HHC v. CWA, 43 OCB 29 (BCB 1989) [Decision No. B-29-89 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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IN THE MATTER OF THE ARBITRATION

-between-

Decision No. B-29-89
Docket No. BCB-1108-88
(A-2893-88)

THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,
Petitioner,
-and
THE COMMUNICATIONS WORKERS OF AMERICA,
Respondent.
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DECISION AND ORDER

On November 2, 1988, the New York City Health and Hospitals Corporation (the "HHC"), appearing by its attorney, John Lewis Brown, filed a petition challenging the arbitrability of a grievance that is the subject of a request for arbitration filed by the Communications Workers of America ("the Union") on September 22, 1988. After receiving several extensions of time, the Union filed an unverified answer on January 13, 1989. The HHC, after receiving two extensions of time, filed its reply on March 17, 1989. Thereafter, on April 18, 1989, the Union filed a verified answer.[1]

BACKGROUND

On or about March 14, 1988, Adele Weisman ("the grievant"), a Principal Administrative Associate, Level I, at Kings County

[1]The Union filed a verified answer after being informed by the Trial Examiner assigned to this case, that its answer would not be considered unless it was verified in accordance with the specifications of Section 7.7 of the OCB Rules.

Hospital, filed a step I grievance in which she alleged that she was being exposed to "unhealthy and unsafe" working conditions due to ongoing construction at her work site. She attached two medical notes dated March 8, 1988 and March 14, 1988 to the grievance, which respectively stated that she was suffering from chronic irritation of her bronchial tubes exacerbated by her working environment, and that she had been treated for severe neck and shoulder pain exacerbated by stress. As a remedy, the grievant requested reassignment to another work space, and that "any pay lost due to this grievance . . . be part of the grievance."

Thereafter, contending that her work conditions were making her ill, the grievant told her timekeeper that she would not appear for work on March 15, 1988 or on March 16, 1988. On March 17, 1988, when the grievant returned to work, she was reassigned to another work space. However, the HHC subsequently denied her request for sick leave for March 15, 1988 and March 16, 1988, and withheld two days pay from her.

The record does not include a formal response to the Step I grievance. However, on or about March 21, 1988, the Union requested a Step II hearing to dispute the denial of the grievant's request for two sick days.[2] On or about April 7,

[2]The Union's request for a Step II hearing provides in relevant part as follows:

> We request a Step II hearing regarding the arbitrary and capricious denial of the attached SR70 [Request for Leave of Absence] for two sick days, March 15 - March 16, 1988.

1988, the grievance was denied at Step II on the ground that there had been no violation of Article XIV, §2(a) of the Citywide Agreement.[3]

Thereafter, on or about April 13, 1988, the Union requested a hearing at Step III of the grievance procedure, contending that the hearing officer at Step II had incorrectly stated that the alleged violation was of Article XIV.[4] The Step III decision, dated August 31, 1988, denied the grievance on the ground that the HHC was within its rights in disapproving the grievant's request for sick leave. It found that the grievant had violated

[3] Article XIV, §2(a) of the Citywide Agreement provides as follows:

> Adequate, clean, structurally safe and sanitary working facilities shall be provided for all employees.

[4] The Union's request f or a Step III hearing provides in relevant part as follows:

> We request a Step III hearing regarding the arbitrary and capricious docking of 2 day's pay on 4/15/88 for the above captioned grievant.
>
> Mr. Woods incorrectly states, in his Step II decision of 4/7/88, that the violation in question is Article XIV. Ms. Weisman was reassigned from the unhealthy and unsafe working conditions, as stated in th(sic) Step I grievance, effective 3/17/88. If she was reassigned on 3/15/88, it would not have been necessary to request these two sick days of 3/15/88 and 3/16/88.
>
> Despite the fact that Ms. Weisman submitted medical documentation for these two days, she was still docked. Therefore, as a remedy we request immediate restoration of these two days pay . . . .

a provision of the Kings County Hospital Center Employee's Handbook which requires that anticipated sick leave be formally approved in advance by a Supervisor, and that the Department be informed of an employee's intention to take unanticipated sick leave at least two hours before he or she is scheduled to report to work.

No satisfactory resolution of the dispute having been reached, the Union filed a request for arbitration on September 22, 1988, pursuant to Article VI, §2, Step 4 of the Principapal Administrative Associate Collective Bargaining Agreement (the "PAA Agreement")[5] alleging that the HHC violated Article V, §5 of the 1980-1982 Citywide Agreement.[6] As a remedy, it seeks the use of two sick leave days and the restoration of two days pay to the grievant.

