HHC v. NYSNA, 33 OCB 6 (BCB 1984) [Decision No. B-6-84 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

DECISION NO. B-6-84

DOCKET NO. BCB-668-83 (A-1721-83)

Petitioner,

-and

NEW YORK STATE NURSES ASSOCIATION

Respondent.

DECISION AND ORDER

On July 25, 1983, the New York Health and Hospital Corporation ("HHC" or "the Corporation") filed a petition challenging the arbitrability of a grievance that is the subject of a request for arbitration filed by the New York State Nurses Association ("NYSNA" or "the Association"). On August 5, 1983, respondent filed its answer, to which petitioner replied on September 2, 1983. A sur-reply was submitted on October 2, 1983.

Request for Arbitration

On June 16, 1982, Pauline Collins was appointed to the position of Assistant Head Nurse at Elmhurst Hospital, a position which she held until her subsequent appointment to the position of Supervisor of Nurses on January 3, 1983.

In a letter dated March 24, 1983, the grievant was informed by Elmhurst Hospital's Personnel Department that

she had failed her probationary period and that effective April 2, 1983, she would be returned to her prior position of Assistant Head Nurse. on March 29, 1983 the union initiated a Step I grievance in her behalf, stating a violation of Article VI, Section 9 of the July 1, 1980 - June 30, 1982 Staff Nurses Agreement which provides, in pertinent part, as follows:

> Grievances relating to a claimed wrongful disciplinary action taken against an employee shall be subject to and governed by the following special procedures:
>
> The provisions contained in this section shall not apply to the following category of employees covered by this contract:
>
> > Full-time employees with less than three (3) months of service unless a longer period is agreed by the Association.
> >
> > Any per them employee who works at least half-time per week and has performed such per them work for at least six (6) months shall be entitled to utilize the contractual grievance procedure (including disciplinary matters) up to and including Step III.
>
> Step I. - Following the service of written charges upon an employee, with a copy to be sent to the Association's New York City office, a conference shall be held with respect to such charges by a person who is designated by the agency head to review such charges. The employee may be represented at such conference by a representative of the Association. The person

> designated by the agency head to review the charges shall take any steps necessary to a proper disposition of the charges and shall issue a decision in writing by the end of the fifth day following the date of the conference.
>
> Step II. - If the employee is dissatisfied with the decision in Step I above, she/he may appeal such decision. The appeal must be within five (5) working days of the receipt of such decision. Such appeal shall be treated as a grievance appeal beginning with Step II of the Grievance Procedure set forth herein.

On June 24, 1983, a request for arbitration was filed with the Office of Collective Bargaining alleging "unfair disciplinary action" and requesting that the demotion be rescinded and that grievant be restored to the Supervisor of Nurses position with full back pay and benefits.

Throughout this proceeding, petitioner has maintained that the failure of the probationary period was and is not a matter with respect to which a grievance can be brought.

Positions of the Parties

HHC's Position

The grounds asserted as the basis for HHC's petition challenging arbitrability may be summarized as follows:

1. Article VI, Section 9 of the contract provides that full-time employees with less than three months of service are not covered by the disciplinary grievance procedure. Since the grievant was notified, within three months, that she had failed her probationary term, she was not covered by the grievance procedure.

2. Article VI, Section 9 provides that written charges shall be filed upon an employee who is being disciplined. Since, it is alleged, none was filed upon the grievant, no disciplinary action, wrongful or otherwise, was taken against her.

3. Rule 5:2:1 of the HHC Personnel Rules and Regulations, promulgated pursuant to Section 7390 of the Unconsolidated Laws of the State of New York, provides that

> [e]very appointment and promotion in the competitive or non-competitive class shall be made subject to the successful completion of a probationary period. The probationary period shall be twelve months and with extensions shall not exceed eighteen months.

Since it is alleged, Article VI, Section l(b) of the collective bargaining agreement provides that the Rules and Regulations of HHC, as they relate to matters set forth in Section 7390 of the Unconsolidated Laws, are non-grievable, and since this proceeding concerns an employee who had not yet completed the one-year probationary period, there is no basis for the request for arbitration. Furthermore, the Board itself, HHC argues, has made clear its position that an employee may be terminated at the end of the probationary period without charges or a hearing provided that the decision to terminate is not made in bad faith. Health and Hospitals Corp. v. Local 237 Teamster, Decision No. B-11-76.

In its reply, HHC repeats its previous assertion that matters set forth in Section 7390 of the Unconcolidated Laws - "policies" "practices", "procedures relating to position classifications," and "promotion" - are not subject to the contractual grievance -arbitration provision, and that the length of the probationary period is clearly amongst

the excluded subjects.

