NYSNA v. HHC, 49 OCB 46 (BCB 1992) [Decision No. B-46-92 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of the Improper
Practice Proceeding

-between-

DECISION NO. B-46-92
DOCKET NO. BCB-1474-92

NEW YORK STATE NURSES ASSOCIATION

Petitioner,

-and-

NEW YORK CITY HEALTH AND
HOSPITALS CORPORATION

Respondent.
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DECISION AND ORDER

On March 11, 1992, the New York State Nurses Association ("the Union") filed a verified improper practice petition against the New York City Health and Hospitals Corporation ("HHC"). The petition alleges that HHC violated Sections 12-306a(3) and (4) of the New York City Collective Bargaining Law ("NYCCBL")[1]. HHC

[1] Sections 12-306a(3) and (4) of the NYCCBL provide:

a. **Improper public employer practices.** It shall be an improper practice for a public employer or its agents:

* * *

(3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization;

(4) to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public

(continued...)

filed a verified answer on April 21, 1992 and the Union filed a verified reply on April 30, 1992.

Background

According to the Union, HHC reassigned and/or rotated supervisory nurses at Sea View Hospital and Home in violation of the parties' collective bargaining agreement and, since November 16, 1991, has repeatedly refused to bargain over the issue. Additionally, the Union alleges, since December 1, 1991, HHC has continually refused to bargain over the "Pilot Weekend Plan" and has refused to prepare an evaluation of the plan.

Positions of the Parties

Union's Position

The Union contends that, by reassigning and/or rotating supervisory nurses, HHC discriminated against nurses at Sea View Hospital and Home for exercising their rights under both Section 12-306a(3) of the NYCCBL and the parties' collective bargaining agreement.[2]

The Union argues that HHC has violated Section 12-306a(4) by refusing to bargain over the rotation of nursing supervisors "as subterfuge for the violation of 'no-rotation' language in its

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[1](...continued)
employees.

[2] As evidence of this allegation, the Union submitted a copy of a memorandum addressed to a supervisory nurse informing her that she would be reassigned from "Tour I to Tour II."

collective bargaining agreement."[3] Similarly, the Union maintains HHC's refusal to evaluate and bargain over the "Weekend Pilot Program" also constitutes a violation of Section 12-306a(4) of the NYCCBL.

HHC's Position

HHC maintains that the Union has failed to allege facts sufficient as a matter of law to constitute an improper practice. According to HHC, the petition contains only conclusory allegations; it is "devoid of any specificity, failing to allege any circumstances, dates, times, places or other facts which would substantiate these allegations of improper practice." HHC argues that this lack of specificity violates Title 61, Section 1-07(e) of the Rules of the City of New York[4] (formerly referred to as Section 7.5 of the Revised Consolidated Rules of the Office of Collective Bargaining), which requires that an improper

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[3] While the Union alleges that the "no-rotation" provision of the contract has been violated, it does not cite a specific article and section of the contract, and a review of the contract, on its face, fails to reveal upon what provision the Union relies.

[4] Title 61, Section 1-07(e) of the Rules of the City of New York, in relevant part, provides:

> **Petition-contents.** A petition filed pursuant to §§1-07(b), (c) or (d) shall be verified and shall contain:
>
> (3) 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...

practice petition set forth, inter alia, relevant and material documents, dates and facts. The failure to comply with this rule, HHC contends, precludes the respondent from being able to respond adequately to the allegations.

In any event, HHC maintains, pursuant to Section 12-307b of the NYCCBL,[5] the statutory management rights provision, it has "the sole right to determine how to deploy its personnel in order to accomplish its work objectives." HHC argues that the Union has failed to allege facts which fall within any of the exceptions to this provision, and has failed to identify with any specificity the source of any limitation on management's rights in this area.

DISCUSSION

[5] Section 12-307b of the NYCCBL provides:

> 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 government 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 within the scope of collective bargaining.

The City asserts that the Union's petition fails to state a valid claim of improper practice because it consists of conclusory allegations devoid of objective evidence including dates, times, places and acts. Title 61, Section 1-07(e) of the Rules of the City of New York delineates the standard for pleading a charge of improper practice. It is the Board's long-established policy that the OCB Rules regarding pleadings be liberally construed.[6] Where it is clear that the petition provides the respondent with sufficient information to place them on notice of the nature of the Union's claim and enable them to formulate a response, the petition is sufficient under §1-07 of the Rules.[7] We note, however, that a petitioner risks dismissal of a claim which fails to provide information sufficient to enable the respondent to formulate its defense or this Board to reach informed conclusions.[8]

With respect to the Union's claim that HHC has refused to bargain over the reassignment of nurses, the petition satisfies the above-described standards. The content of the HHC's answer demonstrates its awareness that the petition alleges implementation of a unilateral change in an area that the Union contends is a mandatory subject of bargaining. As an affirmative

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[6] Decision Nos. B-4-92; B-78-90; B-28-89; B-21-87; B-44-86.

[7] Decision Nos. B-63-91; B-56-88; B-44-86.

[8] Decision No. B-4-92.

defense, the HHC raised its alleged management prerogative to deploy its personnel.

