HHC v. L.237, IBT, 57 OCB 15 (BCB 1996) [Decision No. B-15-96 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Arbitration

-between-

THE NEW YORK CITY HEALTH and HOSPITALS CORPORATION,

Petitioners,

DECISION NO. B-15-96

-and-

DOCKET NO. BCB-1784-95 (A-6066-95)

THE CITY EMPLOYEES UNION LOCAL 237, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

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 September 18, 1995, the New York City Health and Hospitals Corporation ("Corporation" or "Petitioner") filed a petition challenging the arbitrability of a grievance submitted by the City Employees Union, Local 237, International Brotherhood of Teamsters, ("Union" or "Respondent") concerning a claimed wrongful termination of a classified civil service employee. The Union filed an Answer on October 2, 1995.

Background

It is undisputed that Petitioner and Respondent are parties to a collective bargaining agreement ("unit agreement") covering the time period relevant herein.[1] It is also uncontroverted that Article VI of the unit agreement sets forth the grievance and arbitration procedure to be used for

[1] The applicable unit agreement is that between the Corporation and the Union, for the period October 1, 1991, to December 31, 1994, entered January 26, 1995.

resolution of disputes arising thereunder.[2] Section 1 of Article VI of the

[2] The Union also proceeds under Article XV of the Citywide Agreement for the term from July 1, 1990, through June 30, 1992, entered August 13, 1993. That agreement provides in Article XV for the Adjustment of Disputes in a manner virtually identical to the (continued...)

unit agreement provides, in pertinent part, as follows:

> DEFINITION: The term "Grievance" shall mean:
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> * * *
>
> (e) A claimed wrongful disciplinary action taken against a permanent employee covered by Section 75(1) of the Civil Service Law or a permanent employee covered by the Rules and Regulations of the Health and Hospitals Corporation upon whom the agency head has served written charges of incompetency or misconduct while the employee is serving in the employee's permanent title or which affects the employee's permanent status.

There is no dispute that the definition of a grievance in Article VI, § 1, of the unit agreement does not include an alleged violation of the New York State Civil Service Law, nor do the parties dispute that the range of matters which they have agreed to arbitrate does not include alleged violations of the Civil Service Law.

The following facts are unchallenged by the parties: Sgt. Roger L. Fears ("Grievant") was employed by the Corporation as a Senior Special Officer at Harlem Hospital Center ("hospital"). On February 18, 1993, Grievant sustained a compensable work-related injury. He was placed on a medical leave of absence with pay pursuant to § 7.2(a) of the Citywide leave regulation.[3]

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[2](...continued)

Grievance Procedure for which the unit agreement provides.

[3] The leave regulation provides, in pertinent part, as follows:

> Upon a determination of a head of an agency that an

(continued...)

By letter of September 12, 1994, Camille Nanton, Assistant Personnel Director of Human Resources at the hospital, informed Grievant as follows:

> Our records indicate that your Leave of Absence has expired on the above [07-05-94] date. Please notify this office in writing advising us of your intentions regarding continued employment within ten (10) days of this notice.
>
> Failure to respond within ten (10) days will leave us with no alternative but to refer this matter to Labor Relations for appropriate disciplinary actions, which may result in your termination. . . .

Grievant responded by letter dated September 18, 1994, stating, in pertinent part:

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[3](...continued)

> employee has been physically disabled because of an assault arising out of and in the course of his employment, the agency head will grant the injured employee a leave of absence with pay not to exceed eighteen months. No such leave with pay shall be granted unless the Workmen's Compensation Division of the Law Department advises the agency head in writing that the employee's injury has been accepted by the Division as compensable under the Workmen's Compensation Law . . .
>
> The injured employee shall undergo such medical examinations as are requested by the Workmen's Compensation Division of the Law Department and his/her agency, and when found fit for duty by the Workmen's Compensation Board shall return to his/her employment. . . .

A provision which is nearly identical to this Citywide leave regulation is found in Article V (Time and Leave), § 10 (Line of Duty Injury Due to Assault), of the 1990-92 Citywide Agreement. In addition, this section of the Citywide Agreement provides that, if a permanent employee who has five or more years of service does not have sufficient leave credit to cover the employee's absence pending a determination by the Worker's Compensation Division of the Law Department, the agency head shall advance the employee up to forty-five calendar days of paid leave and, in the event that the injury is not accepted as compensable under Worker's Compensation, the employee shall reimburse the City for the paid leave advance.

