HHC v. L. 371, SSEU, 57 OCB 33 (BCB 1996) [Decision No. B-33-96 (Arb)]

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

--between--

DECISION NO. B-33-96

HEALTH AND HOSPITALS CORPORATION
Petitioner,

DOCKET NO. BCB-1772-95
(A-6045-95)

--and--

SOCIAL SERVICE EMPLOYEES
UNION, LOCAL 371
Respondent.
----------x

DECISION AND ORDER

On August 3, 1995, the Office of Labor Relations, appearing for the Health and Hospitals Corporation ("HHC" or the "Corporation"), filed a petition challenging the arbitrability of a grievance submitted by Social Service Employees Union, Local 371, ("Union") on behalf of unit member Thomas Reece ("Reece" or "Grievant"). The request for arbitration, alleging violations of the scheduling provisions of the City-Wide contract and Unit Agreement, was filed on July 10, 1995. After receiving several extensions of time with the consent of the Corporation, the Union submitted an answer to the petition challenging arbitrability on March 7, 1996. The Corporation filed a verified reply on April 12, 1996.

BACKGROUND

Social Services Employees Union, Local 371, is the duly certified collective bargaining representative for employees in the civil service title Addiction Counselor employed by the HHC. HHC and the Union are signatories to a social services agreement covering employees in this title, inter alia, for the period of January 1, 1992 through March 31, 1995 ("Unit Agreement"). Pursuant to the status quo provisions of NYCCBL § 12-311(d), the terms of the Unit Agreement were extended to cover the time period of the events at issue herein.

Article VI, § 1 of the Unit Agreement defines the term "grievance" to include "[a] dispute concerning the application or interpretation of the terms

of this Agreement." Article VI, § 2 of the Unit Agreement specifies a four-step grievance and arbitration procedure to be applied in any case involving a grievance under § 1 of this Article.

It is uncontested that grievant Thomas Reece was employed by the HHC to work at the Harlem Hospital in the civil service title Addiction Counselor since June 28, 1982. Harlem Hospital operates several Methadone Maintenance Clinics at various Hospital Centers in Harlem, New York. Reece was initially assigned to one of the Harlem Hospital Methadone Maintenance Clinics located at 180th Street and Amsterdam Avenue (Harlem Hospital Center III). The grievant remained at the 180th Street location until June 1986, when he was transferred to another of the Hospital's Methadone Maintenance Clinics, at 126th Street and Amsterdam Avenue. The grievant remained at the 126th Street location until October 1994, at which time he was reassigned to a third Harlem Hospital location at 264 West 118th Street (Harlem Hospital Center I). It was at this location that the events relevant to this grievance transpired.

According to the scheduling practices in effect at Harlem Hospital Center I at the time of the transfer, grievant would occasionally be required to take one day off from Monday through Friday to accommodate a Saturday shift. At this location, grievant would be subject to this rotating schedule approximately once every one-and-a-half months.

On October 28, 1994, the Union filed an individual grievance at Step I, on behalf of the grievant, protesting the involuntary scheduling of a day off during those weeks the grievant was required to work on a Saturday. The Step I grievance stated that this practice was "contrary to the city-wide contract," and grievant wished the "administrative policy discontinued."

Before the Step I decision was rendered, the grievance was filed at Step II. The HHC denied the Step II decision on December 16, 1994, stating the action grieved did not meet the definition of a grievance provided in Article VI, § 1 of the Unit Agreement.

The Union appealed the decision to Step III, which was denied on June 5,

1995 as having been untimely submitted.

On July 10, 1995, the Union filed a Request for Arbitration on behalf of the grievant. The Request alleges that the Petitioner violated the 1990-1992 City-Wide Agreement, Article II, § 2[1] and Article IV, § 3(d)[2], and the Unit Agreement, Article XII, § 5[3], and Article IX, § 6[4].

POSITIONS OF THE PARTIES

HHC's Position

The Corporation maintains that the Union has failed to establish a nexus between the HHC's alleged rescheduling and any provision of either the Unit Agreement or the City-Wide Agreement. The HHC claims it has not engaged in a rescheduling or changing of work schedules to avoid the payment of overtime, to which Article IV, §3(d) of the City-Wide refers. First, it asserts that the rotating work chart had applied to the grievant for over seven years at

---

[1] Article II, § 2 reads: "Wherever practicable, the normal work week shall consist of five (5) consecutive working days separated by two (2) consecutive days off. This shall not, however, constitute a bar to the investigation and implementation by the Employer with the Union's participation and consent of flexible work weeks, flexible work days or other alternative work schedule(s)."