HHC further contends that the successful completion of the probationary period for one title cannot be counted toward the completion of the probationary period for another title.

> Upon appointment from a former title to a higher title, an employee must again serve an evaluatory period to determine whether they can meet the additional responsibilities and skill required in their new title.

HHC additionally asserts its statutory right to "determine the standards for selection of employment," pursuant to Section 1173-4.3 (b) of the New York City Collective Bargaining Law, and concludes that it acted well within those rights in establishing a longer period of probation. HHC also notes (1) the absence of a contractual provision on eligibility for review of disciplinary action; (2) the misrepresentation by respondent of the action complained of as a "disciplinary action"; and (3) the failure by grievant to, in any event, meet even the three months of service requirement for the review of disciplinary action under Article VI, Section 9. For all these reasons, HHC maintains that the request for arbitration should be denied and the petition challenging arbitrability granted.

NYSNA's Position

Respondent, in support of its answer to the petition challenging arbitrability, sets forth the following background pertaining to the subject of probation and relevant to the instant proceeding. On September 24, 1980, William C. Howe, Personnel and Labor Relations Vice President at the Corporation, issued a memorandum, "Change in Probationary Period", which purported to establish a probation term of 12 months unless otherwise provided in the applicable collective bargaining agreement. The 1980-82 and 1982-84 collective bargaining agreements between the Corporation and the Association relating to the titles at issue in this proceeding each established a three-month probationary period which, it is alleged, was satisfied by the grievant herein. Even, however, had the grievant not completed an otherwise designated probationary period at the time of her reassignment on April 2, 1983, the collective bargaining agreement would not preclude a grievance over her "demotion" as she had more than three months of service with the Corporation at the time.

To its answer to the petition challenging arbitrability, NYSNA attached the following correspondence between District Council 37 Director of Research, Alan R. Viani, and Mr. Howe of the Corporation. The first correspondence

is an October 30, 1980 letter in which Alan Viani registered his concerns over the "Change in Probationary Period" Memorandum of September 24, 1980, and 'indicated that he assumed that

> ... the extension of the probationary period from 6 to 12 months will in no way contravene the contractual provision which provides a non-competitive probationary employee with the right to a termination hearina after three months on the job.

In that letter, Mr. Viani requested an immediate scheduling of negotiations on, among other things, Rule 5:2:1 of the Personnel Rules and Regulations of the Corporation which sought to lengthen the term of probation. The second correspondence is a November 6, 1980 letter from William Howe to Mr. Viani in which he indicated that a Task Force would be assigned to study the areas of concern cited in Mr. Viani's letter and that upon the completion of the study, a meeting would be arranged to discuss the revisions. The third is a letter dated December 2, 1980, in which Mr. Howe reported the Task Force's results, including the following section:

> Probationary Period
>
> An interpretive memorandum (copy attached) was issued September 24, 1980 advising all facilities that the probationary period is twelve months unless otherwise set forth

> in the collective bargaining agreement covering the title. Since probationary employees do not have a right under civil service law to a termination hearing, whenever a contractual provision provides for a hearing, whenever a contractual provision provides for a hearing after three months, we interpret that as establishing a three months probationary period. The Corporation's decision to adopt a twelve month probationary period is in line with similar action taken by the City some time ago.

The Association maintains that at no time did it agree to a probationary period of more than three months for any class or group of HHC employees which it represents.

Lastly, NYSNA maintains that notwithstanding HHC's contention to the contrary, the failure by HHC to file written charges against the grievant, far from establishing that no disciplinary action was taken, may itself have violated Article VI, Section 9 of the collective bargaining which provides as follows:

> Following the service of written charges upon an employee, with a copy to be sent to the Association's New York City office, a conference shall be held with respect to such charges by a person who is designated by the agency head to review such charges. The employee may be represented at such conference by a representative of the Association. The person designated by the agency head to review the charges shall take any steps necessary to a proper disposition of the charges and shall issue a decision in writing by the end of the fifth day following the date of the conference.

NYSNA concludes from the foregoing facts that the dispute herein directly emanates from a disagreement between the Association and the Corporation over the application and interpretation of Article VI of the collective bargaining agreement, the resolution of which clearly resides in the arbitral forum. The Association's request for arbitration should, therefore, be granted.

Discussion

We have long held that it is the policy of the New York City Collective Bargaining Law to promote and encourage arbitration as the selected means for the adjudication and resolution of grievances.[1] We have, however, stressed that this Board cannot create a duty to arbitrate where none exists nor enlarge a duty to arbitrate beyond the scope established by the parties by contract or otherwise. A party may be required to submit to arbitration only to the extent that it has previously consented and agreed to do so.[2] Thus, in deciding issues of arbitrability, we first ascertain whether the parties have agreed to resolve their disputes through arbitration, and, if so, whether that obligation encompasses the controversy under Board consideration.

