HHC v. CIR, 47 OCB 55 (BCB 1991) [Decision No. B-55-91 (Arb)]

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

The New York Health and Hospitals Corporation,

Petitioner,

-and-

Committee of Interns and Residents,

Respondent.
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DECISION NO. B-55-91
DOCKET NO. BCB-1414-91
(A-3845-91)

DECISION AND ORDER

On August 28, 1991, the New York City Health and Hospitals Corporation ("HHC") filed a petition challenging the arbitrability of a grievance brought by the Committee of Interns and Residents ("the Union"). The grievance alleged that Dr. Kenneth Sigel ("grievant"), a second-year neurology resident, was forced to resign his position at Bellevue Hospital Center ("Bellevue") without cause or due process, in violation of the collective bargaining agreement between the parties ("the contract"). The Union filed an answer on September 17, 1991. HHC filed a reply on October 11, 1991.

Background

Grievant was employed as a House Staff Officer ("HSO") in the Neurology Residency Training Program at Bellevue. He received a certificate of satisfactory completion for his first year of residency, which ended on June 30, 1990, and his

appointment was renewed for the second year of the residency program, beginning on July 1, 1990. According to the terms of the contract, Bellevue was obligated to inform grievant no later than November 15, 1990, of a decision not to renew his appointment on July 1, 1991.[1] No resident can waive rights granted under the contract without the express permission of the Union.[2]

On January 25, 1991, grievant allegedly administered medicine to a patient incorrectly. On January 31, 1991, grievant signed a letter in which he stated his intention to resign from the Neurology Residency Program as of March 1, 1991. A memorandum written by Dr. Saran Jonas, grievant's supervisor, dated February 5, 1991, stated:

> The performance of Dr. Sigel has been adjudged poor (see Departmental Meeting records October and December 1990). It was my intention to inform Dr. Sigel of this decision during his portion of the planned private counseling sessions with the residents in January....
>
> Between the making of the decision not to renew him in

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[1] Article VI of the contract provides, in relevant part:

Section 3.

HSO's who have July 1st appointments will be notified by November 15th... if their services are not to be renewed for the next year of a given residency program. Earlier notice, if possible, will be given to such HSO's.

[2] Article VI, Section 4 of the contract states:

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.

> December and the meeting with the residents in January, Dr. Sigel was involved in a serious problem at Tisch Hospital. On January 25, 1991... he gave the wrong medication to a patient.
>
> This incident did not influence the decision to drop Dr. Sigel from the program. That decision had been made in December....
>
> On January 29th I reviewed the matter of Dr. Sigel's nonreappointment and also of the recent incident with Dean David Scotch and Ms. Annette Johnson, legal counsel. They suggested that since Dr. Sigel would not be given certification for this year's training, it would not be to his interest to continue in the program and suggested that his resignation be explored with him.
>
> I met with Dr. Sigel on January 30, 1991... told him of the December decision, and told him that it was conclusion [sic] that he does not have the potential to be a clinician... I explored the matter of resignation with him. Dr. Sigel agreed that remaining would not be productive for him... I dictated a note to him covering the issues. The note was reviewed by Ms. Johnson and the final form sent to Dr. Sigel along with a note of resignation for his signature...
>
> If asked for letters of reference on him either concerning clinical training or clinical appointment, I will state my negative recommendation.

By letter dated April 30, 1991, the Union filed a grievance at Step I of the grievance procedure. The Union moved the grievance to Step II by letter dated May 21, 1991. In a letter dated July 2, 1991, HHC informed the Union that the grievance was denied at Step II because, in the opinion of the hearing officer, the grievant's resignation had been submitted voluntarily.

No satisfactory resolution of the conflict having been reached, the Union filed a Request for Arbitration on August 7, 1991, alleging violations of Articles VI, XIV and XV of the

contract. As a remedy, it seeks reinstatement of grievant with right of renewal, full back pay, compensatory damages, cleansing of grievant's record, and such other relief as may be appropriate.

