HHC v. Doctors Council, 51 OCB 17 (BCB 1993) [Decision No. B-17-93 (Arb)]

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

-between-

DECISION NO. B-17-93

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

DOCKET NO. BCB-1542-92 (A-4418-92)

Petitioner,

-and-

DOCTORS COUNCIL
(Roberto Gil, D. Cyril D'Souza),

Respondent.
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DECISION AND ORDER

On November 18, 1992, the New York City Health and Hospitals Corporation ("HHC" or "the Corporation") filed a petition challenging the arbitrability of a grievance that is the subject of a request for arbitration submitted by Doctors Council ("the Union") on September 28, 1992. The grievance concerns the HHC's refusal to pay two Residents who allegedly were "moonlighting" as per session Attending Physicians for work performed in that capacity. The Union filed its answer on January 8, 1993. The HHC filed a reply on February 9, 1993.

BACKGROUND

The State University of New York Health Services Center at Brooklyn (Downstate) is affiliated with the HHC's Kings County Hospital Center ("Kings County"). Doctors Roberto Gil and D. Cyril D'Souza ("the grievants") are Chief Residents in the fourth year of their psychiatry residency training program at Downstate. Residents receive remuneration according to the terms of a collective bargaining between the Committee of Interns and Residents ("CIR") and the HHC. Both doctors are foreign nationals. They hold J-1 Visas, allowing them to be in the United States for professional training and research.

On separate occasions during 1991, the doctors applied to Kings County

Hospital for clinical privileges to permit them to "moonlight" as Attending Physicians. Attending Physician remuneration is covered by the terms of a collective bargaining agreement between the HHC and Doctors Council, a union separate and apart from the CIR.

By letter dated August 21, 1991, the Executive Director of Kings County informed Dr. Gil that he had been granted temporary clinical privileges in the rank of Assistant Attending Physician in the Department of Psychiatry, pending a pre-employment physical and approval by the Credentials Committee. In a second letter dated November 12, 1991, however, the Hospital Center's Assistant Personnel Director informed Dr. Gil that he had been "inadvertently processed for a psychiatrist-per-session position." She advised the doctor that, because of his J-1 Visa status, his Attending Physician appointment was being revoked.

In the case of Dr. D'Souza, the Assistant Personnel Director explained to him verbally, in October of 1991, that his visa status did not permit him to be employed as an Attending Physician. It only allowed him, according to the Assistant Personnel Director, to participate in the residency training program.

In response to the Assistant Personnel Director's actions, the Director of Residency Training at Downstate, by letter dated October 10, 1991, informed the Educational Commission for Foreign Medical Graduates ["ECFMG"] that it was necessary for the grievants "to moonlight in our Emergency Room as part of the supervision of first year residents." His letter does not make clear whether the moonlighting was to be performed in the capacity of Chief Residents or as Attending Physicians.

In any event, based upon the Training Director's assertion, the ECFMG, by letter dated October 25, 1991, gave its permission for the grievants to "engage in additional employment in the Emergency Room at [Downstate]." The Program Designation Officer of the United States Information Agency elaborated upon this authorization by letter to the Downstate Training Director dated

November 27, 1991, which reads, in part, as follows:

> As stated in your letter of October 10, 1991, both doctors are required to work in the Emergency Room as part of their training. If the work they are performing is beyond a regular tour of duty for which overtime payment would be paid to an American doctor, the exchange visitors would be entitled to the payment as well. The amount paid to the exchange visitor should be comparable to that paid to any other individuals having similar education and training. Exchange visitors are not precluded from receiving overtime payment for duties performed above and beyond their regular salaries. Authorization to work beyond the regular schedule should come from the sponsoring organization, in this case ECFMG, which you have received.

POSITIONS OF THE PARTIES

HHC's Position

The HHC maintains that it is under no obligation to arbitrate the instant grievances because Kings County Hospital Center never authorized Dr. D'Souza to become a per session psychiatrist, and it withdrew Dr. Gil's authorization on November 12, 1991. Up to that date, the Corporation contends, it paid Dr. Gil in full for his services according to the terms of the Doctors Council contract.

The HHC explains that the problem behind these grievances first surfaced in March of 1991, when the Assistant Vice President for Corporate Affairs sent a memorandum to the HHC's Human Resources Directors informing them that foreign nationals who wish to work in the United States could do so only if they have a "green card," a temporary work permit, or some other type of employment authorization from the U.S. Immigration and Naturalization Service. When Dr. D'Souza applied to Kings County Hospital Center to "moonlight" as a per session Attending Physician, the hospital's Assistant Personnel Director refused to give the authorization because he lacked proper immigration credentials. Although the doctor possessed a J-1 Visa, which entitled him to participate in a training program as a Resident, in her opinion, he could not work as an Attending Physician. When Kings County discovered that Doctor Gil

also held a J-1 Visa, it realized that his moonlighting authority had been granted inadvertently, and the Assistant Personnel Director withdrew his authorization as well. According to the HHC, since Dr. D'Souza was never authorized to work as a per session Attending Physician, he never came under the terms of the Doctors Council contract. In the case of Dr. Gil, the Union assertedly no longer represented him after November 12, 1991, when his Attending Physician authorization was withdrawn.

Addressing the arguments made by the Union in its answer, the HHC contends that the federal agencies that administer the grievants' visas made a mistake in authorizing the two doctors to work as Attending Physicians, because the Downstate Director of Residency Training had given them faulty information. According to the HHC, the letter sent to these agencies by the Downstate Director inaccurately reported that moonlighting is a requirement of the residency program. Denying that moonlighting is required by the program, the Corporation argues that if it was, it would be covered by the collective bargaining agreement between the CIR and the HHC, and not by the Doctors Council contract.

