HHC v. L.375, DC37, 23 OCB 2 (BCB 1979) [Decision No. B-2-79 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

New York City Health and Hospitals Corporation,

Petitioner,

-and-

District Council 37, Local 375, AFSCME, AFL-CIO,

Respondent.

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Decision No. B-2-79

Docket No. BCB-310-79 (A-405-74)

DECISION AND ORDER

The New York City Health and Hospitals Corporation (hereinafter "HHC" or "Corporation") commenced this proceeding with the filing on February 6, 1979 of a petition challenging the arbitrability of a grievance. The request for arbitration. in this matter was filed by District Council 37, Local 375 (hereinafter "the Union") on September 16, 1974. The statement of the grievance to be arbitrated -reads:

> Failure and refusal of Health and Hospitals Corporation to fill the positions of Administrative Engineer by examination, such positions being available, in violation of Article XV of the Collective Bargaining Agreement.

The Union seeks as remedy:

> That Health and Hospitals Corporation hold a promotional examination for title of Administrative Engineer to be taken by all incumbents in Senior Engineer titles in various specialties.

BACKGROUND

The Union claims that HHC violated Article XV of the July 1, 1972 to June 30, 1974 collective bargaining agreement between the City of New York and Civil Service Technical Guild, Local 375, AFL-CIO and District Council 37, AFSCME, AFL-CIO (hereinafter 1972 unit agreement). Article XV states:

> The City agrees to recommend to the City Civil Service Commission and to the City Personnel Director that the titles listed below of Junior Engineer ((all fields of specialization and parenthetical specialites [sic])), Engineering Draftsman ((all fields of specialization and parenthetical specialites [sic])), Junior Architect, Junior Landscape Architect, Senior Engineer ((all fields of specialization and parenthetical specialites [sic])), Senior Architect ((all fields of specialization and parenthetical specialites [sic])) and Senior Landscape Architect be earmarked for present incumbents only and for those appointed from existing civil service lists; these titles will be otherwise discontinued. All permanent incumbents who have been such for one year or more shall be given an opportunity to be appointed to one of the titles listed in the table set forth below as a result of having passed a promotion examination. Incumbent employees who fail to take or pass such examination shall remain in their present positions and titles. Such titles shall be earmarked in the classification and shall be continued for present incumbents only. The City further agrees to recommend to the City Civil Service Commission and the City Personnel Director that the title of Administrative Landscape Architect be established.
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> | Title | Eligible to Take Examination For |
> |---|---|
> | * * * | |
> | Senior Engineer ((all fields of specialization and parenthetical specialties)) | Administrative Engineer |
> | * * * | |

Arbitration of the alleged contractual violation is sought

pursuant to the parties' agreement to arbitrate grievances found in Article VI of the 1972 unit agreement, which defines a grievance as:

> (A) A dispute concerning the application or interpretation of the terms of this collective bargaining agreement;
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> (B) A claimed violation, misinterpretation or misapplication of the rules or regulations, existing policy or orders applicable to the agency which employs the grievant affecting the terms and conditions of employment; provided, disputes involving the rules and regulations of the New York City Civil Service Commission shall not be subject to the grievance procedure or arbitration;
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> (C) A claimed assignment of employees to duties substantially different from those stated in their job specifications;
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> (D) A claimed improper holding of an open-competitive rather than a promotional examination;
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> and
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> (E) A claimed wrongful disciplinary action against an employee.

The file in this case reveals that George Nicolau, Esq., was designated as arbitrator by letter from Chairman Arvid Anderson dated October 17, 1974. In a letter to Mr. Nicolau dated February 11, 1975, Phillip J. Ruffo, as Special Counsel to D.C. 37, confirmed that the matter "is to be adjourned in definitely, subject to being rescheduled upon notice to you." On November 10, 1975, Thomas Laura, as Deputy Chairman OCB, informed the parties by letter that unless either party objected, the case would be closed administratively on

November 20, 1975 due to lack of activity. Richard C. Izzo,

President of Local 375, wrote to Mr. Laura, on November 13, 1975, that "we, as a union, have agreed with Mr. Harry I. Bronstein to 'Stop the clock' on this matter for the reason that it may be resolved in-house." Harry I. Bronstein, as Senior Vice-President Personnel, Labor Relations and Budget Administration, HHC, expressed agreement with "the concept of leaving the matter concerning promotional examinations for Administrative Engineer in limbo for the present time" in a letter dated November 20, 1975 to Mr. Laura. Thereafter, on November 24, 1975 Mr. Laura informed Mr. Nicolau that "the Union has withdrawn its request for arbitration and the parties have agreed that the matter be closed without prejudice. We have therefore closed our files in this case."

