HHC v. NYSNA, 55 OCB 2 (BCB 1995) [Decision No. B-2-95 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Arbitration

-between-

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Petitioner,

DECISION NO. B-2-95

-and-

DOCKET NO. BCB-1626-94 (A-4972-93)

NEW YORK STATE NURSES ASSOCIATION,

Respondent.

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DECISION AND ORDER

Pursuant to the New York City Collective Bargaining Law ("NYCCBL"), § 12-312 (Grievance procedure and impartial arbitration), and to the Rules of the City of New York ("Rules"), § 1-06 (Arbitration), on January 6, 1994, the New York City Health and Hospitals Corporation ("HHC," "Employer" or "Petitioner") filed a petition challenging the arbitrability of a grievance submitted by the New York State Nurses Association ("NYSNA," "Union" or "Respondent") concerning a claimed wrongful termination of a classified civil service employee. On January 18, 1994, the Union filed an Answer. On June 9, 1994, Petitioner advised that no Reply would be submitted.

Background

It is undisputed that Petitioner and Respondent are parties to a collective bargaining agreement ("Agreement" or "Contract") covering the period in question.[1] It is also uncontroverted that Article VI of the

[1] The Agreement which covers the date of the Grievant's discharge, i.e., May 29, 1992, is the 1991-92 Memorandum of Agreement ("1991-92 Memorandum"). Dated April 14, 1992, it covers the term from July 1, 1991, through June 30, 1992. Section 2 ("Existing Terms and Conditions") of the 1991-92 Memorandum continues in effect the provisions of the 1987-90 NYSNA Separate Unit Agreement (entered October 24, 1989; covering the period December 1, 1987, to December 31, 1990) and the 1991 NYSNA Memorandum of Understanding (dated

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applicable Agreement sets forth the grievance and arbitration procedure to be used for resolution of disputes arising thereunder. Article VI provides, in pertinent part, as follows:

> DEFINITION: The term "Grievance" shall mean:
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> (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 New York City Civil Service Commission or 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[2] shall not be subject to the grievance procedure or arbitration . . .
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> * * *
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> (D) A claimed wrongful disciplinary action taken against an employee.

Article VI, § 11, provides:

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September 12, 1991; through June 30, 1991).

[2] Section 7390 of the Unconsolidated Laws of the State of New York, Chapter 5 (New York City Health and Hospitals Corporation) provides, in pertinent part, as follows:

> 1. The corporation shall, upon ten days written notice appropriately posted in the health facilities, promulgate rules and regulations "consistent with civil service law with respect to policies, practices, procedures relating to position classifications, title structure, class specifications, examinations, appointments, promotions, voluntary demotions, transfers, reinstatements, procedures relating to abolition or reduction in positions, for personnel employed by the corporation pursuant to Section Five (§ 7385; "General powers of the corporation"), Subdivision Twelve (authorizing the HHC to "employ such . . . employees as may be necessary and . . . to promulgate rules and regulations relating to the creation of classes of positions . . . reinstatement, procedures relating to abolition or reduction in positions . . . to prescribe their duties, fix their qualifications . . . leaves of absence . . . and other time and leave rules and other terms of employment") of this act. . . .

> The grievance and the arbitration procedure contained in this agreement shall be the exclusive remedy for the resolution of disputes defined as "grievances" herein. This shall not be interpreted to preclude either party from enforcing the arbitrator's award in court. This Section shall not be construed in any manner to limit the statutory right and the obligation of the Employer under Article XIV (Public Employees' Fair Employment Law ["Taylor Act"]) of the Civil Service Law.

There is no dispute that, during the period in question, Antonette Thomas, R.N., ("Grievant") was employed as a Staff Nurse at Coler Memorial Hospital ("Coler").[3] It is unchallenged by the parties hereto that the Grievant was on medical leave of absence from December 27, 1991, through April 29, 1992, and that her cumulative, work-related, medical leave dating back to June, 1984, exceeded one year.[4]

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[3] The Agreement covers employees in the title of Staff Nurse with Title Code Numbers 50910 and No. 09771, but the record does not specify which of these two Title Code Numbers applies to the Grievant herein.

