City & HHC v. Doctor's Council , 61 OCB 52 (BCB 1998) [Decision No. B-52-98 (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-52-98

Petitioner, : DOCKET NO. BCB-1998-98
-and- (A-7324-98)
:
DOCTORS COUNCIL,
:
Respondent.
:
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DECISION AND ORDER

On June 23, 1998, the New York City Health and Hospitals Corporation ("Corporation") filed a petition challenging the arbitrability of a group grievance by the Doctors Council ("Union"). Following a request for an extension, the Union filed an answer on July 30, 1998. The Corporation filed a reply on August 21, 1998.

Background

Since 1989, the State University of New York ("SUNY") has conducted courses in Advanced Trauma Life Support ("ATLS") for Emergency Room ("ER") physicians at Kings County Hospital Center. ER physicians are required to take these courses in order to retain their positions. Through the relevant time period herein, the courses were offered to members of the Union's bargaining unit free of charge.

On February 17, 1998, the Union filed a group grievance "in accordance with but not limited to" Articles III and VIII of the Doctors' Council collective bargaining agreement ("contract").[1] The grievance specified that the Hospital had unilaterally started charging money for Emergency Room physicians to take the required courses. The Union argued that the elimination of the free courses resulted in an effective diminution of salary for bargaining unit members. The grievance sought the continuation of free ATLS courses for unit members and specified that they be made whole for "any losses to date."

By letter dated May 18, 1998, the grievance hearing officer acknowledged receipt of the Union's request for a Step III review to contest discontinuation of free ATLS courses for ER physicians. She acknowledged that the Union had argued that the Hospital's discontinuation of the free courses "'has resulted in an effective diminution of salary for bargaining unit members.'" The hearing officer denied the Union's request for a Step III hearing on the grounds that the

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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 minimum and maximum wage rates, including advancement or level increases, general increases, education differentials, and other salary adjustments of medical personnel at the Hospital. Article VIII (Grievance Procedure) provides a multi-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 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. . . .

matter complained of "does not represent a grievable issue as no specific section of Article III has been cited, or exists, in connection with 'free ATLS courses' that would warrant a review of this matter in accordance with Article VIII., Section 1.a." of the contract. No satisfactory resolution of the dispute having been reached, the Union filed the instant request for arbitration on June 3, 1998.

Positions of the Parties

Corporation's Position

The Corporation admits that ATLS courses for certain employees had been provided without cost to them. However, in its petition challenging arbitrability, the Corporation argues that the grievance fails to allege any nexus between the discontinuation of free ATLS courses for unit members and Article III. The Corporation states that the Union has failed to identify any provision of the collective bargaining agreement or any other agreement or written policy of the employer which provides for free courses for unit members. The Corporation also 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.

Union's Position

The Union argues that, when the Corporation ceased providing ATLS courses free of charge to unit members, it deprived them of "a clear economic benefit" which they had enjoyed

for many years. According to the Union, the elimination of free ATLS courses violates the compensation provisions of the parties' collective bargaining agreement.

Moreover, the Union denies that it is seeking to arbitrate either a past practice, as the Corporation contends it is, or a violation, misinterpretation or misapplication of a rule, regulation, written policy or order of the employer. The Union argues that the discontinuation of free ATLS courses for its unit members constitutes a dispute concerning the application or interpretation of the terms of the applicable contract, specifically, the provision governing salaries. Whether the compensation provisions in Article III of the contract can be interpreted as precluding the elimination of free ATLS courses or implementing a new fee is a straightforward question of contract interpretation for the arbitrator, in the Union's view. 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.[2]

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

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[2] Decision Nos. B-40-98, B-2-92; B-12-90; B-51-89; B-61-88.

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. On one hand, the Union alleges discontinuation of free ATLS courses for unit members and cites Article III, the salaries provision, of the contract. That provision details rates of compensation for medical personnel. On the other hand, the Corporation argues a lack of nexus on the ground that the salaries provision of the contract does not provide for free ATLS courses for unit members, nor has the Union pointed to any other written policy or agreement which would require free ATLS courses for ER physicians. The Corporation also argues that the language of the contractual grievance procedure precludes a finding of a nexus to any claim of a change in past practice.

This case is strikingly similar to another case recently decided by the Board of Collective Bargaining ("Board") in which the salary provision of the contract was alleged to have been violated when the employer stopped providing free parking for unit members.[3] There, we found that the salary provision could not serve as a source of the alleged right to arbitrate, because it was devoid of any reference to parking facilities, fees or privileges. Also, there was no allegation that the employer either withheld or threatened to withhold the payment of wages to pay for parking. The Union disputed the employer's contention that the Union was claiming a violation of past practice, but, in its answer to the petition challenging arbitrability, the Union did claim that the discontinuation of free parking facilities violated the employer's written policy. We

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[3] *City of New York and Health and Hospitals Corporation v. Doctors Council*, Decision No. B-40-98.

disallowed the claim of a written policy violation on the ground that the employer was not on notice of this claim at the lower steps of the grievance procedure.

In the instant case, the salary provision here similarly can not serve as a source of the alleged right to arbitrate, because it is devoid of any reference requiring the Corporation to provide medical courses, for free or not.[4] Also, there is no allegation that the Corporation either withheld or threatened to withhold the payment of wages to pay for the ATLS courses.

As in the earlier case, the Union in this case disputes the Corporation's contention that the Union is claiming a violation of past practice. If the Union indeed means not to assert such a claim, then we need analyze the question no further. To the extent that the Union does assert such a claim, we hold that it nonetheless fails to establish a nexus between the act which is the subject of the claim and the contractual definition of a grievance. We have held that a change in past practice cannot form the basis of a contractual claim where, as here, 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.[5] Unlike the earlier case, the Union herein has not pointed to any written policy or

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[4] In a cursory review of Section 1, Subsection "b," of Article III for purposes of determining whether the claim states a nexus to the contract, we find that the reference to "educational differentials" relates to compensation for having received educational training. The section is devoid of any reference to compensation for the purpose of paying for educational courses. The context of the phrase relates to computing "minimum and maximum salaries, advancement or level increases, general increases, education differentials and any other salary adjustments. . . ."

[5] *Id.* at 8. Both the instant case and the Doctors' Council's "parking" case cited above are distinguishable from a case filed by the Committee of Interns and Residents ("CIR") (Decision
(continued...)

agreement supporting its claim for free ATLS courses for unit members, nor has it even asserted such a claim.

For the reasons cited above, the Union's request for arbitration is denied in all respects and the Corporation's petition challenging arbitrability is granted.

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 Hospital Corporation (BCB-1998-98) be, and hereby is, granted in all respects; and it is further

ORDERED, that the request for arbitration filed by the Doctors Council (Case No. A-7324-98) be, and the same hereby is, denied.

Dated: New York, N.Y.
November 24, 1998

STEVEN C. DeCOSTA
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS

[5](...continued)
No. B-39-98). In that case, the CIR claimed that, by ending free parking privileges for its unit members, the employer had changed a past practice and caused a diminution in the wages of those members. That case is distinguishable, also, in that the CIR collective bargaining agreement defined 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 as to existing policy.

MEMBER

SAUL G. KRAMER
MEMBER

RICHARD A. WILSKER
MEMBER

CAROLYN GENTILE
MEMBER

THOMAS J. GIBLIN
MEMBER