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[5]Article VI, §2, Step 4 of the PAA Agreement provides in pertinent part as follows:

> An appeal from an unsatisfactory determination at Step III may be brought solely by the Union to the Office of Collective Bargaining for impartial arbitration within fifteen (15) working days of the receipt of the Step III determination . . .

[6]Article V, §5 of the 1980-1982 Citywide Agreement provides in relevant part as follows:

> a. Sick leave shall be used for personal illness of the employee. Approval in accordance with "Leave Regulations for Employees who are under the Career and Salary Plan"is discretionary with the agency and proof disability must be provided by the employee satisfactory to the agency within five days of the employee's return to work . .. .

POSITIONS OF THE PARTIES

HHC's Position

The HHC argues that the Union's request for arbitration is moot and must be dismissed. It contends that the instant grievance was completely remedied when the grievant was reassigned from her original work area. Moreover, it asserts that since the Union's answer was not originally filed with a verification, and does not contain specific admissions or denials of the allegations in the petition challenging arbitrability, it must be disregarded in its entirety for failure to comply with the specifications of Section 7.7 of the Revised Consolidated Rules of the Office Of Collective Bargaining ("OCB Rules")[7]

The HHC also argues that the Union's reliance on Article VI, §2, Step 4 of the PAA Agreement as the source of its right to arbitrate this grievance, is improper. It contends that according to Article XIV, §2(e) of the Citywide Agreement,[8] alleged violations of that section may be remedied solely by the initiation of a grievance pursuant to Article XV of the Citywide

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[7] Section 7.7 of the OCB Rules provides in relevant part as follows:

> Answer-Contents. Respondent's answer to the petition shall be verified and shall contain: a. Admissions or denials of the allegations of this petition; . . .

[8] Article XIV, §2(e) of the Citywide Agreement provides in relevant part as follows:

> The sole remedy for alleged violation of this Section shall be a grievance pursuant to Article XV of this Agreement . . . .

Agreement. Therefore, it asserts that the grievant, having originally submitted a grievance alleging the violation of Article XIV, Section 2(a), may only proceed to arbitration pursuant to Article XV of the Citywide Agreement.[9]

Moreover, the HHC argues that the grievant did not allege a violation of Article V, §5 of the Citywide Agreement in her Step II and Step III grievances. It maintains that the claim for "pay lost" which was presented in the proceedings below, was never raised in connection with an alleged violation of the Time and Leave Provisions set forth in Article V, §5, but was consistently alleged to have arisen from a violation of Article XIV, §2(a) of the Citywide Agreement.[10] The HHC contends that it would be fundamentally unfair to allow the Union to create a "new and distinct claim" of sick leave denial at this time, and notes that this Board has consistently denied requests for arbitration in which a party did not have notice of the asserted claim at the

[9]Article XV of the Citywide Agreement sets forth the grievance procedure for resolving disputes involving the application or interpretation of its terms.

[10]In support of this contention, the HHC submits the sworn statement of Larry Woods, the Step II review officer and representative of the HHC at the Step III hearing which provides in relevant part as follows:

> At no time during the Steps II or III hearings did the Union allege that grievant's loss of pay was a violation of Article V, §5 of the contract . . . . The argument was that but/for the allegedly unsafe and unhealthy working conditions, Grievant would have reported for duty . . . . At no time during the hearing was it alleged by me, the Union or the Hearing officer that the source of the grievance was Article V, §5.

lower steps of the grievance procedure. [11]

The HHC also maintains that it acted within its rights pursuant to Article XIV, §2(e) of the Citywide Agreement[12] when it withheld two days pay from the grievant. It points out that this provision permits it to dock the pay of any employee who withholds his or her services in order to protest alleged violations of Article XIV, §2. The HHC argues that the grievant's absences on the days in question, having been unauthorized and unsupported by medical documentation, were intended to be a means of "protesting" or "redressing" alleged violations of that section. Therefore, it asserts that if this grievance proceeds to arbitration, the issue which must be resolved is not whether the grievant is entitled to sick leave for her absences, but whether she withheld her services in violation of Article XIV, §2(e).

Finally, the HHC contends that in any event, an alleged violation of Article V, §5 of the Citywide Agreement is not arbitrable in this case because the Union has not demonstrated a nexus between the instant grievance and that provision. It maintains that Article V, §5 provides management with the

[11] The HHC cites Decision Nos. B-15-87 and B-31-86.

