HHC v. CIR, Braverman, 41 OCB 61 (BCB 1988) [Decision No. B-61-88 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of

THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Petitioner,

-and-

THE COMMITTEE OF INTERNS AND RESIDENTS,

Respondent,

JEFFREY BRAVERMAN, M.D.,

Grievant.

DECISION NO. B-61-88

DOCKET NO. BCB-1071-88 (A-2822-88)

DECISION AND ORDER

The New York City Health and Hospitals Corporation ("the HHC" or "the petitioner") filed a petition on July 22, 1988, challenging the arbitrability of a grievance commenced by the Committee of Interns and Residents ("the CIR" or "the respondent") arising out of the alleged discipline of Dr. Jeffrey Braverman ("the grievant"). The CIR filed its answer to the petition on September 22, 1988. With the permission of this Board, the CIR amended its answer with a submission filed September 28, 1988. The HHC filed its reply on October 11, 1988. The CIR filed affidavits of counsel and the grievant in response to petitioner's reply on October 25, 1988, to which the HHC objected by letter dated October 28, 1988.

Background

The grievant was a resident physician in the residency program at Albert Einstein College of Medicine Department of Obstetrics/Gynecology from July 1, 1983, through June 30, 1987. During this period, grievant was a house staff officer ("HSO") at the Bronx Municipal Hospital Center ("BMHC"). On July 1, 1986, grievant was appointed Chief Resident at BMHC.

Among the privileges accorded to HSO's, including grievant, are "independent operating" privileges. In essence, the Director of Obstetrics/ Gynecology accords the privileges to HSO's whom he designates so that they may perform surgical procedures with limited supervision by more senior doctors.[1]

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[1]Procedure No. 178, as amended, issued March 1, 1962 entitled "Amend 'General Rules Governing House Staff,' A.P. 119, Manual 701.1" ("Procedure No. 178") provides the basis for the according of the independent operating privileges. In relevant part, it provides:

> The resident to be considered for independent operating:-
>
> 1. must be duly licensed to practice Medicine in New York State,
> 2. must have had not less than 3 years Residency training in surgery acceptable to the Commissioner,
> 3. must be selected as qualified by the Director of a designated Surgical or Obstetrical Service,
> 4. must be approved by the Commissioner.
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> However, the authorization does not give the resident blanket permission to operate

(continued...)

It is undisputed that on or about August 5, 1986, grievant met with Dr. Wayne R. Cohen, Director of Obstetrics/Gynecology at BMHC regarding grievant's care of three patients. In a memorandum dated August 6, 1986, from Dr. Cohen to "Resident File," Dr. Cohen indicated that he had spoken to grievant with regard to his performance and claims to have:

> . . . indicated to Dr. Braverman that [he was] extremely disturbed about his involvement in these [three] cases since it seems to represent a pattern of poor judgment bordering on negligence . . . [He had] asked him to be certain that an attending physician physically scrub on all his operative cases, and is physically present to lend advice concerning any major obstetric decision.
>
> [He would] continue to review his performance closely, and if any further difficulties arose, stronger measures [would] need to be undertaken.

Dr. Cohen also notified Dr. Irwin Kaiser, Director of the Department of Obstetrics/Gynecology at Albert Einstein Medical College by letter dated, August 6, 1986, that:

> [a]lthough [he did not] hold [the

(...continued)

> independently; since the discretion of the director as to the maturity of the resident is involved, each case is to be individually chosen by the director of the service concerned, or his designee, with written approval entered in the medical record in advance of the operation. [emphasis added]

> grievant] solely responsible for [complications arising out of his treatment of certain patients] because other house staff members and attending physicians were involved in each, [it was his] reluctant opinion that his ability to perform as a responsible Chief Resident [was] quite limited.
>
> [He had] spoken with him directly about the three problem cases, and . . . indicated that [he did] not wish him to scrub on any operative procedure without an attending physician also scrubbed. In addition, there [was] to be clear documentation of attending participation in all of his major clinical decisions. These requirements are minimal. If his medical judgment shows a pattern of inappropriateness from other services as well as [his] own, [he] suggest[ed] that more serious sanctions be imposed upon him. . .

