City, Dep't of Health v. Doctors Council, 41 OCB 6 (BCB 1988) [Decision No. B-6-88 (Arb)]

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

-between-

THE CITY OF NEW YORK and THE NEW YORK CITY DEPARTMENT OF HEALTH,
Petitioners,

DECISION NO. B-6-88

DOCKET NO. BCB-994-87
(A-2625-87)

-and-

DOCTORS COUNCIL,

Respondent.

- -x

DECISION AND ORDER

The City of New York filed a petition on August 28, 1987, challenging the arbitrability of a grievance submitted by the Doctors Council (also referred to herein as "the Union") concerning an alleged failure to compensate certain employees for weekend on-call duty. The Doctors Council filed an answer to the City's petition on September 17, 1987. The City submitted a reply on October 16, 1987.

Background

The grievance in this matter was brought by the Union on behalf of employees of the Bureau of Preventable Diseases of the Department of Health. The affected employees are physicians classified by the Department as Medical Specialists, who are paid on an hourly basis. The grievance asserts that the Department has required these employees to perform

mandatory "on-call duty" on weekends, but has refused to pay them for the hours spent on such duty. The remedy sought by the Union is compensation, retroactively and prospectively, for hours worked pursuant to the introduction of mandatory on-call duty.

Positions of the Parties

City's Position

The City points out that Article XV of the collective bargaining agreement provides, in Section 5, that:

> "The Labor-Management Committees will meet as soon as practicable and shall consider and report on the following subjects:
>
> a) on-call practices;
>
> b) continuing medical education benefits; and
>
> c) the employment of per session employees in the Health & Hospitals Corporation as medical specialists.
>
> d) new salary rates for moonlighting residents." (emphasis added)

The City submits that pursuant to this section, all questions concerning on-call practices and per session medical specialists are to be handled by the labor-management committee. Additionally, the City notes that Article XV, Section 2 of the agreement states, in pertinent part, that:

> "Matters subject to the Grievance Procedure shall not be appropriate items for consideration by the labor-management committee."

Based upon this section, the City argues that it is "obvious" that areas designated for consideration by the labor-management committee in Article XV, Section 5, are not appropriate items for the grievance procedure.

In its reply to the Union's answer, the City further asserts that Article III of the agreement, which is cited by the Doctors Council as the contractual provision claimed to have been violated, is devoid of any language dealing with compensation for on-call duties.

For all of the above reasons, the City submits that the Union's request for arbitration should be dismissed.

Union's Position

The Doctors Council alleges, initially, that the contractual reference made by the City to the subject of per session medical specialists being submitted to the labor-management committee for consideration, is inapposite. The provision relied upon by the City, Article XV, Section 5, is applicable, by its own terms, only to:

> " ... the employment of per session employees in the Health & Hospitals Corporation as medical specialists."

However, the grievants in the present dispute are employees of the Department of Health, not the Health & Hospitals Corporation. Accordingly, submits the Union, this branch of the City's argument is without merit.

While conceding that the City's argument as it relates to "on-call practices" arguably is more relevant, the Union contends that the parties' agreement to submit this issue to the labor-management committee for consideration was intended to encompass the matter of on-call schedules. It was not intended, according to the Union, as a waiver of enforcement of the right to compensation for on-call responsibilities which, in many facilities, have long existed. The Union alleges that the labor-management committee established under Article XV never has considered the issue of compensation in the course of its deliberations concerning on-call duties. The Union submits that the matter of compensation is governed by Article III of the agreement, which prescribes a designated hourly rate for the employees who are the grievantsherein.

The Doctors Council argues that the City's position would require the Board to construe the labor-management committee provisions of Article XV to effect a waiver

by the Union of the right to arbitrate any matter bearing on on-call practices and/or per session medical specialists. The interpretation of the agreement required to make any such construction, asserts the Union, is a matter which the parties have agreed, in Article VIII of the agreement, is within the exclusive domain of an arbitrator.

