HHC v. L. 371, DC 37, 61 OCB 5 (BCB 1998) [Decision No. B-5-98 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration	:	
	:	
-between-	:	
	:	
NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,	:	
	:	Decision No. B-5-98
Petitioner,	:	Docket No. BCB-1941-97
	:	(A-6824-97)
-and-	:	
	:	
SOCIAL SERVICE EMPLOYEES UNION, LOCAL 371, DISTRICT COUNCIL 37, AFSCME, AFL-CIO	:	
	:	
Respondent.	:	

DECISION AND ORDER

On October 17, 1997, the New York City Health and Hospitals Corporation (hereinafter referred to as "HHC"), filed a petition challenging the arbitrability of a grievance that is the subject of a request for arbitration filed by the Social Service Employees Union, Local 371, District Council 37, AFSCME, AFL-CIO ("SSEU" or "Union"). After requesting an extension of time, the Union filed an answer on November 19, 1997. The HHC did not submit a reply.

Background

Theresa Jennings ("grievant") was hired as a provisional Community Liaison Worker at East New York Diagnostic and Treatment Center ("Center") on October 28, 1991. The grievant

requested, and was granted a leave of absence pursuant to the Family Medical Leave Act ("FMLA") for the period from July 17, 1995 through September 5, 1995. The grievant requested an extension of her FMLA leave on August 18, 1995, prior to the last date of her leave. The Center granted an extension of the FMLA leave from September 6, 1995 through October 7, 1995. On October 6, 1995, grievant requested from the Center a further extension of her approved leave of absence. Her request was denied. The HHC contends that after October 6, 1995, the Center received no further communication or documentation from grievant concerning further extensions of her leave of absence until February 6, 1996, and from October 6, 1995 forward, grievant was on unauthorized leave. The Union denied this contention in its answer.

On February 6, 1996, grievant requested to return to duty on a part time basis. By letter from the Center dated February 9, 1996, the grievant's request was denied and she was notified that she was discharged. In part, the February 9, 1996 letter stated:

> Because of the provisional nature of your previous appointment, as explained to you earlier, you are not entitled to leave of absence without pay. Consequently, your services as a Community Liaison Worker ended when your leave under the Family Medical Leave Act ended on October 7, 1995 and you had exhausted all your accrued leave balances.
>
> Be advised that when you are able to accept full time employment, you should apply for any vacancies for which you qualify and your application will be considered along with others at that time.

On May 3, 1996, a grievance was filed at Step I, claiming a violation of Article VI, §1(h) of the parties' collective bargaining agreement.[1] The statement of the grievance reads, in full, "This

[1] Article VI, §1(h) defines the term grievance as: A claimed wrongful disciplinary action taken against a provisional employee who has served for two years in the same or similar title or related occupational group in the same agency.

member was wrongfully terminated without due process. We are seeking re-instatement and compensation from 2/9/1996." There was no response at this step, or to the Step IA and II grievances. The Union filed a Step III grievance on March 7, 1997. On April 14, 1997, grievant submitted a physician's note to the Center stating that she was fit to return to duty on a full-time basis. Grievant then submitted a letter on May 18, 1997 also stating that she was fit to return to duty. On June 10, 1997, grievant was returned to her full-time position as a provisional Community Liaison Worker at the Center, where she has continued to work to present.

Following a Step III conference held on June 16, 1997, a Step III decision was issued. The Step III decision stated that grievant had not been the subject of wrongful disciplinary action, therefore, the grievance was denied. On July 2, 1997, the Union filed a request for arbitration with the Office of Collective Bargaining. A concise statement of the grievance to be arbitrated was, "Wrongful termination Under my Union Contract and the Americans' with Disabilities protection per current agency policy." The contract provisions which the Union alleged to have been violated was, "SSRT Local 371 Contract Article VI Section 1(h) and Agency policy re: Employees with Disabilities."

Positions of the Parties

HHC's Position

The HHC does not challenge the right of the grievant to arbitrate the claim of wrongful termination pursuant to Article VI, Section 1(h), as claimed through Steps I, II and III of the grievance process. However, the HHC maintains that at the fourth step of the grievance procedure, in the request for arbitration, the grievant had asserted a new allegation not included in any of the

three earlier steps of the grievance procedure; that of a claim of violation of the Americans with Disabilities Act ("ADA"), a federal statute. The HHC's sole challenge to the request for arbitration is that of the claim of the violation of the ADA "protection per current agency policy."

