed by the New York State Nurses Association on behalf of Lauren King, RN, docketed as A-12924-08, as to the claim that Article VI, § 1(D), of the Agreement has been violated by the termination of Grievant's employment, hereby is granted.

Dated: March 9, 2009
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

GABRIELLE SEMEL
MEMBER