HHC v. L. 420, DC 37, 63 OCB 24 (BCB 1999) [Decision No. B-24-99 (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-24-1999
Petitioner,	:	Docket No. BCB-2021-98
	:	(A-7455-98)
-and-	:	
	:	
LOCAL 420, DISTRICT COUNCIL 37, AFSCME, AFL-CIO,	:	
	:	
Respondent.	:	

DECISION AND ORDER

On October 27, 1998, 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 Local 420, District Council 37, AFSCME, AFL-CIO ("Union"). The Union filed an answer on November 25, 1998. The HHC submitted a reply on January 7, 1999.

BACKGROUND

Gilberto Austin ("Grievant") was appointed as a Nurse's Aide at Metropolitan Hospital Center ("Hospital") on August 6, 1994. On December 8, 1997, the grievant was suspended following an arrest that occurred while he was employed at the Hospital. Subsequently, the Hospital conducted a background investigation of the grievant which showed pre-employment arrests/convictions which he had not disclosed in his application for employment. The Hospital sent

a letter to the grievant dated May 19, 1998 terminating his employment effective December 8, 1997.

On June 9, 1998, the Union filed a Step IA grievance claiming that the Hospital violated Article VI, Section 1 (a), (b), (e), and (g)[1] of the Institutional Services Contract and Article VII, Section 1 (a), (b), and (e) of the Hospital Technicians Contract.[2] A request was made for the grievant to be "reinstated with back pay from [d]ate of suspension December 9, 1997 to date of termination." The request for a Step IA hearing was denied on June 22, 1998 with the explanation that: "The action that was taken against Mr. Austin was a revocation of his appointment under the umbrella of the

[1] Article VI, Section 1 of the Institutional Services collective bargaining agreement provides, in relevant part:

> The term "Grievance" shall mean:
>
> (a) A dispute concerning the application or interpretation of the terms of this **Agreement**.
>
> (b) A claimed violation...of the rules or regulations, written policy or orders of the **Employer**...which employs the grievant affecting terms and conditions of employment; provided, disputes involving 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.
>
> (e) A claimed wrongful disciplinary action taken against a permanent employee...covered by the **Rules and Regulations of the Health and Hospitals Corporation**....
>
> (g) A claimed wrongful disciplinary action taken against a non-competitive employee....

[2] The Union eventually abandoned citing the Hospital Technicians' contract because that agreement applies to a bargaining unit which does not include the grievant's title of Nurse's Aide.

New York City Health and Hospital Corporation Rules and Regulations Rule 4.4.4. This rule does not lie in the arena of the Contractual Grievance Procedure."[3]

On July 17, 1998, the Union filed a Step II grievance stating no Step IA disciplinary hearing had been held. Without specifically citing contract provisions in the letter supporting a Step II grievance, the Union stated its position that "this is a wrongful disciplinary action taken against Mr. Austin." The grievance was denied at Step II on August 13, 1998.

The Union took the grievance to Step III on August 18, 1998. It claimed that "the Health and Hospitals Corporation suspension of Mr. Austin on December 8, 1997 and the subsequent termination of his employment without a Step IA disciplinary hearing constituted a wrongful discipline." On September 14, 1998, the Step III grievance was denied on the grounds that the termination "falls squarely within the purview of Health and Hospitals Corporation Rule 4.4.4," and it is "specifically excluded from the grievance procedure by Article VI, Section 1 (B) of the Institutional Services Agreement." The Union filed a Request for Arbitration on October 2, 1998, citing Article VI, Section 1 (b) of the Institutional Services Contract (omitting Sections (a), (e), and (g), which were cited in previous documents).

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[3] The Health and Hospitals Corporation Rule 4:4:4 provides:

> "Investigation of the qualifications and background of an eligible may be made after he/she is appointed. Upon finding of such facts, which, if known prior to appointment, would have warranted disqualification, or upon finding of illegality, irregularity or fraud in his/her application, examination or appointment, the appointment may be revoked and his/her employment terminated, provided, however, that no revocation or termination shall be made more than three years after appointment except in the case of fraud."

