HHC v. NYSNA, 45 OCB 37 (BCB 1990) [Decision No. B-37-90 (Arb)]

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

-between-

THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,
Petitioner,

Decision No. B-37-90
Docket No. BCB-1255-90 (A-3297-89)

-and-

NEW YORK STATE NURSES ASSOCIATION,
Respondents.
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DECISION AND ORDER

On March 6, 1990, the New York City Health and Hospitals Corporation ("the HHC") filed a petition challenging the arbitrability of a request for arbitration which was filed by the New York State Nurses Association ("the Union") on December 29, 1989. The Union filed an answer on April 10, 1990. The HHC did not file a reply.

BACKGROUND

Prior to April 1989, the grievant, Judith Clarke, had been Head Nurse at the Harlem Hospital, Burn Center for approximately seventeen years. In this capacity, she acquired highly specialized experience indigenous to the Burn Unit, and supplemented her experience with specialized training.

On or about March 23, 1989, the grievant received a memorandum from Ulysses Miller, Associate Director of Nursing, informing her that as of April 17, 1989, she would be reassigned

to the Medical Unit. Upon her reassignment, the grievant was to retain the title, salary and duties of a Head Nurse.

On April 14, 1989, the grievant filed a grievance at Step IA of the grievance procedure asserting that her reassignment was arbitrary and capricious. The grievance was denied on May 18, 1989, and was subsequently submitted at Step II on or about May 18, 1989. The Step II grievance was denied in a decision dated July 5, 1989.

The grievant thereafter submitted a letter of resignation, to Martha Grate, Associate Executive Director of Nursing, which was effective on August 28, 1989. In her letter, she stated, in relevant part, as follows:

> My surgical experience and educational qualifications should be a factor in determining where I may best serve the institution. A reassignment to a medical ward does not take these factors into consideration and therefore [sic] [should be] deemed incongruent. There are many areas in nursing service which could better be served by my experience and expertise. . . . Therefore, all these factors in consideration, and in lieu of a suitable alternative, I am left with no choice and forced to render my resignation.

On November 22, 1989, the grievance was dismissed at Step III on the ground that it was moot due to the grievant's resignation.[1] No satisfactory resolution of the instant dispute having been reached, on December 19, 1989, the Union filed a request for arbitration pursuant to Article VI, §§1(B) and (D) of the collective bargaining agreement executed by the parties ("the

[1] Since the Step III grievance is not part of the record, the date upon which it was filed is unknown.

Agreement").[2] In its request for arbitration, the Union contended that the grievant's reassignment was an unfair disciplinary action which had been effected arbitrarily and capriciously. It further alleged that the reassignment was a violation of "Orders of the Employer - Affecting terms and conditions of employment." As a remedy, the Union requests that the grievant be immediately reinstated to the Burn Unit at Harlem Hospital.

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[2] Article VI, Section 1 of the Agreement provides, in relevant part, as follows:

> D E F I N I T 1 0 N: The term "Grievance" shall mean:
> . . .
>
> (B) 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 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;. [Section 7390.1 of the Unconsolidated Laws provides, in pertinent part, that the HHC shall promulgate rules and regulations relating to agency procedures which involve but are not limited to transfers.]
>
> (D) A claimed wrongful disciplinary action taken against an employee.

POSITIONS OF THE PARTIES

HHC Position

The HHC argues that its determination to reassign the grievant was within its statutory management prerogative pursuant to Section 12-307b. of the New York City Collective Bargaining Law ("the NYCCBL").[3] It contends that in the instant case, its needs were best met by reassigning the grievant, because the Medical Unit at Harlem Hospital has a much higher patient population than the Burn Unit. The HHC also points out that there is a severe nursing shortage throughout the country, and that management is under severe constraints to utilize its present staff as efficiently as possible.

Moreover, the HHC notes that pursuant to Section 7:2:2 of the HHC Personnel Rules and Regulations "[a] reassignment may be made at the discretion of the Appointment Officer in the interest of managerial effectiveness." Consequently, the HHC argues that the instant dispute is expressly excluded from the arbitral forum

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[3] Section 12-307b. of the NYCCBL provides, in relevant part, ad 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; . . . direct its employees; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; . . . take all necessary action to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work.

pursuant to Article VI, §1(B) of the Agreement.[4]

The HHC further disputes the Union's contention that the grievant's reassignment was a disciplinary action. It maintains that the grievant's reassignment was effected to best accommodate the hospital's needs. Thus, the HHC maintains that the Union's allegation of wrongful discipline is completely without merit.

Finally, the HHC argues that the instant dispute is moot because the grievant resigned her position as of August 28, 1989. It asserts that the grievance herein must be dismissed for failure to state a cause of action for which relief may be granted.

Union Position

The Union argues that the grievant's reassignment was an arbitrary and capricious disciplinary action. In support of its position, it presents a memorandum, dated March 22, 1989, from Dr. Ferdinand A. Ofodile, Director of Plastic Surgery at Harlem Hospital, to Grate which is critical of the grievant's reassignment. The memorandum provides, in relevant part, as follows:

> Harlem Hospital is one of the designated Burn Centers in New York. For us to remain a Burn Center we must meet the requirements of EMS which include (1) Provision of experienced nursing staff to cover the Unit. (2) The presence of an experienced Head Nurse to supervise Nursing case in the Unit.
> If Ms. Clarke with 17 years of experience is being

[4] See supra at n. 2.

> removed from the Unit . . ., I would like to know which experienced nurse is slated to replaced [sic] her as a Head Nurse. We will not be in compliance as a Burn Center if we have a charge nurse with limited burn experience to run the Unit.

