HHC v. CIR, 47 OCB 50 (BCB 1991) [Decision No. B-50-91 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of the Arbitration

-between-

DECISION NO. B-50-91
DOCKET NO. BCB-1329-90
(A-3576-90)

THE NEW YORK CITY HEALTH
AND HOSPITALS CORPORATION,
Petitioner

-and-

THE COMMITTEE OF INTERNS
AND RESIDENTS,
Respondent
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DECISION AND ORDER

On October 15, 1990, the New York City Health and Hospitals Corporation ("HHC") filed a petition challenging the arbitrability of a grievance filed by the Committee of Interns and Residents ("CIR"). On December 3, 1990, CIR filed its answer to the petition; the City did not file a reply.

BACKGROUND

On June 21, 1990, the Union filed a Step II group grievance pursuant to Article XIV, Section 4[1] of the parties' collective bargaining agreement on behalf of the Rehabilitation Medicine Residents employed at Lincoln and Metropolitan Hospitals. The Union alleged that the Rehabilitation Medicine Residents had been

[1] Article XIV, Section 4 states:

Any grievance of a general nature affecting a large group of Employees and which concerns the claimed misinterpretation, inequitable application, violation or failure to comply with the provisions of this Agreement shall be filed at the option of the Committee at Step II (a) of the grievance procedure, without resort to the previous step.

individually coerced into accepting a "fellowship" in lieu of a portion of their salary. According to the Union, this fellowship subjected the residents to additional conditions of employment. The Union claimed that as a consequence of receiving this fellowship, the residents did not and may not receive their full salary.

The Union argued that HHC's actions with regard to these fellowships violated Article II, Section 2 (prohibition against discrimination for union activities); Article IV, Section 5 (wages) ; Article VI (individual contracts) ; Article XIV (grievance procedure); and Article XVI (general prohibition against discrimination) of the collective bargaining agreement.[2] The Union

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[2] The relevant portions of these Articles state the following:

Article II. Section 2:
The City agrees and the Corporation agrees that they will exercise their best efforts to see that such HSOs [House Staff Officers] suffer no discrimination or reprisals at City health facilities or corporation health facilities, respectively, by reason of their membership in or legitimate activities on behalf of the Committee.

Article IV. Section 5:
(Outlines the salary schedule at each post-graduate year.)

Article VI. Section 1:
(a) Each HSO shall, prior to the HSO's employment in any Hospital of the Corporation, receive a written contract not inconsistent with any of the provisions herein, which shall set forth the Hospital and Corporation commitments to such HSO in the following areas: (a) maintenance of electives, (b) rotational schedule, and (c) PGY [post-graduate year] level and wages appropriate to the PGY

(continued...)

also alleged that the Hospitals violated a "directive"[3] issued on November 16, 1988 by HHC's Deputy Director of Labor Relations. In pertinent part that Step II grievance determination states:

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2 (... continued)
level. . .

(b) In the event of a conflict between the terms of an individual written contract of an HSO who commences employment on or after July 1, 1983 and the provisions of this Agreement, the provisions of this Agreement shall prevail.

Section 4
No individual waiver by an HSO of the HSO's rights or those of the Committee under the collective bargaining agreement shall be effective unless consented to in writing by the Committee.

Article XIV. Section 1:
The term "grievance" shall mean (A) A dispute concerning the application or interpretation of the terms of this collective bargaining agreement; (B) A claimed violation, misinterpretation, or misapplication of the rules or regulations, authorized existing policy or orders of the Corporation affecting the terms and conditions of employment. . .

Article XVI:
No Corporation institution shall discriminate against an HSO on account of race, color, creed, national origin, place of medical education, sex, sexual orientation, affectional preference or age in any matter of hiring or employment, housing, credit, contracting, provision of service, or any other matter whatsoever. . .

[3] Although referred to as a "directive" by CIR, and not challenged as otherwise by HHC, the document is actually a Step II grievance determination issued by HHC's Deputy Director of Labor Relations.

