

OFFICE OF COLLECTIVE BARGAINING  
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

THE NEW YORK CITY HEALTH AND  
HOSPITALS CORPORATION,

Petitioner,

-and-

THE NEW YORK STATE NURSES  
ASSOCIATION,

Respondent.

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Decision No. B-65-89  
Docket No .BCB-1199-89  
(A-3166-89)

**DECISION AND ORDER**

On August 21, 1989, the New York City Health and Hospitals Corporation, appearing by the New York City Office of Municipal Labor Relations ("the HHC"), filed a petition challenging the arbitrability of a grievance that is the subject of a request for arbitration filed on or about August 4, 1989. The New York State Nurses Association ("the Union") filed an answer on September 5, 1989. The HHC filed a reply on September 7, 1989.

**BACKGROUND**

The grievant, Magdulin Lafayette is a Nursing Supervisor at Kings County Hospital. While she was out on sick leave due to corrective foot bunion surgery, she submitted a request for approximately nine weeks of extended sick leave. The Nursing Department ("the Department") at Kings County Hospital denied

this request.

On or about February 16, 1988, the grievant filed a Step IA grievance contending that the denial of her extended sick leave request violated Section 3.5 of the Citywide Agreement ("the Agreement").<sup>1</sup> This grievance was denied on or about April 27, 1988. The Hearing Officer at the Step IA hearing determined that the Department's decision to deny the grievant's request was based on a combination of factors which included the number of times she had been absent over the previous five years, the shortage of nursing staff, and the fact that the grievant's surgery was of an elective nature. Consequently, the Hearing Officer concluded that the grievant's request had not been denied arbitrarily.

The grievant thereafter filed a grievance at Step II of the grievance procedure.<sup>2</sup> The grievance was denied at Step II on or

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<sup>1</sup>Section 3.5 of the Citywide Agreement provides in relevant part as follows:

**3.5 EXTENSION OF SICK LEAVE**

3.5 In the discretion of the agency head, permanent employees may also be granted sick leave with pay for three months after ten months of City service, after all credits have been used. In special circumstances, sick leave with pay may be further extended, with the approval of the agency head. The agency head shall be guided in this matter by the nature and extent of illness and the length and character of service.

<sup>2</sup>Since the Step II grievance was not submitted as part of the record, the date upon which it was filed is unknown.

about June 21, 1988. On or about July 20, 1988, the grievant filed a grievance at Step III of the grievance procedure. Although a Step III hearing was convened on or about October 28, 1988, no Step III decision has issued as of the date upon which the petition challenging arbitrability was filed.

No satisfactory resolution of this dispute having been reached, on or about August 4, 1989, the Union filed a request for arbitration protesting the denial of the grievant's Section 3.5 benefits. As a remedy, it seeks approval of the grievant's Section 3.5 Leave, and back pay for the time period during which she was denied sick leave pay.

### **POSITIONS OF THE PARTIES**

#### **HHC's Position**

The HHC challenges the instant request for arbitration on the ground that the Union has failed to demonstrate a prima facie relationship between the denial of the grievant's request for extended sick leave and Section 3.5 of the Agreement. It notes that Section 3.5 of the Agreement specifically reserves to Agency Heads the authority to grant extended sick leave within their discretion. The HHC asserts that this Board, in Decision No. B-46-86, determined that an employee who challenges a discretionary managerial act must establish that a substantial issue exists as to whether the act was committed arbitrarily in order to have the dispute resolved through arbitration.

In the instant case, the HHC argues that the Union's statements regarding the disputed managerial determination to deny the grievant's extended sick leave request are conclusory and unsupported by specific factual allegations. Therefore, it maintains that the Union has not established the existence of a nexus between the grievance and section 3.5.

#### Union's Position

The Union contends that there is a nexus between the instant grievance and Section 3.5. It states that it intends to present facts before an arbitrator which will demonstrate that based on the grievant's twenty year record of service, and the disposition of similar leave requests, the denial of the grievant's request for extended sick leave was arbitrary and capricious.

#### **DISCUSSION**

This Board has long held, in considering challenges to arbitrability, that the proponent of arbitration must establish a prima facie relationship between the act complained of and the source of the right being invoked.<sup>3</sup> Moreover, the Board must determine whether the parties have agreed to arbitrate the type of dispute at issue.<sup>4</sup> While it is our policy to favor the

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<sup>3</sup>Decision Nos. B-53-88; B-16-87; B-6-86; B-10-83.

<sup>4</sup>Decision Nos. B-52-88; B-35-88; B-13-87; B-31-85.

impartial arbitration of grievances, we cannot create a duty to arbitrate beyond the scope established by the parties in their collective bargaining agreement.<sup>5</sup>

In the instant case, it is undisputed that the parties agreed to arbitrate grievances involving alleged violations of the Agreement. However, the HHC contends that the Union has not demonstrated that the denial of the grievant's request was arbitrary and capricious and therefore, has not met its burden of establishing a nexus between Section 3.5 and the instant grievance. Alternatively, the Union maintains that it can establish the arbitrary and capricious nature of the Department's decision before an arbitrator.

In Decision No. B-46-86, we were faced with a similar dispute involving the exercise of the City's discretion within guidelines set forth in Sections 3.4 and 3.5 of the Agreement.<sup>6</sup> In order to reconcile management's right to exercise its discretion with the right of the employee to fair and reasonable treatment, we determined that a party challenging a discretionary managerial act must specify facts and circumstances which, if proven, would establish that management had exercised its discretion improperly.

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<sup>5</sup>Decision Nos. B-53-88; B-52-88.

<sup>6</sup>Section 3.4 of the Agreement provides for use of unearned sick leave, up to the amount earnable in a year of service, at the discretion of the Agency Head.

In that case, we rejected the City's argument that there was no nexus between Sections 3.4 and 3.5 of the Agreement and the denial of two sick leave requests. We determined that there was a colorable basis for the union's contention that the City had abused its discretion in denying the grievants' requests for sick leave because the union had alleged specific facts concerning the nature and extent of the grievants' illnesses and the character of their service.

In the instant case, we find that the Union has not complied with the standard we established in Decision No. B-46-86. Although it has alleged that in light of the grievant's 20 years of service, her request for extended sick leave was treated differently than similar requests from other employees, the Union has not presented us with a single factual circumstance in support of its contention.

Since the Department made a determination that was within its discretion, the Union's conclusory allegation that it acted arbitrarily and capriciously will not satisfy the requisites of our threshold arbitrability test. Although the Union contends that it can demonstrate the arbitrary and capricious nature of the Department's determination to deny the grievant's extended sick leave request before an arbitrator, we find that it has not complied with its preliminary burden of establishing a nexus between Section 3.5 and this dispute before this Board.

In situations where management's discretion is at issue, a

union must allege more than the mere conclusion that the discretion has been exercised arbitrarily. It must allege the existence of specific facts and circumstances which demonstrate that management arguably exercised its discretion in an improper manner.

Accordingly, we dismiss the instant request for arbitration.

**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 HHC's petition challenging arbitrability be, and the same hereby is granted; and it is further

ORDERED, that the Union's request for arbitration be, and the same is hereby denied.

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

Malcolm D. MacDonald  
CHAIRMAN

Daniel G. Collins  
MEMBER

George Nicolau  
MEMBER

Carolyn Gentile  
MEMBER

Jerome E. Joseph  
MEMBER

Dean L. Silverberg  
MEMBER

Frederick P. Schaffer  
MEMBER