HHC v. L. 30, IUOE, 61 OCB 16 (BCB 1998) [Decision No. B-16-98 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Arbitration

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between

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NEW YORK CITY HEALTH and HOSPITALS CORPORATION :

Petitioner, :

and :

LOCAL 30, INTERNATIONAL UNION of OPERATING ENGINEERS, AFL-CIO, :

Respondent. :

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Decision No. B-16-98
Docket No. BCB-1942-97 (A-6962-97)

DECISION AND ORDER

On October 22, 1997, the New York City Health and Hospitals Corporation ("HHC") filed a petition challenging the arbitrability of a grievance submitted by Local 30, International Union of Operating Engineers, AFL-CIO ("Local 30" or "Union"). The grievance claims that Jacobi Medical Center ("Jacobi") failed to provide Stationary Engineer John Hillen ("Grievant" or "Hillen") with the opportunity to open the shift selection process, *i.e.,* select a shift based on his seniority, upon his transfer from Bellevue Hospital ("Bellevue"). As a remedy, it seeks that Hillen be allowed to choose a shift at Jacobi and make him whole for any money lost as a result thereof. The Union filed its answer on March 18, 1998, and on April 6, 1998, HHC filed its reply.

Background

On May 8, 1995, Hillen, who had been a Stationary Engineer with HHC for eleven years, transferred from Bellevue to Jacobi and was assigned to a Monday - Friday shift. Hillen wanted a different shift and sought to open the shift selection process for engineers, but was asked to wait six months before pursuing his request by Robert McLaughlin, Senior Stationary Engineer ("McLaughlin"), and Joseph Tortorelli, Engineering and Maintenance Department Superintendent ("Tortorelli"). The Grievant says that he renewed his request in January 1996, but, despite the fact that McLaughlin had allowed several other engineers to select shifts, he was informed by Tortorelli that the Jacobi personnel department would not be opening the shift selection process.

On September 26, 1996, Hillen wrote a letter to Susan Morris, Director of Labor Relations at Jacobi, claiming he was not permitted to select a shift and that this resulted in his earning less than other Stationary Engineers. On October 24, 1996, Hillen filed a Step I grievance, alleging violation of Article XI, §2, Step I of parties' collective bargaining agreement.[1] The grievance retroactively designates his letter of September 26, 1996 as a Step I grievance,

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[1] Article XI, §2, Step I states:

> The Grievance Procedure, except for grievances as defined in Section 1d. and 1e of this Article, shall be as follows:
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> Step I - The employee and/or the Union shall present the grievance in the form of a memorandum to the person designated for such purpose by the agency head no later than 120 days after the date on which the grievance arose. The **employee** may also request an appointment to discuss the grievance. The person designated by the **Employer** to hear the grievance shall take any steps necessary to a proper disposition of the grievance and shall issue a determination in writing by the end of the third work day following the date of submission.

claiming that he was not issued a written determination of that grievance in a timely manner. On December 6, 1996, the grievance was denied on the grounds that it did not specify a contract violation.

On December 19, 1996, Hillen filed a Step II grievance, which retroactively designated his grievance of October 24, 1996 as a Step IA grievance, claiming that no contractual violation had been specified in that previous grievance because, "Stationary Engineers are to be reassigned to rotating watches according to Civil Service regulations. This makes pay parity and watch picks a moot point." According to the Grievant, he was entitled to receive a determination of his Step 1A grievance within five working days and HHC's failure to do so was in violation of the contractual grievance procedure. A Step II hearing was held on May 1, 1997. On July 22, 1997, the Union sent a letter to the New York City Office of Labor Relations ("OLR") stating that, because no Step II decision had been rendered, they wished to schedule a Step III hearing. The Step II grievance was denied on August 1, 1997.

By letter dated August 22, 1997, OLR acknowledged the Union's request for a review of its Step II decision. It found no grievance which related to a violation of Article XI, §§1 or 2 of the collective bargaining agreement, or any other section of the rules, regulations, written policy or order of the HHC, and denied the grievance. On September 17, 1997, the Union filed a request for arbitration citing a violation of Article XI, §1(b).[2]

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[2] Article XI, §1(b) states,

> The term "*Grievance"* shall mean:
>
> b. A claimed violation, misinterpretation or misapplication of

(continued...)

Positions of the Parties

HHC's Position

HHC contends that the Union has failed to establish a relationship between the act complained of and the contractual provision alleged to have been violated. It states that in the lower steps of the grievance procedure, the Union relied only on the definitional section of the contract, and has not claimed a violation of any substantive contract provisions.

HHC argues that the selection process and the assignment of shifts is governed by the management rights provisions of New York City Collective Bargaining Law (NYCCBL) 12-307(b).[3] It maintains that the Union has not shown that HHC waived this right in bargaining, or

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[2](...continued)

> 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 Personnel Director 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 shall not be subject to the grievance procedure or arbitration;

[3] Section 12-307(b) of the NYCCBL provides:

> 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; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work. Decisions of the city or any other public employer on those matters are not within the

(continued...)

by any written policy , regulation or procedure.

