HHC v. NYSNA, 67 OCB 30 (BCB 2001) [Decision No. B-30-2001 (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,

Petitioner,

Decision No. B-30-2001
Docket No. BCB-2201-01
(A-8571-00)

-and-

NEW YORK STATE NURSES ASSOCIATION,

Respondent.

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DECISION AND ORDER

New York City Health and Hospitals Corporation ("HHC" or "Petitioner") filed a petition on March 12, 2001, challenging the arbitrability of a grievance brought by the New York State Nurses Association ("Association" or "Respondent") on behalf of nurses Beverly Powerful and Yvonne Brown ("Grievants"). The grievance asserts that HHC failed to honor the nurses' written, approved transfers from Medicine/Surgery to the Emergency Room at Metropolitan Hospital Center ("Hospital"), where both nurses worked. Petitioner argues that the Board should not permit the Association to arbitrate a claimed violation of an Operating Procedure which the Association cited for the first time in its answer and that, in any case, no nexus exists between the failure to transfer the nurses and any cited contractual provision or rule. The Association argues that a nexus does exist. This Board finds that Respondent is precluded from raising a new claim in its answer and has not established the requisite nexus with the Citywide provision.

Accordingly, we grant HHC's petition.

BACKGROUND

On July 29, 1998, Metropolitan Hospital sent notices to nurses Beverly Powerful and Yvonne Brown indicating that they would be transferred to the Emergency Department as they had requested. On August 10 and 11, 1998, respectively, the nurses received notice that their transfer would be "placed on a temporary hold."[1]

The Association filed a grievance on April 15, 1999. According to the November 15, 1999, Step II decision, the Association claimed that the Hospital filled several temporary positions in the Emergency Department; however, when the temporary positions were made permanent, the Hospital did not post the vacancies but hired the temporary employees for the permanent positions. HHC's failure to transfer Grievants, the Association alleged, violated Article XI, § 1, of the Citywide Agreement. That section reads:

> When vacancies in promotional titles covered by this Agreement are authorized to be filled by the appropriate body and the agency with such vacancies decides to fill them, a notice of such vacancies shall be posted in all relevant areas of the agency involved at least five (5) working days prior to filling except when such vacancies are to be filled on an emergency basis. Present agency agreements on this subject shall not be affected by this Section.

HHC's Review Officer determined that Article XI, § 1, provides for the posting of promotional titles. Since Grievants were Staff Nurses, and the Emergency Room vacancies were for Staff

[1] Request for Arbitration. In this decision, Request for Arbitration is denoted by "RFA"; Petition by "Pet."; Answer by "Ans."; Reply by "Rep."; Surreply by "Sur."; Exhibit by "Ex." The exhibits attached to the RFA have not been numbered.

Nurses, no promotional title was involved. In addition, the section addresses the requirement that a vacancy be posted but does not establish criteria for a hospital's filling a vacancy. On these grounds, the grievance was denied. At Step III, the Association cited to the same contractual provision. The Review Officer affirmed the prior decision on the ground that Grievants were in the same title as the title in the vacancies, with no promotion involved.

In its request for arbitration, filed on December 7, 2000, the Association again asserted that HHC violated Article XI of the Citywide Agreement and added Article VI, § 1(B), of the collective bargaining agreement between the parties.[2] In the answer to the petition challenging arbitrability, the Association claimed for the first time that HHC violated Section 4(a)(3) of Corporation Operating Procedure No. 20-16, Posting of Vacant Positions. ("Op. Pro. 20-16.") That rule provides:

> The Notice of Personnel Vacancy shall be posted on employee bulletin boards throughout the Corporation for not less than 7 calendar days following the posting date. A copy shall also be forwarded to the relevant local union representative on the first day of posting.[3]

In the RFA, the Association sought as a remedy that HHC honor the written approved transfers and allow Grievants to fill the next available Staff Nurse positions in the Emergency

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[2] Under Article VI, § 1(B), the term "Grievance" shall mean:

> A claimed violation, misinterpretation or misapplication of the rules and regulations, written policy or orders of the Employer applicable to the agency which employs the grievant affecting terms and conditions of employment. . . .

