HHC v. DC37, 25 OCB 34 (BCB 1980) [Decision No. B-34-80 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Petitioner,

-and-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO

Respondents.

Decision No. B-34-80

Docket No. BCB-433-80 (A-1050-80)

DECISION AND ORDER

On May 13, 1980, District Council 37, AFSCME, AFL-CIO (hereinafter D.C. 37 or the Union) filed a request for arbitration of a grievance alleging that Aaron Jones, the grievant, was improperly discharged by the Health and Hospitals Corporation (hereinafter HHC or the Corporation), a public benefit corporation. The Union alleges that grievant's discharge was in violation of the Corporation's guidelines. The Corporation filed a petition challenging arbitrability on June 11, 1980,[1] alleging that HHC's guidelines were not violated here because the act of discharge complained of was based upon gross misconduct as to which the guidelines are inapplicable.

BACKGROUND

HHC and the Union are parties to a unit agreement (Institutional Services Contract) which includes a grievance procedure at

[1] The parties mutually agreed to extensions of time for the filing by the Corporation of its Petition and for the filing by the Union of its Answer.

Article VI. The term "grievance" is defined therein, in pertinent part, as:

(B) A claimed violation, misinterpretation or misapplication of the rules or 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 Personnel Director 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;

(E) A claimed wrongful disciplinary action taken against a permanent employee covered by Section 75(1) of the Civil Service Law or a permanent competitive employee covered by the Rules and Regulations of the Health and Hospitals Corporation upon whom the agency head has served written charges of incompetency or misconduct while the employee is serving in the employee's permanent title or which affects the employee's permanent status; ....

Operating Procedure No. 20-10, issued by HHC on June 4, 1979, concerns "Employee Performance and Conduct" and describes procedures for taking disciplinary action against employees. Relevant to the instant grievance are sections V(A)(1) and (2) which provide as follows:

1. Except in cases of gross incompetence or gross misconduct, disciplinary action shall be only taken after all reasonable supervisory/managerial efforts, including counseling sessions, have been made to assist an employee in correcting a deficiency in performance or conduct.

2. Where charges are preferred against an employee for acts which do <u>not</u> constitute gross misconduct or gross incompetence, and the supervisor has failed to counsel the employee, evidence of such failure is admissible as an affirmative defense, and shall constitute grounds for summary dismissal of the charges.

Grievant was hired as a Dietary Aide at North Central Bronx Hospital on August 29, 1977. On June 22, 1978, he was notified that he would be subjected to an informal disciplinary hearing regarding his excessive absence and lateness.

A Step I decision issued on July 13, 1978 found grievant guilty of excessive absences and lateness as well as repeated failure to call in as required. His employment was terminated on July 21, 1978. On April 19, 1979, a Step II decision upholding the termination was issued.[2] The Review Officer noted that HHC had properly raised the issue of the timeliness of the grievance; nevertheless, he considered the merits of the case and found the requirement of Operating Procedure No. 20-10 that counseling be provided was preempted in this case by the fact that grievant had received a final warning at a prior disciplinary proceeding.[3]

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[2] The grievance procedure set forth at Article VI of the contract between the parties provides for appeal of an unsatisfactory Step I determination within five working days of receipt of such determination. However, the appeal in the instant case was not filed until December 21, 1978, more than five months after the Step I decision was issued. Nonetheless, HHC took jurisdiction and scheduled a Step II hearing for January 26, 1979. This hearing was subsequently rescheduled for March 15, 1979 and a decision was issued on April 19, 1979.

[3] It appears from OMLR's Step III decision that grievant was the subject of an informal disciplinary hearing on April 21, 1976 on charges similar to those brought against him in the instant case. At that time grievant was employed at Bellevue Hospital and, as a result of the hearing, his services were terminated. The termination was appealed. HHC's decision in the appeal directed that the termination be rescinded and that grievant be given "a final chance".. However, grievant was not reinstated at Bellevue. Rather, his name was put on a preference list for possible appointment at an institution other than Bellevue. The hearing officer added:

> It is understood that if Mr. Jones [the grievant] is selected for appointment from the list, he must maintain satisfactory work performance and attendance records and this decision will serve as final warning notice to this effect. (Emphasis supplied)

At the Step III conference, the Union reiterated its contention that grievant was not accorded progressive disciplinary procedures as per Operating Procedure No. 20-10. The Review Officer denied the grievance in a decision dated April 29, 1980.[4] The Union then filed a request for arbitration with this Board.

