HHC v. CIR, 33 OCB 14 (BCB 1984) [Decision No. B-14-84 (Arb)]

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

THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Petitioner,

DECISION NO. B-14-84

DOCKET NO. BCB-674-83 (A-1745-83)

-and-

COMMITTEE OF INTERNS AND RESIDENTS,

Respondent.

DETERMINATION AND ORDER

This proceeding was commenced by the New York City Health and Hospitals Corporation ("HHC" or "the Corporation") which, on September 23, 1983, filed a petition challenging the arbitrability of a grievance involving the scheduling of on-call duty for House Staff Officers ("HSOs")[1] who are OB/GYN Residents at Bronx Municipal Hospital Center. Respondent, the Committee of Interns and Residents ("CIR", "the Committee" or "the Union"), filed an answer and memorandum of law on October 20, 1983. On November 4, 1983, the Committee submitted a letter supplementing its memorandum. On December 1, 1983, the Corporation filed a reply.

[1] The term "House Staff officer" refers to employees in the following titles: Intern, Resident, Dental Intern, Dental Resident, and Junior Psychiatrist. All are covered by the collective bargaining agreement between the parties herein.

Background

Petitioner and respondent were parties to a collective bargaining agreement covering the period October 1, 1980 to September 30, 1982 ("1980-82 Agreement"). on April 6, 1983, CIR filed a grievance alleging a violation of Article VII, Section 3 of the 1980-82 Agreement, which, the parties concede, was still in effect by operation of the status quo provision of the New York City Collective Bargaining Law ("NYCCBL").[2]

[2] Section 1173-7.Od of the NYCCBL provides as follows:

d. Preservation of status quo. During the period of negotiations between a public employer and a public employee organization concerning a collective bargaining agreement, and, if an impasse panel is appointed during the period commencing on the date on which such panel is appointed and ending sixty days thereafter or thirty days after the panel submits its report, whichever is sooner, provided, however, that upon motion of the panel, and for good cause shown, the board of collective bargaining may allow a maximum of two sixty-day extensions of time for the completion of impasse panel proceedings, provided further, that additional extensions of time for the completion of impasse panel proceedings may be granted by the panel upon the joint request of the parties, and during the pendency of any appeal to the board of collective bargaining pursuant to subdivision c of this section, the public employee organization party to the negotiations, and the public employees it represents, shall not induce or engage in any strikes, slowdowns, work stoppages, or mass absenteeism, nor shall such public employee organization induce any mass resignations, and the public employer shall refrain from unilateral changes in wages, hours, or working conditions. This subdivision shall not be construed to limit the rights of public employers other than their right to make such unilateral changes, or the rights and duties of public employees and employee organizations under state law. For the purpose of this subdivision the term "period of negotiations" shall mean the period commencing on the date on which a bargaining notice is filed and ending on the date on which a collective bargaining agreement is concluded or an impasse panel is appointed.

Article VII, Section 3 provides as follows

> No House Staff Officer shall be required to perform duty in the hospital more frequently than one night in three as the term one night in three is commonly understood....

The grievance alleges that

> Housestaff officers in OBS/GYN at Bronx Municipal Hospital Center are routinely scheduled to work on call more frequently than 1 night in 3 (10 nights in 30 as commonly understood). OBS/GYN house-staff are also being scheduled to "make up" on call for periods when they were on vacation, which results in violations of the no-more-than-1 night-in-3 provision.[3]

A document setting forth the assignments for eleven named House Staff Officers for the months of December 1982, March 1983 and April 1983 is appended to the initial grievance submission.

On or about April 29, 1983, the Committee and HHC concluded a new collective bargaining agreement for the term October 1, 1982 to September 30, 1984 ("1982-84 Agreement"j. The 1982-84

[3] Letter dated April 6, 1983 from George Mastovich, CIR Staff Representative to Tom Doherty, HHC Acting Executive Director.

Agreement reflects a modification in the "no-more-than-one-night-in-three" provision of the predecessor contract. The modified agreement provides as follows:

Article VII, Section 3

a. No HSO shall be required to perform duty in the hospital more frequently than an average of ten (10) calendar nights within a thirty (30) day calendar period.

b. Subject to the applicable provisions of Article V, Sections 2 and 3 [vacations and leave time limitations] an HSO who uses annual leave time provided for in Article V, Section 1 [vacations and leave time] will not be required to make up on-call duty that an HSO would have otherwise worked during the period of said annual leave:

On June 27, 1983, HHC issued a Step II determination in this matter.[4] Applying the terms of the 1980-82 Agreement, because "as of this date, the FCB has not approved the 82-84 CIR agreement", HHC Review Officer Carmen Pinilla found that two of the doctors named in the schedule accompanying the grievance had been assigned in excess of the contract limitation, but found no other violation of contractual obligations.

