OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Arbitration

-between-

City of New York and New York City Health and Hospitals Corporation,
Petitioners,

Decision No. B-2-97
Docket No. BCB-1702-94
(A-5457-94)

-and-

New York State Nurses Association,
Respondent.

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DECISION AND ORDER

On November 25, 1994, the City of New York ("the City") and the New York City Health and Hospitals Corporation ("HHC") filed a petition challenging the arbitrability of a grievance brought by the New York State Nurses Association ("the Union"). The grievance alleged that the reassignment of a nurse violated her religious beliefs and was made in bad faith.

After requesting and receiving an extension of time, the Union filed its answer on December 30, 1994. The City filed a reply on January 13, 1995.

By letter dated July 12, 1996, the City requested a resolution of this case. It stated, "[t]he issue involved is one that the City considers to be of considerable importance, i.e., whether the statutory waiver requirement of the NYCCBL is met if the grievant brings, or reserves the right to bring, a Title VII action. Subsequent requests raising similar issues have been filed."

Background

The Bellevue Hospital ("Hospital") Emergency Room ("ER") has a subdivision called the Emergency Ward. In June 1993, all ER nurses were supervised by an Assistant Director of Nursing and only the Emergency Ward had a supervisory nurse.

Patricia Kunka ("grievant") was the Tour II Nursing Supervisor in the Emergency Ward. Her hours were from 7:00 A.M. to 3:30 P.M. By letter dated June 22, 1993, the grievant was informed that as of July 12, 1993, she would be reassigned to the Division of Operating Room Services as Supervisor of the Post Anesthesia Care Unit ("PACU") and Ambulatory Surgery. At the end of June 1993, the grievant sent a letter to the hospital's Nursing Director requesting reconsideration of the transfer. She said that she did not want to leave the ER and that working in "an area that engages in abortions is against [her] First Amendment rights based on religious freedom." A meeting between the grievant, a Union representative and the Nursing Director did not resolve the dispute.

On July 28, 1993, the grievant filed the instant grievance at Step I. The nature of the grievance, she wrote, was the "[v]iolation of [citywide] contract including Article XI, Section (posting) and violation of NYSNA contract ("unit contract"] including Article VI, Section 1B (policy for accommodation of

religious belief).[1] Assignment to another position made in bad faith." By memo dated July 30, 1993, the Nursing Director informed the grievant that, to accommodate her concerns, her responsibilities would "not include the staffing, supervision, coordination or teaching as it relates to the management of patients having terminations of pregnancy. Nor will you participate in the direct care of these patients."

The grievance was denied at Step I on August 12, 1993 on the grounds that neither Article XI, 91 of the citywide contract nor Article VI, §lB of the unit contract had been violated, and that the grievant's First Amendment rights had not been violated because she would not be exposed to abortion procedures in her new position. The grievance was denied at Step II on November 4, 1993, on the grounds that Article XI, § 1 of the citywide con-

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[1]Article XI of the Citywide Agreement ("Civil Service, Career Development") provides, in relevant part:

Section 1.
When vacancies in promotional titles covered by this Agreement are authorized to be filled by the appropriate body and the agency with such vacancies decides to fill them, a notice of such vacancies shall be posted in all relevant areas of the agency involved at least five (5) working days prior to filling except when such vacancies are to be filled on an emergency basis. Present agency agreements on this subject shall not be affected by this Section.

Article VI, §1 of the unit contract provides, in relevant part:
DEFINITION: The term "Grievance" shall mean:

(B) a claimed violation, misinterpretation or misapplication of the rules and regulations, written policy or orders of the Employer applicable to the agency which employs the grievant affecting terms and conditions of employment ....

tract had not been violated, that the reassignment was a management right, and that claims of violations of the First Amendment "are not a matter subject to scrutiny through the grievance procedure" and that "any such violation would, if [it] existed, belong in an [Equal Employment Opportunity Commission ("EEOC")] forum."

In a memo to the Nursing Director dated March 1, 1994, the grievant stated that the accommodations to her beliefs had "proved unworkable in practice" and that her supervisor suggested that she transfer to another position. She requested a transfer back to the ER.