[12] Article XIV, §2(e) of the Citywide Agreement provides in relevant part as follows:

> An employee who withholds services as a means of redressing or otherwise protesting alleged violations of this Section shall be docked pay for any unauthorized non performance of work and may be subject to appropriate disciplinary action.

discretionary authority to grant or deny an employee's request for sick leave, and that the Union, in order to pursue this grievance through arbitration, must allege facts which demonstrate that management's instant decision to deny the grievant's sick leave request was an abuse of discretion. Since the HHC contends that the Union has not done so, it argues that the request for arbitration must be dismissed.

Union's Position

Contrary to the HHC's contention, the Union maintains that the instant grievance is not moot. Although it admits that the grievance has been remedied partially by the relocation of the grievant's work area, it notes that in her Step I grievance the grievant also requested that no loss of pay be incurred due to her grievance. The Union argues that since the grievant became ill as a direct result of unsafe working conditions in her work area, the denial of her request for the use of two sick leave days arises directly from the allegations in her Step I grievance. Thus, it maintains that its request for the reimbursement of two days pay remains a live controversy which must be resolved through arbitration.

The Union also disagrees with the HHC's contention that it has improperly relied on Article VI, §2, Step 4 of the PAA Agreement, rather than Article XV of the Citywide Agreement as the source of its right to arbitrate the instant dispute. It notes that it has in fact pursued the four step grievance procedure set forth in Article XV of the Citywide Agreement and

that the review officer at Step III referred to Article VI, §2F Step 4 of the PAA Agreement in her decision.[13]

Moreover, the Union disagrees with the HHC1s argument that it did not have prior notice of the instant claim. It points out that the grievance at Step I clearly states that "any pay lost due to this grievance shall be part of this grievance" and that the denial of the grievant's request for two sick leave days resulted in her loss of two days pay. The Union asserts that this issue was the only one raised by the grievant at Step II and Step III of the grievance procedure, and maintains that the HHC was fully aware of the instant claim prior to these proceedings.

The Union also contends that the issue of whether the grievant improperly withheld her services in violation of Article XIV, §2(e) of the Citywide Agreement is a factual one which must be resolved through arbitration. It argues that the grievant can provide the necessary medical documentation and witnesses to prove that she was sick on the days in question. Consequently, it asserts that she was not withholding her services to protest her working conditions.

Finally, the Union maintains that it has established a nexus between Article V, §5 of the Citywide Agreement and this dispute.

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[13]The reference which the Union mentions provides as follows:

> Pursuant to the 7/1/84-6/30/87 Principal Administrative Associates Agreement between the City of New York and Local 1180, Communications Workers of America, it is hereby decided as follows: . . .

It contends that the "act complained of" is the grievant's loss of sick leave pay and that the source of that right is Article V of the Citywide Agreement. The Union asserts that this contractual provision provides City employees with sick leave if they can submit proof that they were medically disabled on the days in question. Since the Union argues that it can supply such medical documentation in this case, it maintains that the adequacy of such documentation and the soundness of the HHC's decision to deny the grievant's request for sick leave, must be determined by an arbitrator.

Discussion

At the outset, we note that in determining the outcome of this case, we will consider the arguments in the Union's answer despite its non-compliance with the specifications of Section 7.7 of the OCB Rules. With due regard for considerations of due process, we have consistently declined to adopt an overly technical application of procedural rules in order to promote the resolution of real issues.[14] Thus, where such rules are substantially complied with, and there is no showing of prejudice to the other party, we will not allow a technical oversight to preclude adjudication of the merits of any arguments or claims raised in the pleadings of a case.

The HHC argues that the Union's failure to comply with the requirements of Section 7.7 by not including specific admissions

[14] Decision Nos. B-9-89, B-73-88, B-14-87, B-23-82. See also, Board of Certification Decision No. 21-82.

or denials in its answer, and initially filing it without a verification, warrants the preclusion of the answer from the record. We disagree. The HHC has not argued that the lack of specific admissions and denials in the Union's answer has impeded its ability to prepare an effective reply, nor has it presented any evidence to show that it was prejudiced in any way by the Union's failure to timely file a verified answer. We note that the contents of the Union's answer clearly demonstrate the Union's position with respect to the allegations in the petition challenging arbitrability, and that the Union refiled the same answer with a verification on April 18, 1989.