[4] Letter dated June 27, 1983 from Carmen Pinilla, HHC Review Officer to Richard Lednicky, CIR Staff Representative.

The decision directed payment of $130 per night for each doctor as to whom a violation was found. On July 25, 1983, the Union requested arbitration.

On October 20, 1983, CIR filed its answer to the Corporation's petition challenging arbitrability claiming, for the first time in this proceeding, that the relevant provisions of the 1982-84 Agreement should be applied retroactively to all aspects of the grievance arising during the period from October 1, 1982 through April 1983. In addition, the Union submitted with its answer a document listing, for the months of July 1982 through April 1983, the number of nights on call, the number of days worked and the dates of scheduled vacation for twenty-three HSOs (including the original eleven), all of whom allegedly were affected by HHC's violation of the contract.

CIR requests that HHC be directed to cease and desist its improper scheduling practice and that all eligible HSOs be compensated for excess on-call assignments.

Positions of the Parties

Health and Hospitals Corporation

HHC opposes the request for arbitration on the following grounds:

1. During the tern, of the 1980-82 Agreement, the assignment of HSOs to make up on-call duty is a management prerogative. While the 1982-84 Agreement prohibits such assignments, the terms of that agreement do not apply to the dispute herein.

HHC asserts that, during the period covered by the 1980-82 Agreement, HSOs had no right to expect that they would not have to make up on-call duty for periods when they were on vacation. According to HHC, the subject of making up on-call duty was not covered by the terms of the 1980-82 Agreement, nor was there any past practice or policy prohibiting make-up assignments. The Corporation maintains that it is management's prerogative, in directing the work force, to require such assignments. Moreover, that such assignments were proper during the term of the 1980-82 Agreement is demonstrated by the fact that CIR deemed it necessary to demand in the negotiations for a successor agreement the protection to which it claims entitlement under the old agreement.

The Corporation objects to any retroactive application of Article VII, Section 3 of the 1982-84 Agreement on the ground that the grievance was filed under the 1980-82 Agreement. This contract, HHC notes, only permits arbitration of

> a dispute concerning the application or interpretation of the terms of this collective bargaining agreement (emphasis added).[5]

In any case, HHC argues, the 1982-84 Agreement is not yet in effect, as it has not been fully executed by the parties or approved by the Financial Control Board. Even though

[5] Article XIV, Section 1(A).

retroactive effect may appropriately be given to the terms of an agreement once that agreement is effective, HHC argues, absent a specific agreement to the contrary, the terms of an agreement that is not yet effective may not be applied retroactively.

2. The waiver submitted by the Union is insufficient.

HHC maintains that the grievance presented does not raise issues relating to the work of the bargaining unit as a whole, but relates only to individual HSO assignments. Since these claims are by their nature unique and personal, individual waivers are required in order to satisfy the mandate of section 1173-8.Od of the NYCCBL and section 6.3b of the OCB Rules.[6]

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[6] Section 1173-8.Od of the NYCCBL provides as follows:

> As a condition to the right of a municipal employee organization to invoke impartial arbitration .... the grievant or grievants and such organization shall be required to file with the director a written waiver of the right, if any, of said grievant or grievants and said organization to submit the underlying dispute to any other administrative or judicial tribunal except for the purpose of enforcing the arbitrator's award.

Section 6.3b of the Revised Consolidated Rules of the office of Collective Bargaining ("OCB Rules") provides:

> If the request for arbitration is served by a public employee organization, there shall be attached thereto a waiver, signed by the grievant or grievants and the public employee organization, waiving their rights, if any, to submit the underlying dispute to any other administrative or judicial tribunal except for the purpose of enforcing the arbitrator's award.

HHC notes that the purpose of the waiver provision is to avoid the possibility of recourse to other remedies concurrently with or subsequent to arbitration. Since claims for compensation may be pursued in the courts by individual HSOs who allege they have been assigned to duty in violation of the contract, it is imperative that individual waivers be obtained.

HHC also asserts that the failure to comply with the waiver requirement of the NYCCBL is a sufficient basis for denial of a request for arbitration, even where the grievance is otherwise arbitrable.

3. Any consideration of the grievance should be limited to the claims of the grievants named in CIR's original submission and to the period for which a violation was initially alleged.

