City & HHC v. Doctor's Council, 61 OCB 40 (BCB 1998) [Decision No. B-40-98 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Arbitration :

-between- :

THE CITY OF NEW YORK AND
THE NEW YORK CITY HEALTH AND :
HOSPITALS CORPORATION, DECISION NO. B-40-98

Petitioner, DOCKET NO. BCB-1977-98
(A-7228-98)

-and- :

DOCTORS COUNCIL,

Respondent.

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DECISION AND ORDER

On April 20, 1998, the New York City Health and Hospitals Corporations ("Corporation") filed a petition challenging the arbitrability of a group grievance filed by the Doctors Council ("Union"). The Union filed an answer on June 1, 1998. After a request for an extension, the Corporation filed a reply on June 26, 1998. On July 8, 1998, the Union filed a surreply, to which the Corporation objected on July 10, 1998.

Background

On July 1, 1994, a written memorandum was issued by the Kings County Hospital Center ("Hospital") police. The memorandum established guidelines for the use of the parking facilities at the Hospital's main complex and Kingston Avenue site. The memorandum applied to all Hospital employees, who were expected to be familiar with "this policy." It also described the

proper use of stickers to identify authorized vehicles but stated that the availability of parking spaces was not guaranteed.

On October 1, 1997, the Hospital suspended free parking for members of the Union's bargaining unit. On October 10, 1997, the Union filed a Step I grievance alleging violation of, "but not limited to," Articles III and VIII of the applicable collective bargaining agreement ("contract").[1] The grievance specified that the discontinuation of free parking and the imposition of a fee on bargaining unit members to park, resulted in an effective diminution of salary for bargaining unit members. The grievance sought the continuation of free parking for unit members. It also specified that they be made whole for "any losses to date."

A Step III hearing ensued on March 2, 1998. By letter dated March 12, the grievance was denied on the grounds that no contractual violation was proven and that the unit members had

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[1] The Corporation and Union are parties to a collective bargaining agreement for the period dated January 1, 1992, to March 31, 1995, currently in *status quo*.

Article III (Salaries)of the contract provides wage rates, including differentials, of medical and dental personnel at the Hospital. Article VIII (Grievance Procedure) provides a five-step dispute resolution procedure.

In Article VIII, § 1, 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 Agreement;
> b. A claimed violation, misinterpretation or misapplication of the rules or regulations, written policy or orders of the Employer applicable to the agency which employees 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. . . .

continued to be paid the salary indicated in Article III of the contract. No satisfactory resolution of the dispute having been reached, 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 any nexus between the elimination of free parking for unit members and Article III. In its first challenge, the Corporation states that the Union has failed to identify any provision of the collective bargaining agreement or any other agreement which provides "any type of parking" to unit members. As for its second challenge, the Corporation maintains that, insofar as the Union is attempting to grieve "an alleged past practice," such a claim is also not within the contractual definition of a grievance.

In its reply, the Corporation asserts two further grounds for denial of the Union's request for arbitration. In its third challenge to arbitrability, the Corporation asserts that the Union raised for the first time in its answer a new claim that the elimination of free parking for unit members constitutes a violation of a written policy. The Corporation alleges that this claim may not be allowed at this late stage of the grievance process. In its fourth challenge to arbitrability, the Corporation asserts that the Union has failed to allege that any provision of written policy has been violated. The Corporation contends that "[t]here is nothing in the policy cited that provides for free parking, nor is there anything in the policy that discusses a cost associated with parking.

The policy cited by Respondent merely sets down guidelines for the 'safe, efficient control of traffic and proper utilization of parking facilities. . . .'"

Finally, the Corporation strongly objects to the Union's surreply. The Corporation contends that what it views as new arguments articulated in the Answer about written policy are not special circumstances warranting consideration of pleadings beyond the Corporation's reply.

Union's Position

The Union argues that, when the Corporation terminated free parking for unit members, it deprived the members of "a clear economic benefit" which they have enjoyed for many years, "at least the last three of which had been pursuant to a written policy issued by the Hospital."[2] According to the Union, the elimination of free parking, "whether by modifying it or by abolishing an existing policy," violates both the Corporation's written policy governing employees' parking privileges[3] and the compensation provisions of the parties' collective bargaining agreement. The Union denies that it seeks to arbitrate a past practice. In short, the Union states, whether the compensation provisions of the contract or the "'written policy' language can be interpreted as precluding the elimination of such monetary benefits as free parking which were provided to unit members at the time the contract was negotiated is a

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[2] The Union refers to the July 1, 1994, memorandum from Hospital police regarding parking and traffic control.

