

HHC v. NYSNA, 67 OCB 24 (BCB 2001) [Decision No. B-24-2001 (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-24-2001  
Docket No. BCB-2184-01  
(A-8561-00)

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 Joan Pickering, a Nurse Practitioner who was performing work in a higher title at East New York Diagnostic and Treatment Center of the 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 such 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 Association's August 11, 1998, grievance went unanswered, the Association submitted the dispute to Step II. On August 23, 1999, HHC's Step II Review Officer sustained the grievance. The Review Officer explained:

Ms. Pickering's title, Nurse Practitioner, is covered by 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 of the parties, I find that Ms. Pickering has been performing the work of an Associate Nurse Practitioner Level II. . . . She has done this work since 1995. However, as this Review Officer is limited by the contract to the period of time of no more than 120 days prior to the date of the filing of the initial grievance, Ms. Pickering is to be paid the difference between her salary and that of an Associate

Nurse Practitioner Level II, retroactive to April 11, 1998. In accordance with the provisions of Article III, Section 11.D, such payment is to be made within two months of this decision.

On November 3, 1999, the Association filed a grievance alleging a violation of Article VI, Section 6, of the Agreement in connection with the Hospital's failure to implement the August 23, 1999, Step II Decision.<sup>1</sup> Thereafter, on November 18, 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 Ms. Pickering "the difference between her current salary and that of an Associate Nurse Practitioner Level II, retroactive to April, 1998." In February 2000, in accordance with the Step II decision and Mr. Jordan's memorandum, Ms. Pickering was paid \$12,245.95 in back pay for the period April 11, 1998, to February 12, 2000.<sup>2</sup>

On November 30, 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

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<sup>1</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 arbitration under Step IV.

<sup>2</sup> The New York City Office of Labor Relations concurrently conducted a Step III review of the Association's "complaint" over the Hospital's failure to "advance" Ms. Pickering to Associate Nurse Practitioner Level II. The September 14, 1999, Step III decision notes that "Article III, Section [11.D], addresses differentials; it does not provide for advancement in levels of a title." For reasons that are not apparent in the record and notwithstanding the August 23, 1999, Step II decision sustaining Ms. Pickering's grievance, another Step III review of the Association's grievance was scheduled for June 20, 2000. The record does not indicate what additional issues had been submitted to Step III, nor does it contain any evidence that a Step III hearing actually occurred, or that another Step III decision was ever issued.

Agreement allegedly violated are Article III, Section 11.D, and Article VI, Section 6. For its remedy, the Association asks that HHC be directed to “[m]ove [Ms. Pickering] to Level II and pay retroactive to February 2000.”

## **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. In addition, HHC contends that the Association’s claim under Article VI, Section 6, is not grievable because the Union has not alleged that HHC 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.

### **Respondent’s Position**

The Association counters that “[t]he Step II decision sustained [Respondent’s] grievance as to Grievant Joan Pickering’s status.” The Step II Hearing Officer’s ruling is that the title, Nurse Practitioner, “is covered by the provisions of this agreement and is therefore covered by the 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 August 23, 1999, determination at Step II found that Ms. Pickering "has been performing the work of an Associate Nurse Practitioner Level II," and that she therefore is entitled, retroactive to April 11, 1998, to a differential under Article III, Section 11.D, equal to the difference between her salary as Nurse Practitioner and the salary of an Associate Nurse Practitioner Level II.

The Association further argues, apparently for the first time, that its Request for Arbitration properly appeals the Hospital's failure to implement the Step II decision under Article VI, Section 2, Step IV of the Agreement. The Association explains that "[a]lthough the Hospital paid back monies to Ms. Pickering, it has failed to pay her for continuing to work out of title."

## DISCUSSION

This 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 Petitioner's assertion that there is no nexus between Article III, Section 11.D, of the Agreement

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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.

and the Association's claim that Ms. Pickering is working in a higher title. The provision addresses the payment of differentials to nurses working in higher titles, and the grievance involves a claim by a nurse that she is entitled to 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> We observe that the Step II decision sustained Ms. Pickering's grievance and that, in accordance with that decision, the grievant received back pay for the period from April 11, 1998, to February 12, 2000. HHC, however, has not alleged as a basis for its challenge to arbitrability that the dispute was fully resolved.

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<sup>4</sup> We note that HHC's Petition failed to mention the existence of the Step II Decision sustaining 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