POSITION OF THE PARTIES

HHC's Position

HHC states that the Board has consistently held that it cannot create a duty to arbitrate where none exists, nor can it enlarge a duty to arbitrate beyond the scope established by the parties in their contract.[4] HHC also notes that the Board has held that the burden is upon the proponent of the arbitration to demonstrate a nexus between the acts complained of and the contract provision allegedly violated.[5] HHC further argues the Board has held that where the parties have voluntarily created an unambiguous exception to an otherwise broad arbitration provision, the Board will not disturb their agreement.[6]

The HHC challenges the right of the grievant to arbitrate the claim of wrongful termination pursuant to any provision of Article VI of the Institutional Services Contract. HHC argues that the grievant's misstatement of facts on his application concerning previous arrests/convictions subject him to disqualification from employment under the Health and Hospitals Corporation Rule 4:4:4. HHC asserts that, pursuant to Article VI, Section 1 (b) of the Institutional Services Agreement, disputes involving this Rule are excluded from the grievance and arbitration procedure. It also challenges the Union's right to assert claims based on Article VI, Section 1 (a), (b), (e), and (g) of the Institutional Services Contract when the Request for Arbitration shows a claim based only on

[4] HHC cites Decision Nos. B-7-79; B-10-79; B-15-79; B-28-82; B-20-85; B-54-87; B-49-89.

[5] HHC cites Decision Nos. B-28-92; B-9-92; B-2-92; B-1-76; B-3-78; B-5-79; B-7-79.

[6] HHC also cites Decision Nos. B-25-82; B-39-86; B-68-89; B-18-91.

Article VI, Section 1 (b).

HHC also notes that Article VI, Sections 1 (e) and (g) contain no provisions for challenging a revocation of appointment based upon disqualification. In an August 13, 1998 letter to the Union, HHC suggested that the grievant should petition for a remedy with the Personnel Review Board, which hears alleged violations of the Corporation's Rules and Regulations. However, on January 7, 1999, the HHC stated that the grievant had fewer than five (5) years of continuous service, which barred him from challenging disciplinary action according to Section 7.5 of the Personnel Rules and Regulations. HHC also disputes the Union's statement that the grievant "was permanently appointed to his position" on August 6, 1994.

Union's Position

The Union rejects HHC's argument that the grievant's termination should be considered subject to the the Corporation's Rules and Regulations rather than to the process provided by the Institutional Services Contract. The Union insists that the termination of the grievant without a disciplinary hearing violates the provisions of the Contract. The Union states that it has grieved a wrongful disciplinary action, i.e. the grievant was suspended and retroactively disqualified, and it argues that, as a permanent employee, the grievant is entitled to pursue such a matter to arbitration, pursuant to Article VI, Section 1 (a), (b), (e), and (g).

Finally, the Union admits an inadvertent omission of Sections 1 (a), (e), and (g) from the Request for Arbitration, but it asserts a right to have these sections considered because the City was on notice under the "better rule" and was made aware of the full scope of the claims during the

course of earlier correspondence.[7] The Union cites repeated reference to "a wrongful disciplinary action" in Steps IA, II, and III.[8]

DISCUSSION

Preliminarily, we shall discuss the City's claim that the Union amended or changed the nature of its grievance. Although we have held that a Union may not amend a grievance in its Request for Arbitration, we have also found that a grievance is arbitrable if the City was put on notice of the Union's claims at the lower steps of the grievance and arbitration procedure.[9] It is more accurate to say that we have denied arbitration of claims that were not alleged at the lower steps of the grievance procedure. This is consistent with our long-standing view that permitting arbitration of such claims would frustrate the purpose of a multi-level grievance procedure: to encourage discussion of the dispute at each step of the procedure.[10]

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[7] The Union cites Arbitrators Anthony Sinicropi and Marvin Hill in Evidence in Arbitration, 1995 BNA Second Edition.

[8] The Union cites City of *New York v. Correction Officers Benevolent Association,* Decision No. B-44-91 (a grievance including a violation of a directive not introduced at lower steps of the procedure was allowed as evidence in support of alleged contractual violations); *City of New York and the Department of Probation v. United Probation Officers Association,* Decision No. B-55-89 (an implicit alleged violation of a contractual provision for working conditions was allowed based on the totality of the grievance); and *New York City Health and Hospitals Corporation v. Communications Workers of America,* Decision No. B-29-89 (a nexus was interpreted to exist between a lower step complaint and a contract provision not mentioned explicitly until submission of a request for arbitration).