As to this challenge, the HHC argues that the Board of Collective Bargaining ("Board") has held that a grievant may not assert a claim for the first time in the request for arbitration. The HHC contends that the Board has consistently denied arbitration of claims raised for the first time after the request for arbitration has been filed, and that 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.

Union's Position

The Union asserts that no claim is made under the ADA. Instead, the Union states that while an "additional source" of the grievant's rights is named in the request for arbitration than was referred to in the prior Steps, *i.e.*, the agency's policy regarding the treatment of persons with disabilities, the grievance remains the claimed wrongful discharge of the grievant. The Union then concludes, "[t]hus, it is clear that the claim asserted in the grievance has remained constant throughout, *i.e.*, that the grievant was wrongfully discharged on February 9, 1996. That is the only claim sought to be asserted by the Union at arbitration."

Discussion

In the present case, it is clear that the parties have agreed to arbitrate grievances, as defined in Article VI of their collective bargaining agreement, and that the HHC does not challenge the Union's right to arbitrate the claim of wrongful discharge under Article VI, § 1(h). The HHC's only

challenge to arbitrability rests upon the language in the request for arbitration which implies a violation of the ADA and agency policy regarding employees with disabilities. Inasmuch as the HHC does not challenge the claim of wrongful discharge based on an alleged violation of Article VI, §1(h) of the collective bargaining agreement, this dispute may proceed to an arbitrator on that issue.

The Union states that no independent claim is made under the ADA or agency policy. However, to the extent that the references to the ADA and agency policy in the request for arbitration could be construed as independent claims, we find that they were raised for the first time in the request for arbitration and may not be interposed initially at that stage. In reaching this conclusion, we are guided by our often stated policy:

> The purpose of the multi-level grievance procedure is to encourage discussions of the dispute at each of the steps. The parties are thus afforded an opportunity to discuss the claim informally and to attempt to settle the matter before it reaches the arbitral stage. Were this Board to permit either party to interpose at this time a novel claim based on a hitherto unpleaded grievance, we would be depriving the parties of the beneficial effect of the earlier steps of the grievance procedure and foreclosing the possibility of voluntary settlement.[2]

Consistent with this policy, we have denied arbitration of new claims or issues alleged for the first time in the request for arbitration,[3] or thereafter.[4] The instant matter is readily distinguishable from those cases where we did not find this policy to have been violated, despite a technical deficiency in the pleadings.[5] The common thread throughout those cases was that the HHC

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[2] Decision Nos. B-6-80; B-22-74.

[3] Decision Nos. B-31-86; B-1-86; B-14-84; B-12-77; B-27-75; B-40-74; B-22-74.

[4] Decision Nos. B-40-88; B-11-81.

[5] *See, e.g.,* Decision Nos. B-29-89; B-44-88; B-35-87; B-14-87.

had clear notice of the nature of the Union's claim or, in appropriate circumstances, that the HHC should have been on notice of the nature of the claim, based upon the totality of the grievance.[6] By contrast, in the instant matter the record indicates that the only issue discussed and considered below concerned the allegation of wrongful discharge, in violation of Article VI, §1(h) of the collective bargaining agreement.

Accordingly, we grant the HHC's petition challenging arbitrability concerning an alleged violation of the ADA or agency policy, leaving for the arbitrator the sole issue of the claimed violation of Article VI, §1(h).

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City

[6] Decision No. B-55-89.

Collective Bargaining Law, it is hereby

ORDERED, that the petition challenging arbitrability filed herein, be, and the same hereby is, granted as to claims involving the ADA or agency policy; and it is further

ORDERED, that the request for arbitration as to the alleged violation of Article VI, §1(h) be, and the same hereby is, granted in part; and it is further

ORDERED, that the request for arbitration as to any independent allegations involving the ADA or agency policy be, and the same hereby is, denied.

DATED: New York, New York
February 19, 1998

Steven C. DeCosta
CHAIRMAN

Daniel G. Collins
MEMBER

Thomas J. Giblin
MEMBER

Robert H. Bogucki
MEMBER

Saul G. Kramer
MEMBER

MEMBER

MEMBER