[4] Grievant's letters of November 18, 1992, to her supervisors assert that her absence by reason of occupational injury on December 27, 1991, did not exceed one

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A letter dated June 1, 1992, from Alan R. Liebowitz, Director of Human Resources at Coler, was appended to the instant Petition. Addressed to the Grievant, it advised her that, "pursuant to Civil Service Law Section 71, . . . [her] services as a Staff Nurse at Coler . . . [were] terminated, effective May 29, 1992."[5]

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[4](...continued)

year or more. However, Grievant's letters make no reference to any absences before that date. See text at 4.

[5] Section 71 of the Civil Service Law ("CSL") states, in pertinent part, as follows:

Reinstatement after separation for disability. Where an employee has been separated from the service by reason of a disability resulting from occupational injury or disease as defined in the Workers' Compensation Law, he shall be entitled to a leave of absence for at least one year, unless his disability is of such a nature as to permanently incapacitate him for the performance of the duties of his position. Such employee may, within one year after the termination of such disability, make application

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By letter dated November 11, 1992, addressed to Ann Rosenberger, Coler's Associate Director of Nurses, the Grievant stated that she was "ready to return to work as of November 30, 1992." She requested an appointment to see the "medical officer" prior to her return, in accordance with the requirements of CSL § 71.

Another letter of the same date was addressed to Angela Firoz, Coler's Acting Director of Human Resources. It also stated that the Grievant was ready to return to work as of November 30, 1992, and requested an appointment with the medical officer.

A letter from the Grievant, dated November 18, 1992, addressed to Joan Hoff-Torpe, Coler's Executive Director of Nurses, stated Grievant's desire to return to work on November 30, 1992. The Grievant denied an alleged assertion by Hoff-Torpe that the Grievant had been absent from her employment as a

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to the civil service department or municipal commission having jurisdiction over the position last held by such employee for a medical examination to be conducted by a medical officer selected for that purpose by such department or commission. If, upon such medical examination, such medical officer shall certify that such person is physically and mentally fit to perform the duties of his former position, he shall be reinstated to his former position, if vacant, or to a vacancy in a similar position or a position in a lower grade in the same occupational field, or to a vacant position for which he was eligible for transfer. If no appropriate vacancy shall exist to which reinstatement may be made, or if the work load does not warrant the filing of such vacancy, the name of such person shall be placed upon a preferred list for his former position, and he shall be eligible for reinstatement from such preferred list for a period of four years. In the event that such person is reinstated to a position in a grade lower than that of his former position, his name shall be placed on the preferred eligible list for his former position or any similar position. This section shall not be deemed to modify or supersede any other provisions of law applicable to the re-employment of persons retired from the public service on account of disability.

Registered Nurse for a year or more. The Grievant stated that an appointment scheduled for November 23 for her to see a medical officer was "cancelled by a verbal conversation with Ms. Ignatia Pitt, Assistant Coordinating Manager for Human Resources. . . ." The Grievant also disputed a statement which she alleged Associate Director of Nurses Rosenberger had made to her to the effect that no vacant position was available for her. The letter continued, "The question of vacancy does not at the present time apply to me, as specified by my department head, Ms. Ann Rosenberger."

A letter addressed to Ms. Rosenberger, also dated November 18, 1992, reiterated that the Grievant had made "3rd notification . . . stating . . . [her] desire to return to work on the 30th November 1992 after being out from [her] employment as a Registered Nurse due to a work related injury on the 27th of December 1991." (Emphasis in original.)

A letter dated November 28, 1992, from Coler's Assistant Director of Human Resources, Yvonne F. Taylor, advised the Grievant that her letter of November 18 was "referred to the Nursing Department for further review in accordance with Section 71 of the Civil Service Law." It quoted a section of the statute to the effect that, upon certification by a medical officer of an applicant's fitness, the applicant "shall be reinstated to his former position, if vacant, or to a vacancy in a similar position or a position in a lower grade . . . or to a vacant position for which he was eligible for transfer." Taylor's letter continued, "If no vacancy exists or if the workload does not warrant filling such a vacancy, the name of such person shall be placed upon a preferred list for his former position." The letter stated that this provision applied to the Grievant's request for reinstatement, and it instructed the Grievant to contact the Human Resources Department for the availability of other positions for which she was qualified.

