

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of
THE NEW YORK CITY HEALTH AND
HOSPITALS CORPORATION,

DECISION NO. B-9-89
DOCKET NO. BCB-1036-88
(A-2763-88)

Petitioner,

-and

LOCAL 420, DISTRICT COUNCIL 37,
AFSCME, AFL-CIO,
Respondent.

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DECISION AND ORDER

On March 4, 1988, the New York City Health and Hospitals Corporation ("petitioner" or "HHC"), filed a petition challenging the arbitrability of a grievance that is the subject of a request for arbitration submitted by Local 420, District Council 37, AFSCME ("respondent" or "the Union") on behalf of its member Muriel Lovell ("the grievant"). The Union filed a verified answer to the petition and an affidavit signed by grievant on June 20, 1988. Thereafter, on July 25, 1988, HHC filed a verification to its petition. In a letter accompanying the verification, HHC explained that "[i]nadvertently, no verification was attached to said petition when it was submitted on March 4, 1988"; and requested that the verification therein submitted "be considered as compliance with Rule 7.5 of the Revised Consolidated Rules of the Office of Collective Bargainin

[OCB Rules]."¹ The Union, by letter dated August 3, 1988, urged the Board of Collective Bargaining ("the Board") to reject HHC's verification inasmuch as it was untimely filed and, therefore, does not comply with the OCB Rules. HHC did not submit a reply to the Union's answer.

BACKGROUND

Grievant, a Nurses Aide employed by Cumberland Neighborhood Family Care Center ("CNFCC"), was injured on the job on October 3, 1986. Due to the injuries she sustained, grievant was unable to perform the duties of her job. Grievant filed a Worker's Compensation claim which, the Union asserts, was approved for the full period of her disability.²

On October 7, 1987, the Assistant Personnel Director of CNFCC, Sonia Dell, wrote to grievant and informed her that

Our records indicate that you have been
absent from duty since October 4, 1986,

¹ OCB Rule 7.5 states that a petition filed pursuant to Rule pursuant to Rule 7.2, 7.3 or 7.4 shall be verified and shall contain:

- a. The name and address of the petitioner;
- b. the name and address of the other party (respondent);
- c. A statement of the nature of the controversy, specifying the provisions of the statute, executive order or collective agreement involved, and any other relevant and material documents, dates and facts. If the controversy involves contractual provisions, such provisions shall be set forth;
- d. Such additional matters as may be relevant and material.

²According to the Union, grievant was unable to return to her job until March 7, 1988.

_____ because of your inability to perform your duties due to medical reasons.

We have held your Nurse Aide position vacant since then, but are not able to continue doing so because of the adverse affect on patient care and the productivity of the Nursing Department.

Accordingly, grievant was terminated from her position effective October 7, 1987.

On October 23, 1987, the Union filed a grievance at Step II of the grievance procedure, which was denied as "non-grievance". Thereafter, on November 15, 1987, the Union filed a request for a Step III review, claiming a violation of Article VI, Section 1(g)³ and Article VI, Section 10⁴ of the collective bargaining agreement between the parties. The Step III Review Officer determined that the contractual provisions cited by the Union were not relevant to grievant's claim and, on January 20, 1988, denied the grievance.

No satisfactory resolution of the matter having been reached, on February 9, 1988, the Union filed a request for arbitration alleging that grievant was wrongfully discharged in violation of Article VI, Sections 1(g) and 10 of the agreement.

³Article VI, Section 1(g) defines a grievance as: A claimed wrongful disciplinary action taken against a non-competitive employee as defined in section 10 of the Article.

⁴Article VI, Section 10 sets forth the special procedures to which grievances alleging a claimed wrongful disciplinary action taken against a non-competitive employee shall be subject.

As a remedy, the Union requests that grievant be reinstated with full back pay, full seniority and all benefits.⁵

POSITIONS OF THE PARTIES

HHC's Position

HHC argues that the request for arbitration should be denied because the Union has failed to state a cause of action for which relief may be granted under the collective bargaining agreement between the parties.

HHC asserts that grievant was not terminated pursuant to Article VI, Section 1(g). To support its assertion, it notes that no disciplinary charges were brought or served against grievant. Instead, HHC maintains that grievant was terminated pursuant to Section 71 of the Civil Service Law,⁶ which it claims

⁵ Grievant claims that when she was able to return to work (in March 1988) she went to CNFCC and presented a doctor's note, dated March 2, 1988, to Sonia Dell's secretary. Thereafter, on March 7, 1988, grievant met with Ms. Dell and a Staff Representative of the Union. Grievant submits that at that meeting she was told that she would not be reinstated "despite the fact that [she] completed and gave to Ms. Dell an Application For Reinstatement and a regular Application For Employment, as requested by Ms. Dell."

