HHC v. CIR, 37 OCB 30 (BCB 1986) [Decision No. B-30-86 (Arb)]

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

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Petitioner,

-and-

COMMITTEE OF INTERNS AND RESIDENTS,

Respondent.
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DECISION NO. B-30-86

DOCKET NO. BCB-808-85
(A-2188-85)

DETERMINATION AND ORDER

On August 23, 1985, the New York City Health and Hospital ("HHC" or "Petitioner") filed a petition challenging the arbitrability of a grievance filed by the Committee of interns and Residents ("CIR" or "respondent") on or about July 20, 1985. Respondent filed an answer to the petition on September 6. 1985. HHC did not submit a reply.

Background

It appears that, on or about April 1. 1984, Dr. Perry Mollick ("the grievant"), a resident physician at Coney Island Hospital, advised his supervisor that he would be absent the following day on account of the illness of his father. It further appears that the grievant remained out for the entire week and, during the period from April 2 through May 6. 1984, that he reported to work on only two days. The grievant

maintains that he attempted to report to work on April 9, 1984, but was advised that his services were no longer required. HHC asserts that the grievant was never told not to come to work, but was advised that he could not be compensated for time he elected to take off to be with his sick father.

On June 21, 1984, CIR filed a grievance, alleging that Dr. Mollick was improperly denied four weeks pay "in and around May" 1984. CIR also alleged that the grievant was denied payment for "bereavement leave" taken when his father passed away. Violations of Article IV; Article V, Section 6; and Article XV, Section 1 of the 1982-1984 collective bargaining agreement between the parties ("the Agreement") were alleged.[1]

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[1] Article IV (Wages) establishes pay levels and prescribes wages increases and differentials for House Staff Officers ("HSOs"). ("HSO" is the term used in the Agreement to refer to all employees in titles for which CIR is the exclusive bargaining representative. Article I,,Section 1).

Article V (Vacations and Leave Time), Section 6 provides for payment for three days of leave which may be taken within a reasonable time of the death of a parent or other related person as prescribed therein (so-called "bereavement leave").

Article XV (Disciplinary Action), Section 1 prohibits the taking of disciplinary action without cause and without adherence to specified procedures.

The grievance was denied at the lower steps of the contractual grievance procedure on the bases that payment for bereavement leave had been made and that the grievant's absences during an additional, four-week period were voluntary, unauthorized and therefore not compensable under the Agreement. Thereafter, the Union filed the request for arbitration which is the subject of HHC's petition in this case. CIR seeks full and immediate-payment for the grievant as a remedy for the alleged contract violations.

While this matter was pending before the Board, CIR submitted a letter, dated April 10, 1986, withdrawing its claim for bereavement pay under Article V, Section 6 of the Agreement. Respondent concedes that the grievant has been paid for the three days of leave taken pursuant thereto. Accordingly, we shall not consider the arguments of the parties with respect to this allegation.

Positions of the Parties

HHC's Position

Petitioner asserts that the alleged violation of Article IV (Wages) is not arbitrable because that provision does not authorize payment during periods when an employee absents himself from work. Therefore, it is alleged, CIR has failed to state a cause of action for which relief may be granted

under Article IV of the Agreement.

With respect to the claim founded upon Article XV, Section 1 of the Agreement, HHC asserts that no disciplinary action was taken against the grievant and, therefore, that no arbitrable claim has been stated.

Finally, petitioner asserts that the request for arbitration must be denied because CIR has failed to submit a written waiver of the right to submit the same underlying dispute to another forum, as required by Section 1173-8.0d of the New York City Collective Bargaining Law ("NYCCBL")[2] and Section 6.3 of the Revised Consolidated Rules of the office Collective Bargaining ("Rules").[3]

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[2] Section 1173-8.0d. of the NYCCBL provides as follows:

> As a condition to the right of a <u>municipal</u> employee organization to invoke impartial arbitration under such provisions, the grie-ant 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 organi-zation to submit the underlying dispute to any other administrative or judicial tri-bunal except for the purpose of enforcing the arbitrator's award.

[3] Section 6.3 of the Rules provides as follows:

> <u>Request-Contents; Waiver. a.</u> A request for arbitration shall contain plain and con-cise statement of the grievance to be arbi-

For the aforementioned reasons, HHC maintains that its petition challenging arbitrability should be granted.

CIR's Position

CIR contends that petitioner's objections to arbitrability are frivolous, as each of them amounts to nothing more than an assertion that, if the facts are as petitioner deems them to be, HHC did not violate the Agreement, Respondent argues that the Board has no basis for deciding the merits of the grievance asserted herein and, moreover, that it is not appropriate for us to do so. According to CIR, HHC does not dispute that claims

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trated; the request shall be on a form prepared for that purpose by the Board.

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(3 continued):

b. If the request for arbitration is served by a public employee organization, ere 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.

arising under Articles IV and XV of the Agreement are arbitrable.

Respondent further maintains that this Board has adopted the federal policy expressed in the Steelworkers Trilogy under which, according to CIR, a grievance is presumptively arbitrable unless specifically excluded by the arbitration pro-

visions of the collective bargaining agreement. Under this test, it is claimed, the grievance asserted herein must be referred to arbitration.

Finally, with respect to HHC's statutory defense under NYCCBL Section 1173-8.0d, respondent states that it has now filed the required waiver and has served a copy of same on HHC.

For the aforementioned reasons, CIR asserts that the request for arbitration should be granted.

Discussion

At the outset, we take administrative notice of the fact that a waiver, dated August 13, 1985, on a form provided by the Office of Collective Bargaining ("OCB"), signed both by the grievant and by respondent's attorney, was submitted under cover of a letter dated August 28, 1985 to former OCB Deputy Director Chairman Thomas M. Laura. We therefore find that CIR has complied with the waiver requirement of the statute and Rules and that it has fulfilled the condition precedent to arbitration that is prescribed therein.