By letter dated August 14, 1986, Dr. Cohen informed Dr. Michael Reichgott, Medical Director of BMHC, that as a result of his department's evaluation of grievant's treatment of certain patients, it had suspended grievant's independent operating privileges. On or about August 25, 1986, grievant left his rotation at BMHC.

The CIR claims that the grievant never learned that his independent operating room privileges had been "formally suspended" until late September, 1987, when a hospital which was unaffiliated with the HHC, after examining a record apparently

related to his tenure as an HSO, questioned him on why he did not inform it of the suspension. The HHC claims that the grievant knew of the HHC's actions as early as August, 1986, when Dr. Cohen allegedly informed him of the suspension of his privileges. It also claims that in November, 1986, he received a copy of a letter to the New York State Education Department, Office of Professional Discipline, dated November 21, 1986, from Barry A. Jasilli, Associate Executive Director, Professional Services of BMHC regarding his treatment of a patient. The letter reads, in relevant part:

> According to the department director, it is more probable than not that the techniques utilized in the delivery [performed by grievant] involved excessive and unusual forces and resulted in or contributed to the injuries.
>
> The department has taken internal disciplinary action to insure that Dr. Braverman's work is kept under the closet [sic] scrutiny. Additionally, Dr. Braverman's independent operating privileges have been suspended until the department is satisfied that they should be restored. [emphasis added]

Grievant denies receiving the letter.

Grievant returned to BMHC in November, 1986. Subsequently, his privileges were reinstated, effective December 1, 1986.

Sometime after the incidents, the HHC filed an "Investigative Report Form" with New York State with respect to the aforementioned incident. The report described the grievant's treatment of the patient and stated:

> The Chief of Service reported the case to Risk Management. The case was reviewed with the Chief Resident, Dr. Jeffrey Braverman, who was given internal discipline to assure his work is kept under close scrutiny. The department has reinforced the role of the attending physician to insure availability and proper consultation when difficult cases arise. The Chief Resident's independent privileges have been rescinded and he can only do cases under supervision. [emphasis added]

The CIR filed a grievance under Article XIV of the collective bargaining agreement[2] on or about November 5, 1987.

[2]Article XIV of the 1984-1987 collective bargaining agreement between the parties ("the Agreement") reads in relevant part:

> The term "grievance" shall mean
>
> (A) A dispute concerning the application or interpretation of the terms of this collective bargaining agreement;
> (B) A claimed violation, misinterpretation, or misapplication of the rules or regulations, authorized existing policy or orders of the Corporation affecting the terms and conditions of employment; . . .
>
> Section 2.
> Step I. The Employee and/or the Committee shall present the grievance in writing to the Chief of Service or to the Executive Director

(continued...)

On or about November 19, 1987, it filed a Step 2 grievance. On or about December 14, 1987, the petitioner rejected the Step 2 grievance finding that there had been no disciplinary action taken against grievant and if there had been, his claim was untimely brought.

The CIR filed its Request for Arbitration on May 28, 1988. It alleged that in violation of Article XV of the Agreement[3], the

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> or the Director's designee no later than ninety (90) days after the date on which the grievance arose. . . .
>
> Step II. (a) An appeal from an unsatisfactory determination at Step I, . . shall be presented in writing to the Corporation's Director of Labor Relations. The appeal must be made within ten (10) working days of the receipt of the Step I determination. . .
>
> Step III. An appeal from an unsatisfactory determination at Step II (a) may be filed by the Committee with the Office of Collective Bargaining for impartial arbitration within thirty (30) days of receipt of the Step II (a) decision.

