Manish Garg, MD, 6 OCB2d 11 (BCB 2013)

(Arb.) (Docket No. BCB-3070-13) (A-14317-12)

Summary of Decision*:** HHC challenged the arbitrability of a grievance alleging that it violated the parties' collective bargaining agreement when it declined to renew the Grievant's residency contract. HHC primarily asserted that it is not obligated under the Agreement to proceed to arbitration where, as here, the request for arbitration is initiated by an individual. It further argued that the renewal of a residency contract is not arbitrable. The Grievant argued that the Union "commenced arbitration" by signing the waiver required for the filing of a request for arbitration, and is therefore a party to the arbitration. The Grievant further argued that nothing in the Agreement or the NYCCBL prevents an individual from filing a request for arbitration. The Board found that the parties' Agreement precludes an individual from filing a request for arbitration and that disputes concerning the non-renewal of a residency contract are not arbitrable. Accordingly, the City's petition challenging arbitrability was granted, and the Grievant's request for arbitration was denied. ***(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration

-between-

THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Petitioner,

-and-

MANISH GARG, MD,

Respondent.

DECISION AND ORDER

On February 15, 2013, the New York City Health and Hospitals Corporation ("HHC") filed a petition challenging the arbitrability of a grievance brought by Manish Garg (AGrievant@). On December 26, 2012, the Grievant filed a request for arbitration alleging that HHC violated the 2008-2010 Interns and Residents Agreement ("Agreement"), when it declined

to renew his residency contract. HHC primarily asserts that it is not obligated under the Agreement to proceed to arbitration where, as here, the request for arbitration is initiated by an individual. It further argues that the renewal of a residency contract is not arbitrable. The Grievant argues that the Union has "commenced arbitration" by signing the waiver required for the filing of a request for arbitration, and is therefore a party to the arbitration. The Grievant further argues that nothing in the Agreement or the NYCCBL prevents an individual from filing a request for arbitration. This Board finds that, under the parties' Agreement, an individual is precluded from filing a request for arbitration, and that disputes concerning the non-renewal of a residency contract are not arbitrable. Accordingly, HHC's petition challenging arbitrability is granted, and the Grievant's request for arbitration is denied.

BACKGROUND

The Grievant was appointed as a PGY 1 Resident at Harlem Hospital Center on July 1, 2009. HHC contends that the Grievant's residency contract covered the period of July 1, 2009 through June 30, 2010. The Grievant argues that his residency contract was extended until June 2012. PGY 1 Residents are represented by the Committee of Interns and Residents ("CIR" or "Union"). On December 3, 2009, the Grievant received a letter from Linnea Capps, Residency Program Director, informing him that due to concerns about his performance, he would be receiving a notice of non-renewal of his residency contract before December 15, 2009. The letter goes on to say that the hospital will work with the Grievant to devise a remediation plan. It then states that if the Grievant is able to demonstrate substantial improvement he will be able to continue in the program and advance to the PGY 2 level and that his progress would be reassessed in three months. HHC claims, and the Grievant denies, that he acknowledged receipt of a non-renewal notice on December 14, 2009. Neither party submitted a copy of this notice.

On or about May 11, 2010, the Grievant received another letter from Capps. The letter states that there were continued concerns about his performance and that he will be required to repeat the PGY 1 year of the program. Two days later, on May 13, 2010, the Grievant received a letter from Harlem Hospital's Associate Director of Human Resources. This letter informed the Grievant that, due to certain allegations, he was suspended pending an investigation. On June 1, 2010, the Grievant received a letter stating that effective May 27, 2010, his suspension would be without pay.

HHC claims that the Grievant was separated from his position on June 30, 2010. However, the Grievant argues that "[t]here is no communication whatsoever to the effect that I was 'separated' from contract on June 30, 2010." (Ans. ¶ 7) He also claims that he never received any documentation of termination.

The record is not entirely clear as to what happened after the Grievant's suspension. However, he submitted a document from the Supreme Court of New York County which states that "on 12/01/2011 the [Grievant] was tried and found not guilty of all pending criminal charges. . . ." (Ans., Ex. 6) The Grievant also submitted a February 2, 2012 letter from an Assistant Professor of Medicine at Harlem Hospital. The letter states:

> This is in response to your interest in continuing your Internal Medicine Training here at Harlem Hospital Center in Affiliation with Columbia University. After careful evaluation of your personnel records, we regret to inform you that we are unable to offer you the opportunity to continue training as a first year intern.
>
> The decision was based on previous evaluations and counsel notes found on your personnel record. A notice of non-renewal of your contract was presented during your 2009-2010 academic training year due to deficiencies in your clinical competency. The opportunity to improve your deficiencies was presented with a remediation plan and a mentor to help implement plans and monitor progress. However, you were unable to demonstrate improvement in your medical knowledge, patient care and clinical judgment.

> The Educational Policy Committee (Competency Committee) determined that you did not demonstrate satisfactory skills and performance in all areas of clinical competencies in order to advance and you were released from the program.