In a letter dated May 25, 1978, the Union requested that the matter "be rescheduled as informal negotiations between the parties have failed to resolve the underlying dispute." On June 1, 1978, Mr. Laura informed the parties that the case "is being reactivated" and would be reopened if neither party objected. HHC stated its opposition to the proposed reactivation of the case by letter dated June 12, 1978. D.C. 37, Local 375 stated, on October 30, 1978, its objections to the arguments raised by HHC. On November 16, 1978, HHC wrote to Mr. Anderson that it "formally takes exception to the arbitrability of the issues introduced by [the Union] in Case No. A-405-74 notwithstanding the fact that the case had previously been carried to, the

threshold of that level." On February 6, 1979, the Corporation filed its petition challenging arbitrability.

POSITIONS OF THE PARTIES

HHC maintains that the grievance is not arbitrable because in the Corporation the title Administrative Engineer is in the managerial class of positions under section V(II) of the New York City Health and Hospitals Corporation Act[1] (hereinafter the Act). HHC notes that pursuant to the cited section, managerial personnel are expressly excluded from collective bargaining representation.

HHC points out that pursuant to its power to create and classify positions, Section V(12) of the Act,[2] the Administrative Engineer title is classified non-competitive in HHC, differing from the title's classification in the competitive class in the City of New York. Because HHC is empowered by the HHC Act to create and administer its own personnel structure and is not required to select its managerial personnel through the competitive process described in the Civil Service Law, the Corporation argues that the selection of managerial personnel is wholly within its managerial prerogatives and outside the scope of matters which are arbitrable.

In addition, HHC contends that while its petition challenging arbitrability was filed eight months after the

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[1] Unconsolidated Laws, section 7381, et. seq. The reference is to section 7385(11).

[2] Unconsolidated Laws, section 7385(12).

Union's request to reactivate the case, the Union is not prejudiced because the Corporation's position and arguments regarding the reopening of the matter were made known to all parties on June 12, 1978, soon after the Union's request on May 25, 1978.

D.C. 37, Local 375 claims that the grievance alleges "the violation of contract provisions and of the rules and regulations governing [HHC], both of which are clearly covered by the grievance arbitration procedure ..." and therefore the matter is arbitrable under the arbitrability policy first enunciated by the Board in Decision B-8-69. The Union contends that the arguments raised by HHC go to the merits of the grievance, and thus are for an arbitrator. The Union argues that the issue herein is not the appointment of managerial employees but concerns contractual promotional rights within the collective bargaining unit of Senior Engineers, a matter "authorized by the terms of the Taylor Law" and therefore not barred by the rule enunciated by the Court of Appeals in Liverpool Central School District v. 'United Liverpool Faculty Ass'n.[3]

The Union also cites the HHC Act, section 7390(2)(a)[4]

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[3] 42 N.Y. 2d 509, 399 N.Y.S. 2d 189(1977).

[4] The section, as cited by the Union, states:

> Every employee, who was an employee of any constituent agency or department thereof, shall be automatically appointed and transferred to the corporation in the same or equivalent classification and position he held at the time of such transfer and for such purpose the corporation shall be deemed the successor to the City as the public employer of

[continued on next page]

(Footnote 4/ continued)

such employee. All officers or employees transferred to the

and argues that employees' contractual promotional rights, when the Senior Engineers were transferred to HHC, were preserved by the law.

In addition, D.C. 37, Local 375 maintains that the petition challenging arbitrability should be barred on the grounds of laches. The Union contends that when the parties mutually agreed in 1974 to adjourn the matter indefinitely, it was done for the purpose of settlement, and negotiations were conducted in the interim with no indication by either party of withdrawing or challenging the request for arbitration. The Union argues that to challenge arbitrability five years after the original request was filed and, according to the Union, granted by OCB without challenge by HHC, "is to work great hardships on [the Union]."

In a reply filed on March 19, 1979, HHC stresses that the contract clause alleged by the Union to have been violated, Article XV of the 1972 unit agreement [quoted on page 21, only provides that the City of New York would make a recommendation to its Civil Service Commission. HHC points out, "Said commission in July of 1972, as at present, is

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corporation who had Civil Service status at the time of such transfer shall retain such status for the purpose of transfer, reassignment or promotion to any position in a City department or agency. [Emphasis added by the Union.]

wholly without jurisdictional authority over personnel practices of the New York City Health and Hospitals Corporation."