HHC asserts that the addition of new grievants and the expansion of the period of alleged contract violation in CIR's answer to the petition challenging arbitrability should be prohibited. Two bases for this position are asserted:

(a) The Board has refused to permit amendment of a grievance at the request for arbitration stage, much less in the answer to a petition challenging arbitrability, to correct a misnaming of grievants or to add an additional allegation of contract violation. Moreover, the Board has specifically denied applications to amend a request for arbitration to correct the misnaming of grievants so that the claims might proceed to arbitration as a group grievance, even though they were litiqated as individual

grievances at the earlier steps. HHC claims that it will be prejudiced by the expansion of the claim because it has been deprived of the opportunity to review and resolve these additional matters;

(b) The collective bargaining agreement bars the filing of a grievance more than 120 days after the alleged violation occurred. Accordingly, the addition of new grievants six months after the last claimed date of violation and the inclusion of time periods extending as far back as nine months prior to the filing of the grievance should not be permitted.

For the aforementioned reasons, the Corporation urges that the request for arbitration be denied.

Committee of Interns and Residents

CIR offers the following arguments in support of its request for arbitration:

1. The assignment of HSOs to make up on-call duty is in no sense a management prerogative. The 1980-82 Agreement should be interpreted to prohibit such assignments. Moreover, the 1982-84 Agreement should be applied retroactively in this matter.

CIR contends that the Article VII, Section 3 of the 1980-82 Agreement should be construed to prohibit assignments to make up on-call duty for periods during which an HSO is on vacation. That the parties negotiated in their 1982-84 Agreement a provision expressly prohibiting such assignments does not militate against such an interpretation, as this additional

language was sought merely to clarify a pre-existing prohibition. The Union argues that,

> in arbitration, an unsuccessful attempt by a party to negotiate clarifying language does not compel a conclusion that the interpretation sought by the unsuccessful party was wrong. A fortiori, a successful attempt does not yield the conclusion that prior to the clarification the interpretation favored by the successful party was wrong.[7]

Accordingly, the Committee requests that an arbitrator be permitted to determine the reason for the change in the contract language and to determine whether the contract was violated by the practice of:

(a) assigning HSOs to on-call duty more frequently than one night in three during parts of the month when they were not on vacation; and

(b) requiring HS0s to make up for on-call duty not performed during periods when they were on vacation.

CIR argues additionally that the terms of the 1982-84 Agreement, concluded on or about April 29, 1983, are presently effective and should be applied to that part of the grievance involving on-call assignments from October 1, 1982 forward. While the Union concedes that the 1982-84 Agreement has not been fully executed or approved by the FCB, it argues that neither of these facts is a bar to the retroactive application of the terms of that agreement.

[7] CIR Memorandum of Law, p. 1 (footnote), citing Elkouri ind Elkouri, How Arbitration Works(3d ed. 1976) at 314-15.

CIR characterizes FCB approval of collective bargaining agreements pursuant to the Financial Emergency Act as "formalistic under the circumstances of this case" because the change in the contract provision at issue herein has no financial impact that would require FCB approval. Even if FCB approval is required, such approval is, at best, a "condition subsequent" which does not affect the time when the terms of a newly negotiated agreement take effect.

In any event, the Union contends, it is for an arbitrator, and not the Board, to determine which version of Article VII, Section 3 is to be given effect at what time.

2. The written waiver submitted on behalf of the Union is sufficient.

CIR maintains that the grievance herein involves questions of contract interpretation or application and applies generally to all employees in the bargaining unit. Therefore, it is a union grievance and a union waiver is sufficient.

In support of its position, the Committee points to the fact that the grievance was filed in accordance with Article XIV, Section 4 of the 1980-82 Agreement which provides for the filing at the second step of the grievance procedure of

> [a]ny grievance of a general nature affecting a large group of employees and which concern[s] the claimed misinterpretation, inequitable application, violation or failure to comply with the provisions of this Agreement ....[8]

[8] We note that the Corporation disputes the assertion that the Union filed its claim under Article XIV, Section 4. HHC

The Committee implies that the fact that a grievance is commenced under Article XIV, Section 4 is evidence that the matter so filed is a "group" or "union" grievance within the meaning of decisions of this Board upholding the sufficiency of a Union waiver.

In addition, CIR argues, the HSOs directly affected by the alleged violations of contract do not have recourse to other remedies. Since the rights asserted herein derive from the agreement and not from any statute or common law, the contractual grievance procedure affords the only avenue of redress.

In sum, it is alleged that the HSOs named in the Union's pleadings do not assert unique and personal claims. Since the rights asserted exist only insofar as the named HSOs are part of the overall bargaining unit, individual waivers should not be required.

3. The grievance is submitted on behalf of all HSOs in the Department of OB/GYN at Bronx Municipal Hospital Center who were affected by a violation of Article VII, Section 3 from the beginning of the post-graduate year (July 1, 1982) through April 30, 1983, and should be considered in its entirety.