[3]Article XV of the Agreement provides, in relevant part:

> Section 1. HSO's shall have the right to a hearing before being subject to disciplinary action except as hereinafter provided. There shall be no disciplinary action taken against an HSO except for cause, and pursuant to and after completion of the procedure herein provided. . .
>
> Section 2. It is understood that

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grievant was disciplined without due process or notice to the CIR when his operating privileges were suspended and the suspension record was unjustified and in error.

In July, 1988, the New York State Department of Health conducted a survey of the BMHC with respect to the incident referred to in the November 21, 1986, letter from Dr. Jasilli. The survey noted, among other things, that:

> The Collective Bargaining Agreement

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> an HSO may be reassigned from medical responsibilities without a hearing where the HSO's continued presence is deemed to risk the successful operation of the hospital. Following such reassignment by either the Chief of Service or the Executive Director of the hospital the Committee shall have the right to an immediate appeal to an arbitrator or arbitration board as hereinafter provided. . .
>
> Section 5. The written charges and proposed disciplinary action shall become final unless; (i) rescinded by the Executive Director; or (ii) rescinded by the Corporation Director of Labor Relations; or (iii) the Committee requests in writing to the office of Collective Bargaining, with simultaneous notice to the Corporation and the Executive Director, within fifteen (15) days after the receipt by the Committee of the original written charges and proposed disciplinary actions, that said charges and action be submitted to arbitration pursuant to this Article XV.

> between the [HHC] and the [CIR], . . . was not observed in the case of J.B., M.D., when he was given "internal department discipline." Specific reference is made to Article XV, Disciplinary Action, and CIR Addendum C, Evaluations and Personnel Folders of the HHC-CIR contract, . . .
>
> The hospital has no written evidence that disciplinary action, either proposed or implemented, was presented by the Executive Director to the CIR and to J.B., M.D. and that the physician was notified of his rights.

For relief, the CIR seeks:

> removal from BMHC records, including Dr. Braverman's file(s), all references to [the] alleged suspension, corrective communications to all persons, entities informed of [the] suspension; [the HHC] cease and desist from informing persons, entities of suspension; .

Parties' Positions

HHC

The HHC challenges the arbitrability of the grievance on several grounds. First, it contends that it did not discipline grievant in that he was not fined, reprimanded, suspended from duty without pay, demoted, terminated or subjected to any other action which could be characterized as disciplinary in nature.

Accordingly, it argues there is no nexus between its actions and Article XV of the Agreement.

Rather than disciplining grievant, the HHC claims it merely evaluated his performance, and that the arbitration of evaluations is barred by §1173-4.3 of the New York City Collective Bargaining Law[4] ("the NYCCBL") and Article III of the Agreement.[5] The HHC also relies on Procedure No. 178 which

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[4]Section 1173-4.3 reads, in relevant part, as follows:

> It is the right of the city, or any other public employer, acting through its agencies, to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees; take disciplinary action; relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work. Decisions of the city or any other public employer on those matters are not within the scope of collective bargaining, . . .

[5]Article III of the Agreement provides:

> Delivery of medical services in the most efficient and effective manner and the provision of an effective training program for HSO's is of paramount importance to the City and the Corporation. Such achievement is recognized to be a mutual obligation of all parties

(continued...)

denies residents "blanket permission" to operate independently and vests it with the exclusive authority to grant and to suspend HSO independent operating privileges.

The HHC also argues that the CIR's claim is barred by the contractual statute of limitations. It claims that the grievant learned of his suspension as early as August 5, 1986, when Dr. Cohen told grievant that his independent operating room privileges were withdrawn, a point in time well-before he filed a grievance in November, 1987. That the grievant was on notice of the suspension is confirmed, according to the HHC, by his request to Dr. Cohen in late November, 1986, that his privileges be reinstated. The HHC argues that he also learned by letter dated

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> within their respective roles and responsibilities. To achieve and maintain a high level of effectiveness, the parties hereby agree to the following:
>
> The Committee recognizes the City's right and the Corporation's right under the New York City Collective Bargaining Law to establish and/or revise medical performance standards or norms notwithstanding the existence of prior medical levels, norms or standards consistent with accepted medical training program practices and requirements. Such standards may be used to determine acceptable performance levels, and to measure the performance of each HSO.