However, we agree with the HHC that the Union's reliance on Article VI, §2, Step 4 of the PAA Agreement as the source of its right to bring the instant dispute to arbitration, is misplaced. Article VI of the PAA Agreement, on its face, sets forth the grievance procedure for resolving disputes which arise under the terms of the PAA Agreement, whereas Article XV of the Citywide Agreement, sets forth the grievance procedure for resolving disputes which arise under the terms of the Citywide Agreement. Although the parties herein contest the propriety of the Union's invocation of Article V, §5 of the Citywide Agreement in the request for arbitration, that provision, being a part of the Citywide Agreement, is subject to Article XV of the Citywide Agreement. Therefore, this dispute, if it is found to be arbitrable, will proceed to arbitration pursuant to Article XV of

the Citywide Agreement.[15]

As has been noted at page 10, it is our longstanding policy to decline to dismiss cases where technical omissions, errors or oversights do not obscure the real issues as to which arbitration is sought.[16] The provisions of Article XV of the Citywide Agreement are substantially similar to those of Article VI, §2 of the PAA Agreement, and as noted by the Union, have been complied with. Since the HHC has not demonstrated that it has been prejudiced in any way by the incorrect contractual citation in the request for arbitration, we find that the Union's mistake in seeking to arbitrate this dispute pursuant to Article VI, §2, Step 4 of the PAA Agrement does not warrant the dismissal of this grievance.

Moreover, contrary to the HHC's contention, we find that the instant dispute is not moot. In her Step I grievance, the grievant, in addition to seeking reassignment from her work site, requested that any pay lost due to her grievance "become part of it". Denial by the HHC of her sick leave request, and the subsequent withholding of two day's pay which resulted from that action remain unresolved. In fact, the withholding of two days pay is the only issue raised in the grievant's Step II and III

[15]We note that since the Union is not seeking to arbitrate an alleged violation of Article XIV, §2 of the Citywide Agreement, the HHC's contention that Section 2(e) of that Article specifically mandates that alleged violations of Section 2 may be remedied only by the institution of a grievance pursuant to Article XV of the Citywide Agreement, is irrelevant to our present inquiry.

[16]Decision Nos. B-20-79, B-9-79.

grievances and in the request for arbitration. Therefore, since the wages in question have not been paid to the grievant, we find that this grievance continues to involve a live controversy.

The HHC also argues that the Union's request for arbitration must be dismissed because the only claim raised at the lower steps of the grievance procedure was an alleged violation of Article XIV, §2(a) and not Article V, §5. We recognize that this Board has consistently denied requests for the arbitration of claims that are not raised at the lower steps of the grievance procedure.[17] We have stated on many occasions that:

> [t)he purpose of the multi level grievance procedure is to encourage discussion of the dispute at each of the steps. The parties are thus afforded an opportunity to discuss the claim informally and to attempt to settle the matter before it reaches the arbitral stage. Were this Board to permit either party to interpose at [arbitration) . . . a novel claim based on a hitherto unpleaded grievance, we would be depriving the parties of the beneficial effect of the earlier steps of the grievance procedure and foreclosing the possibility of a voluntary settlement.[18]

However, we find that these principles have not been violated in the present case, and that dismissal of the request for arbitration is not warranted.

We find that the record demonstrates that the HHC had clear notice of the nature of the Union's claim, at least as early as Step II, despite the fact that the Union did not specifically refer to Article V, §5 prior to the submission of its request for arbitration herein. In requesting a Step II hearing, the Union

[17] Decision Nos. B-40-88, B-31-86, B-6-80, B-22-74,

[18] Decision Nos. B-10-88, B-35-87, B-31-86, B-21-84, B-6-80.

contended that it was disputing the "arbitrary and capricious" denial of the grievant's request for sick leave. Additionally, after the grievance was denied at Step II on the ground that the grievant had not alleged a violation of Article XIV, §2(a) of the Citywide Agreement, we are satisfied that the Union complied with the specifications of prior Board decisions in which we held that a union is obligated to inform the City when it believes that the scope of a grievance is broader than that stated by a hearing officer.[19] The Union argued in its request for a Step III hearing, that "Mr. Woods [the hearing officer] incorrectly state[d] in his Step II decision . . . that the violation in question is Article XIV", and thereafter reasserted its grievance that "[d]espite the fact that Ms. Weisman submitted medical documentation for these 2 days (March 15, 1988 and March 16, 1988), she was still docked."