(8 continued)
Article XIV. Section 2 sets forth the steps of the grievance procedure and contemplates the commencement of grievances at Step 1 by "the employee and/or the Committee." Since the initial grievance submission is part of the record herein, we may and do take administrative notice of the fact that the grievance was filed under Section 4, notwithstanding the Union's failure to refer to Section 4 in the subsequently filed request for arbitration.

CIR asserts that, from the time of its initial grievance submission-, the April 6, 1983 letter from its Staff Representative Mastovich to HHC's Acting*Executive Director Doherty, it has been clear that the grievance was filed on behalf of a group of employees and concerns the routine scheduling of on-call and make-up assignments in violation of the contract. The letter does not define the scope of the grievance more precisely nor, according to CIR, is the scope of the grievance limited by the list of on-call assignments for the months of December 1982, March 1983 and April 1983. Since work schedules are difficult for the Union to obtain, the Committee alleges, it put together a list of assignments available to it at the time. The fact that a supplementary and more complete list of persons affected by the contract violation is provided with the answer to the petition does not affect the arbitrability of the grievance originally stated.

The Union also asserts that HHC could not have been prejudiced by the addition of new names and dates and urges that, in any event, any issue concerning the "supplementation" of the claim should be resolved by an arbitrator.

For all of the aforementioned reasons, CIR requests that the grievance be directed to arbitration in its entirety.

Discussion

This case presents three issues for our resolution. The first is the matter of substantive arbitrability, which in-

volves the question whether the parties are obligated, by contract oi otherwise, to arbitrate their controversies and, if so, whether the obligation is broad enough in its scope to include the controversy presented.[9] Related to the issue of the scope of the obligation to arbitrate is a question as to the applicability of a successor agreement concluded by the parties while this matter was being pursued under the grievance procedure of the predecessor contract. The second issue concerns the appropriateness of the waiver submitted by the Union. The third issue involves the Union's attempt to amend its grievance to include additional claims and dates of contract violation. We turn now to the first issue.

It is undisputed that the parties herein are obligated by contract to arbitrate their controversies. A collective bargaining agreement for the period October 1, 1980 to September 30, 1982, which was in effect by virtue of the status quo provision of the NYCCBL at the time the grievance was filed, includes a grievance procedure providing for final and binding arbitration of disputes concerning the application or interpretation of the terms of that agreement. In determining whether the allegation that HSOs are routinely scheduled to perform on-call duty and to make up on-call assignments in violation of the contract is within the scope of this agreement to arbitrate, we look first to

[9] See Decisions B-2-69; B-4-72; B-28-75; B-10-77;

the. contract provision alleged to have been violated. Article VII, Section 3 of the 1980-82 Agreement provides, in relevant part, that

> No House Staff officer shall be required to perform duty in the hospital more frequently than one night in three as the term one night in three is commonly understood.

Since the contract prescribes the frequency with which HSOS may be assigned to hospital duty, and the grievance alleges that such assignments are being made in contravention of express contract language on the subject, there is clearly a relationship between the act complained of and the source of the alleged right. Accordingly, we find that the stated grievance is witliin the scope of the parties' agreement to arbitrate disputes.

HHC opposes arbitration, however, to the extent that the Union seeks an interpretation of the contract which would prohibit assignments to make up on-call duty scheduled during an HSO's vacation and leave time. HHC contends that it is a management right to require making up on-call duty and the interpretation sought by CIR would interfere with this right. The Corporation asserts the following additional objections to a finding of arbitrability: there is no past practice or policy that prohibits make-up assignments; since the Union was unsuccessful in its attempt to obtain an express pro-

hibition during negotiations for the 1980-82 Agreement,[10] no such prohibition may be found to exist; and the "need" to todemand such a prohibition in negotiations for the 1982-84 Agreement demonstrates that none existed in the prior agreement.

As we see it, CIR does not dispute that the determination of work schedules is a management right. Rather, the Union contends that HHC is exercising its prerogative in a manner that violates an agreed upon term of the agreement between the parties. As we have previously stated, where a limitation on a management right has been imposed by contract, management must exercise that right with due regard for any contractual undertaking it may have made.[11] Further, where it is alleged that management has exercised a right as though no contractual limitation on the right existed, an arbitrable issue is presented.[12]

Whether proper implementation of the 1980-82 Agreement, as a practical matter, would result in foreclosing the

[10] In City of New York v. Committee of interns and Residents (Decision B-10-81), the Board found a demand prohibiting the making up of on-call duty not taken due to the exercise of a contractual right to take time off, a non-mandatory subject of bargaining to the extent that it sought to interfere with the City's right to determine work schedules. This demand was not agreed to or included in the 1980-82 Agreement.

