HHC v. L.1549, DC37, 43 OCB 67 (BCB 1989) [Decision No. B-67-89 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of	DECISION NO. B-67-89
	DOCKET NO. BCB-1127-89 (A-2960-88)
The NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, Petitioner,	
-and-	
DISTRICT COUNCIL 37, LOCAL 1549, AFSCME, AFL-CIO, Respondent.	

DECISION AND ORDER

On January 11, 1989 the New York City Health and Hospitals Corporation ("HHC") filed a petition challenging the arbitrability of a grievance that is the subject of a request for arbitration submitted by District Council 37, Local 1549, AFSCME, AFL-CIO (the "Union") on behalf of its member Scott Silverstein ("Grievant"). The Union filed an answer on January 23, 1989. HHC did not file a reply.

BACKGROUND

On May 25, 1988, Grievant, an Office Aide at Gouverneur Hospital, filed a grievance at Step I of the grievance procedure, claiming a "violation [of the] Code of Ethics [because of] conduct unbecoming [an] employee of HHC." In support of his

claim, Grievant alleged that:

> On Thursday April 28, 1988 in a loud and unprofessional manner Ms. Kollmeyer (Acting Program Dir.) threw papers at Mr. Silverstein (Office Aide) and verbally abused him. Incident occured during lunch hour, in presence of employee and patient.

As a remedy, Grievant demanded an "apology written or apology in the presence of those present at the time of abuse."

Grievant did not receive a response to his Step I grievance and, on June 15, 1988, he refiled his claim. Thereafter, on November 1, 1988, Grievant's claim was denied at Step III of the grievance procedure. The Step III Review Officer determined that "an alleged violation of the 'Employee Handbook' does not constitute a grievance within the contractual definition of that term and, therefore, [the grievance] fails to constitute an issue which may be adjudicated via the contractual grievance procedure." As a result, the Review Officer dismissed the complaint without a Step III conference.

No satisfactory resolution of the matter having been reached, on December 5, 1988, the Union filed a request for arbitration, alleging a violation of "Rule II, E of the Gouverneur Employees Handbook."[1] As a remedy, it requests an

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[1] We take administrative notice of the fact that there is no Rule II in the Gouverneur Employees Handbook and, therefore, assume that in citing "Rule II, E," the Union is in fact referring to Part II, Section E, 2.

Part II of the Gouverneur Employees Handbook, entitled **"What**

(continued...)

> Award that the abusive conduct of Anne Kollmeyer violated the Gouverneur Employees Handbook; that the employer has an obligation to insure that employees are not subjected to such abusive conduct; that Gouverneur Hospital post a copy of the arbitrator's award at Gouverneur Hospital; and that Gouverneur Hospital post a notice that the obligations set forth in the Employee Handbook apply to managerial employees as well as other employees.

POSITIONS OF THE PARTIES

HHC's Position

HHC asserts that the request for arbitration must be denied

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[1](...continued)
Is Expected Of You", states as follows:

> Common sense, good judgement, and acceptable personal behavior are expected of all employees. This includes observance of all Corporate policies. The objective is to create and preserve an atmosphere that insures optimum patient care and a pleasant and safe work environment.
>
> Guidelines for good employee conduct and success on the job are listed on the following pages. Failure to adhere to these guidelines or the commission of acts of misconduct also listed, can result in disciplinary action. This list is only a guide; it does not spell out every possible rule of conduct.

Section E, entitled **"Personal Conduct"**, states in pertinent part as follows:

* * * *

> **2. Employees shall exercise self-control toward patients, visitors, supervisors, and associates, even under extreme stress.**

* * * *

because an alleged violation of the Gouverneur Employees Handbook does not state a claim which is arbitrable under the collective bargaining agreement between the parties. It maintains that the Employees Handbook does not constitute a rule, regulation, written policy or order of the employer within the meaning of Article VI, Section 1B of the Agreement.[2] Rather, it claims that the Employees' Handbook is a "pamphlet" given to new employees of Gouverneur Hospital, which sets forth guidelines for employees in such areas as attendance, punctuality, attention to duty, health, honesty and confidentiality and personal conduct.

