

HHC v. NYSNA, 67 OCB 23 (BCB 2001) [Decision No. B-23-2001 (Arb)]

OFFICE OF COLLECTIVE BARGAINING  
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Arbitration

-between-

NEW YORK CITY HEALTH AND HOSPITALS  
CORPORATION,

Decision No. B-23-2001  
Docket No. BCB-2183-01  
(A-8555-00)

Petitioner,

-and-

NEW YORK STATE NURSES ASSOCIATION,

Respondent.

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**DECISION AND ORDER**

Petitioner New York City Health and Hospitals Corporation (“HHC” or “Petitioner”) challenges the arbitrability of a grievance brought by the New York State Nurses Association (“Respondent” or “Association”) alleging that HHC violated the parties’ collective bargaining agreement (“Agreement”) when it denied payment of a salary differential to Nurse Practitioners who were performing work in a higher title at Kings County Hospital Center. In its January 26, 2001, Petition, HHC asserts that there is no nexus between its denial of the differential and the provisions of the Agreement which are alleged to have been violated. Respondent argues that a nexus exists and asks the Board to order arbitration. Based on our review of the parties’ submissions, the Board finds that Respondent has established the requisite nexus. Accordingly, we deny the Petition and direct that the grievance proceed to arbitration.

### BACKGROUND

The Union brought the subject grievance under Article III, Section 11.D of the Agreement, which reads:

Effective October 1, 1995, any Nurse in a title covered by the agreement who is acting in a higher title pursuant to written authorization, shall receive a differential equal to the difference between the rate of pay for that individual and the greater of either the starting salary of the higher title or the annual amount stated below pro-rated for the period of time applicable. Such differential is to be paid commencing the 31<sup>st</sup> day of sch assignment, and payment shall be made within sixty days of entitlement.

Assistant Head Nurse	\$450
Head Nurse	\$550
Supervisor of Nurses	\$700
Midwife	\$700
Nurse Midwife	\$700
Nurse Practitioner	\$700

After the grievance was denied at Step 1A, the Association submitted the grievance to Step II. In her August 24, 1999, decision partially sustaining the claim, HHC's Step II Review Officer ruled as follows:

The title, Nurse Practitioner, is covered by the provisions of the agreement, and is therefore covered by the provisions of Article III, Section 11.D. Accordingly, the grievance is accepted as falling within the guidelines of Article III, Section 11.D. . . .

\* \* \* \* \*

After review of the record and considering the arguments presented by the parties, I find that three of the grievants are performing duties that fall within the position description for Associate Nurse Practitioner Level I. Ms. Anderson and Ms. Ross do CQI monitoring, and Ms. Anderson interprets and recommends revision

in policies and protocols regarding Nurse Practitioner services as well as provides clinical instruction to nursing students. Ms. Marshall provides clinical instruction to Nurse Practitioner students. The work performed by the other grievants falls within the scope of the title, Nurse Practitioner.

I am, therefore, directing that Kings County Hospital Center pay Marlene Anderson, Judy Ross, and Sandra Marshall the difference in pay between their salary as Nurse Practitioner and the salary of an Associate Nurse Practitioner retroactive to August 16, 1997, 120 days prior to the date of filing of the Step I grievance. The monies are to be paid within two months following receipt of this decision in accordance with the provisions of Article III, Section 11.D. of the Staff Nurses contract.

The grievance was denied as to all other grievants.

On September 19, 2000, Fred A Jordan, the Hospital's Assistant Personnel Director, in adherence with the Step II Decision, instructed the Hospital's Coordinating Manager for Wage and Salary to pay three (3) of the grievants "the difference between their current salary and that of an Associate Nurse Practitioner L-1, retroactive to August 16, 1997." Nevertheless, the grievants named in Mr. Jordan's memorandum have not received the differential.<sup>1</sup>

On November 29, 2000, the Association filed its Request for Arbitration. In its Request, the Association describes the grievance as "[w]orking in a higher title." The provisions of the Agreement allegedly violated are Article III, Section 11.D, and Article VI, Section 6.<sup>2</sup> For its

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<sup>1</sup> Although Step III hearings to review the Association's grievance were scheduled for April 11, 2000 and June 20, 2000, the record contains no evidence that a Step III hearing actually occurred or that a Step III decision was ever issued.