On March 22, 1994, the grievant was assigned as Supervisor of the Department of Medical Nursing on Tour III, which runs from 3:30 P.M. to midnight. Gynecology and obstetrics patients are not treated in the Department of Medical Nursing. The Nursing Director wrote, "this assignment will provide accommodation to your religious beliefs and at the same time will complete the number of supervisors we deem necessary on Tour III."

The grievance was denied at Step III on April 4, 1994. The hearing officer wrote, "the Hospital has removed the grievant from the protested assignment. Furthermore, regarding posting, the Corporation has indicated that, in accordance with Article XI, Section 1 of the Citywide Agreement, vacancies, when they exist, will be posted."

The Union filed the instant request for arbitration on May

3, 1994. As the nature of the dispute to be arbitrated, the Union alleged:

> Ms. Kunka was reassigned to Ambulatory Surgery, Tour where routine pregnancy interruptions were performed. It is against Ms. Kunka's religious beliefs to circulate on such cases. Ms. Kunka was then reassigned to Tour III in bad faith.

It cited Article VI, §1B as both the contract provision alleged to have been violated and the section of the contract under which the demand for arbitration was made.

On September 21, 1994, the grievant filed a claim against the Hospital with the New York State Division of Human Rights ("DHR"). On the same day, she filed a claim of a violation of Title VII of the 1964 Civil Rights Act with the EEOC, alleging:

> I was punished for exercising my religious beliefs. This punishment (transfer to evening duty) was an act of discriminatory and arbitrary retaliation for objecting in writing to assisting in the performance of abortions as a Roman Catholic Nurse ... in violation of my seniority rights ... My day position as Supervisor of Nurses for Emergency Services has remained open for a year ....

The charges are pending.

On October 25, 1994, the Union, as part of its request for arbitration and as required by the New York City Collective Bargaining Law, submitted to the Office of Collective Bargaining a waiver signed by the grievant. It states, in relevant part:

> [t]he undersigned employee organization and employee(s) aggrieved in this matter waive their rights to submit the underlying dispute to any other administrative or judicial tribunal, and except for the Purpose of a claim in federal court that said reassignment was

retaliation in violation of 42 U.S.C. 2000e-3(e).[2]

The grievant was represented at the grievance hearings by a Union representative, but was also accompanied by an attorney from the Legal Center for Defense of Life. By letter dated December 22, 1994, the grievant's attorney stated to the Union's attorney:

> Since each of the hearing officers in the grievance process held that their jurisdiction did not extend to the religious conscience/abortion issue, Ms. Kunka agreed to take this aspect of the underlying employment dispute to the EEOC. That is why her EEOC claim was added as an exception to her waiver ... [O]ur agreement was to separate the issues if matters could not be resolved. In essence, that was the intent of the amended waiver as signed by Ms. Kunka under my supervision.

Positions of the Parties

City's Position

The City argues that the Union has failed to execute a valid waiver because the grievant has filed claims with the DHR and EEOC. The City maintains that if the grievant wishes to enforce Title VII rights at the EEOC she may do so, but she is then precluded from taking the dispute to arbitration. It says that the issue here is whether the Board can vitiate the "clear and absolute" statutory waiver requirement by compelling arbitration of a matter that has already been submitted to the EEOC.

The City further alleges that the Union has failed to show a

[2]The underlined portion of the waiver was added by the grievant.

nexus between the instant dispute and the contractual right alleged to have been violated. It argues that the gravamen of the grievant's complaint is a violation of First Amendment rights and that claimed violations of Federal and state statutes may not be arbitrated under the contract. In addition, the City claims, the Union has cited Article VI, §1(B) as the regulation or rule alleged to have been violated, but the cited section only provides the definition of a grievance under the contract.

Union's Position

The Union argues that the waiver required under the NYCCBL only waives other, concurrent appeals of civil service matters. It cannot, the Union maintains, extend to rights that are protected by state and Federal statutes.