Discussion

It is well established that where the parties, as here, do not dispute that they have agreed to arbitrate their controversies, the question before this Board on a petition challenging arbitrability is whether the particular controversy at issue is within the scope of the agreement to arbitrate.[1] In determining this question, the Board has a responsibility to ascertain whether a prima facie relationship exists between the act complained of and the source of the alleged right, redress of which is sought through arbitration. In this regard, a union, where challenged to do so, has a duty to show that the contract provision invoked is arguably related to the grievance to be arbitrated.[2]

[1] See, e.g., Decision Nos. B-4-88; B-12-87; B-6-86.

[2] Decision Nos. B-35-86; B-10-86; B-4-83; B-8-82; B-7-81.

Applying these considerations to the matter in dispute herein, we are satisfied that the Doctors Council has met its burden of establishing that its grievance is within the scope of the parties' agreement to arbitrate. The Union's grievance concerns compensation for on-call duties. The provision of the contract relied upon by the Union, Article III, entitled "Salaries", includes specific rates for Medical Specialists, such as the grievants herein, and further expressly contains hourly rates for hourly and per diem employee such as the grievants. Article III does not refer to the issue of whether on-call duties are compensable; but, neither does it deal with the compensability of any other type of duty assigned by management. It merely provides that employees in certain titles or capacities shall receive a certain wage on an annual or hourly basis, depending upon the employee's status. We find that the Union's claim for compensation is at least arguably related to the subject of Article III.

The City's argument based upon the labor-management committee provisions of Article XV of the agreement does not persuade us that the matter is not arbitrable. First, as the Union points out, that Article's reference to the

matter of the employment of per session employees is irrelevant to the present dispute since, by its own terms, the labor-management committee's consideration of that matter is limited to employment by the Health and Hospitals Corporation. Inasmuch as the grievants herein are employees of the City's Department of Health, the City's reliance on this provision of Article XV is unwarranted.

Second, concerning the City's position that Article XV's reference to on-call practices effectively excludes any dispute involving that subject from being brought under the contractual grievance and arbitration procedures, we are unable to conclude that such an exclusion is clear and unambiguous on the face of the agreement. We have held that where the parties have voluntarily created an unambiguous exception to an other wise broad arbitration provision, the Board will not disturb their agreement.[3] However, we find that the exclusion for which the City argues in this case is problematic and far from unambiguous. It is, in short, a matter requiring contract interpretation including the harmonization of two contract provisions which are facially

[3]Decision No. B-25-82.

subject to conflicting interpretation. As such, the matter is subject to determination by an arbitrator and not by this Board.

Exclusions from contractual grievance procedures which have been recognized by this Board typically provide that the decision or response of a specified person or office,

> "... shall be final and binding and not subject to the contractual grievance procedure."[4]

In contrast, in the present case, the contract provides that the labor-management committee "shall consider and report on", inter alia, the subject of "on-call practices", and that,

> "Matters subject to the Grievance Procedure shall not be appropriate items for consideration by the labor-management committee."

The City would have us adopt a converse reading of the above language, to the effect that matters subject to the labor-management committee shall not be appropriate items for consideration under the contractual grievance procedure. However, it is not clear to us that the con verse is true, or was intended by the parties. We find

[4]Decision No. B-25-82; see Decision Nos. B-39-86; B-10-79.

that the City's proposition is arguable but not self evident.

For its part, the Union contends that the labor-management committee's consideration of "on-call practices was intended to encompass the matter of on-call schedules, but was not intended as a waiver of the right to seek compensation under Article III of the agreement. We do not believe that the labor-management committee provision of the agreement is so clear on its face as to preclude arbitral consideration of this contention. Rather, we hold that this involves a matter of contract interpretation which the parties have agreed must be resolved by an arbitrator. Accordingly, we will order that this dispute be submitted to arbitration.

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

ORDERED, that the petition of the City of New York be, and the same hereby is, denied; and it is further

ORDERED, that the request for arbitration of the Doctors Council be, and the same hereby is, granted.

Dated: New York, N.Y.
March 29, 1988

MALCOLM D. MacDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

CAROLYN GENTILE
MEMBER

EDWARD F. GRAY
MEMBER