City &HHC v. CIR, 61 OCB 39 (BCB 1998) [Decision No. B-39-98 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration	
-between-	
THE CITY OF NEW YORK AND THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,	DECISION NO. B-39-98
Petitioner,	DOCKET NO. BCB-1981-98 (A-7257-98)
-and-	
COMMITTEE OF INTERNS & RESIDENTS	
Respondent.	

DECISION AND ORDER

On April 28, 1998, the New York City Health and Hospitals Corporations ("Corporation") filed a petition challenging the arbitrability of a group grievance filed by the Committee of Interns and Residents ("Union"). The Union filed an answer on May 12, 1998. The Corporation filed a reply on May 27, 1998.

Background

At a time unspecified in the pleadings in the instant proceeding,[1] the Corporation suspended free parking for members of the Union's bargaining unit at Kings County Hospital Center ("Hospital). On December 19, 1997, the Union filed a Step II(a) grievance alleging violation of, "but not limited to," Articles I (Recognition) and IV (Wages) of the Union's

[1] The request for arbitration in the instant proceeding concerns a claim similar but not identical to that in the proceeding docketed as BCB-1977-98 (A-7228-98), filed by the Doctors Council against the petitioner herein. In both cases, the unions grieve the discontinuation of free parking privileges for their unit members. In the other case, the union claims that free parking was discontinued on October 1, 1997. In the instant case, the Union has not specified a date, and none is cited in the request for arbitration. As to the substantive differences between these two cases, *see p.* 5 *et seq.*

collective bargaining agreement ("contract").[2] The grievance specified the unilateral imposition of parking fees on all bargaining unit members employed at the Hospital, resulting in an effective diminution of salary for bargaining unit members by requiring them to pay for parking in lots that were in the past available for parking at no charge. The grievance sought a "[r]eturn to past practice" of allowing unit members to park in the parking lot for free and reimbursement for all parking fees paid by unit members since the imposition of parking fees. The Union filed the instant request for arbitration on March 25, 1998.

Positions of the Parties

Corporation's Position

In its petition challenging arbitrability, the Corporation argues that, on two grounds, the grievance fails to allege a nexus between the elimination of free parking for unit members and either Articles I or IV of the contract. In its first challenge, the Corporation states that the Union

---

[2] The Corporation and Union are parties to a collective bargaining agreement for the period dated April 1, 1995, to March 31, 2005.

Article I (Recognition) of the contract provides for recognition of the Union as the sole collective bargaining representative for employees ("House Staff Officers") of the City in the titles of Intern, Resident, Dental Intern, Dental Resident, and Junior Psychiatrist.

Article IV (Wages), § 5, establishes pay levels for House Staff Officers.

Article XIV (Grievance Procedure) provides a three-step dispute resolution procedure. The contractual definition of a grievance is stated, in pertinent part, as:

> a. A dispute concerning the application or interpretation of the terms of this collective bargaining agreement;
> b. A claimed violation, misinterpretation or misapplication of the rules or regulations, authorized existing policy, or orders of the Corporation affecting the terms and conditions of employment. . . .

has failed to identify any provision of the contract or any other agreement which provides parking to unit members. As for its second challenge, the Corporation maintains that the gravamen of the complaint is that the Corporation has made a unilateral change without bargaining. Rather, the Corporation asserts, the Union attempts to allege a violation of the New York City Collective Bargaining Law ("NYCCBL"), § 12-306, which, the Corporation maintains, does not fall within the contractual definition of a grievance.[3] The Corporation also contends that the Union's citation of the contract's recognition clause is misplaced, because it does not obligate the Corporation to bargain on any subject.

With respect to the Union's citation of *New York City Off-Track Betting Corp. V. Local 858*,[4] the Corporation avers that the Union's reliance on this case is inapposite. The Corporation states that the only commonality between the instant matter and the cited case is the allegation that the wage provision of the contract was violated. The Corporation contends that, in the instant matter, the Union has failed to demonstrate that the wages of unit members have in fact been diminished by management's imposition of parking fees. Moreover, the Corporation contends that the Union has not alleged that the parties even contemplated including the cost of parking in the wage provision of the contract.

The Corporation asks that the request for arbitration be denied.