The Union maintains that general arbitration provisions in a collective bargaining agreement do not waive statutory rights under federal law. It claims that the doctrine of equitable estoppel applies here because the employer's hearing officer stated, during the grievance hearing, that the grievance procedure is not the proper forum for a Title VII claim.

The Union raises several claims for the first time in the answer to the petition. It contends that the grievant was transferred to Tour III as a disciplinary action in retaliation for

exercising her rights under §79-i of the Civil Rights Law.[3] It also maintains that a 1988 memo precludes HHC from transferring the grievant.

Discussion

When a public employer challenges the arbitrability of a grievance, we determine whether the parties have agreed to arbitrate disputes and, if they have, whether their contractual obligation includes the act complained of by the Union.[4] Here, the parties have agreed to arbitrate certain types of disputes set forth in the collective bargaining agreement. The City, however, contends that the Union has failed to establish an arguable nexus between a contract provision and the action about which it complains.

The City argues that the gravamen of the grievant's complaint is an alleged violation of First Amendment rights, and that claimed violations of Federal and state statutes may not be arbitrated under the contract. While the City is correct that claimed violations of constitutional and statutory rights may not

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[3]Section 79-i of the New York State Civil Rights Law provides, in relevant part:

> 1. When the performing of an abortion on a human being or assisting thereat is contrary to the beliefs of any person, he may refuse to perform or assist in such abortion by filing a prior written refusal setting forth the reasons therefor with the appropriate and responsible hospital ... and no such hospital ... shall discriminate against the person so refusing to act.

[4]See. e.g., Decision Nos. B-3-94; B-27-93; B-14-93.

be arbitrated under this contract, we find that the grievant has alleged a separate contractual claim based on asserted violations of the Citywide and unit contracts.[5] Because it is clear that the parties have agreed to bring some claimed violations of the contract to arbitration, we must determine whether the instant dispute is the kind of claimed violation that the parties have agreed to arbitrate.

The city maintains that the grievance is not arbitrable because the Union, in its request for arbitration, cited the definitional provision of the contract as the provision having been violated. It is true that we have denied arbitration on these grounds;[6] the underlying principle is that the City ought not to be surprised or prejudiced by claims raised late in the procedure. To the extent that the grievance relies upon Article VI, Section l(B) of the unit agreement, the definitional provision, without identifying or referring to a specific rule, regulation, written policy or order claimed to have been violated, it fails to state an arbitrable grievance.[7]

At the lower steps of the grievance procedure, the grievant also claimed a violation of Article XI, §1 of the Citywide

[5] See, note 1, supra.

[6] See, e.g., Decision No. B-14-94.

[7] The Union also claimed a violation of an unnamed policy regarding accommodation of religious beliefs. Since it did not identify a specific, written policy of the HHC, we cannot find a nexus between such an alleged policy and a provision of the contract.

agreement, alleging that the Hospital had violated the Citywide agreement by not posting her former position. This claim, however, was abandoned by the Union when it did not submit this claim in its request for arbitration or answer, apparently because the City agreed to comply with the posting requirement at Step III of the grievance procedure. For this reason, it is unnecessary for us to consider whether it is an arbitrable claim.

The Union raised several other alleged grounds for arbitration in its answer which were not raised at the lower steps of the grievance procedure. We have consistently denied 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.[8] Therefore, these claims were raised too late to be considered here. In addition, since no part of this dispute is arbitrable, it is unnecessary to reach the City's arguments concerning the effect of federal caselaw on the arbitrability of this dispute.

Accordingly, for all of the above reasons, we grant the City's petition challenging arbitrability.

[8] See, e.g., Decision Nos. B-2-95; B-30-94; B-29-91; B-40-88.

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 in Docket No. BCB-1702-94 be, and the same hereby is, granted.

Dated: New York, New York
January 30, 1997

Steven C. DeCosta
CHAIRMAN

George Nicolau
MEMBER

Daniel G. Collins
MEMBER

Carolyn Gentile
MEMBER

Jerome E. Joseph
MEMBER

Saul G. Kramer
MEMBER

Richard A. Wilsker
MEMBER