[3] The Union cites Decision No. B-5-69.

straightforward question of contract interpretation for the arbitrator." The Union 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 arbitrate their controversies and, if so, whether the obligation is broad enough to include the particular controversy presented.[4]

By way of Article VIII, § 1, the parties in the instant proceeding have agreed to submit to arbitration a dispute concerning the application or interpretation of the terms of the contract as well as a claimed violation, misinterpretation or misapplication of the rules or regulations, written policy or orders of the employer applicable to the agency which employs the grievants affecting terms and conditions of employment.[5] The Corporation argues a lack of nexus as to the former and a failure to raise a timely claim as to the latter.

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

[5] The instant case is distinguishable from a similar case filed by the Committee of Interns and Residents (BCB-1981-98 [A-7257-98]) and decided by this Board simultaneously herewith. In that case, the Union alleged that, by ending free parking privileges for its unit members, the Respondent Health and Hospitals Corporation changed a *past practice* and caused a diminution in the wages of those members. That case is distinguishable, also, in that the collective bargaining agreement applicable there defines a grievance as a claimed violation, misinterpretation or misapplication of, *inter alia*, authorized *existing policy* of the Corporation affecting terms and conditions of employment. The contract in the instant case contains no language with regard to existing policy.

First, the Union alleges curtailment of free parking privileges for unit members and cites Articles III (Salaries) of the contract. Article III details rates of compensation for medical personnel. We find this case distinguishable from an earlier case in which the salary provision of the contract was alleged to have been violated.

In that case, *Department of Probation v. United Probation Officers Association,*[6] the union argued that, by requiring that applicants for promotion sign a tax waiver as a prerequisite for consideration, the City was implicitly threatening to withhold wages and promotional opportunities and that the threat violated the contract clause providing for salaries. We found that the union had articulated a nexus between the employer's requirement and the cited contract provision.[7]

In the instant case, Article III (Salaries) is devoid of any reference to parking facilities, fees or privileges. Moreover, unlike the earlier case, in which money was threatened to be withheld from the payment of wages, the Union has not alleged that unit members have not been paid wages pursuant to the "Salaries" provision of the contract or that the employer has threatened to withhold wages to pay for parking. For this reason, we find that Article III of the applicable contract cannot serve as a source of the alleged right to arbitrate the claim in the instant proceeding.

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[6] Decision No. B-4-94.

[7] The claim was denied on other grounds, *i.e.*, there was no indication that the City was on notice of the new claims before the union's answer was served.

With regard to the Union's claim that the cessation of free parking for unit members violates written policy, the Corporation argues that this claim should not be considered, because it has been raised for the first time in an untimely fashion in the Union's answer. By itself, the failure to cite a written policy at the lower steps of the grievance procedure is not dispositive of the issue. The answer to this issue depends on whether the Corporation had notice of the Union's claim.

We have held that, where a union has failed to cite contractual provisions at the lower steps of a grievance procedure, the mere failure to cite such provisions, alone, would not defeat the union's claim if the employer had notice of the claim sought to be grieved.[8] Notwithstanding this policy, however, in the instant case, it is not apparent from our review of the record that the Corporation did have notice at the lower steps of the grievance procedure that the Union was relying specifically on the July 1, 1994, memorandum. The fact that the Step I grievance includes the phrase "but not limited to" does not, by itself, constitute sufficient notice that the Union was alleging a violation of written policy at that time. The record below is devoid of any reference at the lower steps of the grievance procedure to the July 1, 1994, memorandum or to any "policy," which, if articulated as such, arguably could sustain a claim under the contract.[9]

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[8] Decision No. B-8-97.

[9] This is in contrast to the *CIR* case; *see n.* 5. There, the Corporation had timely notice of the claim.

As to the Corporation's contention that the Union is attempting to assert a claim with regard to changed past practice, the Union denies that it is attempting to make such an argument. If the Union means not to assert such a claim, we need analyze the question no further. To the extent that the Union does assert such a claim, we hold that the Union, nonetheless, fails to establish a nexus between the act which is the subject of the claim and contractual definition of a grievance. We have held that a change in past practice cannot form the basis of a contractual claim where the contract defines a grievance as "a claimed violation, misinterpretation or misapplication of the rules or regulations, written policy or orders of the Employer" but does not include an alleged violation of past practice.[10]

Therefore, the Union's request for arbitration is denied in all respects but without prejudice to the Union's raising such a question, if timely, at the appropriate step of the grievance procedure.

[10] Decision No. B-24-92; this also contrasts with the *CIR* case, at *n.* 5, where the contractual definition of a grievance permits a claim of a change in *existing policy*.

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 Doctors Council (Case No. A-7228-98 [Group]) be, and the same hereby is, denied; and its is further

ORDERED, that the petition challenging arbitrability filed by the New York City Health and Hospital Corporation (BCB-1977-98) be, and hereby is, granted in all respects.

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

STEVEN C. DeCOSTA
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

RICHARD A. WILSKER
MEMBER

SAUL G. KRAMER
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ROBERT H. BOGUCKI
MEMBER

THOMAS J. GIBLIN
MEMBER