[2] Article IV, § 3(d) reads: "There shall be no rescheduling of days off and\or tours of duty to avoid the payment of overtime compensation. Any work performed on a scheduled day off shall be covered by this Article."

[3] Article XII, § 5 reads: "The Employer agrees to make every reasonable effort to supply the Union with information regarding changes in working conditions, changes in job content, changes in programs, or functions prior to proposed implementation of such changes."

[4] Article IX, § 6 reads: "The following shall apply when an individual's normal work week schedule is to be changed within the same work location:
i. Volunteers who are qualified in order of seniority.
ii. Non-volunteers who are qualified in inverse order of seniority."

the time of his complaint, and the Corporation had not rescheduled or changed the chart since its inception in 1987.

The HHC supports the contention that the schedule was in place for over seven years at the time of Reece's grievance by attaching five memoranda to its petition challenging arbitrability. The earliest of these is dated December 28, 1987, and is titled "Saturday Work Schedule". This work schedule applied to the counseling staff of Harlem Hospital Center III, located at 500 West 180th Street, New York. The schedule lists a series of Saturday dates to be worked and the name of the staff member to work on that date.

The second, dated January 25, 1988, is titled "Saturday Hours", and appears on Harlem Hospital Center letterhead. This particular work schedule was sent to all Methadone Maintenance Treatment Program (MMTP) Addiction Program Administrators and all MMTP Head Nurses, and purports to "standardize" its Saturday tour. The effective date of the standardization is given along with the new hours. A rotation schedule is not listed.

The third memorandum, dated June 7, 1989, applies only to the Methadone Maintenance Clinic located at 500 West 180th Street (Harlem Hospital Center III), and re-establishes a Saturday work schedule for that Center, in effect through July of 1989. A rotating chart is listed along with the dates to be worked and the staff member to work on that date.

The fourth memorandum, dated May 14, 1992, is addressed to all MMTP staff, restates the Saturday clinic hours and explains that the administrators are responsible for assuring that staff comply with the directive.

The fifth memorandum, dated May 9, 1995, is the first where grievant's name is listed on a rotating schedule. This memorandum appears on Harlem Hospital Center I stationery (264 West 118th Street location), and is addressed to the social work staff. The work schedule on the memorandum was to be effective from June 3, 1995 through December 30, 1995. Reece's Saturday workdays on this schedule were as follows: June 3, July 22, September 9, October 28 and December 16, 1995.

The Corporation also asserts that it has not attempted to avoid the payment of overtime, and that the claim by Reece has nothing to do with the assignment or scheduling of overtime since the number of hours and days worked per week, month or year has not changed when the grievant works on a Saturday and one less weekday.

The HHC's nexus argument further rests on Decision No. B-1-95 (INJ), which denied a union's request for injunctive relief. The petition in that case alleged, in part, that the employer's modification of work charts limited the opportunity to work extra overtime. The HHC calls specific attention to the section of the decision which stated that the change did not "affect the number of hours worked per tour, per 25-day cycle, or per year, nor the number of appearances per 25-day cycle or per year." The Corporation argues that in the instant case, the total number of hours worked and appearances made have remained unchanged, and the Board of Collective Bargaining ("Board") should follow its earlier precedent.

The Corporation argues that grievant was aware that he may be subject to a rotating schedule when he signed a Health and Hospitals Corporation employment application form in 1982. The application form stated that Hospital facilities are open seven days a week, 24 hours a day, subject to rotation of shifts and days worked as needed.

The Corporation also maintains that it is within HHC's managerial prerogative to require the grievant not to work one weekday during those weeks the grievant was scheduled to work on a Saturday. It refers to the management rights section of the NYCCBL § 12-307(b), which reads:

> 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;...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.

The HHC cites Decision No. B-1-95(INJ), which reads: "[i]t is a management right to determine and to change work schedules, provided the change does not affect the number of hours worked, the number of appearances, or other mandatory subjects of bargaining." The Corporation acknowledges that this right may be limited by voluntary collective bargaining, but asserts that the limitation "must be supported by reference to an express statement of such limitation in the collective bargaining agreement."[5]

The HHC argues that the Saturday rotating schedule was established for over seven years as part of its managerial prerogative, and it does not impact upon the number of hours worked or the number of appearances by the grievant. It also contends that the Union has not cited any contractual provisions which contain an express statement limiting the HHC's right to set the work schedules for its employees.