> I am presently unable to work at my position as Sergeant, Hospital Police. It is my intention to return to duty as soon as my doctor allows me. I intend to remain employed by the Health and Hospitals Corp., assigned at Harlem Hospital.

In a letter dated October 6, 1994, Alma Robinson, Associate Director of Human Resources at the hospital, informed Grievant that, effective October 21, 1994, his employment would be terminated under § 71 of the Civil Service Law ("CSL").[4]

Respondent filed a grievance on behalf of Grievant dated October 31,

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[4] CSL § 71 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 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 filling 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.

1994. It alleged as follows:

> Sgt. Roger Fears states that on October 17, 1994, arbitrarily and capriciously, after being examined by his doctor and receiving approval to return to work from an injury received while pursuant to his official duties as a Hospital Police Officer, he was denied an appointment with Employer Health Service and was told that he was terminated under § 71 of the Civil Service Law. Officer Fears also states that he was ready and fit for duty.

The grievance sought compensation from October 17, 1994, until the date that he is reassigned to Harlem Hospital. A Step II decision dated December 19, 1994, denied the grievance on the ground that it alleged a statutory violation rather than a contractual violation. On January 13, 1995, the Office of Labor Relations ("OLR") denied a request for a Step III hearing. The denial stated:

> Your letter states that, "Based upon the original grievance submission, and the relevant contract provisions . . . the grievant should be allowed to take advantage of the provisions of the Citywide Contract . . . as complained of in the original submission." The original submission, however, makes no mention of the Citywide Contract (nor does your letter specify which provisions you deem relevant). . . . (Ellipsis in original.)

The denial letter also reiterated that the Grievant's employment was terminated pursuant to CSL § 71 and that alleged violations of law are not subject to review under the contractual grievance procedure. On August 2, 1995, Respondent filed a Request for Arbitration of the matter with the Office of Collective Bargaining ("OCB"). Respondent claimed violation of Article IX (Personnel and Pay Practices), § 9, of the Citywide Agreement[5] and Article VI,

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[5] Article IX, § 9, of the Citywide Agreement provides as follows:

> Any employee who is required to take a medical examination to determine if the employee is physically capable of performing the employee's full duties, and who is found not to be so capable, shall, as far as practicable, be assigned to in-title and related duties in the same title during the period of the employee's disability. If a suitable position is not available, the employer shall offer the employee any available

(continued...)

§ 1(e), of the unit agreement.[6] Respondent seeks arbitration under the grievance procedures set forth in Article VI of the unit agreement and Article XV of the Citywide Agreement. As a remedy, Respondent seeks Grievant's assignment to duties as Special Officer "or other appropriate title" as well as retroactive payment of salary and benefits "from the date of employment termination to the present."

Positions of the Parties

Corporation's Position

The Petitioner Corporation raises several challenges to the arbitrability of Respondent's grievance. First, the Corporation maintains that:

> Although it appears on its face that the Respondent cites a violation of the collective bargaining agreement by alleging in the request for arbitration that there has been a wrongful termination of the Grievant, there has been nothing stated by the Respondent at any of the grievance steps which establishes a nexus between the facts contained herein and a violation of the collective bargaining agreement . . . .

Second, the Corporation states that Grievant's employment was not terminated due to disciplinary action, noting that no disciplinary charges were brought or served. Third, the Corporation argues that, since Grievant's

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[5] (...continued)
opportunity to transfer to another title for which the employee may qualify by the change of title procedure followed by the New York City Department of Personnel pursuant to Rule 6.1.1 of the City Personnel Director's Rules or by noncompetitive examination offered pursuant to Rule 6.1.9 of the City Personnel Director's Rules.

If such an employee has ten (10) years or more of retirement system membership service and is considered permanently unable to perform all the duties of the employee's title and no suitable in-title position is available, the employee shall be referred to the New York City Employee's Retirement System and recommended for ordinary disability retirement.

[6] See text at 2, above.

employment was terminated under CSL § 71, the grievance fails to state a claim remediable under the contractual grievance procedure, and further that the Request for Arbitration should be denied for want of a nexus between the discharge of the Grievant under Civil Service Law and the applicable agreement.[7] The Corporation cites Board precedent on this point.[8]

Union's Position

The Respondent Union denies Petitioner's characterization of the grievance as claiming a violation of the Civil Service Law. The Union states that the claims which it seeks to arbitrate are alleged violations of the unit agreement and of the Citywide Agreement.

Concerning the Union's claim under the unit agreement that the

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[7] The Petition acknowledges that the Request for Arbitration claimed a violation of the Citywide Agreement, but it addresses no argument to that claim.