The record indicates that a grievance was first filed at Step III. On

May 5, 1993, pursuant to Article VI of the contractual grievance procedure, a Step III hearing was held at the Office of Labor Relations. According to the hearing officer's report of July 19, 1993, NYSNA alleged that the Grievant had been absent for less than one year and that the termination violated the collective bargaining agreement and CSL § 71. The report also stated that HHC alleged that the Grievant had been absent cumulatively for more than one year, that case law permitted termination upon the accumulation of one year or more of medical leave, and that the Civil Service Law did not apply here.

The hearing officer denied the grievance on the ground that the allegation that the termination violated CSL § 71 was not a matter which could be addressed by the contractual grievance procedure. On August 9, 1993, the Union filed a Request for Arbitration, alleging a violation of Article VI, § 1(D), of the Contract, seeking reinstatement of the Grievant with back pay. A violation of Article VI, § 1(B), was not alleged in the Request for Arbitration.

Positions of the Parties

HHC's Position

The HHC raises three challenges to the arbitrability of the Union's grievance. First, although the Request for Arbitration alleges violation of Subsection D, addressing wrongful disciplinary action, the Petitioner argues that nothing has been alleged at the lower steps of the grievance procedure which would establish a violation of the Contract.

Second, Petitioner states that Grievant's employment was not terminated due to disciplinary action, noting that no disciplinary charges were brought or served. Since the termination was not carried out under Article VI, § 1(D), the Petition continues, the instant grievance may not be pursued herein.

The Petitioner asserts that the Grievant's discharge was carried out under CSL § 71, "which," the Petition states, "grants a non-disciplinary

discharge of an employee who has been continuously or cumulatively absent for more than one . . . year due to a work-related disability . . ." The Petitioner cites Crestwood v. Director, Creedmore Psychiatric Center[6] in support of its position[7] and states, "If Grievant wishes to be reinstated, she

[6] 88 Misc.2d 492, 388 N.Y.S.2d 546 (1976) (On an Article 78 petition, the court annulled the discharge of a permanent competitive civil service employee with an occupational injury whose employment had been terminated after her cumulative medical leave exceeded one year. Inasmuch as her absence was due to occupational rather than ordinary disability, the court held that the discharge was not authorized under the Civil Service Law. The employer was directed to authorize a medical examination to determine the employee's fitness to perform the duties of her former position; however, the court found no merit in the employee's contention that CSL § 71 authorized leave duration of one continuous, rather than cumulative, year.)

[7] The text of the Petition does not specify the proposition for which Crestwood is cited; however, a copy of the decision is annexed as Exhibit 5, with Headnote 2 circl

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ed. Headnote 2 states, "Classified civil servant who suffered occupational injury was not entitled to leave of absence of one continuous year, but only to cumulative absences of one year. Civil Service

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must proceed according to the provisions of Section 71" rather than under the contractually provided grievance procedure.

Third, the Petitioner argues that the instant matter involves the interpretation of a statute, "specifically [CSL] section 71," and, therefore, is beyond the scope of the Contract and must be denied by the Board.

NYSNA's Position

The Union denies the Petitioner's contention that nothing was stated at prior steps of the grievance procedure which could establish a nexus between the facts alleged and a violation of the Contract. The Union states that, at the Step III grievance hearing held on May 5, 1993, not only did it claim a violation of CSL § 71 but also of the Contract.

Without elaborating, the Union also denies the Petitioner's argument that the discharge was not disciplinary and that the Grievant is not entitled to pursue the grievance which is the subject of this proceeding. The Union denies HHC's allegation that CSL § 71 permits a non-disciplinary discharge of an employee who has been continuously or cumulatively absent for more than one year due to a work-related disability.

The Union does not deny that the Petitioner cited statutory authority for the termination of the Grievant's employment, but it challenges the Petitioner's view that the instant matter falls outside the scope of the Contract and thus the Board's authority to determine the arbitrability of the

[7](...continued)

Law §§ 6, 71, 73, 75."

grievance.

The Union denies Petitioner's contention that CSL § 71, and not the Contract, provides the only means by which reinstatement may be made. It contends that the grievance arbitration procedure prescribed by the Contract in Article VI, § 11, "mandates that the parties' dispute over Ms. Thomas' CSL § 71 rights, and the Corporation's CSL § 71 obligations, be submitted to arbitration." The Union argues, "Any contrary conclusion would nullify [Article VI] section 11."