November 19, 1986, that his file would be annotated with respect to "an incident that had occurred," which it contends is a reference to that action taken by it with respect to grievant's independent operating privileges. Because Article XV, section 5 of the Agreement requires that a request for arbitration be filed within fifteen days after receipt of written charges and proposed disciplinary action, HHC maintains that his grievance is time-barred.

The HHC also claims that the grievance is further barred by laches, because it has relied to its detriment on grievant's failure to request arbitration in a timely manner. As a consequence, some of the principals involved are no longer with HHC and the memories of those witnesses still available has faded.

The HHC also contends that because the CIR did not allege a violation of Article XIV in its request for arbitration, it cannot raise it, as it does, in its answer to the HHC's petition. Regardless of whether the CIR has alleged a violation of Article XIV at too late a stage of the grievance procedure, the HHC claims that any grievance under Article XIV is time-barred. Under Article XIV, the CIR must present a grievance in writing no more than ninety days after the date on which the grievance arose. With respect to respondent's claim that the grievant did not have notice of the evaluation, the HHC argues that it is

irrelevant because there is no contract provision which requires the HHC to give notice of an evaluation.

Finally, the HHC argues that the respondent's claim arose when an alleged inquiry was made into grievant's record in September, 1987. Because grievant was no longer a member of the the CIR at the time when the grievance arose, the HHC claims that the respondent lacks standing to raise the claim.[6]

CIR

The CIR argues that the HHC's internal documentation, as well as its representations to third parties such as those made to New York State, establish that grievant was ultimately not merely evaluated but was disciplined. Thus, by the HHC's actions and words, the CIR claims to have established an adequate nexus between its claim and Article XV of the Agreement.

It also argues that the HHC's managerial prerogative to evaluate is limited by the procedures provided by Article XIV and Article XV of the Agreement. What the CIR characterizes as the HHC's alleged disciplining of the grievant, its filing erroneous reports with the State and its tendering of allegedly inaccurate and misleading information to third parties regarding the grievant is, according to the CIR, an abuse of its prerogative

[6]It relies on Decision Nos. B-7-88 and B-10-83.

which is remediable by procedures provided by the Agreement.

The CIR argues that its grievance is timely under the Agreement. Under Article XV, section 5 of the Agreement, the CIR must file a request for arbitration within fifteen days after its receipt of written charges. Because the HHC never proffered written charges, the statute of limitations under the Agreement did not began to run as early as contended by the HHC. Furthermore, the CIR argues that the HHC's unclean hands in failing to comply with the terms of the Agreement bar it from pleading laches.

Finally, the CIR contends that it satisfied the time requirements provided by Article XIV because it filed the grievance ninety days after it learned of the discipline in September, 1987.

Discussion

The HHC has requested, as a preliminary matter, that the names of the patients treated by grievant whose care allegedly prompted the HHC to suspend his independent operating privileges be redacted from the record of this case or, in the alternative, that this Board's record be sealed because the presence of these names in the CIR's pleadings "violates the confidentiality of their medical records." We need not decide whether the documents alleged to contain confidential medical records are in fact

protected by the physician/patient privilege or otherwise privileged, although on their face they do not appear to be medical or treatment records which might be privileged.[7] The facts which the HHC and the CIR allege form the basis for the suspension of grievant's independent operating privileges go to the merits of grievant's case and are irrelevant to any consideration of the arbitrability of this matter. But, in order to allay any concerns that might be raised with respect to the records and with no resulting effect on our consideration of the instant matter, we have not used the names of patients in our decision.