[8] HHC v. NYSNA, Decision No. B-2-95, (BCB-1626-94, A-4972-93).

Grievant's discharge was wrongful discipline, the Union argues that the Corporation's failure to serve written charges is not dispositive of the issue. Similarly, the Union contends that the Corporation's assertion that the termination was carried out under CSL § 71 does not negate the disciplinary nature of the action.

As to the claim of a violation of the Citywide Agreement, the Union contends that "the contractual rights of the grievant existed prior to his [termination] and are the basis upon which the Request for Arbitration was filed, not Section 71." The Respondent Union contends that, while Grievant's medical leave was granted "pursuant to Citywide leave regulations," the Citywide Agreement, in Article V (Time and Leave), § 10 (Line of Duty Injury Due to Assault), "provides for the same leave." The Union maintains that the Corporation had an obligation to examine the Grievant "based on the grievant's claim that he was fit for duty." If not found fit, the Union continues, Grievant was then entitled to assert a claim for benefits under Article IX, § 9, of the Citywide Agreement concerning, inter alia, assignment to in-title and related duties and the opportunity to transfer to another title as far as practicable. The Union says the Corporation "never examined the grievant and hence did not comply with the Citywide Contract and offer the grievant alternatives available thereunder." Hence, the Union argues, the required nexus is established and it thus remains for an arbitrator to determine the question of whether Grievant's discharge constituted wrongful discipline or termination pursuant to the Civil Service Law as well as the question of whether Grievant was entitled to the benefits of Article IX, § 9, of the Citywide Agreement.

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 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]

With respect to the Union's claim that the Corporation violated Article VI, § 1(e), of the unit agreement, we observe that this provision defines a grievance as a claimed wrongful disciplinary action against a permanent employee covered by § 75(1) of the Civil Service Law or a permanent employee covered by the Rules and Regulations of the Health and Hospitals Corporation. Grievant's civil service status is not in dispute. The Union's contention is that the Grievant's discharge constituted wrongful disciplinary action under that section of the unit agreement which defines wrongful discipline. The Corporation denies that the discharge was due to disciplinary action, noting that no disciplinary charges were brought or served.

The record reflects that in a letter dated September 12, 1994, the Hospital's Assistant Personnel Director stated that Grievant's leave of absence for a work-related injury had expired. The letter directed the Grievant to inform her of his intentions regarding continued employment within ten days of that notice, and it noted that his "[f]ailure to respond within ten (10) days will leave us no alternative but to refer this matter to Labor Relations for appropriate disciplinary actions, which may result in your termination." In this regard, we find that "this matter" to which the September 12 letter alludes arguably may refer to the expiration of the Grievant's leave of absence and the employer's resulting action, rather than a

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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., __ A.D.2d __, 627 N.Y.S.2d 619 (1st Dep't 1995), aff'd, __ N.Y.2d __ (March 26, 1996) (No. 910); see, also, Decisions No. B-23-95, B-2-95, B-47-92 and B-15-90.

[10] Decisions No. B-23-95, B-2-95, B-50-92, and B-47-92.

failure to comply with the ten-day deadline for responding to the letter. Grievant's employment was terminated effective October 21, 1994. A letter dated October 6, 1994, from the Hospital's Associate Director for Human Resources, cited CSL § 71 as the authority by which the Grievant was discharged. It is not for this Board to determine whether the language of either of the respective letters is dispositive of the reason for the Grievant's employment termination here.

Whether an employee has actually been disciplined within the meaning of a contractual term is ordinarily a question to be determined by an arbitrator.[11] In interpreting contract provisions identical to Article VI, § 1(e), we have held that the fact that no written charges of incompetency or misconduct have been served on a grievant will not invariably bar the arbitrability of a claimed wrongful disciplinary action,[12] because the issue of whether an act constitutes discipline may depend on circumstances surrounding the act.[13] The instant matter is such a case. While it remains for an arbitrator to determine the merits of the claim, we find that the Union has stated an arguable nexus between the Grievant's discharge and Article VI, § 1(e), of the unit agreement relating to claims of wrongful discipline.

This finding is not controverted by the Corporation's citation of Decision No. B-2-95. That decision is offered in support of the Corporation's argument that the instant Request for Arbitration should be denied on the ground that the discharge was carried out pursuant to CSL § 71. There is no dispute that any question concerning the interpretation of CSL § 71 is not a

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[11] Decisions No. B-23-95, B-54-91, B-52-89, and B-40-86.