> Requiring written commitments to the Federal Government promising future service does not conform with the Health and Hospitals Corporation pursuit of good faith labor relations and fair treatment of its employees.

It appears that this previous Step II decision affected the same group of employees at issue in the instant case (residents in the Rehabilitation Medicine Program at Lincoln and Metropolitan Hospitals and dealt with a similar issue (commitments to the federal government requiring future services).

As a remedy, the Union requested the immediate withdrawal of all letters of commitment signed by residents. In these letters the residents agreed that a portion of their salary would be paid from a fellowship which they would have to pay back to the federal government. CIR demanded that the residents be released from these agreements, that the HHC cease and desist from coercing the residents into signing for the fellowship, and that a notice be posted stating that HHC is refraining from such activity. The Union also requested that HHC pay the difference in salary owed to the affected residents.

On August 21, 1990 HHC's Deputy Director of Labor Relations denied the Step II grievance. The Director stated that a study of the matter revealed no violation of the collective bargaining agreement. In addition, the Director found that the November 16, 1988 decision was not relevant to the instant matter.

CIR then filed a Request for Arbitration in which it alleges the aforementioned violations of the collective bargaining

agreement and requests the aforementioned remedy.

POSITIONS OF THE PARTIES

HHC's position:

HHC argues that CIR's claim of a violation of Article II, Section 2 should be dismissed since there is no nexus between the alleged grievance and the contractual provision cited. Article II Section 2 states that House Staff Officers ("HSOs") may not be discriminated against because of their membership in or activities an behalf of CIR. HHC argues that there has been no discrimination against HSOs because of their membership in or activities on behalf of CIR. HHC points out that prior to the HSO's acceptance of the residency, the HSO is informed that the New York Medical College residency training program receives a federal grant and that for each year the HSO's salary is funded in part by the grant, the HSO will be required to practice in the field of rehabilitation medicine for one year. HHC argues that since the information is given to the individuals prior to their respective acceptances of offers to enter the program, CIR's claim of discrimination can not be supported. According to HHC, the same information is given to every applicant to the program and thus, there can be no discrimination against the members of CIR.

HHC similarly argues that grievant's claim of a violation of Article IV, Section 5 must fail since there is no nexus between the grievance and the contractual provision cited. Article IV,

Section 5 lists the pay levels for each postgraduate year and the effective dates of those wages. HHC claims that each resident in the rehabilitation medicine residency program is receiving the appropriate wage according to the schedule set forth. Moreover, HHC points out that CIR has not claimed that its members are not receiving the appropriate salary in accordance with the schedule set forth in Article IV, Section 5.

HHC argues that CIR's claim of a violation of Article VI also must fail. Article VI sets forth the information that must be contained in the individual contract. HHC notes there is nothing set forth in Article VI of the contract which prohibits the partial funding of an HSO's salary by a federal grant. Therefore, according to HHC, CIR's request for arbitration should be dismissed for failure to establish a nexus between its grievance and Article VI.

Article XVI of the contract prohibits discrimination against an HSO "on account of race, color, creed, national origin, place of medical education, sex, sexual orientation, affectional preference or age. HHC notes that there has been no claim by CIR that only some of its members have received funding from the federal grant or have been refused funding based upon a prohibited characteristic. HHC argues that since all applicants are "equally informed prior to accepting" their residencies and since "all HSOs are subject to this equal treatment," CIR's request for arbitration

pursuant to Article XVI should be dismissed.

Article XIV defines a "grievance" as "a dispute concerning the application or interpretation of the terms of this collective bargaining agreement." HHC argues that CIR has failed to state a grievance under this definition. HHC notes that the contract does not contain any restriction on the source of funding for wages of HSOs and that the contract does not set forth any prohibition on funding from federal grants. HHC adds that, in fact, it receives its funding from various sources. Arguing that matters which are not prohibited by the contract may not be found to violate the contract, HHC asks that the request for arbitration be dismissed.