[7]The HHC objects specifically to the following exhibits which are appended to the Affidavit of Herbert Eisenberg, counsel for the CIR:

(1) Exhibit "B" which is a memorandum from Dr. Wayne Cohen to "Resident File," dated August 6, 1986;

(2) Exhibit "C" which is a letter from Dr. Wayne Cohen to Michael Reichgott, dated August 14, 1986;

(3) Exhibit "D" which is a memorandum from Dr. Wayne Cohen to Michael Reichgott, dated September 4, 1986; and

(4) Exhibit "I" which is an "Investigative Report" form and a "Confidential Risk Management/Quality Assurance Incident Report" form.

The HHC also challenges the affidavit submitted by counsel for the CIR in its answer. Contrary to the HHC's assertion, a petition challenging the arbitrability of a grievance is not similar to a motion for summary judgment under New York's Civil Practice Law and Rules nor are we otherwise bound by the CPLR or by a strict application of the rules of evidence. We thus deny the HHC's request that we not consider the affidavit of counsel and will consider it and the exhibits attached thereto. We also note that after the HHC objected to the inclusion of counsel's affidavit, the CIR submitted an affidavit of grievant incorporating by reference all of counsel's statements that, in our discretion, we also will consider.

In deciding an issue of arbitrability, this Board must determine whether the parties are obligated to arbitrate their controversies and, if so, whether the grieving party has pleaded that the controversy is within the scope of the obligation.[8] The CIR alleges that the instant dispute is arbitrable because it arises out of the discipline of grievant and disciplinary actions are arbitrable under the Agreement. The HHC denies that the dispute is arbitrable, because it alleges that rather than disciplining grievant, it exercised its managerial prerogative by evaluating him to determine whether he met acceptable medical

[8]Decision Nos. B-44-88; B-13-85; B-6-85.

standards which only it could establish. Pursuant to Article XV of the Agreement, HSO's have the right to a hearing before being subject to disciplinary action, or if the situation arises, shortly after being removed from a situation which the HHC determines to be dangerous. The HHC contends that its suspension of grievant's independent operating privilege was not discipline, and thus he had no right to a hearing either before or after the fact. The HHC also contends that the conferral of independent operating privileges is discretionary, and its decision to revoke those privileges is not arbitrable.

As we have held in the past, management's right to manage is neither unfettered nor unlimited.[9] Situations arise where, as in the instant matter, there is an apparent conflict between management's prerogative and an asserted contractual right. When there is such a conflict, we must determine if the union has alleged sufficient facts to establish a prima facie relationship between the acts complained of and the source of the alleged rights. A bare allegation, without supporting facts, will not satisfy a union's burden of proof.[10] Moreover, where management's prerogative has been challenged on the grounds that it is associated with discipline, we examine the facts and the

[9]Decision Nos. B-33-88; B-4-87; B-40-86; B-9-81; B-8-81; B-36-80.

[10]Decision Nos. B-33-88; B-4-87.

issues asserted by the parties to determine whether a substantial issue as to the disciplinary nature of the action complained of has been raised. Based on the documentation proffered by the CIR, which includes the HHC's internal documentation and representations to third parties, we find that the actions taken by the HHC are arguably disciplinary in nature, and thus the CIR has satisfied its burden of proof.

It is undisputed that the HHC's suspension of grievant's independent operating privileges and its placement of the letters in his file regarding his treatment of patients were in response to grievant's performance which HHC believed deviated from medical standards which it had the right to establish. The HHC's right to set medical standards is not an issue raised in the request for arbitration. Yet, we need not rely only on the characterization of HHC's actions offered by the CIR; HHC itself has made such a characterization. In the HHC's investigative report filed with New York State, it represented that grievant had been "given internal departmental discipline to assure his work is kept under close scrutiny . . . and [his] independent privileges have been rescinded . . ."