HHC also challenges the arbitrability of the grievance on the ground that the remedy sought in the request for arbitration differs from the remedy requested in the lower steps of the grievance procedure. According to HHC, "[t]he fact that the remedy requested at arbitration has changed is almost an admission by the Union that it is aware that such remedy is unavailable under the Contract." Additionally, it claims that the remedy sought by the Union is "essentially one for a declaratory judgement that a wrong was done and that such be

[2] Article VI, Section 1B of the collective bargaining agreeement between the parties defines the term "grievance" as:

> A claimed violation, misinterpretation or misapplication of the Rules or Regulations, written policy or orders of the Employer applicable to the agency which employes the grievant affecting terms and conditions of employment.

posted." Since "[t]hat is not the purpose of an arbitration award, nor is it the purpose of a grievance", HHC contends that the Union is seeking a remedy that is beyond the authority of an arbitrator to award.

HHC further contends that to the extent the remedy requested in the request for arbitration seeks a ruling on the applicability of the Employees Handbook to a group of employees who are not covered by the contract (i.e., managerial employees), it is "clearly beyond the jurisdiction of an arbitrator". Accordingly, HHC argues that the request for arbitration must be dismissed because it fails to state a cause of action for which relief may be granted.

Finally, HHC points out that the request for arbitration is based upon a single incident wherein some papers allegedly were thrown at Grievant. It notes, however, that "[t]here is no allegation of a pattern of behavior in any step of the grievance procedure heretofore. There is no claim that the incident lasted more than a few moments." Therefore, HHC argues, "[t]he claim by Grievant is, at best, de minimis, and should be dismissed."

Union's Position

The Union contends that contrary to HHC's assertion, the claimed violation of the Employees Handbook is arbitrable pursuant to Article VI, Section 1B of the Agreement. In support of its position, the Union asserts that:

> the imposition of physical and verbal abuse upon one bargaining unit employee by a managerial employee, with the knowledge and consent of the administration of Gouverneur Hospital, in violation of the Employees Handbook constitutes discriminatory enforcement of work rules which directly affect[s] the grievant and indirectly affect[s] all bargaining unit employees by creating an atmosphere of intimidation and harassment on the job.

The Union also disputes HHC's contention that the instant grievance is de minimis. To the contrary, it claims that "a single incident of physical and verbal abuse by a managerial employee against a bargaining unit employee in violation of the employer's work rules is a serious matter not 'de minimis' as claimed in the petition [challenging arbitrability]."

Finally, with respect to HHC's arguments concerning the remedy requested in arbitration, the Union submits that such arguments are not relevant to the arbitrability of the grievance. The fact that it is seeking a remedy in arbitration which is different from that requested in the lower steps of the grievance procedure does not change the basic underlying dispute and, the Union argues, cannot form the basis for the denial of its request for arbitration. Moreover, the Union asserts that the fact that an arbitrator might render a proscribed remedy cannot serve as a valid basis for denying a request for arbitration. According to the Union, "the arbitrator has broad authority under the Agreement to accept one or more of [the Union's] requested 'remedies' or to fashion other appropriate remedies so long as

those ordered draw their essence from the Agreement." Thus, it claims that the difference in the remedies requested in the lower steps of the grievance procedure and in the request for arbitration "is irrelevant to the petitioner's obligation to arbitrate the grievance or to the arbitrator's jurisdiction to hear the grievance and render an award ...."

DISCUSSION

It is well-established that in determining disputes concerning arbitrability, this Board must decide whether the parties are in any way obligated to arbitrate their controversies and, if so, whether the obligation is broad enough in its scope to include the particular controversy at issue in the matter before the Board. In the instant case, it is not disputed that HHC and the Union have agreed to arbitrate grievances. Instead, the question presented for our determination is whether a claimed violation of the Gouverneur Employees Handbook falls within the contractual definition of the term "grievance" and, therefore, within the scope of the parties' agreement to arbitrate.

In support of its petition challenging arbitrability, HHC claims that the Gouverneur Employees Handbook is a "pamphlet" given to new employees which, in a section entitled "What Is Expected Of You", sets forth guidelines in such areas as attendance, punctuality and personal conduct. HHC maintains, however, that the Employees Handbook does not constitute a rule,

regulation, written policy or order of the employer and, consequently, the alleged violation at issue in the case herein does not state a grievance within the contractual definition of that term. We disagree.

In prior decisions, this Board has held that guides,[3] "informationals",[4] manuals,[5] and other documents external to the collective bargaining agreement may constitute "written policy" of the employer within the contractual definition of the term "grievance". In this regard, we note that in Decision No. B-28-87, this Board held that the Department of Environmental Protection ("DEP") Supervisors Guide to Policies and Procedures for Plant Operations Employees, the Agency Guide to Performance Evaluation for Sub-Managerial Positions, the Department of Personnel's Personnel Policy and Procedure, and the DEP Employees Guide to Policies and Procedures all constitute "written policy" subject to arbitration under a contractual provision identical to Article VI, Section 1B in the case herein. In reaching that conclusion, we were persuaded by the fact that each of the documents considered "impose specific standards and requirements".

