HHC v, L.237, IBT, 23 OCB 5 (BCB 1979) [Decision No. B-5-79 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION

DECISION NO. B-5-79

-and-

DOCKET NO. BCB-312-79

LOCAL 237, INTERNATIONAL BROTHERHOOD OF TEAMSTERS

(A-805-79)

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DECISION AND ORDER

On February 14, 1979, the New York City Health and Hospitals Corporation ("Corporation") filed a petition challenging arbitrability of a grievance filed by Local 237, International Brotherhood of Teamsters ("the Union") on behalf of Newcomb Baker, a Special Officer assigned to the Psychiatric Emergency Transfer Service ("P.E.T.S.").

The Union's request for arbitration was made pursuant to Article VII Section 1(E) of the Special Officer's contract which provides for arbitration of claimed wrongful disciplinary action. The Union claims that the grievant was wrongfully disciplined in that he was "reinstated at lower salary" than he had received prior to his resignation.

The Corporation maintains that the underlying grievance relates to "reinstatement" and is not subject to arbitration because reinstatement is one of a number of subjects explicitly excluded from grievance procedures by

contractual agreement of the parties.[1] This rationale was adopted at the last step of the grievance procedure by a Review Officer of the Office of Municipal Labor Relations.

Factual Background

Grievant was originally employed as a Special Officer in the Psychiatric Emergency Transfer Service of the Corporation. At a date not specified in the pleadings, grievant was suspended from duty pending a disciplinary hearing pursuant to Section 75 of the Civil Service Law; the nature of the charges against him is not indicated. On May 26, 1977, while on suspension, grievant submitted his resignation citing "personal family problems."

[1]Article VII, Section 1(B) of the contract provides that a grievance is a claimed violation or misapplication of the rules, policy or orders of the employer, except:

> ". . . 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 shall not be subject to the grievance Procedure or arbitration."
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> (emphasis added)

One of the matters set forth in Section 7390.1 of the Unconsolidated Laws is reinstatement.

On October 11, 1977, grievant was rehired by Sgt. Bill Ormond, a Senior Security officer, who allegedly told him that he was reinstated at his old salary. It appears, however, that at all times subsequent to his complaint, he was paid at the entry level rate of $8,800[2] rather than at his pre-resignation rate of $9,300.

It is not contested that a letter, dated December 9, 1977, was sent to grievant by the Corporation (although no copy of that letter has been submitted to this office by either party), advising him of his transfer to the EMS which had absorbed PETS and informing him that as a new employee his entry level salary would be subject to the 10% contractual rollback mentioned in footnote 2.

On April 12, 1978, a grievance was filed which alleged, in pertinent part, that "grievant . . . applied for reinstatement on 10/11/77; "that Sergeant Bill Ormond hired grievant as a reinstatement, but had failed to process the proper forms"; and that grievant "was led to believe by his supervisor that he was a reinstatement."

This information, along with a request for formal reinstatement and restoration of pre-resignation salary was sent to the Personnel Director of the Maspeth branch of EMS, who responded by letter, dated May 5, 1978, stating, in

[2]The $8,800 salary was subject to a 10% rollback applicable to the salaries of new employees during the period 10/1/76 - 5/31-77 pursuant to Article III, Section 2 of the 1/1/76 - 12-31-77 contract between the parties.

pertinent part:

> "1. Reinstatement to permanent civil service status must be requested by the agency head and approved by the NYC Departnent of Personnel; it is not done at the time of rehire.
>
> "2. You submitted a resignation for 'personal reasons' while you were on suspension pending a Section 75 hearing.
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> * * *
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> "3. There was an administrative error made when a salary of $9300 was indicated on your personnel action form.
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> * * *
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> "5. In view of the circumstances that were pending at the time of your resignation, the Emergency Medical Service will not recommend reinstatement to a permanent status."

Discussion

Both parties agree that grievant is, and since December 1977, has been employed as a Special officer in the EMS and that prior to his resignation in May 1977, he was employed as a Special Officer in PETS, predecessor to EMS. His grievance is based upon the fact that he is being paid less now than he was paid prior to his resignation; and the contested allegation that the reduction was effected by the employer as a matter of discipline for the charges pending at the time of his resignation. It is this latter issue which the Union seeks to submit to arbitration.