HHC further argues that the dispute concerns the manner in which "the City and its agencies" would implement the recommendation stated in Article XV if accepted by the New York City Civil Service Commission. The Corporation notes that it has not adopted the recommendation because the Administrative Engineer title is in the managerial class and appointment to managerial class positions, in HHC, "is not through the competitive process of promotional examination...."

Finally, HHC claims that section 7390(2)(a) of the HHC Act, cited by the Union, does not preserve promotional rights of senior engineers transferred to HHC, but "protects the individuals rights [sic] to return to his former position should he transfer back into a City department or agency." [Emphasis in original.]

DISCUSSION

Before discussing the diverse issues presented, we emphasize that the grievance involves the alleged contractual right of senior engineers employed in the Health and Hospitals Corporation to be given an opportunity to be appointed, by promotional examination, to the title Administrative Engineer pursuant to Article XV of the 1972 unit agreement.

The contentions of the parties present two issue resolution by the Board:

- Whether arbitration and/or the challenge to arbitrability is time barred.

- If not, whether the grievance is presently arbitrable pursuant to the 1972 unit agreement.

Because we decide this case on substantive arbitrability grounds, we do not deal at great length with the allegations of the parties concerning timeliness. We find that laches is not applicable to bar either arbitration or the challenge to arbitrability. The correspondence in the case indicates that each side was timely made aware of the position of the other in 1974 shortly after the request for arbitration was filed. The correspondence also indicates that both parties were actively seeking to negotiate a settlement of the dispute at various times after the filing of the request. Both parties consented to the adjournment, without date, of the arbitration of the grievance. In addition, the record indicates that the request for arbitration was withdrawn in November 1975, without prejudice to a future reactivation of the case. The Union's May 25, 1978 request that arbitration be reactivated was the exercise of the reserved and unprejudiced right to reinstate the request for arbitration. Similarly, HHC is exercising its right, equally unprejudiced by the earlier adjournment and the ensuing long delay, to challenge the arbitrability of the grievance. There is no evidence that either party unduly rested on its

claim to the prejudice or detriment of the other; but, on the contrary, the record indicates that each of the parties contemplated a protracted delay in joining in and consenting to the request for adjournment sine die. Therefore, we find that the allegations of laches or untimeliness are inapplicable and we will consider the contractual arbitrability question.

In numerous decisions commencing in 1969 we have held that the basic issue in a dispute as to the arbitrability of a grievance is "whether the parties are in any way obligated to arbitrate their controversies and, if so, whether the obligation is broad enough in its scope to include the particular controversy presented."[5] The 1972 unit contract contains an agreement to arbitrate grievances; and defines and enumerates the specific types and categories of disputes encompassed by the term "grievance" as contemplated in the agreement of the parties.[6] The issue for the Board is whether the parties, in their 1972 agreement to arbitrate, intended to cover the present dispute.

Circumstances and facts have changed since the original filing of the request for arbitration. In that four and one-half year period, the City of New York and the Union have executed three unit contracts.[7] None of the subsequent unit agreements contain

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[5] Board Decision No. B-2-69.

[6] Article VI, 1972 unit agreement. The contract definition of a grievance is quoted on page 3, supra.

[7] The unit agreements were for the terms July 1, 1974 to June 30, 1976; July 1, 1976 to June 30, 1978; and July 1, 1978 to June 30, 1980.

a provision similar in language or intent to Article XV of the 1972 unit agreement. Apparently, this is because the City acted on its agreement to make the specified recommendations to the City Civil Service Commission.[8] If that is, in fact, the reason the provision was not carried forward in subsequent contracts, it would seem to indicate that the parties mutually regarded the employer's obligations as having been fully discharged.

HHC maintains that it is empowered by its enabling legislation to create and administer a personnel structure separate and apart from the New York City Department of Personnel and the City Civil Service Commission.[9] Pursuant to its powers, HHC deleted from the Corporate Plan of Titles the title Administrative Engineer, effective February 1, 1978, by Personnel Order No. HHC 078/15, dated April 17, 1978. There was no equivalent title created and, therefore, it appears there is no present position within HHC for which a senior engineer could be tested if the agency were ordered to comply with Article XV of the 1972 agreement.

Moreover, since September 1974 when the original request for arbitration was filed, employees in the title

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[8] Our investigation reveals that the City Civil Service Commission, by Resolution Number 73/59, dated August 1, 1973, reclassified the Senior Engineer titles (listing specialties and fields of specialization) for present incumbents only and by Notice of Examination Number 2535, dated July 23, 1973, offered a promotion examination for appointment to Administrative Engineer to persons employed, inter alia, as a Senior Engineer as of September 11, 1973.