[3] Operating Procedure 20-16, dated September 11, 1989, was superceded in June 2000, but the earlier rule governs the claim in this case. The only revisions in the pertinent provision are not at issue here.

Room. The Association seeks dismissal of the petition, or, alternatively, requests that the Board remand the matter to the grievance process.

POSITIONS OF THE PARTIES

Petitioner's Position

HHC argues that since Article XI, § 1, of the Citywide Agreement addresses the posting of vacancies in promotional titles, that provision is inapplicable because Grievants seek lateral transfers. (Pet. ¶ 28.)

HHC also objects to the Association's raising, for the first time in its answer, an alleged violation of Op. Pro. 20-16. HHC asserts that the Board has found improper a respondent's adding a new claim at the last step in the grievance procedure since doing so denies the parties an opportunity fully to consider and attempt to resolve the issue at the initial steps. (Rep. ¶ 9.)

According to HHC, the Association has failed to allege facts concerning the lack of posting or the way the vacant positions were filled. Respondent's only claims are that Grievants were approved and then disapproved for transfers to the Emergency Department. (Rep. ¶ 27.) Thus, HHC avers, Respondent has not demonstrated a nexus between the discontinued transfers and the rule requiring the posting of vacancies.

HHC objects to the Association's filing a surreply on the grounds that the Association did not articulate "special circumstances" and that the surreply does not rebut a substantive fact or legal theory.

Respondent's Position

The Association argues that the meaning of the phrase, "vacancies in promotional titles," in Article XI, § 1, of the Citywide Agreement is a contractual formulation for an arbitrator to interpret. Similarly, an arbitrator should decide the interrelationship between Article XI, § 1, and Op. Pro. 20-16. (Ans. ¶ 9.) According to the Association, Article XI, § 1, encompasses the procedures in Op. Pro. 20-16, and for an arbitrator to consider the Citywide Agreement's term, "vacancies in promotional titles," without also considering the requirements in Op. Pro. 20-16, entitled "Posting of Vacant Positions," would be inappropriate. (Ans. ¶ 7; Sur. ¶ 7.) Citing Op. Pro. 20-16 for the first time in the answer is not making a new claim, Respondent asserts, for HHC is presumed to be aware of its own procedures relevant to the issue of the case. (Sur. ¶ 5.)

The Association alleges that throughout the period in question, September 21, 1998, to August 5, 1999, HHC did post, as Op. Pro. 20-16 mandates, several positions, including those in the Emergency Room. (Ans. § 6; Ex. 6.) HHC violated Op. Pro. 20-16 because HHC had initially accepted Grievants for those vacancies, subsequently denied them the positions, and then denied them the opportunity to reapply for those vacancies. (Ans. ¶ 6; Sur. ¶ 6.) The "entire process followed by the Hospital," Respondent claims, violated Article XI, § 1, of the Citywide Agreement and Op. Pro. 20-16.

DISCUSSION

The issue in this case is whether this Board may consider Op. Pro. 20-16 to determine arbitrability and whether a nexus exists between Metropolitan Hospital's failure to transfer Grievants and the contractual provisions cited by the Association. This Board will not consider

the Operating Procedure cited for the first time in the Association's answer and finds that no nexus has been established.