In HHC's view, Doctors Council is attempting to have it both ways, first claiming that the grievants are required to moonlight because it is a requirement of their residency, but then denying that the work is covered by the HHC-CIR agreement. These two positions, according to the Corporation, clearly are inconsistent.

Union's Position

The Union notes that the HHC does not deny that Attending Physicians are covered by the terms of the collective bargaining agreement between the Corporation and Doctors Council. It further contends that when Residents serve as Attending Physicians, they are working outside the scope of their residency duties. In such cases, according to the Union, there exists a well established practice of compensating Residents under the terms of the HHC-

Doctors Council contract rather than the HHC-CIR contract. To support this point, the Union notes that Dr. Gil himself was paid under the terms of the Doctors Council contract before the Assistant Personnel Director terminated his authorization to serve as an Attending Physician. Therefore, according to the Union, the issue in this case simply is whether the grievants performed any services as Attending Physicians for which they were not properly paid.

In this regard, the Union points out that the HHC does not deny that the two doctors performed services as Attending Physicians in the emergency room of Kings County Hospital. To the contrary, the Hospital, and, more specifically, two of its doctors who are the grievants' direct supervisors, allegedly "repeatedly assured" the grievants that the immigration confusion would be resolved and "specifically authorized and directed [them] to continue performing services as Attending Physicians in the meantime."

In the Union's view, the only defense raised by the Corporation is that "certain HHC personnel" did not authorize Dr. D'Souza to work as an Attending Physician, and that Dr. Gil had his authorization rescinded. According to Doctors Council, nothing in the contract requires or even addresses the issue of authorization to work in a given title. It accuses the HHC of reading into the contractual definition of "employee" a requirement that individuals obtain authority from certain Hospital personnel to perform services covered by the HHC-Doctors Council contract, even after their supervisors allegedly direct and authorize them to perform those services. The Union insists that such an interpretation is contrary both to the language of the contract, and to the established past practice of the Corporation.

Finally, the Union contends that the HHC "required" the two doctors in this case to moonlight as Attending Physicians at Kings County as part of their residency training. It points out that the Director of Residency Training at Downstate personally sought authorization for the grievants to receive payment for moonlighting work from the agencies that administer their visas, and that these agencies authorized them to receive payment for any

extra work that they may perform.

In conclusion, the Union argues that the HHC is masking its challenge to the merits of the grievants' claims under the guise of a threshold issue of arbitrability. What the Corporation really is seeking, according to the Union, is an interpretation of the parties' contract on whether the grievants fall within the definition of "employee" in light of the facts of the case. This, it contends, can only be decided by an arbitrator.

DISCUSSION

It is public policy, expressed in the New York City Collective Bargaining Law, to promote and encourage arbitration as the selected means for the adjudication and resolution of grievances.[1] We cannot create a duty to arbitrate where none exists, however, nor can we enlarge a duty to arbitrate beyond the scope established by the parties.[2]

In this case, there is no dispute that the parties have agreed to arbitrate unresolved grievances as defined in their collective bargaining agreement. There also is no dispute that the HHC-Doctors Council agreement covers salaries for Attending Physicians.[3] The question is, does the Union's

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[1] Decision Nos. B-8-92; B-60-91; B-24-91; B-76-90; B-73-90; B-52-90; B-41-82; B-15-82; B-19-81; B-1-75; and B-8-68.

[2] Decision No. B-8-92; B-60-91; B-24-91; B-11-90; B-41-82 and B-15-82.

[3] Article III of the current HHC-Doctors Council contract covers salaries. Section 1.c. of this Article provides as follows:

> Employees who work on a per diem or hourly basis and who are eligible for any salary adjustment provided in this Agreement shall receive the appropriate pro-rata portion of such salary adjustment computed as follows, unless otherwise specified:
>
> Per diem rate - 1/261 of the appropriate minimum basic salary.

contention that grievants functioned as "employees," as contemplated by Article III of the Doctors Council contract, qualify as a basis for the arbitration of the parties' present dispute.

The Union asserts, and the HHC does not deny, that despite the confusion over the grievants' immigration authorization, "the grievants' direct supervisors, Drs. Kesselman and Becker, . . . specifically authorized and directed the grievants to continue performing services as attending physicians . . . ." In view of this unrebutted assertion, we find that the Union has provided an arguable nexus between its claim that the grievants served in the capacity of Attending Physicians, the actions of the Kings County Hospital Assistant Director of Personnel notwithstanding, and Article III of the parties' collective bargaining agreement. We leave it for the arbitrator to decide whether Drs. Gil and D'Souza did, in fact, moonlight as Attending Physicians, and whether their work was recompensable under the terms of the Doctors Council contract.

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 by the New York City Health and Hospitals Corporation, and docketed as BCB-1542-92, be, and the same hereby is, denied; and it is further

ORDERED, that the request for arbitration filed by Doctors

Hourly Rate - 35 hour week basis - 1/1827 of the appropriate minimum basic salary.

37½ hour week basis - 1/1957.5 of the appropriate minimum basic salary.

Council in Docket No. BCB-1542-92 be, and the same hereby is granted.

Dated: April 28, 1993
New York, N.Y.

MALCOLM D. MACDONALD
CHAIRMAN

DANIEL COLLINS
MEMBER

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MEMBER

THOMAS J. GIBLIN
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