[12] 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., __ A.D.2d __, 627 N.Y.S.2d 619 (1st Dep't 1995), aff'd, __ N.Y.2d __ (March 26, 1996) (No. 910); see, also, Decisions No. B-23-95, B-2-95, B-12-93, and B-54-91.

[13] Decisions No. B-23-95, B-2-95, B-12-93, and B-57-90.

matter for an arbitrator under the procedures allowed by the applicable collective bargaining agreements here. Even so, the case cited by the Corporation offers no support for its overall position. The case concerned a request for arbitration based on two contractual definitions of a grievance: (i) as a claimed disciplinary discharge, and (ii) as a claimed violation, misinterpretation or misapplication of the rules or regulations, written policy or orders of the employer applicable to the agency which employed the grievant.

First, we found no evidence of discipline there and dismissed that claim. By contrast, in the instant matter, the Union has presented documentary evidence that raises an arguable question as to whether the discharge was disciplinary. Second, although the union in the earlier case did not deny that the grievant's discharge may have been on statutory grounds, it argued that the other contractual definition of a grievance included such issues as employment termination under New York State Civil Service Law. It reasoned that the contractual definition of a grievance did not specifically exclude leave-of-absence and reinstatement provisions of the State Civil Service Law, but it cited no authority to substantiate its reasoning and offered no other support for that conclusion. We dismissed the request to arbitrate that claim.

By contrast, in the instant proceeding, the Union has not claimed a violation, misinterpretation or misapplication of any rules or regulations, written policy or orders of the Corporation, as was the case in the earlier proceeding; nor has it claimed that an alleged violation of statute is grievable under the collective bargaining agreement. Thus, the case cited by the Corporation is not controlling here.

With respect to the claims under the Citywide Agreement, we note as a preliminary matter that, under Article IX ("Citywide Issues") of the unit agreement, the parties have agreed to submit to arbitration questions

concerning contractual interpretation of the Citywide Agreement.[14]

With respect to the claim under Article IX, § 9, of the Citywide Agreement, the Corporation states that, "[a]lthough it appears on its face that the Respondent cites a violation of the collective bargaining agreement by alleging in the request for arbitration that there has been a wrongful termination of the Grievant, there has been nothing stated by the Respondent at any of the grievance steps which establishes a nexus between the facts contained herein and a violation of the collective bargaining agreement. . . ." It is unclear whether the Corporation here intends to make an argument concerning the belated assertion of a claim or an argument concerning nexus.

With respect to the timing of the assertion of a grievance, we have consistently denied the arbitration of claims which are challenged as having been raised for the first time after a request for arbitration has been filed.[15] This is true except (i) where an employer had clear notice of the nature of a union's claim despite the fact that the union did not specifically cite a contractual clause prior to submission of its Request for Arbitration,[16] or (ii) where the employer should have been on notice of the nature of a claim based upon the totality of the grievance.[17] This conclusion is consistent with the clear mandate of NYCCBL § 12-302[18] and with our own

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[14] See, also, Decision No. B-23-95.

[15] Decisions No. B-2-95, B-44-91, B-29-89, B-40-88, B-31-86, and B-22-74.

[16] Decisions No. B-29-91 and B-29-89.

[17] Decisions No. B-19-90, B-55-89 and B-14-87.

[18] Section 12-302 of the NYCCBL provides:

Statement of policy. It is hereby declared to be the policy of the city to favor and encourage the right of municipal employees to organize and be represented, written collective bargaining agreements on matters within the scope of

(continued...)

well-established policy of favoring the resolution of disputes through impartial arbitration.[19]

In the instant matter, the Union described the complaint --as early as Step I -- as one in which the Grievant was denied an appointment with the Employer Health Service and was subsequently discharged.[20] The remedy sought in the Step I submission was that the Grievant "be returned to duty" and be compensated for the time that he was denied a medical appointment to the time that he is reassigned to work at Harlem Hospital. The Union appealed the Step II decision which rejected the grievance and requested a Step III conference. In denying the request for a Step III hearing, an assistant commissioner of the Office of Labor Relations observed that the Union was contending that "the grievant should be allowed to take advantage of the provisions of the Citywide Contract . . . as complained of in the original submission." (Ellipsis in original.) Although she stated that "the original submission, however, makes no mention of the Citywide Contract," her letter denying the Step III hearing acknowledges on its face that the employer knew the Union was alleging that the Citywide Agreement had been violated. Taken together with the language of the Step I grievance which articulated "return to duty" as the desired remedy, inter alia, we find that the Corporation had clear notice before the Request for Arbitration was filed that the Union's complaints included not only an alleged failure to schedule a fitness examination to determine if the Grievant was capable of resuming the duties of his title but also an alleged failure to offer the Grievant the benefits under this section of the Citywide Agreement.