Clearly, the references in each of these letters were directed towards alleged violations of the HHC's sick leave policy, as set forth in Article V, §5.[20] Article XIV, §2(a) does not involve the approval or denial of sick leave requests, nor does it contemplate the submission of medical documentation to the employer in order to obtain approval of such requests. In contrast, Article V, §5 sets forth guidelines for the exercise of the employer's discretion in awarding sick leave, and requires

[19] See, Decision Nos. B-10-88, B-31-86, B-6-80.

[20] See generally, Decision No. B-10-88 where we found that the Union's arguments at the lower steps of the grievance procedure alleged violations of contractual provisions which had not been specifically cited.

that satisfactory proof of medical disability be supplied by an employee before he or she is granted sick leave.

We also note that the record demonstrates the HHC's awareness that the instant dispute was not limited to an alleged violation of Article XIV, §2(a). The decision at Step III is based on the review officer's consideration of the HHC's claim that "Ms. Weisman, an eight year employee, should have been aware of hospital policy regarding leaves of absence, whether planned or unplanned" and that she did not comply with that policy. Although the HHC maintains that the Union's argument at the lower steps of the grievance procedure was grounded in an alleged violation of Article XIV, §2(a), it is clear from the Step III decision that the participants in that hearing were attempting to resolve a dispute which involved an alleged improper denial of sick leave.

Therefore, although the parties herein may not have fully explored the applicability of Article V, §5 to this dispute in the proceedings below, we are satisfied that they had the chance to do so, and have not been deprived of an opportunity to reach a voluntary settlement in this matter. We do not believe that the HHC lacked notice of, or has in any way been surprised by a novel claim at this time. Consequently, we reject its argument that the Union added a new and distinct claim to its original grievance by alleging a violation of Article V, §5 in its request for arbitration.[21]

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[21] See, Decision Nos. B-35-87, B-21-84

We also disagree with the HHC's-argument that the instant grievance is not arbitrable because the Union failed to demonstrate a nexus between the instant grievance and Article V, §5. In testing arbitrability, we require only that a party seeking to arbitrate a particular dispute demonstrate that the parties involved agreed to arbitrate disputes of that nature, and that a prima facie relationship exists between the grievance and the source of the right being invoked.[22] We have said on many occasions that once these requisites are established, consideration of the merits of a case is properly within the realm of the arbitrator.[23]

In resolving the instant nexus issue, we note that Article V? §5 incorporates the sick leave policy set forth in the "Leave Regulations For Employees who are Under the Career and Salary Plan." Those regulations mandate that City employees receive a specified sick leave allowance. Therefore, although Article V, §5 provides management with the authority to grant sick leave requests within its discretion, there are arguably guidelines to which it must adhere in exercising that discretion so that the specification of a sick leave allowance is not rendered merely illusory.

The HHC asserts that the Union has failed to allege facts which demonstrate that it arguably violated Article V, §5 by abusing its discretion to grant the grievant's sick leave

[22] Decision Nos. B-5-88, B-16-87, B-36-86, B-22-86.

[23] Decision Nos. B-54-88, B-37-88, B-36-88, B-33-88.

request. The Union, on the other hand, maintains that Article V, §5 provides that City employees will be permitted sick leave if they can provide "proof of disability", and that the grievant can do so in this situation.

The issues thus presented - determination of the sufficiency of the grievant's medical documentation for her absences, and whether the HHC properly exercised its discretion within the meaning of Article V, §5 when it denied her request for sick leave - are issues of fact and of contractual interpretation. As such, they are matters which must be determined by an arbitrator.

Similarly, we hold the HHC's assertion that it acted within the mandate of Article XIV, §2(e) when it withheld two days of wages from the grievant, to be an issue for an arbitrator to resolve. The question of whether the grievant's absences were necessitated by her medical needs or intended as a protest of alleged violations of Article XIV, §2(a) also requires inquiry as to the facts of this case, and the interpretation of a contractual provision. Therefore, it is not properly within our domain.

Accordingly, we dismiss the HHC's petition challenging arbitrability and direct that this grievance be resolved through arbitration.

Decision No. B-29-89 is
Docket No. BCB-1108-88 (A-2893-88)

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 ishereby

ORDERED, that the petition challenging arbitrability filed herein by the New York City Health and Hospitals Corporation be, and the same is hereby dismissed; and it is further

ORDERED, that the request for arbitration herein filed by the Communications Workers of America be, and the same hereby is, granted.

Dated: New York, N.Y.
May 23, 1989

MALCOLM D. MACDONALD
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