In Decision No. B-28-83, on the other hand, this Board

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[3] See e.g., Decision Nos. B-43-88; B-15-80; B-8-78.

[4] See e.g., Decision No. B-38-85.

[5] See e.g., Decision No. B-31-82.

denied the arbitrability of a grievance finding that a contract between the City and New York State does not constitute "written policy" and, therefore, did not fall within the definition of the term "Grievance" set forth in the collective bargaining agreement between the parties. We stated that:

> [w]ritten policy generally consists in a course of action, a method or plan, procedure or guidelines which are promulgated by the employer, unilaterally, to further the employer's purposes, to comply with requirements of law, or otherwise to effectuate the mission of an agency. The agreement of the union may be sought but is not required. Nevertheless, a policy must be communicated to the union and/or to the employees who are to be governed thereby.

We held that the City-State contract at issue therein did not qualify as a "written policy" in that a contract is, by definition, a bilateral document, not a unilateral directive of the employer. Additionally, the contract did not offer guidelines or procedures; and it was not communicated to the union or to the employees.

Applying the criteria set forth in prior Board decisions as to what constitutes "written policy" to the instant matter, we find that the Gouverneur Employees Handbook falls within the contractual definition of the term grievance. It is clear that the Employees Handbook imposes specific standards and requirements, and has been communicated to the employees of

Gouverneur Hospital.[6] Moreover, we note that the Employees Handbook clearly states that:

> The purpose of this booklet is twofold. The first is to welcome new employees to Gouverneur and help them to become well adjusted and productive members of our staff as soon as possible. The second is to provide those who are already members of our family with up to date guidelines for the observation of rules and regulations, which is your responsibility.
>
> This handbook points out your obligations as well as your benefits. (Emphasis in original)

We reject the City's claim that the request for arbitration must be denied because the Union changed the remedy it requested. We note that HHC has not alleged, nor do the pleadings show, that the Union has expanded the list of grievants, or included additional allegations, or added unpleaded grievances at the arbitration stage. Instead, the only change alleged by HHC is that the remedy requested in the request for arbitration differs from the remedy requested in the lower steps of the grievance procedure. The fact that the Union is now seeking a remedy which is not identical with the one originally sought does not change

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[6] In this regard, we find it significant that at the end of the Employees Handbook there is a space for the employee's signature, with the following statements written under the signature space:

> I (signature space) employed at Gouverneur Hospital, have received a copy of the Corporation's Employee Handbook. I agree to read the Handbook carefully and to comply with the policies and rules and regulations stated therein.

the basic underlying dispute and, therefore, will not form the basis upon which this Board will deny a request for arbitration.[7]

We also reject HHC's claim that the request for arbitration must be denied because it contains a remedy that the arbitrator is not empowered to award. This Board has long held that arguments addressed to questions of remedy are not relevant to the arbitrability of the grievance.[8] The propriety of the remedy sought is a matter for the arbitrator, not the Board to decide.[9]

Finally, we reject HHC's contention that the request for arbitration should be dismissed because the claim by Grievant "is, at best, de minimis." In this regard, we note that there is nothing in the contractual definition of the term "grievance" or in the Agreement generally which bars the arbitration of a claim that is otherwise arbitrable on the ground that it is de minimis. In any event, the question whether a contractual violation is so insignificant as to be unworthy of a remedy goes to the merits of the grievance and, therefore, is a question to be addressed by the arbitrator, not this Board.[10]

Accordingly, for all of the above-stated reasons, we shall deny HHC's petition challenging arbitrability in its entirety,

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[7] See e.g., Decision No. B-32-82.

[8] Decision Nos. B-5-74; B-22-81.

[9] Decision Nos. B-22-81; B-2-71.

[10] Decision No. B-13-89.

and we shall grant the Union's request for arbitration. This threshold determination of arbitrability is not intended to reflect, in any manner, the Board's view on the merits of the underlying dispute. We note that questions concerning the merits of a grievance are for the arbitrator to determine; and not this Board which properly considers whether the dispute is arbitrable.[11]

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

ORDERED, that the request for arbitration filed by District Council 37, Local 1549, AFSCME, AFL-CIO on behalf of its member

[11] Decision Nos. B-15-88; B-7-81; B-17-80.

Scott Silverstein be, and the same hereby is, granted.

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

MALCOLM D. MacDONALD
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