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[18](...continued)
collective bargaining, the use of impartial and independent tribunals to assist in resolving impasses in contract negotiations, and final, impartial arbitration of grievances between municipal agencies and certified employee organizations.

[19] Decisions No. B-55-89, B-29-89, B-20-79 and B-9-79.

[20] See text at 5 and at 9.

We also find a sufficient nexus between Article IX, § 9, of the Citywide Agreement and the Union's claim that the Corporation denied the Grievant certain benefits under the Citywide Agreement. Those benefits, as articulated in Article IX, § 9, include "return to duty," which the Step I grievance specifically requested.[21] The parties do not dispute that the Grievant herein falls within the category of employees required under the Citywide leave regulations to take a medical examination to determine his physical fitness before returning to duty. The action of which the Union complains here is the Corporation's alleged failure to offer the alternatives specified under Article IX, § 9, i.e., to assign the Grievant to in-title work or to transfer him to a title for which he would qualify or to recommend him for ordinary disability retirement. The omission occurred, the Union argues, because the Corporation failed to schedule a medical examination to determine whether or not the Grievant was fit for duty. As this claim concerns an allegation that the employer failed to offer accommodations under Article IX, § 9, of the Citywide Agreement, we find that the Union has met its burden of establishing a nexus between that Agreement and the allegation that the Corporation did not offer the benefits thereunder.

On this point, a similar question was presented to us in Decision No. 23-95 concerning the same provision of the Citywide Agreement. There, a grievant was told in advance that his leave of absence for work-related injury was due to expire and that his employment would be terminated if he were unable to return to work. He requested additional leave time but was denied and discharged. As here, the employer cited CSL § 71 as the grounds for termination. The grievance filed on his behalf alleged wrongful termination, failure to grant additional leave, and, as here, failure to accommodate him. As with the instant case, there was no dispute that the parties had not included alleged violations of the Civil Service Law within the range of

[21] See n. 5 at 6.

matters which they agreed to arbitrate. Also as in the instant matter, the relief sought was, inter alia, assignment to duties which the grievant performed before the injury or other appropriate title. This Board granted the union's request for arbitration in that case with respect to the claim that Article IX, § 9, of the Citywide Agreement was violated. The Board found that the union's allegations that -- the employer acted to terminate the grievant's employment rather than accommodate him by offering the benefits specified in the cited provision of the Citywide Agreement -- were arguably related to that provision.

Finally, doubtful questions as to the arbitrability of any grievance presented for resolution under a contractually provided procedure are resolved in favor of arbitration; we have long held this to be so.[22]

For the reasons stated above, we deny the City's petition challenging arbitrability and grant the Union's request for arbitration. The questions which we shall permit an arbitrator to consider are whether the provisions of the parties' unit agreement and of the Citywide Agreement discussed hereinabove have been violated by the actions of the Corporation of which the Union complains here. Our determination in no way reflects this Board's opinion on the merits of the respective parties' claims and defenses in the underlying grievance. These are matters for determination by the arbitrator.

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, with respect to a claimed violation of Article VI, § 1(e), of the Special Officers Agreement, the challenge to arbitrability raised

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[22] Decisions No. B-2-91, B-35-90, B-73-89, B-71-89, B-63-89, B-65-88, B-20-79, B-9-79, B-1-78 aff'd sub nom. City of New York v. Anderson et al., N.Y. Co. Supreme Court 7/17/78, B-14-77, B-13-77 aff'd sub nom. City of New York v. Anderson et al., N.Y. Co. Supreme Court 7/17/78, B-28-75, B-12-75, and B-18-74.

herein by the New York City Health and Hospitals Corporation be, and the same is hereby, denied, and it is further

ORDERED, that with respect to a claimed violation of Article IX, § 9, of the Citywide Agreement, the challenge to arbitrability raised herein by the New York City Health and Hospitals Corporation be, and the same is hereby, denied, and it is further

ORDERED, that the Request for Arbitration filed herein by the City Employees Union, Local 237, International Brotherhood of Teamsters, be, and the same is hereby, granted.

Dated: New York, N.Y.
May 21, 1996

STEVEN C. DeCOSTA
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

JEROME E. JOSEPH
MEMBER

THOMAS J. GIBLIN
MEMBER

Dissent. SAUL G. KRAMER
MEMBER