[9] See, e.g., *City of New York and New York City Police Dept. And Dist. Council 37, L 1549,* Decision No. B-50-98, at 7-8.

[10] *City of New York v. District Council 37, AFSCME, AFL-CIO,* Decision No. B-20-74 (finding that a "sound, effective, and speedy grievance procedure entails the clear formulation of the issues at the earliest possible moment, adequate opportunity for both parties to investigate

Looking at the grievance as presented at the lower steps, it is clear that HHC was on notice from the beginning that the Union cited violations of Article VI, Section 1 (a), (b), (e), and (g) altogether (rather than Section 1 (b) alone) as the basis for their claim. Therefore, we will not dismiss the grievance on these grounds.

In considering challenges to arbitrability, we must determine whether the parties have obligated themselves to arbitrate grievances and, if they have, whether that contractual obligation is broad enough to include the act complained of by the Union.[11] The burden is on the Union to establish a nexus between the City's acts and the contract provisions it claims have been breached.[12]

The parties have included a grievance procedure in Article VI, Section 1 of their contract that culminates in binding arbitration. However, HHC maintains that the grievant's conduct in misstating his arrest/conviction record on his employment application gave the employer reason to apply Rule 4:4:4 of the Personnel Rules and Regulations, which it argues is exempted from the grievance procedure. The HHC argues that an investigation discovered previous arrests/convictions which showed that the grievant failed to disclose such required information when completing his application for employment.

HHC's position is supported by Article VI, § 1 (b) of the Institutional Services Agreement.

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and argue the grievance under discussion, and encouragement by the parties of their representatives to explore and conclude settlements at the lower steps of grievances which do not involve broad questions of policy or of contract interpretation.. Obviously, none of these elements is achievable if easy amendment of the grievance at the . . . arbitration step were permitted.")

[11] See, e.g., Decision Nos. B-58-90; B-19-89; B-65-88.

[12] Decision Nos. B-58-90; B-1-89; B-7-81.

Article VI, Section 1 (b) of the agreement clearly states that disputes involving the Rules and Regulations of the HHC, with respect to those matters set forth in Section 7390 of the Unconsolidated Laws, shall not be subject to the grievance procedure.[13] Section 7390.1 allows the corporation to promulgate rules regarding appointments, policies and practices among other things. Since Rule 4:4:4 gives HHC the right to terminate an employee who would have been disqualified from appointment if all the facts had been known to the employer during the employment application process, it is clearly one of "those matters" covered under Section 7390. Thus, Article VI, Section 1(b) excludes disputes involving this Rule from the grievance and arbitration procedure. We need not discuss the grievant's disputed status as a permanent employee because such status is not relevant to the application of this Rule.

The Union claims that HHC violated Article VI, Section 1 (a), (b), (e), and (g) of the Institutional Services Contract by terminating the grievant's employment without a hearing. However, the Union has not established a nexus between the grievant's disqualification under Rule 4:4:4 and any alleged disciplinary action. Accordingly, the City's petition challenging arbitrability is granted. Our granting of the City's petition is without prejudice to any rights the grievant may have in any other forum.

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[13] Section 7390 states that:

[t]he corporation shall, upon ten days written notice appropriately posted in the health facilities, promulgate rules and regulations consistent with civil service law with respect to policies, practices, procedures relating to position classifications, title structure, class specifications, examinations, appointments, promotions, voluntary demotions, transfers, re-instatements, procedures relating to abolition or reduction in positions, for personnel employed by the corporation pursuant to section five, subdivision twelve of this act.

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 City of New York, be and the same hereby is, granted; and it is further

ORDERED, that the request for arbitration filed by the District Council 37, Local 420 be, and the same hereby is denied.

DATED: July 13, 1999
New York, N. Y.

STEVEN C. DeCOSTA
CHAIRMAN

DANIEL G. COLLINS
MEMBER

SAUL G. KRAMER
MEMBER

ROBERT H. BOGUCKI
MEMBER

CAROLYN GENTILE
MEMBER