Furthermore, Dr. Jasilli's letter to the New York State Education Department Office of Professional Discipline stated that that department had "taken internal disciplinary action to insure that [grievant's] work is kept under the closet [sic]

scrutiny. Additionally, [grievant's] independent operating privileges have been suspended until the department is satisfied that they should be restored."

The State of New York Department of Health ultimately relied on the HHC's representations when it conducted a survey for the period July 11 through July 13, 1988, and found, among other things, an alleged deficiency in BMHC's records. It noted that the Agreement between the HHC and the CIR "was not observed in the case of [grievant] when he was given 'internal department discipline.'" The Department of Health's characterization of the HHC's action as internal discipline is, of course, not binding on our determination. Nonetheless, it indicates the effect of the HHC's characterization of the action it took with respect to the grievant. Whether the substance of the HHC's actions taken against grievant was, in fact, disciplinary in nature under the Agreement as it represented to New York State or whether the HHC is bound by its own characterization of its actions are questions for an arbitrator.

Through the HHC's own documentation, the CIR has established that the HHC's actions were related to the grievant's conduct and were of an arguably disciplinary nature. A substantial issue has been presented in this regard. Therefore, we find that the CIR has demonstrated a sufficient nexus between the HHC's actions and grievant's contractual right to grieve disciplinary action.

We reject the HHC's claim that the CIR is barred from asserting a claim under Article XIV of the Agreement. Article XIV simply defines the term "grievance" and sets forth a procedure for the adjustment of grievances. Moreover, the CIR alleged that the HHC had violated Article XIV in each of the earlier steps of the grievance procedure. While it failed to cite Article XIV in its request for arbitration, it reiterated its reliance on this provision in its answer to the petition herein. Under these circumstances, we find that the HHC has not shown that it has been prejudiced by CIR's minimal lapse with regard to the citation of Article XIV.

The HHC's allegation that the instant claim is barred by the equitable doctrine of laches is also deficient. In order to establish laches as a defense, its proponent must allege facts which indicate (1) that the claimant was guilty of significant delay after obtaining knowledge of the claim; (2) that such delay was unexplained and/or inexcusable; and (3) that such delay caused injury and/or prejudice to the defendant's ability to perform and present a defense against the claim.[11]

The HHC's conclusory allegation that it relied to its detriment on Grievant's silence because some of the principals involved are no longer with HHC and the personal recollection of

[11]Decision No. B-28-88.

what happened is difficult is wholly unsupported by any specific pleading of fact. Thus, there are insufficient grounds to warrant dismissing the request for arbitration on the grounds of laches.

Whether grievant knew as early as November, 1986, that formal action had been taken against him so as to render his claim untimely under Article XIV and Article XV of the Agreement is an issue we cannot consider. Questions of timeliness under a collective bargaining agreement are questions of procedural arbitrability which are properly determinable by an arbitrator and not by this Board.[12]

Finally, we find that the CIR has standing to bring the instant grievance. The pleadings indicate that the gravamen of the claim involves events which occurred while grievant was employed by the HHC. The fact that he may not have learned of the claim until after he had left its employ should not bar the arbitration of the claim.[13]

Our decision in no way reflects this Board's opinion on the merits of the CIR's claim nor HHC's defenses, both procedural and substantive. The issue before us is whether the various objections raised by HHC, or any of them, constitute a bar to the submission of CIR's claims to arbitration. Having found that

[12]Decision Nos. B-33-82; B-15-81; B-12-81.

[13]See Decision Nos. B-7-88; B-10-83.

they do not, we deny the HHC's petition challenging arbitrability.

ORDER

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 filed by the New York City Health and Hospitals Corporation be, and the same hereby is, denied; and

ORDERED, that the request for arbitration filed by the Committee of Interns and Residents be, and the same hereby is, granted.

Dated: New York, New York
November 29, 1988

MALCOLM D. MacDONALD
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

CAROLYN GENTILE
MEMBER

EDWARD F. GRAY
MEMBER

DEAN L. SILVERBERG
MEMBER