We turn now to the issues of substantive arbitrability raised in the petition filed by HHC. As we have long held, it is our function in determining arbitrability to decide whether the parties have obligated themselves to arbitrate their con-

troversies and, if so, whether the particular dispute presented lies within the scope of that obligation.[4] It is clear in the present case that HHC and CIR are parties to a collective bargaining agreement which includes a grievance procedure that culminates in final and binding arbitration. The term "grievance" is defined therein to include, inter alia:

> (A) A dispute concerning the application or interpretation of the terms of this collective bargaining agreement [Article XIV, Section 1].

In the present case, the union asserts that management's refusal to pay the grievant for a period of four weeks during which he was absent from work violates two provisions of the Agreement. Insofar as Article IV (Wages) is concerned, CIR maintains that the grievant was denied pay accrued pursuant to that Article for a period during which he was prevented by his employer from reporting to work. HHC does not deny that salary disputes are arbitrable generally. However, it argues that Article IV does not afford the basis for an arbitrable claim in this case, as it does not authorize payment of wages to an employee for periods of voluntary absence which, petitioner claims, was the case here. With respect to Article XV, CIR contends that the denial of pay without

[4] Decision Nos. B-2-69; B-8-74.

adherence to prescribed procedures violates the contractual prohibition against taking disciplinary action without due process. HHC denies that the grievant was subjected to disciplinary action.

We find that the two "causes of action" advanced by CIR are but alternative theories for the same grievance, i.e., that the Agreement has been violated by the failure to pay the grievant the contractual wage. Alleged violations of contract are patently a basis for grievance arbitration.[5]

More particularly, Article IV establishes pay levels for covered employees in accordance with their post-graduate year (PBY) and it sets forth the salary rates that are applicable to each PGY level. CIR's allegation that the grievant was improperly denied four weeks' pay amounts to a claim that the grievant was denied a benefit guaranteed him by Article IV Accordingly, we find respondent's wage claim to be arbitrable. The parties' dispute as to whether the grievant voluntarily absented himself from his post or was prevented by the employe from reporting to work goes to the underlying issue of the grivant"s entitlement to the wages denied. This question of course, involves the merits of the dispute into which the Board does not inquire.[6]

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[5] Article XIV Section I(A).

[6] Decision Nos. B-12-69; B-8-74; B-10-77; B-4-81; B-20-82; B-10-86

CIR's claim that the denial of wages was effected in contravention of procedural rights affored the grievant by Article XV also speaks to a failure to fulfill the terms of the Agreemnet and is arbitrable in accordance with Article XIV. We note that Article XV, Section 1 provides, in part, that "[n]o HSO's pay check shall be withheld for disciplinary reasons except after full compliance with the procedures herein provided."

In the present case, therefore, respondent has established to our satisfaction that there is a prima facie relationship between the act complained of (denial of pay) and the sources of the right which is sought to be redressed through arbitration (Articles IV and XV of the Agreement). Therefore, we conclude that the grievance presented is within the scope of the parties' agreement to arbitrate and shall direct that this matter be submitted to arbitration.

An additional comment concerning the union's characterization of our role in determining questions of arbitrability is warranted in this case. We have frequently cited the decisions of the United States Supreme Court collectively known as the Steelworkers Trilogy [7] and have referred, in

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[7] Steelworkers V. American Mfg. Co., 46 LRRM 2414 (1960); Steelworkers v. Warrior and Gulf Navigation Co., 46 LRRM 2416 (1960); Steelworkers V. Enterprise Wheel and Car Corp., 46 LRRM 2423 (1960).

particular, to the Court's discussion of the role of the tribunal considering arbitrability, which is "confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract." [8] We also frequently have referred to the test of arbitrability applied by the Court:

> An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.[9]

Moreover, the NYCCBL itself expressly states that:

> It is ... the policy of the City to favor and encourage... final, impartial arbitration of grievances between municipal agencies and certified employee organization.[10]

Notwithstanding the above, however, we also have long held that in determining arbitrability we will inquire as to the *prima facie* relationship between the act complained of and the source of the right which is sought to be redressed

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[8] *Steelworkers v. American Mfg. Co.*, *supra* at 2415. *See*, No. B-15-80.

[9] *Steelworkers v. Warrior and Gulf Navigation Co.*, note 8 *supra* at 2419. *See*, Decision Nos. B-5-74; B-18-74; B-28-75; B-1-78; B-15-80.

[10] NYCCBL §1173-2.0.

through arbitration. Where challenged to do so, a grievant must establish that the contract provision he has invoked is arguably related to the grievance to be arbitrated.[11]

Thus, in asserting that this Board follows a rule of presumptive arbitrability, CIR overstates the position adopted by this Board. It has long been our policy on a challenge to arbitrability affirmatively to consider whether there is a sufficient nexus between the grievance and the rule, regulation or contract provision alleged to be violated to warrant, a findihg that the particular claim asserted is within the scope of the parties' agreement to arbitrate. We have applied this policy in the present case and have determined the matter to be arbitrable.

0 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

[11] Decision Nos. B-1-76; B-3-78. See Decision Nos. B-8-81; B-8-82; B-4-86; B-10-86.

ORDERED, that the petition challenging arbitrability filed by the City of New York 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.

DATED: New York, N.Y.
May 29, 1986

ARVID ANDERSON
CHAIRMAN

DANIEL G. COLLINS
MEMBER

MILTON FRIEDMAN
MEMBER

JOHN D. FEERICK
MEMBER

DEAN L. SILVERBERG
MEMBER

EDWARD F. GRAY
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CAROLYN GENTILE
MEMBER