The Union supports its argument that the Contract governs the instant dispute by asserting that Subsection B of Article VI, § 1, of the Contract applies hereto. The only exclusions from this definition, in the Union's view, are rules and regulations of the New York City Civil Service Commission and of the Health and Hospitals Corporation. Not excluded, in the Union's view, are "issues related to the New York State Civil Service Law [e.g., § 71] and/or the New York State Civil Service Commission." (Emphasis added.)

The Union cites Crestwood,[8] as well, to support its position that the hospital's letter of June 1, 1992, to the Grievant terminating her employment, was unlawful and violative both of § 1(B) ("[as a violation of the New York State Civil Service Law]" and of § 1(D) ("as 'a WRONGFUL DISCIPLINARY ACTION TAKEN AGAINST AN EMPLOYEE'"). As relief, the Union asks the Board to dismiss the City's Petition and to grant its Request for Arbitration.

Discussion

Where, as here, the parties do not dispute that they have agreed to arbitrate their controversies, the question before the Board on a petition

[8] See p. 9, n. 6, above.

challenging arbitrability is whether the particular controversy at issue is within the scope of the parties' agreement to arbitrate.[9] When challenged to do so, a union requesting arbitration has the burden of showing that the contractual provision which it claims has been violated is arguably related to the grievance sought to be arbitrated.[10]

Moreover, when Management's statutory right is implicated,[11] not only is the burden on the union, ultimately, to prove that allegation but also, initially, to establish to the satisfaction of the Board that a substantial issue is presented.[12] This showing requires close scrutiny by the Board on a case-by-case basis.[13]

The fact that no written charges of incompetency or misconduct have been

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[9] City of New York v. D.C. 37, L. 375, Decision No. B-12-93, aff'd sub nom. N.Y.C. Dep't of Sanitation & City v. Malcolm D. MacDonald, et al., Index No. 402944/93 (Sup. Ct. N.Y. Co. 1993); see, also, B-47-92 and B-15-90.

[10] Decision Nos. B-50-92, B-47-92, B-29-91 and B-9-89.

[11] Section 12-307b ("**[M]anagement rights**") of the NYCCBL provides, in pertinent part:

> 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; . . . and exercise complete control and discretion over its organization and the technology of performing its work....
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> See, also, Decision Nos. B-13-93 and B-28-92 (layoff); and B-12-93 (transfer).

[12] Decision Nos. B-13-93, B-12-93 and B-40-86.

[13] Decision Nos. B-12-93 and B-40-86.

served on a grievant will not invariably bar the arbitrability of a claimed wrongful disciplinary action.[14] Whether an act constitutes discipline depends on circumstances surrounding the act.[15]

Applying these standards to the present case, we find that the Union has failed to demonstrate the required nexus between the subject of the grievance and the contractual provisions cited as the basis for its claim. Our reasoning is as follows:

Concerning the charge that termination of the Grievant's employment constituted wrongful disciplinary action in violation of Article VI, § 1(D), of the Contract, we find that the Union has not alleged any facts or circumstances which are traditionally characteristic of disciplinary action. In fact, the record is devoid of facts alleging that charges of incompetence or misconduct were made or served or that accusations of any sort of culpability were made. As to circumstances surrounding the discharge, the only evidence offered by the Union consists of correspondence from the Grievant, who requested a medical examination in preparation for reinstatement to her prior position, and correspondence from various hospital officials, who denied reinstatement, claiming no appropriate job vacancy existed. There is no supporting documentation or any statement or allegation of fact other than the Union's conclusory allegation of disciplinary action which would indicate a punitive motivation by the employer for denying the Grievant's request for reinstatement. In the absence of evidence supporting the Union's conclusory assertion of disciplinary motive, we find that the Union has not met its burden of presenting a substantial issue under the Contract on the claim that Article VI, § 1(D), of the Agreement was violated.

The Union's position is unavailing as well on the claim that the

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[14] Decision Nos. B-12-93, B-54-91, B-76-90, B-57-90, B-33-90, B-52-89 and B-61-88.

