City v. Doctors Council, 33 OCB 21 (BCB 1984) [Decision No. B-21-84 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

- - - - - - - - - - - - - - - - - - X

In the Matter of

THE CITY OF NEW YORK,

Petitioner, DECISION NO. B-21-84

-and- DOCKET NO. BCB-729-84 (A-1961-84)

DOCTORS COUNCIL,

Respondent.

- - - - - - - - - - - - - - — - - - - X

DECISION AND ORDER

On August 13, 1984, Doctors Council ("the Union") filed a request for arbitration of a grievance concerning the alleged improper suspension and subsequent termination of Murvin Rabbin, M.D. by the New York City Health and Hospitals Corporation ("HHC") . The City of New York, through its representative, the New York City Office of Municipal Labor Relations ("OMLR" or "the City"), filed a petition challenging arbitrability on August 22, 1984. The Union filed an answer' to the petition on August 31, 1984 to which the City replied on September 10, 1984.

Background

The grievant, a physician at Coney Island Hospital, was suspended from his position on or about December 1, 1982. At the time of his suspension, the grievant was not served with disciplinary charges. Representatives of the

Hospital and grievant's attorney met subsequent to the grievant's suspension to consider affording him the opportunity to resign. The grievant rejected the Hospital's offer of settlement and filed a grievance. Thereafter, on or about May 12, 1983, the grievant was terminated from his position.

The Step II decision, dated July 25, 1983, stated that the grievant was terminated for falsification of time records and patient medical records. On August 30, 1983, the Union filed a Step III grievance protesting "not only [the grievant's] suspension but his subsequent termination and all violations of procedure which occurred in this case." The Step III Hearing officer acknowledged that the grievant should have been served with disciplinary charges at the outset. However, she concurred with the Step II determination and denied the grievance. Following receipt of the Step III decision, the Union filed a request for arbitration under Article VIII, Sections 1 and 2 of the Agreement alleging violations of Articles IV (Personnel Pay Practices) and VIII (Grievance Procedure). [1]

---

[1] Article VIII, Section 1 of the Agreement defines a grievance as follows:

(A) A dispute concerning the application or interpretation of the terms of this Agreement;

(More)

(Footnote 1/ continued)

> (B) A claimed violation, misinterpretaion or misapplication of the rules or regulations, written policy or orders 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;
> (C) A claimed assignment of employees to duties substantially different from those stated in their job specifications;
> (D) A claimed improper holding of an open - competitive rather than a promotional examination;
> (E) A claimed wrongful disciplinary action taken against (i) a permanent employee covered by Section 75(1) of the Civil Service Law; (ii) a permanent competitive employee covered by the Rules and Regulations of the Health and Hospitals Corporation; and (iii) a non-competitive per annum employee appointed in a titled (sic] in Section 2(a) of Article III hereof; upon whom the agency head shall have served written charges of incompetency or misconduct while the employee is serving his or her permanent title or which affects his or her permanent or continued status of employment;

Positions of the Parties

The City's Position

The City asserts that there is no prima facie relationship between the alleged wrongful discipline of

the grievant and Article IV.[2] The City argues that Ariti-

(F) Per session employees who have been employed at least 5 years on a regular basis of at least 10 hours per week, will not be subject to termination of employment for arbitrary or capricious reasons; and any issues hereunder shall be subject to the contractual grievance procedure up to and including Step III (OMLR) only.

[2] Article IV of the Agreement reads as follows:

Personnel Pay Practices

Section 1. Attending Physician. Effective July 1, 1981, employees in the title of Attending Physician II shall be automatically promoted to the title of Physician II upon completion of five (5) years of post-medical school practice, of which at least two and one-half (2 1/2) years must be within the municipal system. There shall be no automatic promotions from the Attending Physician II title to Attending Physician III.

Section 2. Physician (Hourly). Effective July 1, 1981, employees in the hourly paid Physician title employed by the Health and

cle IV concerns Personnel Pay Practices and is not relevant to the instant grievance involving a disciplinary action. The City contends that the Union, in alleging a violation of Article IV, failed to state a contractual basis for the grievance.

> Hospitals Corporation, where an issue of "medical specialist duties" has arisen, shall be reclassified into the appropriate Attending Physician level as per annum employees, without additional cost to the Corporation and without loss of benefits to the employee. The job specification for the Attending Physician series shall govern assignment levels and responsibilities. The procedures for such reclassification shall be developed pursuant to Article XV Section 5 of the Agreement.

The City also argues that because Article VIII, Section 1 (F) clearly and unambiguously prohibits per session employees from pursuing a claim of arbitrary or capricious termination to arbitration, the Union failed to state an arbitrable grievance under the collective bargaining agreement. The City maintains that the grievant was a per session employee at the time of his suspension and subsequent termination and that, therefore, the Union's request for arbitration should be denied.

The City concedes that the grievant was not served with disciplinary charges at the time of his suspension. However, the City maintains that written charges were not issued "in order to spare grievant the effects of such an action upon his professional medical career." The City notes that written charges must be reported to the New York Medical Association.

In its reply, the City disputes the Union's contention that Decision No. B-4-84 is applicable to the present case. The City alleges that the instant case is distinguishable on the ground that the grievant herein, claiming a violation of the disciplinary procedures of Article VIII, has not made any attempt to grieve the alleged failure to change his employment classification from a per session to a per annum. employee. The City further argues that if the

Board finds Decision No. B-4-84 dispositive of the issue in this case, the Board must direct the arbitrator to decide grievant's classification status first, and then determine what rights, if any, he has under Article VIII. The City also contends that the Union has the burden of proof with regard to grievant's alleged status as a per annum, employee, and that such burden of proof must be clearly allocated in any Board decision.