POSITIONS OF THE PARTIES

Union Position

The Union claims that grievants termination on July 21, 1978 for excessive lateness and absenteeism was improper in that the Corporation failed to follow Operating Procedure No. 20-10 and to give grievant counseling sessions before taking disciplinary action. Presumably the Union's argument before this Board is the same as that asserted at the Step III Conference, namely, that had grievant been subjected to progressive disciplinary procedures as per Operating Procedure No. 20-10, his medical problem would have been identified and he might have had greater opportunity to improve his attendance.

D.C. 37 maintains that the Corporation's actions constitute a grievance as defined in section 1, subsections B and E of the Article VI grievance procedure (quoted above). The Union's position is that a grievance, as defined in subsection B, has been stated because the Corporation's "misapplication of Petitioner's policies". A grievance as

[4] Neither party offered an explanation for or objected to the delay of one year between the Step II and Step III decisions.

defined in subsection E has also been stated, according to the Union, because the termination of grievant's employment is "a claimed wrongful disciplinary action".

D.C. 37 maintains that HHC has failed to set forth any basis for a challenge to arbitrability. The Union seeks "reinstatement, back pay and restoration of all benefits" for the grievant.

Corporation Position

The Corporation (HHC) contends that the stated grievance is not arbitrable because "the act of discharge is based upon misconduct in its gross form" which is not subject to progressive disciplinary procedures.[5]

The Corporation also maintains that the alleged failure to consider grievant's medical problem is not arbitrable because Operating Procedure No. 20-10 does not provide for consideration of medical problems in its disciplinary scheme.

HHC requests that its petition challenging arbitrability be granted.

DISCUSSION

The 1978-1980 Institutional Services Contract to which D.C. 37 and the Corporation are parties provides for arbitration of disputes which may arise thereunder. In the instant case, D.C. 37 alleges that it has stated a grievance as defined in Article VI, Section 1 (B) and (E).

[5] See Operating Procedure No. 20-10, Para. V(A) (1) and (2) (quoted above).

We agree that the Union has stated a grievance pursuant to subsection B by alleging that HHC's failure to comply with Operating Procedure No. 20-10 constitutes a violation of written policies of the Employer. Operating Procedure No. 20-10, an internal memorandum from the Vice President for Personnel and Labor Relations to Executive Directors of the Agency, is a "written policy or order of the Employer" and an alleged violation of such policy is within the scope of the parties' agreement to arbitrate. This Board has held that a grievant need not do any more than allege a violation within the contractual definition of grievance; no proof need be presented to the Board regarding the merits of the grievance.[6]

The Corporation's contention that grievant's discharge was based upon gross misconduct and that HHC was thus exempt from Operating Procedure No. 20-10 is also for consideration by the arbitrator since it relates to the merits of the grievance and requires interpretation of the relevant HHC guidelines. In deciding questions of arbitrability, we have repeatedly held that we will not inquire into the merits of a dispute.[7]

On the same reasoning, we find that HHC's contention that its failure to consider grievant's medical problem is not arbitrable because Operating Procedure No. 20-10 does not provide for consideration of medical problems is a question for the arbitrator. While in no way expressing a view on the merits of the grievance, however, we note that Operating Procedure No. 20-10 sets Forth factors for consideration

[6] Board Decision B-10-77.

[7] Board Decision B-12-69; B-8-74; B-19-74; B-1-75; B-5-76; B-10-77.

in determining penalties appropriate to specific types of misconduct. These factors include:

a) Seriousness of offense

b) Circumstances leading to misconduct or incompetence

c) Extenuating factors (e.g., personal problems) that may mitigate the charges

d) The employee's past disciplinary record

e) Length of time since last disciplinary problem

f) Length of employee's service

g) Sensitivity of employee's job functions. (Emphasis added)

Thus, we shall grant DC 37's request for arbitration of the grievance as defined in Article VI section 1 of the contract.

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 Union's request for arbitration be, and the same hereby is, granted; and it is further

ORDERED, that the Corporation's petition challenging arbitrability be, and the same hereby is, dismissed.

DATED: New York, N.Y.
September 11, 1980

ARVID ANDERSON
Chairman

WALTER L. EISENBERG
Member

JOHN D. FEERICK
Member

FRANKLIN J. HAVELICK
Member

EDWARD J. CLEARY
Member

CAROLYN GENTILE
Member

DANIEL G. COLLINS
Member