[1] See NYCCBL Section 1173-2.0 and Decision Nos. B-8-68, B-1-75, B-19-81, B-15-82, B-41-82.

[2] Decision Nos. B-12-77, B-15-82, B-41-82.

We begin our inquiry, therefore, with an examination of Sections 5:2:1 and 5:2:2 of the Personnel Rules and Regulations of the Health and Hospitals Corporation, promulgated pursuant to the New York City Health and Hospitals Corporation Act, which provide as follows:

> 5:2:1 Every appointment and promotion in the competitive or non-competitive class shall be made subject to the successful completion of a probationary period.
>
> 5:2:2 The Appointing officer may terminate a probationer for gross misconduct or because his performance is not satisfactory at any time during the course of his probation by written notice to the probationer.
>
> In the case of probationers in competitive titles where performance is not satisfactory, he may do so only after a minimum period of probationary service of two months for original appointment, and four months for promotion appointments.

We also note that Article VI, Section l(b) of the collective bargaining agreement expressly removes from the grievance-arbitration procedure "disputes involving the Rules and Regulations of the New York City Civil Service Commission[3] or the Rules and Regulations of the Health

[3] It is well settled that under civil service law, a probationary employee may be terminated at the end of the probationary period without charges or a hearing provided that the decision to terminate is not made in bad faith

and Hospitals Corporation with respect to those matters set forth in the first paragraph of Section 7390.1 of the Unconsolidated Laws... 11 Moreover in Section 9 of Article VI the parties have expressed the intention that full-time employees with less than three months of service not be covered by the disciplinary grievance procedure.

In the instant matter, grievant was appointed to the position of Supervisor of Nurses on January 3, 1983. On March 24, 1983, before she completed three months of service in that title, she was notified in writing that she had failed her probationary period and would, effective April 2, 1983, be returned to her former position as Assistant Head Nurse.

The grievance, which alleged "unfair disciplinary action" was brought pursuant to a contract provision which clearly does not apply in these circumstances. Grievant had not served in the higher title for three months, and cannot, therefore, avail herself of the disciplinary

(FOOTNOTE 3 CONTINUED)
Voll v. Helbing, 9 NYS 2d 376 [App Div 3rd Dept(1939)], appeal dismissed 294 NY 653 (1945) ; Ramos V. Dept. of Mental Hygiene, 311 NYS 2d 538 [App Div lst Dept (1970)]; Howard v. Kross, 202 NYS 2d 445 (1960),.

procedure applicable to "permanent" employees. The fact that grievant served satisfactorily in another title for a period of almost seven months is inconsequential. The purpose of probation is to establish, as stated by HHC, a period during which an employer can evaluate employees "to determine whether they can meet the additional responsibilities and skills required in their new title." Since a promotion brings with it different, if not greater duties and responsibilities, an employee's performance in the lower title does not serve the evaluatory purpose of the requirement of probation.

In Matter of New York Health and Hospital Corporation and Local 237, International Brotherhood of Teamsters, Decision No. B-11-76, when considering the rights of a probationary employee serving in the Corporation, we found that

> [t]aken together, the various provisions of the contract between the parties do not indicate any intent to grant probationary employees the right to arbitrate their dismissal at the end of the probation period. The definition of a grievance specifically omits from the scope of arbitrable matters the application of civil service rules. Furthermore, although the contract defines a grievance as "a claimed wrongful disciplinary action," Section 4 [4] of the contract specifies a disciplinary procedure applicable to "permanent" employees only. Where it is sought to enlarge the

[4] The equivalent of Section 9 under the 1980-82 collective bargaining agreement.

> traditional and well-defined incidents of probationary status, the Board will require an explicit contractual expression of that intent. We find no-such expression of intent in the contract before us now. Therefore, we shall deny the request for arbitration.

Based on the clear language contained in the collective bargaining agreement pursuant to which this grievance is brought, we cannot find that a duty to arbitrate this grievance exists. Nor can we find that an ambiguity exists which would itself create the need for arbitral resolution. We must, therefore, deny the request for arbitration.

O R D E R

Pursuant to the power vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

ORDERED that the petition of the Health and Hospitals Corporation herein be, and the same hereby is, granted; and it is further

ORDERED that the Union's request for arbitration be, and the same hereby is, denied.

DATED: New York, N.Y.
March 5, 1984

ARVID ANDERSON
CHAIRMAN

DANIEL G. COLLINS
MEMBER

MILTON FRIEDMAN
MEMBER

EDWARD F. GRAY
MEMBER

EDWARD SILVER
MEMBER

JOHN D. FEERICK
MEMBER