[15] Decision Nos. B-12-93, B-57-90 and B-5-84.

employer violated Article VI, § 1(B), of the Agreement by allegedly violating CSL § 71. The Board has consistently denied the arbitration of claims raised for the first time after the Request for Arbitration has been filed. Permitting arbitration of such claims would frustrate the purpose of a multi-level grievance procedure, which is to encourage discussion of the dispute at each step of the procedure.[16]

With respect to the instant proceeding, the Union's Request for Arbitration claimed violation of Subsection D only. No claim was cited for a violation of Subsection B; that claim was stated for the first time in the Union's Answer to the instant Petition. Although the Union claimed a violation of statute (CSL § 71) prior to making its Request for Arbitration, and although the Employer acknowledged that claim in the report of the Step III hearing officer, we must dismiss the claim with regard to violation of Article VI, § 1(B), because of the Union's failure to cite § 1(B) as the source of its alleged right to arbitrate.

In the alternative, were we to accept an argument that the claim was stated at lower stages of the grievance procedure, we would be compelled, nonetheless, to disallow the claim alleged under § 1(B). It is true that, in the past, we have interpreted an agreement to arbitrate "a claimed violation, misinterpretation or misapplication of the rules, regulations or procedures of [a public employer]" as an agreement to commit a very broad range of issues to ultimate arbitral determination and to have the effect of requiring arbitration of disputes that arguably fall within its ambit despite the fact that the clause makes no specific mention of the particular type or class of dispute presented in a given case.[17] However, it is well settled that the precise scope of the obligation to arbitrate is defined by the parties in

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[16] Decision Nos. B-12-94, B-44-91 and B-29-91.

[17] Decision B-8-87.

their collective bargaining agreement and that this Board cannot enlarge a duty to arbitrate beyond the scope established by the parties.[18]

In the instant matter, the Union argues that Article VI, § 1(B), of the Contract includes a violation of a statute (the Civil Service Law) within its definition of a grievance. Subsection B defines a grievance as 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 the terms and conditions of employment. . . ." Violation of statute is nowhere to be found in the text of Article VI, §1(B), and cannot reasonably be interpreted as falling within the ambit of its definition.

The Union offers the conclusion that Subsection B should be interpreted to include a claimed violation of the New York State Civil Service Law from the fact that this subsection specifically excludes from resolution via the grievance procedure those disputes which involve rules and regulations of the New York City Civil Service Commission, as well as disputes involving HHC rules and regulations about leave of absence and reinstatement.

No authority is cited by the Union, however, to substantiate the Union's proposition that "issues related to the New York State Civil Service Law and/or the New York State Civil Service Commission are not excluded" from the contractual grievance procedure. Moreover, the Union offers no support for its conclusion that the contractual grievance procedure is the exclusive procedure to address disputes arising under CSL § 71.

Although interpretation of a contract is a job for an arbitrator, it is our duty to determine whether the particular controversy at issue is within the scope of the parties' agreement to arbitrate, as we stated above. Because the contractual definition of a grievance under Article VI, § 1(B), on its face, does not encompass a violation of statute, we conclude that the issue

[18] Decision Nos. B-7-91, B-73-90, B-35-90 and B-25-90.

which the Union presents -- whether CSL § 71 (i) actually authorizes a public employer to discharge a classified civil service employee on cumulative medical leave for occupational injury for a year or more or (ii) simply affords job protection to such an employee -- is not a matter which the parties have agreed to submit to arbitration. Therefore, on this ground as well, we dismiss the request to arbitrate the claim with regard to violation of Article VI, § 1(B).

In sum, because the Union has not met its burden of presenting a substantial issue on the claim that Article VI, § 1(D), of the Agreement was violated, we must deny the Union's Request for Arbitration and grant the City's challenge to arbitrability. Furthermore, inasmuch as NYSNA's Request for Arbitration has not alleged a violation of a rule, regulation, policy or order of the Employer, we find that the Union has failed to establish a nexus between the Grievant's discharge and Article VI, § 1(B), the contractual provision cited as the claimed source of the right to arbitrate.

O 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

ORDERED, that the challenge to arbitrability raised herein by the Health and Hospitals Corporation be, and the same is hereby, granted in all respects, and it is further

ORDERED, that the Request for Arbitration filed herein by the New York State Nurses Association in all respects be, and the same is hereby, denied.

Dated: February 22, 1995
New York, N.Y.

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

THOMAS J. GIBLIN
MEMBER

RICHARD A. WILSKER
MEMBER

SAUL G. KRAMER
MEMBER