HHC v. CIR, 35 OCB 33 (BCB 1985) [Decision No. B-33-85 (Arb)]

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

NEW YORK CITY HEALTH AND
HOSPITALS CORPORATION,

Employer, DECISION NO. B-33-85

-and- DOCKET NO. BCB-777-85
(A-2102-85)

COMMITTEE OF INTERNS AND
RESIDENTS,

Respondent.
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DECISION AND ORDER

The New York City Health and Hospitals Corporation (hereinafter "the employer") has filed a petition challenging the arbitrability of a grievance submitted by the Committee of Interns and Residents (hereinafter "the Union") concerning the claimed improper withdrawal of an offer to promote Dr. James McIntosh to the position of Chief Resident in the Department of Psychiatry for the year 1984-1985, and the failure to appoint Dr. McIntosh to that position. The Union filed an answer to the petition, alleging that the grievance is arbitrable in its entirety.

Background

The facts in this matter are as follows. In the spring of 1984 the employer's Department of Psychiatry at Harlem Hospital offered McIntosh a promotion into a position as

Chief Resident. After McIntosh accepted the Chief Resident position, the offer was withdrawn. In its answer to the petition, the Union alleges that "witnesses are available to testify that the reason given for the withdrawal was Dr. McIntosh's activities as President of the Harlem Hospital chapter of [the Union]". This statement is supported by an attached affidavit.

On or about June 27, 1984, the Union filed a grievance alleging violations of Article II, Section 2 and Article XV of the collective bargaining agreement in that:

> ... Dr. McIntosh was denied the Chief Resident position in Psychiatry for 1984-85 because of union activity. Further, we consider this action by the Department as constituting a wrongful disciplinary action in violation of Article XV.
>
> The Union seeks the immediate appointment of Dr. McIntosh as Chief Resident for 1984-85, with compensation for Dr. McIntosh as a Chief Resident commencing July 1, 1984.

Article II, Section 2 of the parties' agreement reads as follows:

> The City agrees and the Corporation agrees, that they will exercise their best efforts to see that... (House Staff Officers (HSOs)] suffer no discrimination or reprisals at City health facilities or Corporation health facilities respectively by reason of their membership in or legitimate activities on behalf of the Committee.

Article XV proscribes disciplinary action against HSOs except for cause and sets forth procedures to be followed in the event of disciplinary action. Article XV, Section 3 specifically provides that when disciplinary action is "contemplated", written charges "shall" be prepared and presented to the Union and to the employee. It is alleged in the petition, without contradiction by the Union, that no such charges were ever brought against McIntosh.

On or about March 26, 1985, after the grievance had been denied at steps I and II of the grievance procedure, the Union filed its request for arbitration. Thereafter, the instant petition was filed with the Board.

Positions of the Parties

Employer's Position

The employer asserts that the Union has failed to establish any basis for arbitration of either of its claims. Regarding the alleged violation of Article XV of the agreement, the employer argues that since no disciplinary measures were taken against McIntosh, it could not have violated that provision. Clearly, according to the employer, the mere failure to appoint McIntosh as Chief Resident was not disciplinary, and no disciplinary action of any kind was ever contemplated, proposed or imposed.

With regard to Article II, Section 2 of the agreement, the employer contends that nothing in the agreement limits its unfettered management right to make job appointments pursuant to §1173-4.3(b) of the New York City Collective Bargaining Law. In addition, the employer argues that the Union has not shown any nexus between the actions it has grieved and the alleged violation of this section of the agreement.

Union's Position

Factually, the Union relies exclusively upon its contention that McIntosh had his promotion rescinded because of his union activity. It follows, according to the Union, that McIntosh was punished and disciplined without the procedures of Article XV of the agreement having been followed, and that a violation of those procedures is clearly arbitrable. Further, the Union claims that the employer's management rights are not a sword which can be used to violate provisions of the agreement such as Article II, Section 2. Finally, with regard to its allegation of discrimination, the Union claims it has established a nexus between the employer's failure to promote McIntosh and Article II, Section 2.

Discussion

The issues to be decided in this case revolve solely around the employer's failure to appoint McIntosh to a Chief Resident position. The Union alleges that, in this regard, the employer breached two provisions of the collective bargaining agreement. In order to establish its right pursuant to that agreement to proceed to arbitration of these two claims, the Union must allege sufficient facts to establish a prima facie relationship between the act complained of and the source of the alleged rights.[1]

With regard to the claim of discrimination, we conclude that the Union has demonstrated that Article II, Section 2 of the agreement is at least arguably related to the failure to appoint McIntosh to the Chief Resident position. Put another way, we find that the Union has established a sufficient nexus between its claim that Dr. McIntosh, President of the Harlem Hospital chapter of the Union, was discriminated against because of his union activity, in violation of Article II, Section 2 and the withdrawal of the offered appointment to the position of Chief Resident for 1984-1985 to warrant further examination of this allegation

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[1] See, e.g., Decision No. B-8-81

in the arbitral forum. We note that the Union has stated, in its answer to the petition and by way of its contract administrator's affidavit, that witnesses are available to testify that the reason given by the employer for the withdrawal of the offer was Dr. McIntosh's activities on behalf of the Union.

The employer's uncontested right to manage does not require a different result. As we have previously stated In the Matter of the City of New York and District Council 37, AFSCME, AFL-CIO, Decision No. B-8-81, at p. 10:

> This right to manage, and the reservation of an area in which management is free to act unilaterally in order to manage effectively and efficiently, is not a delegation of unlimited power. The protected area is not intended to be so insulated as to preclude any examination of actions claimed to have been taken within its limits. In short, it is intended as a means to enable management to do that which it should do but not as a license to do that which it should not. Section 1173-4.3b does not. authorize management to abrogate the statutory or contractual rights of employees ....

For the above stated reasons, we shall grant in this respect the Union's request for arbitration under the provisions for arbitration set forth in Article XIV, Section 2 of the collective bargaining agreement and dismiss that portion of the employer's petition which challenges the

arbitrability of the claim alleging a violation of Article II, Section 2 of the agreement.

However, we reach a different conclusion with regard to the Union's attempt to arbitrate its claim that the denial of the promotion to McIntosh also constituted a form of discipline in violation of Article XV of the agreement. It is clear to us that the Union has not established an arguable basis for its claim that the treatment accorded McIntosh was for a disciplinary purpose within the meaning of Article XV. The Union's bare allegation that the denial of the promotion was disciplinary does not suffice to sustain its burden in this proceeding of establishing to the satisfaction of the Board that a substantial issue involving the interpretation of Article XV has been framed.

Having concluded that a sufficient nexus has not been established between the failure to appoint McIntosh to the Chief Resident position and the alleged contractual right to grieve disciplinary action or procedural violations in the course of the administration of discipline, we shall grant this portion of the petition and deny the Union's request for arbitration i n this respect.

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 portion of the employer's petition challenging the arbitrability of the Union's claim that Article II, Section 2 of the collective bargaining agreement has been violated be, and the same hereby is, denied, and the Union's request for arbitration in this regard be, and the same hereby is, granted; and it is further

ORDERED that the portion of the employer's petition challenging the arbitrability of the Union's claim that Article XV of the collective bargaining agreement has been violated be, and the same hereby is, granted, and the Union's request for arbitration in this regard be, and the same hereby is, denied.

DATED: New York, N.Y.
October 31, 198

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MEMBER

DANIEL G. COLLINS
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EDWARD SILVER
MEMBER

JOHN D. FEERICK
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