City, HHC v. Doctors Council, 33 OCB 4 (BCB 1984) [Decision No. B-4-84 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

THE CITY OF NEW YORK and the HEALTH AND HOSPITALS CORPORATION,

Petitioners,

DECISION NO. B-4-84

DOCKET NO. BCB-685-84 (A-1810-83)

-and-

DOCTORS COUNCIL,

Respondent.

DECISION AND ORDER

On January 6, 1984, the New York City Office of Municipal Labor Relations ("OMLR" or "the City"), on behalf of the City of New York and the New York City Health and Hospitals Corporation ("HHC") , jointly referred to as "petitioners", filed a petition challenging the arbitrability of a grievance that is the subject of a request for arbitration filed by Doctors Council ("the Union") on December 8, 1983. The Union filed its answer on January 18, 1984, to which the City replied on January 30, 1984. Claiming that the City raised a new issue in the reply and presented factually incorrect material therein, the Union submitted a surreply on February 3, 1964. The City responded to the surreply in a letter dated February 6, 1984.

Request for Arbitration

The Union states the grievance as follows:

> The improper lay-off and/or reduction of hours of Jerry Beeber, M.D., Joseph Amari, M.D., Natalio Schvartz, M.D., Gunda Zymantiene, M.D., Jean Louis Casseus, M.D., and Mahendra Pandya, M.D., by the New York City Health'& Hospitals Corporation.

Doctors Council alleges a violation of the job security provisions contained in Article IX of the 1980-1982 collective bargaining agreement ("the Agreement") entered into by the parties. Article IX reads, in pertinent part, as follows:

> ARTICLE IX-JOB SECURITY
>
> Section 1.
>
> Except for employees of the Health and Hospitals Corporation ("HHC"), provisions pertaining to the abolition of positions, reductions in staff, demotions and preferred lists, as set forth in Article XVI of the 1978-1980 City-wide contract between the City of New York and District Council 37, A.F.S.C.M.E., AFL-CIO, shall be applicable as if fully herein set forth.
>
> Section 2.
>
> (a) With respect to those employees of the HHC, Section 7.6 of the Health and Hospitals Corporation Personnel Rules and Regulations (hereinafter "§7.6"), as currently in effect, shall be applicable with respect to the abolition of positions, reductions in staff, demotion and preferred lists, except as hereinafter set forth:
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> (i) In the case of incumbents in the title of Attending Physician I, II and III, seniority as applied pursuant to §7.6 shall be defined according to approved

specialties, which for the purposes hereof shall be determined by the departmental assignment of the individual employee.

(ii) Any variation in the determination of one's specialty, as set forth in Section 2(a)(i) of this Article, whereby an employee's specialty is not defined by his/her departmental assignment and he/she is rendering essential services to the employer in a subspecialty or inter-departmental capacity not otherwise available, the provisions of this Article may be waived ... In the event there is no agreement the matter may be submitted directly to arbitration.

(iii) In the event a subspecialist is laid off or demoted hereunder and such subspecialist has been functioning programically (sic) in such subspecialty in his/her employment with the HHC, he/she may elect reappointment to the first available position according to his/her seniority in such specialty (department) and/or subspecialty.

(b) Notwithstanding anything hereinbefore set forth, should a vacancy arise in a position which presently carries or requires an academic appointment, the HHC shall be obligated only to give first consideration to employees subject to recall hereunder in the speciality involved, but in the event no employee is recalled to fill such vacancy the employees on the preferred list shall retain their eligibility for other vacancies which do not so require or carry academic appointments.

(C) The eligibility for recall of a person on the preferred list shall not continue for a period longer than four years from the date of separation.

Section 3.

The foregoing provisions of this Article shall apply only to per-annum employees, irrespective of the work week which they are assigned.

As a remedy, the Union seeks:

> Reinstatement of the grievants to the positions and/or hours held prior to the improper action by the Employer; back pay and benefits, including pension credit, retroactive to the date of the wrongful action, plus interest; and such other relief as may be appropriate.

Positions of the Parties

The City's Position

OMLR argues that the provisions of Article IX do not apply to the named grievants. The City contends that each of the grievants holds, or held, the per sessional title of Physician and is, or was, an employee of HHC. Petitioners maintain that Article IX, Section 1 excludes HHC employees from coverage and that Section 3 of that Article limits applicability to per annum employees. Thus, urges the City, the grievants have no standing to allege a violation of Article IX. Moreover, contends the City, the allegations are without merit.