[11] Decision B-4-83.

[12]

possibility of assignments to make up on-call duty is not our concern in determining the arbitrability of the grievance. This issue relates to the merits of the dispute, into which we do not inquire.[13] The sole question presented for arbitration, therefore, is whether the Corporation's scheduling practice violates a contract provision that arguably imposes a limitation on management's otherwise unilateral right to assign on-call duty.

We reject the Corporation's arguments concerning the Union's previous failure to negotiate a contract provision expressly prohibiting the making up of on-call duty and its subsequent successful effort to do so. As we have previously held, where a contract contains a broad arbitration clause and no clear and express provision excluding a subject from arbitration, the fact that the parties bargained on the subject of the dispute and did not reach agreement is irrelevant to the Board's determination of the arbitrability of the dispute.[14] This view is in accord with that of the U.S. Supreme Court which held that it was error, on a motion to compel arbitration, to admit evidence of bargaining history to show

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[13] See, e'-a.,, Decisions B-8-74; B-5-76; B-12-79; B-7-81; B-4-83.

[14] Decisions B-14-74; B-19-74.

that the union failed to obtain through negotiation a provision relating to the subject it was seeking to arbitrate. Evidence of bargaining history is relevant, if at all, to the merits of the dispute, which are solely for the arbitrator to determine.[15]

Furthermore, the alleged "need" to negotiate a provision in a successor agreement dealing with the subject in dispute is not relevant to our determination of arbitrability. That the parties subsequently agreed upon language providing the precise benefit to which the Union claims entitlement under the predecessor contract also is relevant, if at all, to the merits of the dispute.

Our inquiry into the substantive arbitrability of the grievance presented by CIR'does not end here, however. The Union would have us rule that the agreement to arbitrate is not limited to matters that are arbitrable under the terms of the 1980-82 Agreement. Since agreement has been reached as to a successor contract which, by its own terms, was effective October 1, 1982, the Union argues that the terms of that agreement should be applied to the extent that the grievance concerns events occurring on or after October 1, 1982. HHC argues, however, that the obligation to arbitrate is limited to bontroversies ihvolvin'-g the application or

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[15] United Steelworkers of k-nerica v. Warrior & Gulf Navigation Co., 46 LRRM 2416 (1960).

interpretation of the 1980-82 Agreement. moreover, HHC asserts the 1982-84 Agreement, not having been executed by the parties or approved by the FCB, is not yet in effect and, therefore, cannot provide the basis for a grievance.

Section 1173-7.Od of the NYCCBL, the status quo provision, provides for the extension of the terms and conditions of a contract during a "period of negotiations", defined as

> the period commencing on the date on which a bargaining notice is filed and ending on the date on which a collective bargaining agreement is concluded .... [16]

The grievance in this matter was filed on April 6, 1983 and the 1982-84 Agreement was "concluded" on or about April 29, 1983. Since Article XIV, Section l(A) of the 1980-82 Agreement clearly limits arbitration to matters involving the application or interpretation of the terms of that agreement, there can be no doubt that the scope of the parties' agreement to arbitrate is limited to the terms of the 1980-82 Agreement.

Nevertheless, CIR cites cases which allegedly stand for the proposition that the terms of an agreement not in existence at the time a grievance arose may be applied retroactively to the grievance once the agreement to arbitrate

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[16] The full text of Section 1173-7.Od is quoted at note 2 supra.

is in effect.[17] These cases are inapposite because in each of them the grievance was initiated after the agreement whose terms were sought to be applied retroactively was in effect.[18] Here, there can be no doubt that the grievance was filed before the 1982-84 Agreement was in effect, whether its 'effective date is deemed to be as early as the date the agreement was concluded by the parties. [19] or the date of its execution,[20] or the date of approval by the FCB. [21] Since the grievance was filed before even the earliest of these dates, well within the status quo period governed by the 1980-82, Agreement, we do not deem it necessary to resolve the parties' dispute as to the effective date of the 1982-84 Agreement.[22]

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[17] In re Truesdell GMC Truck, Inc., 72 LA 380 (Heinsz, Arb.)(Mar. 12, 1979); In re Neuhoff Bros. Packers, 53 LA 433 (Elliott, Arb.)(Aug. 1-5, 1-979); In re Local 1567, IBEW, Sup. Ct., Rockland Cty., N.Y.L.J., N6v-. 77, 1983 at 15, col.6.

[18] Unlike the case at bar, the cited cases involve private sector grievances arising during a hiatus between collective bargaining agreements.