[9] HHC Act, section 7385(11), (12) and section 7390 (1).

Administrative Engineer, employed in mayoral and non-mayoral agencies, have been determined by the Board of Certification to be managerial and/or confidential within the meaning of the New York City Collective Bargaining Law and, therefore, excluded from collective bargaining.[10] We point out that contrary to the allegation of HHC and as stated by the Board of Certification in Decision No. 45-78:

> [The HHC Act] provides that the employees of the HHC be treated like other public employees in New York City in that they come within the jurisdiction of the office of Collective Bargaining and, as a result, can only be excluded from collective bargaining based on a finding of managerial/confidential status by this Board [citing section 7390(5) of the HHC Act].[11]

An additional shadow on arbitrability is cast by the language of the disputed clause. Article XV of the 1972 unit agreement refers only to action to be taken by the City of New York. The 1972 unit agreement, by its terms, is "between the City of New York ('City'), and Civil Service Technical Guild, Local 375, AFL-CIO, and District Council 37, A.F.S.C.M.E., AFL-CIO ('Union')...." In subsequently executed unit agreements, beginning with the July 1, 1974 to June 30, 1976 unit agreement, the contract expressly states it is an agreement:

> . . . between the City of New York and related public employers pursuant to and limited to their respective elections or statutory requirement to be covered by the New York City Collective Bargaining Law and their respective authorizations

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[10] Board of Certification Decision No. 45-78

[11] Decision No. 45-78, p.31

> to the City to bargain on their behalf and the New York City Health and Hospitals Corporation (hereinafter referred to jointly as the 'Employer'), and the Civil Service Technical Guild, Local 375, District Council 37, A.F.S.C.M.E., AFL-CIO (hereinafter referred to as the 'Union') . . . .
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> [Emphasis added]

Thus, the applicability, if any, of the 1972 unit agreement to the HHC is debatable; apparently, however, the agreement was applied de facto to employees in the unit working for HHC. The applicability of Article XV of the 1972 unit agreement to the grievants herein, senior engineers employed in HHC, is a different matter. Article XV refers only to the City of New York, the City Civil Service Commission and the City Personnel Director; the clause does not mention or, apparently, impose an obligation on the HHC. And, given the Corporation's separate personnel structure and rules, which differ in certain material respects from the City Civil Service system, it cannot be assumed that the clause was intended to apply to HHC.

In an arbitrability dispute of such an unusual nature, highlighted by the passage of almost five years since the dispute arose and the changes in circumstances during that time, we believe our umpire role warrants examination by the Board of the contract in question and of the merits of the grievance. While we have generally adhered to the rule that issues as to the merits of a grievance should be left to the arbitrator, we have recognized, from time to time, unique circumstances may require the Board's

examination of such matters in order to resolve an issue of arbitrability clearly within the Board's purview.[12] On its face, the contract clause allegedly violated imposes an obligation on the named employer to make a recommendation; the clause does not require the named employer to give a promotion examination. Article VI of the 1972 unit agreement, the parties' agreement to arbitrate certain defined grievances, does not indicate an intention to submit to the arbitral forum, nearly five years and three contracts after the expiration of the 1972 unit agreement, a dispute concerning a clause apparently complied with by the only employer named in the contract and which concerns a recommendation to offer a promotion examination to a position not extant in HHC's personnel system since February 1978. It should be noted also, in connection with developments affecting the title subsequent to the 1972-1974 contract period, that the title has been found by the Board of Certification to be managerial and excluded from collective bargaining. It is our opinion that to order arbitration of the 1974 grievance, given the changes in circumstances and facts since the request for arbitration was originally filed, would require enlargement of the scope of the grievance-arbitration agreement set forth in the 1972 unit contract. Moreover, we believe that it is not in the interest of sound labor relations to decree arbitration

[12] See, for example, Board Decisions Nos. B-8-68, B-12-77.

when, as in this case, the proceeding would be a futility because the remedy sought no longer exists. Therefore, we deny the request for arbitration.

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 petition challenging arbitrability filed herein by the New York City Health and Hospitals Corporation be, and the same hereby is, granted; and it is further

ORDERED, that the request for arbitration filed herein by District Council 37, Local 375, AFSCME, AFL-CIO be, and the same hereby is, denied.

DATED: New York, N.Y.
April 17, 1979

ARVID ANDERSON
Chairman

WALTER L. EISENBERG
Member

ERIC J. SCHMERTZ
Member

MARIA T. JONES
Member

EDWARD SILVER
Member

EDWARD J. CLEARY
Member

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Member