The City expands on its arguments regarding the exclusion of per sessional employees from coverage of the provisions of Article IX in its reply. OMLR maintains that the union has conceded that all of the grievants are, or were, per sessional employees. Since the exclusionary language of Article IX, Section 3 is clear in limiting the applicability

of that Article to per annum employees, argues OMLR, there is no need to submit the matter to arbitration. In support of its position, the City cites Decision No. B-10-79, in which we stated:

> In the instant cases, there is no question that the parties have included in their collective bargaining agreement (see Article XXII) a grievance procedure culminating in final, binding arbitration. It is also clear, however, that the parties have limited the rights created by Article XX and Article XII, Section 4B of the contract. These Articles provide that the Fire Department's decisions concerning the filling of vacancies and the granting of leave, respectively, are final.
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> The UFA would have the Board send these cases to arbitration on the ground that any and all questions of contract interpretation are for the arbitrator. If the Board were to carry this proposition to its logical conclusion, reductio ad absurdum, it would have to send to arbitration disputes involving contract provisions containing language specifically barring such disputes from the grievance procedure, in order to afford the arbitrator the opportunity to interpret the meaning of the exclusionary language. This would not only be an abuse of the process but would necessitate that the parties incur the expense of needless arbitration proceedings. Moreover, it would force the City to submit to arbitration a matter it rightfully believed to be an issue on which, by agreement, it had the last word.
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> The dictionary defines "final" as "leaving no further chance for action, discussion, or change; deciding; conclusive." As the Board has stated in Decision No. B-19-75, where contract language is clear and unambiguous on its face, there is no need to look to the intent of the parties or to the other provisions of the contract to aid in the interpretation of the clause at issue.

OMLR further contends in its reply that the Union is alleging a violation of Article IX as a "subterfuge", claiming that Doctors Council is actually attempting to arbitrate an alleged violation of Article IV, Section 2.

Article IV, Section 2 of the Agreement states:

> Effective July 1, 1981, employees in the hourly paid Physician title employed by the Health and 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.

Article XV, Section 5, referred to above, reads as follows:

> The Labor-Management Committees will meet within 30 days of Financial Control Board approval of the Contract and shall make their best efforts to issue an initial report within 120 days on the subjects of:
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> a) The movement of per session employees who work 10 or more hours per week into corresponding Attending Physician or other per annum titles, without additional cost to the Employer, and without loss of benefits to the employee.
> b) Current education practices, including appropriate recommendations.
> c) Current on call practices, including appropriate recommendations.

OMLR argues that pursuant to the language of Articles IV and XV the movement of per session employees into per annum titles is not an issue within petitioners' exclusive control; therefore, responsibility for any failure to implement the language of Article IV, Section 2 must be shared by the Union.

In its reply, the City claims that Doctors Council never filed a grievance over petitioners' alleged failure to implement Article IV, Section 2. In response to a "sur-reply"[1] filed by the Union, the City acknowledges that in October, 1982 the Union grieved the alleged failure to implement the provisions of Article IV, Section 2. However, claims the City, the grievance was untimely filed and the Union chose to pursue the matter in negotiations rather than through the grievance procedure. The City urges that Doctors Council should not be permitted to force the City to arbitrate an alleged violation of Article IV under the "guise" of an Article IX grievance.

The City further maintains that the Union's surreply should be disregarded since it is not a pleading provided for in the Revised Consolidated Rules of the office of Collective Bargaining ("the Rules").

[1] The basis for the Union's filing of this "surreply" was to refute this assertion by the City and to provide specific details concerning the Article IV, Section 2 grievance.