[19] The 1982-84 Agreement was concluded on or about April 29, 1983.

[20] The 1982-84 Agreement was fully executed when the last signature was affixed in April, 1984.

[21] The 1982-84 Agreement was approved by' the FCB at its meeting on-July 12, 1984.

[22] The Union argues, incorrectly, that the question as to which version of the disputed contract provision is to be given effect at the relevant times is for an arbitrator to determine.

In light of the above, we shall dismiss the Union's claim that Article VII, Section 3 of the 1982-84 Agreement should be considered in resolving the controversy presented and shall limit arbitral consideration to the relevant provisions of the 1980-82 Agreement. However, nothing herein shall preclude the parties from presenting to the arbitrator evidence of discussions and negotiations concerning a new version of Article VII, Section 3, which may have a bearing on the meaning and intent of the existing provision. Neither is the arbitrator precluded from considering the bargaining history of the parties in applying and interpreting the contract that is before him.

We turn now to the issue of appropriate waiver. In City of New York v. Patrolmen's Benevolent Association,[23] we noted that the purpose of the waiver requirement is

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(Footnote 22/ continued)

It is the Board's function, in determining the scope of an agreement to arbitrate disputes, to resolve questions as to the existenc of the contract pursuant to which arbitration is sought or the provisions of which are in dispute. See, e.2., Decision B-3-78 (Board held grievance seeking overtime compensation not arbitrable under 1973-1976 Citywide agreement as that agreement was not in effect when overtime allegedly was worked).

[23] Decision B-8-79.

> to prevent multiple litigations of the same dispute and to assure that a grievant who elects to seek redress through the arbitration-process will not attempt at another time to reliti-gate the matter in another forum.

Where the waiver requirement has been violated by submission to another forum of the same dispute as underlies a grievance pending before us, we have denied arbitration even though the particular clain, asserted was otherwise arbitrable.[24] Where there has been no actual violation of the waiver pro-vision by the commencement of another proceeding, however, we have had to determine how the statutory requirement is to be satisfied. In so doing, we have identified three categories of grievances:

(1) A union grievance involves a question of contract interpretation or appli-cation in which the union is the only identifiable grievant. The subject of the grievance applies to all employees in the bargaining unit as well as to persons who will be bargaining unit employees in the future;

(2) A group grievan - e does not necessarily apply to all employees in the bar-gaining unit, but rather to a number of employees in a unit who are similarly affected by an alleged violation;

(3) An individual grievance involves one or more individual grievance who claim a violation of contractual rights. [25]

[24] Decisions B-11-75; B-6-76; B-7-76; B-8-79; B-31-81.

[25] Decision B-12-71.

In the case of a union grievance, we stated, only the union is required to file a waiver. In the case of an individual grievance, both the union and the individual(s) are expected to sign waivers. In the case of a group grievance, the Board may require individual waivers as well as a waiver signed by the uniont or it may require only a union waiver. Questions of appropriate waiver are to be decided on a case-by-case basis, "depending upon the factual nature of the grievance alleged." [26]

In the instant case, the Corporation argues that the alleged contract violation involves claims which are unique and personal to individual HSOs and individual waivers should be required. moreover, since the remedy sought includes compensation, HHC asserts that individual waivers are necessary to avoid the possibility that such remedies will be pursued in the courts. However, CIR maintains that the grievance involves questions of contract interpretation that affect the bargaining unit as a whole. The Committee denies that individual HSOs have any avenue of redress other than the grievance procedure. In CIR's view, a union waiver satisfies he statutory requirement.

[26] Id. at 9.

We note that the grievance herein has two aspects. To the extent that it involves routine assignments to on-call duty allegedly in excess of one night in three, the claim is a "group grievance", applying to a number of employees in the bargaining unit who are similarly affected by the alleged contract violation. To the extent that the claim involves assignments to make up on-call duty and, thus, raises a question requiring contract interpretation - whether the one-night-in three limitation applies to make-up assignments as well as to regular assignments, it is a "union grievance." We distinguish these two aspects for purposes of categorizing the claim; for purposes of satisfying the statutory waiver requirement, however, it is a distinction without a difference. Both parts of the grievance seek enforcement of a right not to be assigned to duty in violation of the contract, a right which is not unique to any individual employee, but is possessed by the bargaining unit as a whole.

In City of New York v. New York City Local 246, S.E.I.U.[27] we discussed the waiver problem at length and clearly stated our view that

> Under the NYCCBL if a factual situation demonstrates that the issue involves an alleged violation of a right possessed by the bargaining unit as a whole, or by the union as exclusive representative, the union's waiver is sufficient to warrant proceeding to arbitration of the dispute.