Finally, HHC notes that the method of funding HSO salaries is a decision which is a management right,[4] so long as the contract is

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[4] New York City Collective Bargaining Law §12-307b states as 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; determine the standards of selection for employment; direct its employees; take disciplinary action; relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work. Decisions of the city or any other public employer on those matters are not within the scope of collective bargaining, but, notwithstanding the above, questions concerning the practical impact that decisions on the above matters have on employees, such as questions of workload or manning, are matters within the scope of

(continued...)

followed with regard to the payment of the correct post-graduate year levels. Pointing out that there is nothing in the contract which indicates its surrender of that right, HHC argues that the request for arbitration should be dismissed in its entirety.

Union's Position

In its answer, CIR explains that some HSOs in the Rehabilitation Medicine Program at Lincoln and Metropolitan Hospitals are required to sign for a federal grant, which they must later pay back in money or services. Thus, CIR argues that since part of their salaries must later be paid back, HSOs are not being paid their full salaries as required by the collective bargaining agreement. CIR alleges that "[n]o other HSOs covered by the Agreement . . . have their salaries subsidized by grant money which must then be reimbursed in money or services. This additional condition of employment is not a negotiated part of the Agreement and cannot be legitimately foisted on any bargaining unit member."

CIR argues that there is a nexus between its grievance and its claim of violation of Article II, §2 of the contract. Article II §2 protects HSOs from discrimination because of their membership in or activities on behalf of CIR. CIR alleges that HHC is discriminating against "some HSOs of the Rehabilitation

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4 (... continued)
collective bargaining.

This statutory provision is referred to as the "management rights" clause.

Medicine Program by imposing only upon then the burden of accepting a 'fellowship' or 'grant' with a pay back commitment in lieu of a portion of their salary" and by "requesting [that they] sign for the grant." CIR claims that "[t]he evidence to be shown more fully at arbitration will support the claim for discrimination and its connection with the HSOs activities on behalf of the CIR." CIR explains that "[d]uring 1986 the subject hospitals issued letters of dismissal to all of the HSOs of the Rehabilitation Medicine Program" and that "[o]nly those who committed to sign for the federal grant and the pay back commitment were to be renewed." CIR alleges that it "blocked these outrageous efforts." CIR asserts that "[i]n the following year, the Hospitals restarted their campaign and were successful in obtaining commitments -under duress!-, from some of the HSOs, all without notice or negotiation with the CIR. CIR argues that as a nexus exists between the instant grievance and Article II, §2 of the contract, an arbitrator should decide "[t]he means by which those commitments were obtained and whether or not it was discriminatory."

CIR similarly claims that a nexus exists between Article IV, §5 and its grievance. CIR alleges that "[t]he Agreement does not provide for a difference in salary for HSOs working in different departments or programs." CIR explains that "[t]his means that an HSO in the first year of Surgery will earn the same salary as an HSO in the first year of Rehabilitation Medicine." Thus, CIR

claims that HHC "is violating the Agreement by imposing on the HSOs the additional burden of a salary pay back in money or services, a commitment not required by the Agreement and one [to which] none of the other residents covered by the Agreement is subjected." CIR further argues that "[p]ermitting the HSOs to be coerced into signing up for the federal 'grant' also violates the Agreement." CIR asserts that "because of this pay back imposition the Rehabilitation Medicine HSOs are as a matter of fact earning less than the salary agreed upon in the Agreement and, therefore, less than the other HSOs covered by the Agreement."

CIR notes that Article XIV establishes the obligation to arbitrate any "dispute concerning the application or interpretation of the terms of this collective bargaining agreement." Accordingly, CIR argues that this provision establishes its right to arbitrate its claim that HSOs in the Rehabilitation Medicine Program are not receiving their full salaries because of the pay back obligation imposed upon them.