(Ans., Ex. 8)

The Grievant filed a Step I grievance on April 24, 2012. He subsequently filed a Step II(a) and Step II(b) grievance on May 15, 2012. The Grievant claims that he submitted the Step II(b) grievance to the House Staff Affairs Committee as required by the Agreement, but that it was stamped as "refused" and sent back to him. Thereafter, on September 14, 2012, a Step III conference was held at the New York City Mayor's Office of Labor Relations ("OLR"). On October 16, 2012, a Step III decision was issued, which stated that OLR did not have jurisdiction to review the non-renewal of the Grievant's residency contract "as such matters fell under the purview of the facility's Medical Board for final decision." (Pet. ¶ 10) Additionally, the decision indicated that OLR did not have jurisdiction to review any of the Grievant's other claims because they were procedurally untimely.

On December 26, 2012, the Grievant filed a request for arbitration, which stated the issue as:

> 1) Breach and violation of Categorical Internal Medicine training contract
> 2) Lowering of Overall/Biennial evaluation twice during PGY1 year of training
> 3) Contempt of Supreme Court Decision (attached) [1]
> 4) Violation and misapplication of rules, policies and regulations of NYCHHC, NYCCBL, ABIM, and ACGME

(Request For Arbitration, Docket No. A-14317-12) As a remedy, the Grievant seeks:

[1] As the Board does not have jurisdiction to enforce New York State Supreme Court decisions, we address only alleged violations of the NYCCBL.

1) Reinstatement to the Internal Medicine Residency Training position
2) [Credit] for PGY1 year of training
3) Promotion PGY2 year of training as per the guidelines, [and]
4) Compensation for the damages

(*Id.*)

Although the Union signed the waiver required under NYCCBL §12-312(d), it informed the Office of Collective Bargaining ("OCB") that it was doing so "solely because it is necessary to allow the further processing of Dr. Garg's individually filed Request for Arbitration . . . ." (Ans., Ex. A) In this letter the Union also stated that it would not represent the Grievant at arbitration, nor did it consider itself an aggrieved party to the matter. Additionally, the Union sent the Grievant a letter explaining in detail why the Agreement "does not provide a means for CIR to provide the assistance you request."[2]

POSITIONS OF THE PARTIES

HHC's Position

HHC argues that the Grievant cannot satisfy the first prong of the Board's test for arbitrability because HHC does not have an obligation under the parties' Agreement to proceed to arbitration when an individual files a request for arbitration on his own. Article XV, Section 2, Step III of the Agreement specifies that the Union shall commence arbitration by submitting a request to OCB. While the Union signed the waiver required under NYCCBL §12-312(d), it did not file the request for arbitration at issue. Furthermore, the Union explicitly stated that it did not wish to be involved in the request for arbitration and that it would not represent the Grievant. Additionally, while Article XV, Section 2 allows the employee himself to initiate a grievance at

[2] We take administrative notice of this letter, dated August 20, 2012, which was forwarded to the Board by the Union.

Step I, HHC argues that the Grievant was not an employee when he filed the underlying grievance and, therefore, did not have standing to file it in the first instance.

HHC also argues that it is not obligated to arbitrate any claims involving the facility's refusal to provide the Grievant with a renewed residency contract, as Article XV, Section 2, Step II(b) explicitly states that all issues concerning contract renewals are subject to the final decision of the Medical Board. Therefore, the parties have specifically excluded this particular issue from proceeding to arbitration. Finally, HHC argues that all of the Grievant's claims are procedurally untimely.

Grievant's Position[3]

The Grievant argues that by signing the waiver required under NYCCBL §12-312(d), the Union has "commenced arbitration." Therefore, he argues that neither the NYCCBL nor the Agreement prevents him, as an individual, from filing the request for arbitration. Additionally, he argues that his request for arbitration involves events that occurred when he was employed by HHC, thus he should not be precluded from arbitration on the basis that he is no longer an HHC employee.

As a factual matter, the Grievant disputes HHC's claim that he was separated from employment on June 30, 2010. He claims that he never received any communication from HHC to indicate that he was being terminated. Furthermore, he denies receiving notification on December 14, 2009, that his residency contract would not be renewed. He argues that the letter he received on December 3, 2009, which states he will be receiving a notice of non-renewal and

[3] As the Grievant is representing himself *pro se*, we have construed his claims broadly and consider them in the light most favorable to him. However, many of the Grievant's arguments involve statutes that are outside the jurisdiction of this Board or issues that are irrelevant or were not raised in his request for arbitration. Any such argument will not be discussed herein. We will, therefore, discuss all arguments made by the Grievant which are relevant to his specific request for arbitration or constitute a response to assertions made by HHC in its petition challenging arbitrability.

also mentions a remediation plan, is self-contradictory. The Grievant further argues that the May 11, 2011 letter that states that he will be required to repeat his PGY 1 year is also contradictory to HHC's argument that his residency contract was not renewed.