In its reply, HHC states that the Union first claimed an alleged violation of a written policy in its answer, and that arguments raised for the first time after the request for arbitration are not arbitrable. It contends that there is no written policy and, therefore, it could not have withheld a written policy from the Union. Moreover, HHC asserts that the Board has held that grievances based on verbal agreements and past practice are not arbitrable.[4]

Union's Position

The Union claims that, when the grievant was transferred to Jacobi from Bellevue, he had certain seniority rights with respect to selecting a work shift. The Union further asserts that since the Grievant was placed in a Monday - Friday shift, with no shift differential and minimal opportunities to earn overtime, he earned approximately $14,500.00 less than other Stationary Engineers.

In its answer the Union states that HHC has a written policy providing for a shift selection process for Stationary Engineers, based on seniority, and that the Grievant was harmed when HHC refused to follow that policy in his case. The Union claims that evidence of this written policy is contained in a July 30, 1997 memo from Superintendent Tortorelli, Jacobi Medical Center, to all Stationary Engineers, which states,

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[3](...continued)

> scope of collective bargaining, but, notwithstanding the above, questions concerning the practical impact that decisions on the above matters have on employees, such as questions of workload or manning, are within the scope of collective bargaining.

[4] HHC cites Decision Nos. B-13-93; B-30-84; B-25-83; B-28-82; B-20-72.

> At this time, all shifts for Stationary Engineers will be open for bids. Please indicate your preference by signing next to the shift listed below.
>
> This memo will be circulated in seniority order and I would like you to make your selection and return it to the office within two (2) working days from receiving this notice.

The Union maintains that it could only get a copy of the written policy by participating in the discovery process during arbitration.

Discussion

In determining questions of arbitrability, it is the function of this Board to decide whether the parties are in any way obligated to arbitrate their controversies and, if so, whether the present controversy is within the scope of that obligation.[5] When challenged, a union must establish a nexus between the act complained of and the contract provisions it claims have been breached.[6] Once an arguable relationship is shown, we will not consider the merits of a case; it is for the arbitrator to decide the applicability of the cited provisions.[7] Applying these standards to the present case, we find that the Union has failed to demonstrate the required nexus between the issue of the claimed shift selection process and Article XI §1(b) of the parties' collective bargaining agreement.

In the letter of September 26, 1996, Hillen initially argues that, after transferring to Jacobi, he was not permitted to select a shift in accordance with his rights as a senior employee

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[5] Decision Nos. B-31-90; B-6-88.

[6] Decision Nos. B-29-91; B-2-91; B-41-90; B-10-90; B-27-89.

[7] Decision Nos. B-46-91; B-29-89; B-54-90; B-11-90.

with HHC, but failed to cite a contract provision or written rule, regulation or policy, as required by the contractual grievance and arbitration procedure. In his ensuing grievances he cited only the contractual provisions governing the time within which HHC was to issue a written determination of grievances filed. At Step II Hillen stated, "The reason watch picks and pay parity are not addressed in the contract, is the fact that Stationary engineers are to be reassigned to rotating watches according to Civil Service regulations."

In the request for arbitration, the Union alleged a violation of Article XI, §1(b) of the parties' collective bargaining agreement alleging for the first time the violation of an unidentified written policy. We have 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.[8] Therefore, we dismiss that portion of the request for arbitration pertaining to a violation of a written regulation, rule, policy or procedure governing the selection of shifts based on seniority.

We next address the Union's failure to demonstrate an arguable nexus between the grievance and the cited contract provision. The only provision of the contract alleged in the request for arbitration to have been violated was that defining a grievance. The alleged violation, misinterpretation or misapplication of the definitional provision of a contract does not, by itself, furnish the basis of a grievance. Such citation must be made together with citation of a specific substantive provision, the alleged breach of which the parties have agreed would form the basis

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[8] Decision No. B-2-95. *See also*, Decision Nos. B-12-94, B-44-91, B-29-91; B-55-89.

of an arbitrable claim. There can be no nexus between the disputed management action and the definitional section.[9] We therefore find that the Union has failed to establish a nexus between the grievant's transfer and Article XI, §1(b) of the collective bargaining agreement. Accordingly, the petition challenging arbitrability is granted.

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[9] *See,* Decision Nos. B-4-94; B-22-85; B-22A-85; B-22-83; B-41-82; B-22-80

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

ORDERED, the petition challenging arbitrability filed by the City of New York be, and the same hereby is, granted, and it is further,

ORDERED, that the Union's request for arbitration be, and the same hereby is, denied.

DATED: June 10, 1998
New York, New York

Steven C. DeCosta
CHAIRMAN

Daniel G. Collins
MEMBER

George Nicolau
MEMBER

Thomas J. Giblin
MEMBER

Saul G. Kramer
MEMBER

Richard A. Wilsker
MEMBER