The Corporation also maintains that Article IV § 3(d) of the City-Wide Agreement does not create an entitlement to a specific assignment resulting in overtime compensation. It argues that even where, as here, the contract provides for compensation of overtime worked, such a provision in no way establishes that an employee is guaranteed the right to perform overtime work in any particular circumstance.[6] In the HHC's view, the grievant is not contractually entitled to work weekdays only at the straight time rate, nor is he entitled to work five weekdays during the same week he works on a Saturday in order to earn overtime compensation.

Finally, the HHC argues that the grievance challenging the Saturday rotating chart is time-barred under the doctrine of laches. It alleges that it has been inexcusably prejudiced by the Union's unexplained or inexcusable delay in asserting a known right. The Corporation argues that since the five

[5] Decision No. B-1-95 (INJ). The Corporation also refers to Decision Nos. B-24-75; B-10-75; B-5-75; B-6-74; and B-4-69.

[6] The HHC cites Decision Nos. B-29-92; B-29-87; and B-35-86.

memoranda were issued to the social work staff including the grievant's predecessors beginning at least seven years prior to the filing of the instant grievance, and since the rotating schedule has applied to the grievant since its inception, the Union has waited approximately eight years to file a grievance with respect to the Saturday rotating schedule. Therefore, the HHC argues that it would be inequitable to assess the HHC with such great liability because of the Union's lengthy delay.

Union's Position

The Union argues that there exists a plain and direct nexus between the grievance and the cited provisions of the City-Wide Agreement and the Unit Agreement. It maintains that the rotating schedule deprived the grievant of five consecutive working days separated by two consecutive days off and constituted a rescheduling of days off and/or tours of duty to avoid the payment of overtime compensation to him.

Furthermore, the Union argues, the HHC's managerial prerogative under NYCCBL §12-307(b) to, inter alia, direct its employees, relieve its employees from duty because of lack of work or for other legitimate reasons, and maintain the efficiency of governmental operations, is expressly limited by Article II, §2 of the City-Wide Agreement. This Article mandates that wherever practicable, the normal workweek shall consist of five days on with two days off. The Union also argues that Article IV, §3(d) of the City-Wide Agreement, which provides that there shall be no rescheduling of days off and/or tours of duty to avoid the payment of overtime compensation, also restricts management prerogative. Finally, it asserts that Article IX, §6 of the Unit Agreement again limits managerial authority. This Article provides that when an individual's normal work schedule is to be changed within the same work location, such change is to be done on the basis of first volunteers in order of seniority and then non-volunteers in the order of inverse seniority.

The Union responds to the HHC's laches argument by pointing out that the instant grievance was timely filed under Article VI, §2 of the Unit Agreement in that Reece promptly filed it immediately upon being subjected to an alleged improper assignment.

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.[7] The Board 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.[8]

In this case, there is no dispute that the parties have agreed to arbitrate unresolved grievances as defined in their collective bargaining agreement. However, the parties are in dispute as to whether the particular controversy at issue is within the scope of the parties' agreement to arbitrate. One issue is whether a nexus exists between the act complained of, a rescheduling or change in schedule to avoid the payment of overtime, and the contractual scheduling provisions, which are the source of the Union's asserted right to submit this dispute to arbitration. The second issue is whether the arbitrability of this dispute is foreclosed by management's right to determine the methods, means and personnel by which its operations are to be conducted, pursuant to §12-307(b) of the NYCCBL. Before we resolve the first two questions, however, we must first consider the Corporation's laches defense.

---

[7] Decision Nos. B-14-94; B-5-94; B-33-93; 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.

[8] Decision Nos. B-14-94; B-5-94; B-33-93; B-8-92; B-60-91; B-24-91; B-76-90; B-73-90; B-52-90; B-31-90; B-11-90; B-41-82 and B-15-82.

Laches

The HHC challenges the arbitrability of the Union's grievance on the ground that it was untimely filed and should be barred by the doctrine of laches. The equitable doctrine of laches applies when a party would be unjustly prejudiced by a lapse between the time of the alleged act and the time a claim was filed. We have held previously that the submission of an otherwise arbitrable claim may be barred by laches when the claimant was guilty of significant delay after obtaining knowledge of the claim; such delay was unexplained or inexcusable; and the delay caused injury or prejudice to the HHC's ability to present a defense.[9]

The Corporation contends it has alleged facts sufficient to satisfy the above criteria so as to warrant the extraordinary remedy of laches. However, the Board has followed a policy in cases involving "continuous violations" of recognizing the 120-day contractual time limitation for the filing of claims as representing a block of time which the parties themselves have agreed would not form the basis of a claim of prejudicial, unexplained delay.[10]

It is clear from the facts presented that what is involved in this case is an allegedly continuing violation. As this is so, the defense of laches will not operate as a bar to the instant action. Since the grievance-arbitration provision of the City-Wide Agreement calls for the filing of a grievance within 120 days from the date on which the grievance arose, we find that the Union's claim which relates to the continuous commission of the wrong, from June 28, 1994 (120 days prior to the filing of the grievance

[9] Decision Nos. B-49-92; B-34-90; B-73-88; B-14-87 and B-23-83.