The Grievant construes the February 2, 2012 letter, which states that he could not continue training as a first year intern, as his "release letter." Consequently, he argues that his April 24, 2012 Step I grievance was timely filed within the requisite 90 days after his grievance arose. The Grievant additionally argues that questions of timeliness are for the arbitrator to decide, not this Board.

DISCUSSION

We find that this matter is not arbitrable and grant the petition challenging arbitrability. As discussed below, an individual does not have the right to file a request for arbitration under the parties' Agreement under any circumstance. Additionally, we find that the parties specifically excluded the subject of the grievance from proceeding to arbitration.

This Board has formulated a two-prong test to determine whether a dispute is arbitrable. This test considers:

> (1) whether the parties are in any way obligated to arbitrate a controversy, absent court-enunciated public policy, statutory, or constitutional restrictions, and, if so (2) whether the obligation is broad enough in its scope to include the particular controversy presented. In other words, whether there is a nexus, that is, a reasonable relationship between the subject matter of the dispute and the general subject matter of the Agreement.

DC 37, L. 2507, 6 OCB2d 6, at 9 (BCB 2013) (quoting *UFOA*, 4 OCB2d 5, at 8-9 (BCB 2011)) (citations and internal quotation marks omitted). As the Board lacks jurisdiction to enforce contractual rights, it will generally not inquire into the merits of the parties' dispute. *See DC 37, L. 420*, 5 OCB2d 4, at 12 (BCB 2012) (citing *NYSNA*, 3 OCB2d 55, at 7-8 (BCB 2010); *NYSNA*,

69 OCB 21, at 7-9 (BCB 2002); *DC 37*, 27 OCB 9, at 5 (BCB 1981)); *see also* N.Y. Civ. Serv. Law ("CSL") § 205(5)(d).

The Grievant's claim cannot satisfy the first prong of the arbitrability test. Article XV, Section 2, Step III of the Agreement governs arbitrable disputes and states:

> An appeal from an unsatisfactory determination *at Step II(a) may be filed by the Committee* with the Office of Collective Bargaining for impartial arbitration within thirty (30) days of receipt of the Step II(a) decision. The Corporation shall have the right to appeal any grievance determination under Section 1, *except for grievances brought under Section 1(d)* directly to arbitration. Such appeal shall be filed within thirty (30) days of the receipt of the determination being appealed. *The Committee and/or Corporation shall commence such arbitration* by submitting written request therefor to the Office of Collective Bargaining.[4]

(*Id*.) (emphasis added) The plain language of this provision is clear that in any dispute, whether it is an appeal from a determination at Step II(a) or II(b), only the Union or HHC has the right to invoke arbitration. This is in contrast to the language of Step I, which states that "*[t]he Employee and/or the Committee* shall present the grievance in writing…" (*Id*.) (emphasis added) Further, the language of Step III above explicitly states that issues brought under section 1(d), involving the non-renewal of a residency contract, are not arbitrable.

Article XV, Section 2, Step II(b) further supports the conclusion that the grievance at issue is not arbitrable. This provision addresses the "appeal from an unsatisfactory determination at Step I in regard to a grievance brought under Section 1(d)." (Pet. Ex. 1) It states that such an appeal must be brought to the House Staff Affairs Committee of the Medical Board for evaluation and determination. It further states that "[t]he decision of the Medical Board in all such matters shall be final." (*Id*.) Consequently, this language is clear that the final

[4] Article XV, § 1 of the Agreement defines the term "grievance" and § 1(d) defines a grievance as "[a] question regarding the non-renewal of the appointment of an HSO."

determination of grievances regarding the non-renewal of a residency contract will be made by the Medical Board.

The Grievant argues that because the Union signed the waiver required under NYCCBL §12-312(d), it has "commenced arbitration." However, it is evident that although the Union signed the waiver, it did not file the request for arbitration.[5] The Union explicitly stated that it was signing the waiver only as a procedural matter, and that it did not wish to take any part in the Grievant's individually filed request for arbitration. Consequently, because the parties' Agreement does not allow an individual employee to file for arbitration under any circumstance, and because the Grievant's dispute is explicitly excluded from arbitration, we cannot find that HHC is obligated to arbitrate the controversy at issue.[6] Accordingly, the petition challenging arbitrability is granted, and the request for arbitration is denied.

[5] In the request for arbitration, the Grievant's name is listed under the "Name of Public Employee Organization and Local" section. Furthermore, the "Person Filing Request" section is signed only by the Grievant.

[6] In portions of his Answer, the Grievant appears to deny that his dispute involves a question of the "non-renewal" of his residency contract. However, as discussed above, regardless of the issue in dispute, only the Union is permitted to proceed to arbitration under the parties' Agreement.

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, docketed as BCB-3070-13, hereby is granted; and it is further

ORDERED, that the request for arbitration filed by Manish Garg, docketed as A-14317-12, hereby is denied.

Dated: April 15, 2013
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
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CHARLES G. MOERDLER
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