The Union's Position

Doctors Council asserts that grievants have standing to file and pursue the instant claim to arbitration. The grievants, maintains the Union, obtained per annum Attending Physician status as of July 1, 1981 pursuant to the provisions contained in Article IV, Section 2 and are thus covered by the language of Article IX. Doctors Council contends that Articles IX and IV must be read together; issues pertaining to the construction of these Articles and the applicability of Article IX to the grievants amount to matters of contract interpretation and application within the province of the arbitrator. Similarly, maintains the union, the City's arguments relating to the merits are not properly before this Board, for issues relating to the merits of a claim are also to be determined by the arbitrator. In support of its position, Doctors Council quotes Decision No. B-6-77:

> [T]his Board has previously ruled that a contention that the contract provision cited by the party seeking arbitration was not intended to deal with the claimed grievance goes to the merits of the matter and therefore is an argument appropriate for presentation to an arbitrator rather than the forum dealing with questions of arbitrability (see Board Decisions Nos. B-4-72 and B-8-74). The interpretation of contract terms and the determination of their applicability in a given case are functions reserved to an arbitrator.

With regard to the grievance filed in October, 1982 concerning HHC's alleged failure to implement the terms of Article IV, Section 2, the Union states that the "class-wide" grievance filed on behalf of "all sessional employees" is still pending at Step III of the grievance procedure.

Discussion

Initially, we note that the Rules do not make provisions for the filing of a surreply or a response thereto. However, the unusual circumstances of this case, in which each exchange of pleadings has opened up new areas of Controversy, persuade us that this is an appropriate instance, in the exercise of discretion, to eschew strict adherence to form and procedural precision in favor of obtaining a more complete and accurate exposition of the issues and the relevant facts and circumstances as the basis for our decision in this matter.

The parties in the present matter do not dispute their obligation to arbitrate grievances. Rather, the threshold determination that must be made concerns the standing of the individuals named as grievants to pursue an alleged violation of Article IX to arbitration.

The City first claims that employees of HHC are excluded from coverage of Article IX as a result of the

language contained in Section 1 thereof. That provision clearly states that Article XVI of the 1978-1980 City-wide contract between the City and District Council 37 shall apply to non-HHC employees in issues pertaining to the abolition of positions, reductions in staff, demotions and preferred lists. However, Article IX, Section 2 covers HHC employees with regard to these same subjects. The matters presently being grieved (i.e., layoffs and reductions in hours) are arguably encompassed by the aforementioned categories. The Request for Arbitration cites "Article IV as the contractual provision violated. Since Section 2 covers the employees in question, we cannot say that grievants are precluded from pursuing the instant grievance on account of their status as HHC employees. To hold differently would be to bar otherwise covered HHC employees with job security grievances from utilizing the Agreement's grievance procedure/arbitration machinery.

The second issue pertaining to standing concerns grievants' proper employment classification, i.e., whether they are per session or per annum employees, for if per session, grievants are excluded from Article IX's coverage. Doctors Council concedes that grievants are being carried as per session employees. However, the Union avers that grievants are entitled to per annum status but have not

been so classified on account of the City's failure properly to implement other contractual provisions, namely, Article IV, Section 2.

There is no question that the Union sought implementation of the provisions of Article IV, Section 2 to put grievants in per annum status and it is clear that the matter reached the third step of the grievance procedure.

The present status of the Article IV, Section 2 grievance is unclear, however. The Union maintains that the grievance is still pending at Step III; the City claims that Doctors Council chose to resolve the matter through bargaining.

Although the request for arbitration cites a violation of Article IX, we note that the correspondence from the Doctors Council to Harlem Hospital and Seaview Hospital dated April 26, June 14, June 28 and August 22, 1983, constituting the Step 1 submission of the grievances on behalf of the six grievants, specifically allege a violation by the hospitals and HHC of both Articles IV and IX. Similarly, the Step 3. determination by OMLR acknowledges that the Doctors Council had alleged a violation of both Articles IV and IX and that decision shows that the Hearing officer considered the Article IV allegations and ruled against the grievants. Therefore, because of the clear relationship

between Articles IV and IX in the determination of this matter, we have concluded that an arbitrable dispute has been presented. However, in directing arbitration, we will require that the arbitrator first determine the grievants' classification status in accordance with Article IV and, if the arbitrator finds that the grievants or any of them are per annum employees, the arbitrator may then determine their rights, if any, under Article IX.

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 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.
March 5, 1984

ARVID ANDERSON
CHAIRMAN

MILTON FRIEDMAN
MEMBER

DANIEL G. COLLINS
MEMBER

EDWARD F. GRAY
MEMBER

EDWARD SILVER
MEMBER

JOHN D. FEERICK
MEMBER