⁶ Section 71 of the Civil Service Law states as follows: Reinstatement after separation for disability. Where an employee has been separated from the service by reason of a disability resulting from occupational injury or disease as defined in the workmen's compensation law, he shall be entitled to a leave of absence for at least one year, unless his disability is of such a nature as to permanently incapacitate him for the performance of the duties of his position. Such employee may, within one year after the termination of such disability, make application to the civil service

"grants a non-disciplinary discharge of an employee who has been absent for at least one (1) year and who remains unfit to return to duty." HHC claims that if grievant wants to be reinstated, she must proceed according to the provisions of Section 71. In the event grievant is still dissatisfied with her status once that procedure is completed, HHC submits that her sole recourse is to bring a proceeding pursuant to Article 78 of the New York Civil Practice Law and Rules.

Union's Position

department or municipal commission having jurisdiction over the position last held by such employee for a medical examination to be conducted by a medical officer selected for that purpose by such department or commission. If, upon such medical examination, such medical officer shall certify that such person is physically and mentally fit to perform the duties of his former position, he shall be reinstated to his former position, if vacant, or to a vacancy in a similar position or a position in a lower grade in the same occupational field, or to a vacant position for which he was eligible for transfer. If no appropriate vacancy shall exist to which reinstatement may be made, or if the work load does not warrant the filing of such vacancy, the name of such person shall be placed upon a preferred list for his former position, and he shall be eligible for reinstatement from such preferred list for a period of four years. In the event that such person is reinstated to a position in a grade lower than that of his former position, his name shall be placed on the preferred eligible list for his former position or any similar position. This section shall not be deemed to modify or supersede any other provision of law applicable to the re-employment of persons retired from the public service on account of disability.

The Union asserts that the petition submitted by HHC violated OCB Rule 7.5 because it did not include a verification. Accordingly, the Union argues that the petition challenging arbitrability should be dismissed; and the request for arbitration granted.

The Union also asserts that grievant's termination was invalid in that "there was no legal or contractual basis by which Ms. Lovell's employment was terminated." The Union claims that grievant could not have overstayed her leave because she was not given a leave of absence with a specific date of return. Moreover, it contends that no rule, regulation or provision of the agreement was cited as the reason for grievant's termination.

According to the Union, "the employer violated the collective bargaining agreement by not holding a Step II meeting with the Union to review the grievance as required by Article VI, Section 2" Having refused to meet with the Union as required by the collective bargaining agreement, the Union submits that HHC then compounded the error by alleging that "... Ms. Lovell was terminated pursuant to Section 71 of the New York State Civil Service Law, and as such, this is not a grievable matter." "It is obvious," the Union asserts, "that such misplaced reliance on Section 71 of the New York State Civil Service Law was no more than an after thought." The Union alleges that this is evidenced by the fact that the letter terminating grievant's employment did not cite any law, rule,

regulation or contractual provision as the basis for grievant's termination. Since "it is well-established that after a termination notice (in this case one month later) that the underlying support for the decision cannot be added at a later time," the Union claims that the "termination of [grievant] was void because no support was cited for the decision to discharge at the time the decision was made."

The Union further claims that grievant's termination, allegedly based on Section 71 of the civil Service Law, is invalid because she is not covered by the Civil Service Law with respect to personnel actions. According to the Union, HHC has promulgated its own rules and regulations relating to personnel administration. Since Ms. Lovell was subject to the rules and regulations of the HHC, the Union argues that her termination pursuant to the Civil Service Law was "totally invalid." "Simply stated," the Union asserts, "Ms. Lovell was not subject to Section 71 of the New York State Civil Service Law and, therefore, her termination was allegedly based on a law which did not apply to her." In any event, the Union contends that the employer did not attempt to rely on Section 71 of the Civil Service Law until one month after the actual termination. Thus, the termination of grievant was void ab initio.

Finally, The Union claims that even assuming arguendo that Section 71 of the Civil Service Law is applicable, grievant's termination cannot stand because "HHC violated the specific leave

of absence provision of Section 71." In support of its position, the Union notes that Section 71 requires that an employee "shall be entitled to a leave of absence of at least one year...." The Union submits, however, that Ms. Lovell was not placed on a leave of absence by the employer, as evidenced by the fact that she was not informed that her leave would begin on a certain date and end on a certain date. Rather, the Union claims that Ms. Lovell was under the "reasonable assumption that since she was absent due to a job related injury she would be able to return to work when she recovered from the injury." Thus, the Union argues, grievant's due process rights were violated in that she was terminated without notice or an opportunity to meet with the employer to explain her medical situation and to discuss the date of her return to work. The Union points out that even after her request for reinstatement, on March 7, 1988, Ms. Lovell was not given a physical examination by HHC. Therefore, the Union submits, it is evident "that the termination of [grievant] was a wrongful disciplinary termination."

Discussion

At the outset, we shall address the Union's claim that the petition challenging arbitrability should be denied because HHC failed to submit a verification with its petition and, therefore, violated OCB Rule 7.5. HHC does not dispute the Union's assertion that the petition that was filed in March 1988 did not

include a verification. Rather, it maintains that the failure to file a verification was inadvertent; and when it became aware of the error, it filed a verification in accordance with OCB Rule 7.5.