[27]Decision B-12-71.

That case involved the alleged out-of-title performance by an employee in another department of duties properly assignable to members of the bargaining unit represented by the union. The City contended that nine employees who were identifiable as potential beneficiaries of the remedy sought should be required to waive recourse to any other forum. We disagreed, finding that the claim was a union grievance protesting the alleged invasion of bargaining unit work. The union's waiver was deemed sufficient. Explaining our rejection of the City's argument, we said,

> Were we to accept the City's position, the statutory policy of encouraging arbitration of grievances would be destroyed except in those instances in which the grievance is clearly an individual grievance and in which an individual waiver is signed .... The dimensions of the problem ... may be illustrated by a grievance which possibly applies to all employees in a large unit. In such a case, all the employees would be required to sign waivers and one employee's failure or refusal to sign a waiver could successfully thwart access to arbitration.

In 1978, a potential example of the above-described problem was presented when the Impartial Members of this Board, sitting as an arbitration/impasse panel, pursuant to the dispute resolution provisions of the 1975 Wage Deferral Agreement, were requested to determine whether the City's obligation to repay wages and salaries deferred during New York City's fiscal crisis continued beyond June 30, 1978. No

individual waivers were submitted in that case. The parties - the City of New York and nearly all of its public employee unions - stipulated, however, that they would not commence or participate in any judicial proceeding relating to matters before the panel. It would have been impossible to obtain a waiver from every employee affected by the arbitration/impasse proceeding. [28]

From our first treatment of the waiver problem, in Decision B-12-71, we have consistently sought to accommodate the statutory policy of encouraging arbitration of grievances [29] and the equally important policy of protecting a party from having to defend the same action in multiple lawsuits in different forums. In so doing, we have frequently found a union waiver to be sufficient even where individual grievants were identified or ascertainable. [30] Moreover, we have upheld the sufficiency of a union waiver where, as in the instant matter, the remedy sought included compensation.

In City of New York v. Uniformed Fire officers Association, Local 854,[31] for example, the union grieved the Fire

[28] Matter of Coalition Unions and City of New York, No. A-743-78/-I-141-78 (Arbitrators: Anderson, Collins and Friedman)(July 20, 1978).

[29] NYCCBL §1173-2.0.

[30] Decision B-2-77.

[31] Decision B-2-77.

Department's refusal to pay overtime to newly appointed fire officers who were required to attend a training program outside of their regularly scheduled hours. Even though the City contended that the only members of the bargaining unit affected by the dispute were those recently promoted officers who had attended the training session during off-duty hours, we viewed the case as involving an alleged violation of a right possessed by the bargaining unit as a whole. Reasoning that

> [d]isputes involving issues as fundamental as the meaning to be accorded the contractual phrase "working hours", primarily concern the collective rights of the entire unit, not the personal rights of individual employees,

we found the union's waiver sufficient to warrant proceeding to arbitration.[32]

Turning now to the statutory requirement itself, we emphasize that the NYCCBL requires waiver of "the right, if any,... to submit the underlying dispute to any other administrative or judicial tribunal [emphasis added]." The legislative history of this provision makes clear that the phrase "the right, if any," refers to rights that exist by virtue of statutes, which may predate collective bargaining for municipal employees, but which continue to afford

See also, City of New York and Health and Hospitals Corporation v. Doctors Council, Decision B-36-82 (union waiver deemed sufficient where contract clause sought to be enforced on behalf of certain employees provided for payment of supervisory differential).

[32] See also, City of New York and Health and Hospitals Corporation v. Doctors Council, Decison B-36-82 (union waiver deemed sufficient where contract clause sought to be enforced on behalf of certain employees provided for payment of supervisory differential).

protections similar to those now also provided in collective bargaining agreements.[33] Section 76 (appeals from determinations in disciplinary proceedings) and Section 100(l)(d) (monetary remedy for out-of-title work) of the State Civil Service Law, Article 78 of the New York Civil Practice Law and Rules (appeals from determinations of administrative bodies), and Section 220 of the New York State Labor Law (determinations of hours and wages for laborers, workmen and mechanics employed in public works) are examples of statutes that may provide a parallel but independent cause of action to an employee-grievant.