CIR further argues that there is a nexus between Article VI and the instant grievance. Article VI provides that HSOs shall receive, prior to employment at any HHC hospital, a written contract, which should not be inconsistent with any provision of the collective bargaining agreement. Article VI further states that, in the event of a conflict between the individual contract and the collective bargaining agreement, the collective bargaining

agreement shall prevail. Article VI, §4 states that no HSO can waive rights under the collective bargaining agreement unless CIR consents in writing to the waiver. CIR alleges that HSOs of the Rehabilitation Medicine Program who were renewed or contracted for in the 1990-1991 year "had to sign not only the traditional individual contracts but, also a commitment for the 'grant' and an agreement to pay back in work or money for the 'funding' received through the grant." CIR argues that "the individual contracts for this particular group of HSOs are inconsistent with the terms of the Agreement." CIR explains that "Article VI expressly prevents any subversion of rights provided in the Agreement," but that "HHC is effectively using the individual contracts to [obligate] the HSOs beyond the terms of the Agreement." CIR further counters HHC's claim that Article VI does not limit its sources for funding salaries. CIR explains that it "is not questioning the funding source but, rather the additional responsibilities imposed upon the housestaff as a result of having to sign for the 'funding.'" CIR argues that HHC is unilaterally reducing the salary provided for by the Agreement by obligating the HSOs to additional commitments.

CIR also argues that there is a nexus between its grievance and Article XVI of the Agreement, which protects the HSO from discrimination based on a prohibited characteristic. CIR alleges that "not all the HSOs in each and every department and/or in the rehabilitation program of these two HHC Hospitals have been

required to sign for the grant. The reason for this differentiation among HSOs is highly questionable and suggests discrimination."

Finally, CIR argues that the last defenses raised by HHC are not grounds for challenging arbitrability. CIR notes that it is not questioning the source through which the salaries of the members of the bargaining unit are being funded. CIR asserts that it is questioning the imposition of "an additional work or salary reimbursement commitment which was not negotiated with the CIR and therefore, is a violation of the Agreement."

DISCUSSION

Where 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.[5] When challenged to do so, a party seeking arbitration has the burden of establishing a nexus between the act complained of and the source of the alleged right, redress of which is sought through arbitration.[6] In the instant case, HHC argues that CIR has not established a nexus between the provisions of the collective bargaining agreement allegedly violated and the subject matter of

[5] Decision Nos. B-44-91; B-18-90; B-15-90; B-6-88.

[6] Decision Nos. B-44-91; B-18-90; B-15-90.

CIR's grievance. Thus, we must determine whether a nexus exists between the cited contractual violations and CIR's grievance.

CIR asserts that a nexus exists between Article 11, §2 and its grievance. Article II, §2 protects HSOs from discrimination because of their membership in or activities on behalf of CIR. CIR alleges that only some HSOs of the Rehabilitation Medicine Program were required to sign for the grant. CIR suggests that the selection of these individuals to sign for the grant may be connected to their activities on behalf of CIR. CIR alleges that it blocked an effort by HHC to dismiss HSOs of the Rehabilitation Medicine Program who did not sign for the federal grant and pay back commitment. CIR further alleges that the following year HHC was able to obtain commitments from some HSOs in the program, without notice or negotiation with CIR. However, CIR has not alleged which HSOs in the Rehabilitation Medicine Program were required to sign for the grant, nor how the selection of these individuals to sign for the grant may have been connected with their activities on behalf of CIR. Accordingly, CIR has not sufficiently demonstrated a nexus between its grievance and Article II, §2.

CIR further alleges there is a nexus between its grievance and Article IV, §5 of the contract. Article IV, §5 sets forth the wages that HSOs are to receive at each post-graduate year level. CIR contends that HSOs in the Rehabilitation Medicine Program are

not receiving their full salaries as provided for in Article IV, §5 because part of their salary consists of money from a federal grant, which must later be paid back in money or services.