[10] Decision Nos. B-1-84; B-24-82; B-7-82; B-4-82; B-15-81; B-3-80; B-9-76; and B-3-76.

herein) to the present, is timely asserted.[11]

The fact that we have concluded that laches does not bar the arbitration of the grievance in issue here should not be construed as preventing HHC from citing its long-established practice when seeking denial of the grievance on the merits in arbitration.

Nexus

It is well-settled that when challenged, a union must establish a nexus between the act complained of and the contract provision it claims has been breached.[12] Once an arguable relationship is shown, this Board will not consider the merits of a case; it is for the arbitrator to decide the applicability of the cited provisions.[13]

We find that the Union has shown the requisite nexus between the instant grievance and the relevant provisions of both the City-Wide and Unit Agreements. Article VI, § 1 of the Unit Agreement defines the term "grievance" as "[a] dispute concerning the application or interpretation of the terms of this Agreement." The grievance provision in the Unit Agreement is similar to the provision found in the City-Wide Agreement. Article IX, § 6 of the Unit Agreement provides that when an individual's normal work week schedule is to be changed within the same work location, the change is to be made first on the basis of volunteers who are qualified in order of seniority and then non-volunteers who are qualified in inverse order of seniority. In

---

[11] We note that the remedy being sought contains no demand for back pay or for deprivation of overtime, further diminishing the possibility of unjust prejudice to the HHC.

[12] Decision Nos. B-27-93; B-24-92; B-29-91; B-2-91; and B-41-90.

[13] Decision Nos. B-27-93; B-24-92; B-46-91; B-29-89; and B-54-90.

addition, Article II, § 2 of the City-Wide Agreement provides that wherever practicable, the normal work week shall consist of five consecutive working days separated by two consecutive days off. Article IV, § 3(d) of the City-Wide provides that there shall be no rescheduling of days off and/or tours of duty to avoid the payment of overtime, and that any work performed on a scheduled day off shall be covered by the Article. By providing that wherever practicable, the normal work week shall consist of five consecutive working days, and by mandating a procedure for selecting employees to work should the five-day schedule not be practicable, Article II, § 2 of the City-Wide Agreement and Article IX § 6 of the Unit Agreement arguably limits the employer's right to schedule time off. Thus, we find that these provisions have an arguable relationship to the issues in dispute in this case. Similarly, Article IV, § 3(d) of the City-Wide Agreement arguably limits the employer's right to unilaterally change the work schedule. As such, we find that the Union has met its burden in providing a nexus between the acts complained of and the contract provisions it claims have been breached.

Management Prerogative

We recognize that the HHC possesses the managerial prerogative to make unilateral work assignments as prescribed in § 12-307(b) of the NYCCBL. However, as the HHC acknowledges, the employer's ability to make those changes is tempered by any limitation which the parties themselves may have agreed to in a collective bargaining agreement. We do not agree with the HHC's claim that there has been no reference to an express statement of such limitation in the collective bargaining agreement by the Union. The five days on/two days off provision in Article II,
§ 2, the bar against rescheduling to avoid overtime in Article IV, § 3(d), and the method for selecting employees to work in Article IX, § 6, arguably constitute such limitations. The Union has shown the presence of a sufficient contractual nexus for an arbitrator to evaluate the merits of the Union's

grievance.[14]

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-1772-95, be, and the same hereby is, dismissed except as to the claim based on Article XII § 5 of the Unit Agreement; and it is further

ORDERED, that the request for arbitration filed by the Social Service Employees Union, Local 371 in Docket No. BCB-1772-95, be, and the same hereby is, granted insofar as the request seeks arbitration of the claimed violation of Article II, § 2 and Article IV, § 3(d) of the City-Wide Agreement and Article IX, § 6 of the Unit Agreement from and including June 28, 1994 to the present, and is denied insofar as the request seeks arbitration for the claim for the period prior to June 28, 1994.

DATED: New York, N.Y.
September 26, 1996

STEVEN C. DeCOSTA
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

RICHARD A. WILSKER
MEMBER

SAUL G. KRAMER
MEMBER

JEROME E. JOSEPH
MEMBER

[14] We do not find that Article XII, § 5 of the Unit Agreement, by its terms, is arguably related to this dispute.

ROBERT H. BOGUCKI
MEMBER