The Corporation maintains that Mr. Baker was rehired but that he was not reinstated; that this is a dispute over reinstatement, and, as such, is not subject to arbitration since it is specifically excluded from the parties' grievance procedure.

Section 7390.1 of the Unconsolidated Laws empowers and directs the Corporation to promulgate rules and regulations. Pursuant to that mandate, the Corporation has promulgated Rule 7:3:1 which reads, in pertinent part, as follows:

> "Reinstatement: An employee who had completed his probationary term in a position and who had thereafter resigned or retired my, subject to the consent of the Appointing Officer and with the approval of the Senior Vice President, be reinstated to the same or similar position provided that his separation was without fault or delinquency on his part."

In response to this office's request for further information on the Appointing officer, the Corporation filed a supplemental letter, dated April 11, 1979, stating:

> "The Appointing Officer of the PETS program at the time of grievant's hiring was Barbara Johnson. Sgt. Ormond had the authority to recommend his [grievant's] hiring. However, he was without authority to reinstate grievant. Please be advised that there are no papers filed with Appointing officer by grievant requesting reinstatement."

Mr. Baker alleges that Sgt. Ormond, the then Senior Special officer, hired him and in doing so, stated that he was reinstated. According to Rule 7:3:1 (supra), reinstatement is subject to consent of the Appointing Officer and the Senior Vice President.

The Union concedes that issues concerning reinstatement are not arbitrable but maintains that grievant has been reinstated de facto; that the only dispute now is as to his rate of pay; and that the Corporation's failure and refusal to pay him at the rate he received prior to resignation constitutes a punishment for the charges pending against him at the time of his resignation although no finding as to his guilt or innocence of those charges was ever made; thus, the Union maintains, the issue here is one of wrongful disciplinary action, not reinstatement, and is arbitrable under Article VII

Section 1 (E) of the contract between the parties.

The facts stated by the Union in support of its conclusion that grievant's employment on October 11, 1977, constituted a reinstatement do not appear to spell out a reinstatement in accordance with applicable rules and regulations. There was no substantial or even partial compliance with the clearly defined procedures for obtaining reinstatement in connection with grievant's return to work.

This is not a case of technical error in a request for reinstatement or a minor lapse in conforming with procedural steps such as might support the view that there had been substantial compliance with and satisfaction of requirements set forth by Rule and Regulation. Here, there is no evidence of any attempt to comport with the Rule, and thus there is no arguable basis for the Union's claim that grievant was reinstated. It follows that the rate of pay to which grievant would have been entitled had he been reinstated is irrelevant and is not at issue here.

The fact that a lesser rate of pay results from a failure to obtain reinstatement does not make the refusal of reinstatement arbitrable nor does it make the lesser rate of pay a direct result - through disciplinary action - of the earlier unresolved disciplinary charges. Rather, the pendency of disciplinary charges was a direct cause of the refusal to reinstate; and the lack of reinstatement, the fact

that grievant had the status only of a newly hired employee entitled him to no more that the entry level rate of pay.

Grievant, upon his voluntary resignation, ended his employment status with the Corporation and that unless and until the formal requirements as to reinstatement were fully satisfied, any further employment of the grievant by the Corporation would constitute a hiring but not a reinstatement. If grievant was not reinstated in October 1977, his hiring gave rise to no rights referable to his prior employment by the Corporation and neither his civil service status nor his rate of pay in that prior employment would have any relevance to his employment subsequent to October 1977. Even if considerations of the disciplinary charges pending at the time of his resignation had bearing upon his reemployment, they had to do only with the matter of whether or not he would be reinstated; at most, however, this might indicate that there had been an improper exercise of the Corporation's totally discretionary powers in the matter of reinstatement. Since issues as to allegedly improper exercise of powers of reinstatement under Article VII Section 1(B) of the contract are not arbitrable, and although grievant may have other sources of relief available to him, the grievance as it is presented here is not arbitrable.

0 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 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 by Local 237, International Brotherhood of Teamsters, be and the same hereby is denied.

DATED: New York, New York
May 21, 1979

ARVID ANDERSON
Chairman

ERIC J. SCHMERTZ
Member

WALTER L. EISENBERG
Member

MARIA T. JONES
Member

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