In the case at bar, however, the rights asserted have no statutory counterpart. The right not to be assigned to on-call duty more frequently than one night in three derives exclusively from the agreement between CIR and HHC. In the event that the Union, after exhausting the grievance and arbitration procedure, seeks to enforce its contract rights in another forum, Article XIV, Section 9 of the Agree-

[33] That the pursuit of duplicative statutory remedies was what the drafters of the NYCCBL had in mind when they included a waiver provision in the collective bargaining law is evidenced by the 1966 Memorandum of Agreement between representatives of the City of New York and public employee organizations. This negotiated agreement, which formed the basis for the comprehensive legislation that became the New York City Collective Bargaining Law, provided as follows

> Before invoking impartial arbitration, the grievant or grievants shall waive their rights under CSL Section 76 and CPLR Article 78 (Article-VII, Sec~ion D].

ment should afford the City adequate protection. This provision, typical of many contracts between municipal employers and employee organizations, makes the grievance and arbitration procedure "the exclusive remedy for resolution of disputes defined as 'grievances'."

Furthermore, even though an individual employee may process his own grievance through the lower steps of the procedure, only the collective bargaining representative may invoke andutilize the arbitration procedure provided in the agreement.[34] It is the settled law of New York that an individual employee, in becoming a beneficiary of a collective bargaining agreement, gives up to the exclusive representative his individual right to sue on or litigate as to the contract.[35] Thus, it appears that there is no basis for direct action against the City by individual employees in this case.

For the aforementioned reasons, we conclude that the waiver submitted by CIR satisfies the requirement and the underlying policy of NYCCBL section 1173-8.0d.

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[34] 1980-82 Agreement Article XIV, Section 2; NYCCBL §1173-8.0g(2).

[35] Albert v City of Now York, 103 Misc. 2d 962, 431 N.Y.S. 2d 240 (Sup. Ct., App. Term, lst Dep't 1980). See, Chupka v. Lorenz-Schneider Co., 12 N.Y. 2d 1, 233 N.Y.S. 2d 929, 186 N.E. 2d 191 (1962); Parker v. Borock, 5 N.Y. 2d 156, 182 N.Y.S. 2d 577, 156 N.E. 2d 297 (1959).

Finally, we address the issue raised by HHC concerning CIR's inclusion in its answer of additional HSOs affected by the alleged contract violation and of additional months during which such alleged violations occurred. HHC argues that the Board should, consistent with its prior decisions, refuse to permit amendment of the grievance as the parties did not have the opportunity to review and resolve the additional claims at the lower steps of the grievance procedure. Moreover, HHC objects to the attempt to amend the grievance outside of the 120-day contractually prescribed period for the filing of a claim. CIR argues that the grievance was never limited to the claims of HSOs named in the list initially submitted, and that the supplementation of this list in conjunction with the filing of an answer does not alter the grievance presented.

We agree with the City on this point and, accordingly, shall limit the scope of any remedy in arbitration to the claims of the eleven HSOs initially identified by the Committee during the months of December 1982, March 1983 and April 1983. As we have previously held,

> The purpose of the multi-level grievance Procedure is to encourage discussion of the dispute at each of the steps. The parties are thus afforded an opportunity to discuss the claim informally and to attempt to settle the matter before it reaches the arbitral stage. Were this Board to permit either party to interpose [just prior to arbitration]

> a novel claim based on a hitherto unpleaded grievance, we would be depriving the parties of the beneficial effect of the earlier steps of the grievance procedure and foreclosing the possibility of a voluntary settlement. [36]

In the instant case, we find that CIR's submission of a more comprehensive list of grievants and enlarged schedule of assignments together with its answer to the petition challenging arbitrability is an attempt to amend the grievance in violation of the above-stated principle. Claimed contract violations during months other than December 1982, March 1983 and April 1983 were not discussed by the parties at the earlier steps of the grievance procedure. Accordingly, they are, for purposes of the arbitration in this case, new claims, the assertion of which shall not be permitted at this stage of the proceeding.

Since we do not permit, unless the parties shall mutually agree otherwise, the submission to arbitration of any individual claim that was not presented at the outset and included in the request for arbitration, we need not address the City's argument that such additional claims also are time-barred under the collective bargaining agreement.

Having carefully considered and evaluated the facts presented and the positions of the parties in this dispute,

[36] Decision B-22-74. See also, Decisions B-20-74; B-27-75; B-3-76; B-12-77; B-6780.

we shall grant the request for arbitration, subject to the limitations set forth herein.

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 by the Health and Hospitals Corporation be, and the same hereby is, denied; and it is further

ORDERED, that the request for arbitration filed by the Committee of Interns and Residents be, and the same hereby is, granted, subject to the limitations set forth in the opinion.

DATED: New York, N.Y.
July 18, 1984

ARVID ANDERSON
CHAIRMAN

DANIEL G. COLLINS
MEMBER

MILTON FRIEDMAN
MEMBER

EDWARD SILVER
MEMBER

JOHN D. FEERICK
MEMBER

EDWARD F. GRAY
MEMBER

CAROLYN GENTILE
MEMBER