The Union contends that "if as Dr. Ofodile states, the Hospital will not be in compliance as a Burn Center as a result of Ms. Clarke's transfer, it is clear that there is no rational reason for her transfer, except that it was for disciplinary reasons."

Moreover, the Union disputes the HHC's contention that the grievance herein is moot. It asserts that the grievant's resignation "was forced by the hospital", and was therefore a form of discipline. Thus, it argues that the instant grievance is arbitrable, and that the City's petition challenging arbitrability must be denied.

DISCUSSION

Since it is clearly not in the interest of sound labor relations to order the arbitration of a particular dispute when the remedy sought no longer exists, we will evaluate the HHC's claim that the instant dispute is moot at the outset of our discussion.[5] The HHC contends that the grievance herein must be dismissed because the grievant is no longer employed by Harlem Hospital, and the remedy of reinstatement to the Burn Unit which is sought by the Union is not available. In contrast, the Union maintains that the grievant's resignation was "forced" by the

[5] Decision No. B-2-79.

hospital as a form of discipline, and is therefore subject to arbitration under Article VI, §1(D) of the Agreement.

We have carefully considered the Union's allegation, and we find that there are no allegations of fact in the record which even arguably indicate that the grievant's resignation was not voluntary. Although it is clear from the grievant's letter of resignation that she was dissatisfied with her reassignment to the Medical Unit, we cannot deem her resignation to have been "forced" simply because she was transferred to a unit which was not of her choice or liking. Consequently, we find that the grievant had effectively resigned from Harlem Hospital as of August 28, 1989, and that the remedy of reinstatement to the Burn Unit which is sought by the Union herein is not available.[6] Accordingly, we hold that the instant grievance is moot, and must be dismissed on that basis.

Moreover, we find that in any event, this dispute does not satisfy the test which we have developed in resolving challenges to the arbitrability of grievances. This test involves a well settled two-part inquiry to determine whether the parties have agreed to arbitrate the type of dispute which is the subject of the grievance in question,[7] and whether there exists a prima facie relationship between the grievance and the source of the

[6] We emphasize that the remedy of reinstatement to the Burn Unit is the only remedy sought by the Union in this matter.

[7] Decision Nos. B-69-89; B-61-88; B-30-86.

right being invoked by the proponent of arbitration.[8]

In applying our threshold arbitrability test to the instant grievance, we note that a municipal employer has the unrestricted authority to assign its employees.[9] However, it is well settled that the assignment of personnel is a permissive subject of bargaining which may be limited by mutual agreement of the parties to a collective bargaining agreement.[10]

In the instant case, pursuant to Article VI, §1(D) of the Agreement, the parties have agreed to arbitrate disputes involving matters of alleged wrongful employee discipline. Consequently, since the Union alleges that the grievant's reassignment was a form of discipline, we find that the first requirement of our threshold arbitrability test has been met.

However, the Union has failed to demonstrate that this dispute complies with the second part of our test. Specifically, the Union has not established to our satisfaction that the grievant's reassignment to the Medical Unit was arguably effected for disciplinary purposes.

Whenever a union challenges an employer's managerial right to assign its employees on the ground that a particular assignment was motivated by disciplinary reasons, the union must raise a substantial question as to management's intent in making

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[8] Decision Nos. B-65-89; B-65-88; B-54-87; B-10-86.

[9] See supra at fn. 3.

[10] Decision Nos. B-74-89; B-52-89; B-67-88; B-47-88.

the assignment.[11] A bare allegation that a reassignment was effected for disciplinary purposes will not suffice to overcome an employer's assertion that its determination was within its managerial right.[12]

In the instant case, the Union contends that the internal memorandum from Ofodile to Grate evidences the disciplinary nature of the grievant's reassignment. Although the language of the memorandum implies that Ofodile was opposed to the grievant's reassignment, there are no allusions therein as to the cause of the grievant's reassignment. Consequently, we find that the memorandum sheds no light on management's motivation for reassigning the grievant and does not establish that the grievant's reassignment was arguably effected for disciplinary purposes.

Furthermore, we are not satisfied with the Union's argument that a disciplinary motive for the grievant's reassignment may be inferred if, as a result of her transfer, the Burn Unit failed to comply with EMS standards. We note in this respect, that Ofodile did not conclusively state in his memorandum that the Burn Unit would fail to comply with the requisite standards if the grievant was reassigned. We also have no information on the Burn Unit's actual compliance with those standards after the grievant's departure. Moreover, even if the Burn Unit did not comply with

[11] Decision Nos. B-4-87; B-40-86; B-5-84; B-8-81.

[12] Decision Nos. B-52-89; B-61-88; B-14-87; B-5-87.

EMS standards due to the grievant's reassignment, the inference that the grievant's reassignment must therefore have been effected for disciplinary purposes is far too tenuous and conclusory to overcome the arguments in the HHC's petition challenging arbitrability.

Finally, with respect to the Union's contention that the grievant's reassignment was a violation of "Employer Orders", we note that the Union has failed to specify the orders to which it refers. Therefore, we are deprived of the opportunity to ascertain whether there exists a nexus between the particular order at issue and the instant grievance. Consequently, we hold the Union's allegation that the HHC violated "Employer Orders" is to be vague and conclusory.

Accordingly, for all the aforementioned reasons, we grant the HHC's petition challenging arbitrability, and we dismiss the Union's request for arbitration.

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 is hereby

0 R D E R E D, that the challenge to arbitrability filed herein by the HHC be, and the same is hereby granted, and it is further

0 R D E R E D, that the request for arbitration filed herein by the Union be, and the same is hereby denied.

Dated: June 27, 1990
New York, N.Y.

MALCOLM D. MACDONALD
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