---

[3] At one point in its petition, the Corporation cites Article VIII as defining contractual grievances. At another is correctly cites Article XIV. We take the citation of Article VIII as an inconsequential error. There is no dispute concerning the actual language of the article governing the contractual grievance procedure.

[4] Decision No. B-27-84.

Union's Position

The Union argues that, by imposing new parking fees when none had previously existed, the Corporation has "shifted the burden of an operating expense onto the shoulders of its employees." This action, the Union contends, has directly caused the diminution of the wages of unit members, as wages were negotiated through collective bargaining and memorialized in Article IV of the contract.

Relying on the *OTB* case,[5] the Union concludes that, "where a change in an employer policy has a direct impact on an obligation contained in a collective bargaining agreement, a sufficient nexus has been established to bring the matter within the scope of the parties' agreement to arbitrate. The Union argues that it has established a nexus between the act that is the subject of the complaint and the applicable "section" of the contract. It requests that the instant petition be dismissed.

Discussion

In deciding issues of arbitrability, we have repeatedly held that the scope of our inquiry includes a threshold determination to ascertain whether the parties are in any way obligated to

[5] *Id.*

arbitrate their controversies and, if so, whether the obligation is broad enough to include the particular controversy presented.[6]

By way of Article XIV of the applicable contract, the parties in the instant proceeding have agreed to submit to arbitration a dispute concerning its application or interpretation as well as a claimed violation, misinterpretation or misapplication of the rules or regulations, authorized existing policy or orders of the Corporation affecting terms and conditions of employment.[7]

With respect to the argument that the wages and recognition provisions of the contract have been violated, we hold that the Union has failed to show a nexus between the end of free parking for unit members at the Hospital and either of these provisions. The language of each provision is devoid of any reference to parking. The record is also devoid of any evidence that parking was contemplated by the parties during the negotiation of either of these provisions. Therefore, we find no nexus between the claim asserted herein and either of these cited provisions of the contract.

---

[6] Decision Nos. B-2-92; B-12-90; B-51-89; B-61-88.

[7] The instant case is similar to a case filed by the Doctors Council (BCB-1977-98 [A-7228-98]) and decided by this Board simultaneously herewith. In both cases, the union has alleged that, by discontinuing free parking for members of the union's bargaining unit, the Respondent Health and Hospitals Corporation diminished the salary of bargaining unit members. The cases are distinguishable, however. Whereas, in the instant case, the union claims that the Corporation changed a past practice in violation of *existing* policy, in the *Doctors Council* case, the union disclaimed any intention to grieve a past practice and relied, instead, on a claimed violation of *written* policy. The collective bargaining agreement in the *Doctors Council* case does define a grievance as a claimed violation, misinterpretation, or misapplication of, *inter alia*, *written* policy, but we denied arbitration of the claim because it was not asserted in a timely fashion. No timeliness objection was raised in the instant case. In addition, we noted in the *Doctors Council* case that if the union had grieved a change in past practice, it would not have been arbitrable under a contract covering violations of *written* policy rather than *existing* policy.

The facts dictate a different result, however, with respect to the Union's argument that the Corporation has changed a past practice. In the past and as here, where a change in past practice was alleged, we have found the requisite nexus where the contractual definition of a grievance included a claimed violation, misinterpretation or misapplication of existing policy or orders applicable to the agency by whom the grievant was employed.[8]

In fact, one of our earliest decisions concerned a grievance over the discontinuation of parking privileges. In *Local 240, D.C. 37*,[9] the union grieved the employer's unilateral removal of parking privileges for non-professional employees under such a provision. The Board found the grievance arbitrable.[10]

Also, in *Uniformed Firefighters Association, Local 94*,[11] the union sought to arbitrate the employer's elimination of ambulance No. 3 which, according to the union, constituted a benefit previously enjoyed by unit members. The Board found the contention to be within the contractual definition of a grievance as:

> a complaint arising out of claimed violations, misinterpretations or inequitable application of the provisions of this contract or of existing policy or regulations of the Department.

---

[8] Decision Nos. B-14-94; B-27-86; B-9-75; B-5-69; B-7-68.

[9] Decision No. 5-69.