Positions of the Parties

HHC's Position

HHC notes that the Union's answer, verification and affirmation are stated "upon information and belief". For this reason, HHC maintains, the entire answer must be stricken. Even assuming that the answer is not stricken, HHC argues, it presents no arbitrable issue under the contract.

HHC maintains that if an employee chooses to resign when facing the possibility of adverse action, such resignation does not constitute termination by the employer. Citing Black's Law Dictionary, petitioner presents the definitions of the terms "coerce" and "duress" to support its argument that "even if the melodramatic description of sleep deprivation leading to Dr. Sigel's resignation occurred as described... there was certainly no compulsion, constraint or compelling in a vigorous or forcible manner" and that "Dr. Sigel was neither under duress of imprisonment nor under duress **per minas**."

According to the dictionary, petitioner claims, "it is never 'duress' to threaten to do that which a party has a legal right to do." HHC claims that Dr. Jonas correctly and legally informed

grievant that his performance was below standard, that he would not be entitled to credit for the year, and that his services should be terminated. It is HHC's position that grievant submitted his resignation rather than proceed with disciplinary hearings.

HHC argues that once grievant submitted his resignation, the question of the timeliness of the decision not to renew him became moot because "a non-renewal that was never made cannot be deemed to have been made too late to comply with the terms of the [contract]." Petitioner also claims that an employee's appeal of his own resignation does not fall within the definition of the term "grievance".

There is no violation of Article VI, Section 4 of the contract, HHC maintains, because any employee may resign a position without requiring the prior permission of the Union. If such a requirement existed, petitioner claims, it would compromise the rights of the individual employee. Further, petitioner asserts, a resignation is not a waiver of rights pursuant to the contract because it contains no provision referring specifically to resignations by HSO's.

Union's Position

The Union asserts that grievant's resignation was not voluntary, but rather was coerced and made under conditions of duress. It relies on Decision No. B-25-75 to argue that the

question of whether grievant was illegally discharged or voluntarily resigned requires a factual inquiry and a determination of the merits of the dispute before an arbitrator. The Union maintains that the central issue is whether HHC properly terminated Dr. Sigel pursuant to the contract.

Under the terms of the contract, the Union claims, HSO'S must be notified by November 15th of a decision not to renew their appointments for the following year. The Union states that notification of non-renewal by November 15th allows residents to make timely applications to other programs. Because grievant did not receive such notice of non-renewal on the date stipulated in the contract, the Union argues, he was entitled to continue in the program for the year commencing July 1, 1991. The Union maintains that HHC cannot deprive a resident of such entitlement unless it proceeds under the terms of Article XV of the contract, which provides that "there shall be no disciplinary action taken against an HSO except for cause and pursuant to and after completion of the procedures herein provided." The Union asserts that in addition to showing just cause, HHC must follow the procedures provided in the contract, including the right to notice of charges and proposed discipline and the right to an informal hearing and binding arbitration.

The Union claims that the memo of February 5, 1991, from Dr. Jonas reveals that the decision not to renew grievant's appointment was made in December, 1990, after the November 15th

deadline stipulated in the contract. Because the deadline had passed, the Union alleges, Dr. Jonas needed either to amass sufficient evidence to prove just cause for discipline or to convince grievant to resign. The Union asserts that Dr. Jonas took advantage of grievant's guilt and remorse over the January 25th patient mismanagement incident to coerce his resignation. The Union further maintains that the incident occurred when grievant had been required to work for thirty-two consecutive hours without sleep, contrary to the public policy of New York State.

The Union claims that, at their meeting on January 30th, Dr. Jonas presented grievant with the choice of resigning immediately or being terminated from the program in June without receiving credit for the year's work. The Union states that on January 31st, Dr. Jonas' secretary summoned grievant to Dr. Jonas' office, handed him a typed resignation form, and told him that Dr. Jonas expected him to sign it. After grievant had signed the prepared resignation letter, the Union asserts, his later request to have his resignation rescinded was refused by Dr. Jonas.