We find that CIR has established a nexus between its grievance and Article IV, §5. In so determining, we note that our previous decisions have found wage disputes to be arbitrable generally.[7] Moreover, we have previously stated that the expectation that earned wages will be paid promptly and in full is a quintessential quid pro quo of the employment relationship.[8] In the instant case, part of the salary an employee now receives must later be paid back in the form of money or services. This is an arguable violation of the salary provision of the agreement and thus, is a matter for arbitration. In Decision No. B-2-91, we similarly found that an employee who alleged that receipt of wages could not be conditioned upon the completion of an address verification form had established a nexus between the grievance and the salary provision of the contract.

CIR similarly argues that there is a nexus between its grievance and Article VI of the collective bargaining agreement. Article VI sets forth the provisions to be included in each HSO's individual contract. CIR explains that HSOs in the Rehabilitation Medicine Program who signed individual contracts covering the 1990-

[7] Decision Nos. B-2-91; B-31-90; B-14-88; B-30-86.

[8] Decision Nos. B-2-91; B-31-90.

1991 year also signed a commitment to pay back in work or money funding received through a grant. CIR notes that Article VI States that in the event of a conflict between the individual contract and the collective bargaining agreement, the terms of the collective bargaining agreement govern. CIR further notes that Article VI states that an HSO may not waive rights under the agreement unless CIR consents in writing. Accordingly, CIR contends that although "Article VI expressly prevents any subversion of rights provided in the Agreement," HHC is "using the individual contracts to [obligate] HSOs beyond the terms of the Agreement." As these allegations sufficiently demonstrate a nexus between CIR's grievance and Article VI, CIR's claim of violation of this contract article may proceed to arbitration.

CIR asserts that a nexus exists between Article XVI and its grievance. Article XVI protects HSOs from discrimination based upon a prohibited characteristic. CIR suggests that discrimination may have played a role in the selection of those HSOs required to sign for the grant, since HSOs in other departments and some HSOs in the Rehabilitation Medicine Program did not have to sign for the grant. However, CIR does not specify the particular individuals allegedly discriminated against or the particular prohibited characteristics upon which the individual discrimination claims are based. Accordingly, as CIR has not sufficiently demonstrated a nexus between its grievance and Article XVI, CIR's claim of a

violation of this contract article may not proceed to arbitration. We next address HHC's claim that CIR has failed to state a grievance under the definition set forth in Article XIV of the contract. HHC argues that as "the contract does not contain any restriction on the source of funding for wages of HSOs," HHC could not have violated the contract by funding wages from a federal grant. Article XIV defines a grievance as a "dispute concerning the application or interpretation of the terms of this collective bargaining agreement." As explained above, CIR has adequately established a nexus between its grievance and some of the provisions of the collective bargaining agreement it claims have been violated. Accordingly, CIR has stated a grievance under the definition set forth in Article XIV of the contract. We therefore find meritless HHC's claim that because the contract does not restrict the way in which wages may funded, HHC did not violate the contract. CIR's grievance did not contest the source of funding for HSOs' salaries. CIR argued that in requiring the grievants to accept the grant, HHC was imposing upon them an additional monetary or service commitment in violation of various provisions of the contact.

We similarly consider HHC's claim that because the choice of methods to fund salaries is a management right, CIR's grievance may not proceed to arbitration. Although we agree that it is within HHC's managerial prerogative to decide how it will fund the

salaries of HSOs, such a finding is not dispositive of the instant case. The statutory management rights clause does not defeat CIR's claim that HHC's chosen method of funding salaries imposes upon HSOs in the Rehabilitation Medicine Program an additional monetary or service commitment in violation of the collective bargaining agreement. Accordingly, CIR's grievance may proceed to arbitration.

ORDER

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 petition challenging arbitrability filed herein, be, and the same hereby is, granted as to the alleged violations of Article 11, §2 and Article XVI of the contract; and it is further

ORDERED, that the request for arbitration filed herein, be, and the same hereby is, granted as to the alleged violations of Article IV §5, Article VI and Article XIV of the contract.

DATED: New York, NY
October 23, 1991

MALCOLM D. MacDONALD
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