This Board, as is true of most quasi-judicial administrative agencies, has the discretion, with due regard for considerations of due process, to apply its rules liberally and in such fashion as will promote the resolution of real issues, rather than the application of technical rules of procedure more appropriate to the courts. Thus, in prior decisions we have stated that where the rules are in essence 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 the claims raised in the petition.⁷

Applying these principles to the instant case, we do not find it appropriate to permit HHC's failure to file a verification to bar consideration of the instant petition. In reaching this conclusion, we note that the Union has presented no evidence to show that the grievant was in any way prejudiced by the fact that HHC initially filed its petition without a verification. Accordingly, we shall deny the Union's request that we dismiss HHC's petition challenging arbitrability on this basis.

⁷See, _Decision Nos. B-73-88; B-20-85; B-15-83. See also, Board of Certification Decision No. 21-82.

We turn now to the substantive basis for HHC's petition challenging arbitrability, namely, its assertion that the Union failed to state a cause of action for which relief may be granted under the collective bargaining agreement between the parties.

It is well established that where, as here, the parties 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.⁸ In determining this question, this 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. 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.⁹

Applying these standards to the present case, we find that the Union has failed to demonstrate the required nexus between the subject of its grievance and the contractual provisions cited as the basis for its claim. The Union contends that grievant's termination constitutes wrongful disciplinary action in violation of Article VI, Sections 1(g) and 10. We note, however, that it has not alleged any facts or circumstances traditionally

⁸ See, e.g., Decision Nos. B-4-88; B-12-87; B-6-86.

⁹ Decision Nos. B-4-88; B-35-86; B-10-86; B-4-83.

characteristic of wrongful disciplinary action, such as the service of charges or accusations of culpability, which would support its contention. HHC, on the other hand, has alleged business necessity as the underlying reason for its action. In this regard, we note that in her letter to grievant, dated October 7, 1987, Ms. Dell specifically stated that:

We have held your Nurse Aide position vacant since then [October 4, 1986] but are not able to continue doing so because of the adverse affect on patient care and the productivity of the Nursing Department. (Emphasis added)

Under these circumstances, we find that the Union has failed to allege sufficient facts to support its assertion that the management action complained of, grievant's termination, constituted wrongful disciplinary action in violation of the cited contractual provisions.¹⁰

¹⁰We take administrative notice of the fact that

Section 7:3:4 of the Personnel Rules and Regulations of the New York City Health and Hospitals Corporation provides that:

An employee who has been separated from service because of a job connected disability or disease as defined in the Worker's Compensation Law shall be entitled to a leave of absence for at least one year unless permanently incapacitated from performing the duties of the position and may request reinstatement within one year after termination of such disability. Upon being duly found by the Corporation to be physically and mentally fit to perform the duties of his/her former title he/she shall be reinstated to his/her former title if there is a vacancy or to a similar or lower title in the same occupational field or to a vacant position for which he/she is eligible for transfer.

We will not address the merits of the Union's other claims, namely, that Section 71 of the Civil Service Law did not apply to grievant; and that even assuming arguendo it did, grievant's termination could not stand because HHC violated the specific provisions of Section 71. Determination of the applicability of Section 71 to the instant matter would require an interpretation

If no appropriate vacancy exists to which reinstatement may be made or the work load does not warrant the filling of a vacancy the name of such a person shall be placed on a preferred list for his/her former title or a similar title and he/she shall be eligible for reinstatement for a period of four years thereafter. Acceptance of a position in a lower salary range shall not preclude his/her name from being retained on a preferred list for his/her former position.

Article VI, Section 1 (B) of the collective bargaining agreement, however, defines a 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 employs the grievant affecting terms and conditions of employment; provided, disputes involving the Rules and Regulations of the New York City Personnel Director or the Rules and Regulations of the Health and Hospitals Corporation with respect to those matters set forth in the first paragraph of Section 7390.1 of the Unconsolidated Laws shall not be subject to the Grievance Procedure or arbitration

Accordingly, we note that while Section 7:3:4 of the HHC Rules and Regulations arguably may be related to the instant grievance, that provision is not subject to the grievance and arbitration procedure set forth in the agreement between the parties.

of the Civil Service Law, a matter which is beyond the scope of our authority. Moreover, since Section 71 is outside the contractual definition of the term grievance under the parties' collective bargaining agreement, we find that consideration of these other claims would be outside the scope of the parties' agreement to arbitrate.

Accordingly, for the above stated reasons, we shall deny the Union's request for arbitration; and we shall grant HHC's petition challenging arbitrability.

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 request for arbitration filed by Local 420, District Council 37, AFSCME, on behalf of its member, Ms. Muriel Lovell, be, and the same hereby is, denied; and it is further

ORDERED, that the petition challenging arbitrability filed by the New York City Health and Hospitals Corporation be, and the

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same hereby is, granted.

DATED: New York, N.Y.
March 30, 1989

MALCOLM D. MacDONALD
CHAIRMAN

DANIEL COLLINS
MEMBER

CAROLYN GENTILE
MEMBER

EDWARD GRAY
MEMBER

EDWARD SILVER
MEMBER

DEAN SILVERBER
MEMBER