<sup>2</sup> Article VI, Section 6 reads,

If the Employer exceeds any time limit prescribed at any step in the Grievance Procedure, the grievant and/or the Association may invoke the next step of the procedure, except, however, that only the Association may invoke impartial

remedy, the Association asks that HHC be directed to “[m]ove all Nurse Practitioners involved to Level II and pay monies retroactive to August 16, 1997.”

## **POSITIONS OF THE PARTIES**

### **Petitioner’s Position**

HHC argues that there is no nexus between the Agreement and the alleged violation because Article III, Section 11.D, “does not provide for a differential for nurses claiming they are doing the work of an Associate Nurse Practitioner.” According to HHC, relief under Article III, Section 11.D, is available only for nurses working in the titles specifically listed in the provision – Assistant Head Nurse, Head Nurse, Supervisor of Nurses, Midwife, Nurse Midwife and Nurse Practitioner. With respect to the Association’s claim that HHC violated Article VI, Section 6, Petitioner asserts that the provision merely addresses situations in which the employer has exceeded the time limits prescribed in the grievance procedure. Because the Union has not alleged that HHC has exceeded any time limits and because, in any event, the grievance procedure does not define or create substantive rights that furnish an independent basis for a grievance, Petitioner argues that the Association’s claim under Article VI, Section 6 is not grievable.

### **Respondent’s Position**

The Association, in response, recites the Step II Hearing Officer’s ruling that the title Nurse Practitioner “is covered by the provisions of the agreement and is therefore covered by the

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arbitration under Step IV.

provisions of Article III, Section 11.D.” The Association notes that contrary to HHC’s claim in this arbitrability challenge that Article III, Section 11.D, grants a differential only to employees performing work in the six (6) titles specifically listed in the provision, HHC’s determination at Step II found that Nurse Practitioners who have performed the duties of Nurse Practitioner Level I are entitled, during the applicable period, to a differential under Article III, Section 11.D, equal to the difference between their salary as Nurse Practitioner and the salary of an Associate Nurse Practitioner Level I.

The Association further argues that its Request for Arbitration properly appeals the Hospital’s failure in the Step II decision to grant relief to all the grievants. The Association also asserts that it properly grieved, as a violation of Article VI, Section 6, the Hospital’s failure to implement the Step II decision insofar as it partially sustained the Association’s grievance.

### **DISCUSSION**

The Board has carefully reviewed the positions of the parties as set forth in their respective pleadings, and, based on the record before us, we find that the Association’s grievance is arbitrable.

The test to determine arbitrability is, first, whether the collective bargaining agreement obligates the parties to arbitrate their controversies, and second, whether a nexus exists between the grievance and the contract provision said to have been violated.<sup>3</sup> We find no merit in

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<sup>3</sup> *New York City Office of Labor Relations & New York City Office of the Comptroller and District Council 37, AFSCME*, Decision No. B-47-99 at 7; *City of New York & New York City Dep’t of Sanitation and Local 246, Serv. Employees Int’l Union*, Decision No. B-32-99 at 9.

Petitioner's assertion that there is no nexus between HHC's denial of the disputed differentials, and Article III, Section 11.D. The provision addresses the payment of differentials to nurses working in higher titles, and the grievance involves a claim by a group of nurses that they are due a differential for work performed in a higher title. HHC's assertion that Article III, Section 11.D, specifically limits the payment of the differential to nurses performing work in certain enumerated titles merely raises an issue of contract interpretation. Therefore, the scope of the provision properly should be determined in arbitration, rather than by this Board. What weight, if any, should be given to HHC's Step II Decision is also a question for the arbitrator.<sup>4</sup>

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<sup>4</sup> We note that HHC's Petition failed to mention the existence of the Step II Decision sustaining part of the grievance. HHC has offered no explanation for the reason it has taken a position here that is plainly inconsistent with its prior determination.

**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 HHC's petition challenging arbitrability be, and the same is hereby denied; and it is further

ORDERED, that the Association's request for arbitration be, and the same hereby is, granted.

Dated: June 14, 2001  
New York, New York

MARLENE A. GOLD

CHAIRMAN

DANIEL G. COLLINS

MEMBER

GABRIELLE SEMEL

MEMBER

CHARLES G. MOERDLER

MEMBER

RICHARD A. WILSKER

MEMBER

EUGENE MITTELMAN

MEMBER