The Union's Position

Doctors Council asserts that even if the grievant was "classified" by HHC as a per session physician at the time of his termination, the grievance is arbitrable. The Union argues that pursuant to Article IV, Section 2 of the Agreement, the grievant acquired the status of a per annum physician, and all of the rights attendant thereto, as of July 1, 1982. The Union contends that the failure of HHC to implement Article IV, Section 2 in a timely fashion cannot now be used to deny the grievant the right to arbitrate his claim.

In support of its position, Doctors Council cites Decision No. B-4-84 in which this Board determined that the employment classification status of the grievants therein, under Article IV of the 1980-82 Doctors Council collec-

tive bargaining agreement, is a matter to be decided by the arbitrator. The Union maintains that the Board's determination in Decision No. B-4-84 is controlling in the present case. Therefore, the Union argues, the employment classification status of the grievant and the entitlement of rights which accompany that status are issues reserved to the arbitrator.

Discussion

It is well established that in determining arbitrability, the Board must decide 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 before the Board.[3]

In the present case, it is clear that the parties have agreed to arbitrate grievances, as defined in Article VIII of their collective bargaining agreement. A claim of wrongful disciplinary action is expressly within the contractual definition of an arbitrable grievance subject, however, to the limitations specified in Article VIII, Section 1(F).[4]

[3] See, e.g., Decision Nos. B-5-84; B-1-84; B-15-79 and decisions cited therein.

[4] See footnote 1 supra, p. 1. and 3.

The City contends that because the grievant was classified as a per session employee at the time of his termination, Article VIII, Section 1 (F) precludes arbitration of the instant grievance. The City further contends that Article IV, Section 2 is not relevant to the dispute herein; and the Union's reliance on that provision of the Agreement as the source of their alleged right to arbitration-is misplaced.

The Union denies the City's contention that Article IV, Section 2 is not relevant. Rather, Doctors Council maintains that the grievant was entitled to per annum status as of July 1, 1982 and that, but for HHC's failure to implement Article IV, Section 2 in a timely fashion, the grievant would be entitled to all of the rights attendant to that employment classification, including the right to arbitrate his alleged wrongful termination.

We have consistently held that in determining arbitrability, the Board will confine its inquirty to whether a prima facie relationship has been established between the act complained of and the source of the alleged right, redress of which is sought through arbitration. The grievant, where challenged to do so, has a duty to show that the contractual provision invoked is arguably related

to the grievance to be arbitrated.[5]

In City of New York and Health and Hospitals Corporation v. Doctors Council, Decision No. B-4-84, this Board held that there was a close relationship between Articles IV and IX (Job Security) of the 1980-82 Doctors Council collective bargaining agreement because the challenge to arbitration was based, in part, upon the grievants' alleged classification as per session employees. As in Decision No. B-4-84, we find that the Union herein has demonstrated a close relationship between Articles IV and VIII because the Agreement provides that per annum. status is a condition precedent to the right to arbitrate the instant grievance. Therefore, we conclude that an arbitrable dispute has been presented.

We are not convinced by the City's argument that Decision No. B-4-84 is distinguishable from the present case. The City maintains that the grievant did not cite his alleged improper employment classification as a basis for the grievance herein until the request for arbitration stage of the procedure. However, the record shows that the grievant did raise the issue of HHC's "failure to integrate [him) into the per annum salary schedule as called for under Health

[5] See, e.g., Decision Nos. B-1-84; B-15-80; B-3-78; B-1-76.

and Hospital's Rules and Regulations" at Step I of the grievance procedure. Thus, the City was not deprived of notice of a.claim founded on the grievant's employment classification nor did the parties lack the opportunity to discuss and resolve the claim from the earliest stage of the grievance process.[6]

The purpose underlying our policy against permitting the tardy amendment of a claim is fulfilled when the parties are afforded the opportunity to discuss and settle their dispute short of arbitration. That the parties in this case did not, in fact, discuss or resolve the grievant's classification status in the context of a claim arising under Article VIII is not relevant to our determination. Therefore, we shall reject this challenge to

[6] We have previously stated that:

> "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 at this time 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."
> See, e.g., Decision Nos. B-6-80; B-12-77; B-3-76; B-27-75; B-22-74; B-20-74.

arbitration and direct the arbitrator to determine whether the grievant should have been classified as a per session or per annum, employee at the time of his suspension and subsequent termination.

In addition, we note that questions of procedural arbitrability, including the effect of the City's failure to serve the grievant with disciplinary charges and the effect of the City's alleged failure to timely comply with the grievance procedure, are questions for the arbitrator to resolve.[7]

Finally, contrary to the City's contention, we find that the arbitrator, and not this Board, must determine each party's burden of proof with regard to the grievant's proper employment classification. In directing arbitration, we will require that the arbitrator first determine the grievant's classification status in accordance with Article IV and, if the arbitrator finds that the grievant is a per annum. employee, the arbitrator may then determine his rights, if any, under Article VIII.

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

[7] B-14-76; B-6-75; B-7-68.

ORDERED, that the City's petition challenging arbitrability be, and the same hereby is denied; and it is further

ORDERED, that the Union's request for arbitration be, and the same hereby is, granted in accordance with the foregoing discussion.

DATED: New York, N.Y.
October 25, 1984

ARVID ANDERSON
CHAIRMAN

DANIEL G. COLLINS
MEMBER

MILTON FRIEDMAN
MEMBER

DEAN L. SILVERBERG
MEMBER

JOHN D. FEERICK
MEMBER

EDWARD F. GRAY
MEMBER

CAROLYN GENTILE
MEMBER