The NYCCBL imposes a duty upon the employer, as well as upon the employees' representative, to bargain in good faith on matters that are within the scope of collective bargaining. These matters, which include wages, hours, and working conditions, are regarded as mandatory subjects of bargaining. This does not mean, however, that every decision of a public employer which may affect a term and condition of employment automatically becomes a mandatory subject of bargaining.[9] In the absence of an express limitation set forth in the collective bargaining agreement or in a rule or regulation or written policy of the employer, the broad managerial authority to direct employees provided under Section 12-307b of the NYCCBL permits the employer to unilaterally implement adjusted work assignments or schedules as it deems necessary. Unless the reassignment alters the number of work hours per day or per week that employees are required to work, it is a non-mandatory subject of bargaining.[10] The Union has not alleged that the reassignments have altered the number of hours of work required of supervisory

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[9] Decision No. B-69-88.

[10] See, e.g., Decision Nos. B-45-88 (changes in duty charts); B-24-75 (starting and finishing times of tours or duty, number of different charts, number of tours on each chart); B-10-75 (starting and finishing times); B-5-75 (changes in duty charts); B-6-74 (right to schedule work on holidays and weekends).

nurses. A refusal to bargain over a non-mandatory subject does not constitute an improper practice.[11]

As to the Union's claim that HHC violated the contract by reassigning supervisory nurses, we note that pursuant to Section 205.5 of the Taylor Law, the Board may not enforce the terms of a collective bargaining agreement unless the alleged violation would otherwise constitute and improper practice.[12] Here, the Union has not supplied us with enough information to enable us to decide whether there is any foundation to its charge of contractual violation. Certainly, the Union has not identified any express contractual limitation on management's right to reassign its employees. We cannot ascertain which provision of the contract the Union claims has been violated, nor has HHC been given sufficient information concerning the nature of the claims

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[11] Based on the memorandum submitted by the Union which refers to a change from one tour to another, we assume that these "reassignments" involve schedule changes. We note, however, that the term "reassignment" could also imply job duty changes. Even if the Union is attempting to allege reassignments in job duties, the petition still would not state a valid claim of improper practice. This Board has held that management has the unilateral right to decide, within a general job description of a title, the job assignments that are appropriate for employees in that title; management has the right to assign work in a way it deems necessary. See e.g., Decision No. B-14-92.

[12] Section 205.5(d) of the Taylor Law, which is applicable to this agency, provides, in relevant part, as follows:

> ...the board shall not have authority to enforce an agreement between an employer and an employee organization and shall not exercise jurisdiction over an alleged violation of such an agreement that would not otherwise constitute an improper employer or employee organization practice.

to formulate a defense to the charge.

In its petition and reply, the Union alleges that the Department has refused to bargain over the "Weekend Pilot Program." As to this claim, we find that the petition fails to satisfy the standards set forth in §1-07 of the Rules. The Union has not provided this Board with any description of the "Weekend Pilot Program."[13] Without this information, the Board cannot reach a conclusion as to whether the program involves a mandatory subject of bargaining. Therefore, this claim must be dismissed.

Finally, we turn our attention to the Union's claim that by reassigning and/or rotating supervisory nurses, HHC discriminated against nurses at Sea View Hospital and Home for exercising their rights under both Section 12-306a(3) of the NYCCBL and the parties' collective bargaining agreement. We find that this aspect of the petition also fails to satisfy the standards set forth in §1-07 of the Rules. When an employer is accused of having violated §12-306a(3) of the NYCCBL, the petitioner has the initial burden of showing that:

> 1. the employer's agent responsible for the alleged discriminatory action had knowledge of the employee's union activity; and
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> 2. the employee's union activity was a motivating factor in the employer's decision.

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[13] In its answer, HHC maintained that the petition contained only conclusory allegations. Despite being put on notice of its failure to allege facts, the Union supplied no further detail in its reply; it simply stated that HHC was "fully aware that it had failed and refused to prepare its evaluation of the Weekend Pilot Program."

In the instant case, the petition fails to allege any union activity whatsoever; it sets forth nothing more than a conclusory allegation of discrimination unsupported by any facts. Under these circumstances, the respondent cannot be expected to formulate a defense and this Board cannot be expected to reach an informed conclusion. Therefore, this claim must also be dismissed.

In conclusion, we find that since scheduling is not a mandatory subject of bargaining, HHC did not commit an improper practice by refusing to bargain over the reassignment of supervisory nurses. As to the remainder of the Union's improper practice petition, we find that the Union is not in compliance with our rules in that it has failed to allege facts sufficient to support its claim of improper practice. Therefore, we shall dismiss the petition in its entirety.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the NYCCBL, it is hereby,

ORDERED, that the improper practice petition filed herein by the New York State Nurses Association, be, and the same hereby is, dismissed.

DATED: New York, New York
November 18, 1992

Malcolm D. MacDonald
CHAIRMAN

George Nicolau
MEMBER

Daniel G. Collins
MEMBER

Thomas J. Giblin
MEMBER

Jerome E. Joseph
MEMBER

Dean L. Silverberg
MEMBER

Steven H. Wright
MEMBER