[10] *Cf.*, *City Employees Union*, Decision No. B-20-72 (where the Board found that a claimed violation of past practice was not within the definition of a grievance in Executive Order No. 52, because that definition of a grievance was limited to a claimed violation of certain rules or regulations and did not include a claimed violation of existing policy.

[11] Decision No. B-6-69.

The Board said:

> The meaning of the term "existing policy" as used in the contract; whether the City's provision of the ambulance in question and any related services constituted a "policy" within the meaning of that term; and whether the employer has the right to modify or cancel an "existing policy" are questions involving the interpretation or application of the provisions of the contract.

Similarly, in *D.C. 37, Local 1320*,[12] the union claimed that the employer consistently changed the work schedule at the 26th Ward Water Pollution Control Plant to favor the relief watch Senior Sewage Treatment Worker to the detriment of other workers. The union sought to arbitrate the question of whether the employer violated past practices under the contractual definition of a grievance which included alleged changes in "existing policy." The Board said:

> [t]he meaning of the term "existing policy" as used in the contract, whether it encompasses past practices, whether the [Environmental Protection Administration ("EPA")]scheduling constitutes a past practice, and whether the EPA has violated its past practices are questions relating to the merits of the parties' dispute and are, accordingly, for the arbitrator to determine.

In the case before us, the Union claims, and the Corporation was on notice, that the Hospital's imposition of fees to park in lots which heretofore required no parking fees is a change in past practice.[13] Consistent with our precedent as cited above,[14] we hold that the claimed

---

[12] Decision No. B-9-75.

[13] Notice of the claim was given by virtue of the fact that, at the lower steps, the grievance sought a "[r]eturn to past practice." This is in contrast to the *Doctors Council* case; *see n.*7.

[14] *See* notes 9, 10, 12 and 14, *supra.*

violation falls within a contractual definition of a grievance which includes a claimed violation, misinterpretation, or misapplication of existing policy.[15]

Finally, the Corporation maintains that the instant grievance is tantamount to a claim that it has violated NYCCBL § 12-306 by making a unilateral change in parking policy without bargaining. The Corporation contends that the contractual definition of a grievance does not encompass claimed violations of statute. If the Union intends such a claim, we find that it is indeed precluded from consideration. The Union has pointed to nothing from which we may conclude or infer that the parties intended to arbitrate claims of statutory violations.

In sum, we hold that the Union has stated a claim that the Corporation arguably violated existing policy by changing past practice with respect to free parking privileges for unit members at the Hospital. We hasten to add that whether such a policy or practice existed and whether the

---

[15] Parenthetically, we find the Union's citation of Decision No. 27-84, to be inapposite, because the contractual definition of a grievance there did not include a claimed violation, misinterpretation, or misapplication of *existing* policy, as in the case at bar but rather of *written* policy.

The Union also incorrectly interprets the cited case to stand for the proposition that "where a change in an employer policy has a direct impact on an obligation contained in a collective bargaining agreement, a sufficient nexus has been established to bring the matter within the scope of the parties' agreement to arbitrate." If, by this, the Union means to assert that an employer is obligated to arbitrate a claim which implicates a matter within the mandatory subject of bargaining, then this statement is overly broad. It is more accurate to say that an "existing policy" need not be limited to matters which are within the mandatory scope of bargaining in order to be subject to arbitral review under the terms of the parties' agreement. Limitations concerning a permissive subject of bargaining, once agreed to and reduced to a term of a collective bargaining agreement, are binding and enforceable for the duration of that agreement and for any period of *status quo* thereafter. *See* Decision Nos. B-20-91; B-76-90; B-68-90; B-7-72; B-7-69; B-11-68.

Hospital had the right to change an existing policy are questions involving interpretation of the contract, which is to be determined by an arbitrator, not this Board.

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 request for arbitration filed by the Committee of Interns and Resident (Case No. A-7257-98) be, and the same hereby is, granted; and its is further

ORDERED, that the petition challenging arbitrability filed by the New York City Health and Hospital Corporation (BCB-1981-98) be, and hereby is, denied.

Dated: New York, N.Y.
Sept. 28, 1998

STEVEN C. DeCOSTA
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

ROBERT H. BOGUCKI
MEMBER

THOMAS J. GIBLIN
MEMBER