The Union argues that grievant cannot resign his position without express permission of the Union because such an action waives his rights in violation of Article VI, Section 4 of the contract. The Board should not agree with HHC, the Union maintains, that a resignation can never be a waiver of rights subject to the protection of Article VI, Section 4 of the

contract. The Union states that this contractual provision was included in recognition of the opportunities for undue pressure inherent in the relationship between residents and their department directors, whose approval they need to advance in their careers. Even though a resident is forced to resign, the Union states, he or she may do so with the implicit hope or explicit promise that the director will then help the resident advance his or her career elsewhere. The Union argues that this provision of the contract applies to involuntary resignations as well as to other situations, and should be deemed a nexus sufficient to allow the instant issue to proceed to arbitration.

Discussion

At the outset, we address HHC's claim that the Union's answer should be stricken because the body of the document was affirmed on the information and belief of its attorney. In its affirmation supporting the verified answer to the petition, respondent's attorney states that he is, "familiar with the facts of this case from [his] review of the file and discussions with grievant... and CIR Contract Administrator Nancy Currier. All facts stated herein are stated on information and belief." By so affirming, the Union's attorney has complied fully with the Rules of the Office of Collective Bargaining.

In considering challenges to arbitrability, we must first determine whether the parties have obligated themselves to

arbitrate grievances and, if they have, whether that contractual obligation is broad enough to include the act complained of by the Union.[3] The burden is on the Union to establish a nexus between the City's acts and the contract provisions it claims have been breached.[4]

The parties have included a grievance procedure in Article XIV of their contract that culminates in binding arbitration, and have defined arbitrable grievances.[5] HHC maintains that an employee's appeal of his own resignation is not an arbitrable grievance under the contract. In Decision No. B-20-74, we held that, "individual grievances... arise when one or more identifiable individuals claim a violation of contractual rights." An employee who has resigned may grieve matters which

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[3] See, e.g., Decision Nos. B-58-90; B-19-89; B-65-88.

[4] Decision Nos. B-58-90; B-1-89; B-7-81.

[5] Article XIV, Section I of the contract provides, in relevant part:

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;...

(D) A question regarding the non-renewal of the appointment of an HSO....

allegedly took place during his employment.[6] In the instant case, the Union claims violations of the contract which allegedly occurred before grievant's resignation took effect. Because the Union's claims are arguably related to Article XIV, §§ 1(A), (B), and (D) of the contract,[7] we find that the subject matter of this grievance falls within the scope of the parties' agreement to arbitrate disputes.

The only issue to be reached here is whether there is a nexus between a provision of the contract claimed to have been violated and the alleged actions of the employer. It is clear, from the admission made by Dr. Jonas in his memo of February 5, 1991, that the decision not to renew grievant's employment was made in December, 1990, after the deadline stipulated in Article XV of the contract had passed. We find, therefore, that the Union has demonstrated an arguable nexus between the acts alleged and Articles XIV and XV of the contract. The dispute about the events which flowed from that decision, culminating in grievant's resignation, reaches the merits of the grievance, which are for an arbitrator to decide.

The Union also alleges that grievant's resignation is in violation of Article VI, Section 4 of the contract because it was a waiver of his rights, which is not effective unless consented to in writing by the Union. The City argues that a~resignation

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[6] Decision No. B-7-88.

[7] See, footnote 5, supra.

is not a waiver of rights pursuant to the contract because there is no provision of the contract which refers to resignations by HSO's. The conflict between the parties' interpretations of this provision presents a substantive question of contract interpretation for an arbitrator to decide.

Accordingly, we find the grievance presented to be arbitrable.

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 by the City of New York be, and the same hereby is, denied, and it is further,

ORDERED, that the request for arbitration filed by the Committee of Interns and Residents be, and the same hereby is, granted.

Dated: New York, New York
November 25, 1991

MALCOLM D. MACDONALD
CHAIRMAN

DANIEL G, COLLINS
MEMBER

CAROLYN GENTILE
MEMBER

JEROME E. JOSEPH
MEMBER

GEORGE BENJAMIN DANIELS
MEMBER

ELSIE KRUM
MEMBER