Initially, we respond to Petitioner's objection to the surreply. Petitioner asserts that it raised no new issues in the reply; however, the surreply gave Respondent the opportunity to respond to HHC's statements in the reply that since the Association had not raised Op. Pro. 20-16 in the lower steps, HHC had had no notice of that claim. To the extent that the surreply clarifies this issue, we will consider that pleading in rendering a decision.[4]

This Board has consistently denied arbitration of claims raised after a union has filed a request for arbitration since arbitration of such claims would frustrate the purpose of the multi-step grievance procedure, designed to encourage discussion at each step.[5] In *Patrolmen's Benevolent Ass'n,*[6] we held that an alleged violation of an Operating Procedure cited for the first time in the union's answer was not arbitrable, for allowing a party to interpose a novel claim deprives the parties of an opportunity to reach a voluntary settlement at earlier proceedings. However, when a technical deficiency exists in the request for arbitration, we will send the

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[4] *Patrolmen's Benevolent Ass'n and City of New York & City of New York Police Dep't,* Decision No. B-4-99 at 9-10; *City of New York & New York City Police Dep't and Detectives Endowment Ass'n,* Decision No. B-10-98 at 1; *City of New York and Dist. Council 37, Local 2507, AFSCME*, Decision No. B-47-97 at 6.

[5] *Dep't of Corr. & City of New York and Corr. Officers Benevolent Ass'n,* Decision No. B-20-98 at 12; *New York City Health and Hosp. Corp. and Soc. Serv. Employees Union, Local 371, Dist. Council 37, AFSCME,* Decision No. 5-98 at 5-6; *City of New York and Patrolmen's Benevolent Ass'n,* Decision No. B-40-88 at 10-11; *Dist. Council 37, AFSCME and City of New York,* Decision No. B-22-74 at 4.

[6] Decision No. B-40-88 at 10-11.

grievance to arbitration if the City had previously been on notice of the alleged violation.[7]

In addition, this Board has determined that a union has the responsibility to notify the City if the intended scope of a grievance is broader than that stated by hearing officers in Step II or III decisions.[8] In *City of New York and D.C. 37, AFSCME,*[9] we wrote:

> Surely upon receipt of this decision, if not at an earlier stage, the Union should have been put on notice that the City considered the grievance to be limited, as defined by the hearing officer, to the alleged violation. . . . If the Union believed that the scope of the grievance was broader than this, it had an obligation to make its belief known to the City.

Here, we are not persuaded that the Association's failure to cite Operating Procedure No. 20-16 until its answer is a mere technical deficiency. HHC had no notice and should not be presumed to know what policy the Association was claiming HHC violated. The Review Officers in the Step II and III decisions examined the nexus between the Hospital's failure to transfer Grievants and the Association's claimed violation of Article XI, § 1, of the Citywide Agreement and found specifically that no nexus existed because the transfer would not have been promotional. Under this Board's decisions, the Association was obligated to inform HHC that the scope of the grievance was broader than the promotional provision that the hearing officers addressed. Respondent's citing Op. Pro. 20-16 for the first time in the answer and merely

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[7] *Corr. Officers Benevolent Ass'n,* Decision No. B-20-98 at 12; *Health and Hosp. Corp.,* Decision No. B-5-98 at 5.

[8] *City of New York and Local 371, Soc. Serv. Employees Union,* Decision No. B-29-91 at 10; *City of New York and Unif. Fire Officers Ass'n, Local 854,* Decision No. B-6-80 at 9.

[9] Decision No. B-31-86 at 9 (citation omitted).

repeating the alleged violation of Article XI, § 1, of the Citywide Agreement in Steps II and III and in the RFA deprived HHC of an opportunity to consider and possibly settle that claim and is thus not arbitrable.

Considering the arbitrability of the claim under Article XI, § 1, we ask first, whether the collective bargaining agreement obligates the parties to arbitrate their controversies, and second, if so, whether a nexus, or "arguable relationship," exists between the grievance and the contract provision said to have been violated.[10] The burden is on the grievant to establish a nexus.[11]

Here, the parties do not question that they are obligated to arbitrate disputes pursuant to their collective bargaining agreements, including the applicable provisions of the Citywide Agreement. As to the second prong of the test, we must agree with the Review Officers' Step II and III decisions that HHC's failure to transfer Grievants bears no arguable relationship with Article XI, § 1, because the transfer was not a promotion. The provision on its face covers "vacancies in promotional titles," a phrase that does not require interpretation by an arbitrator.[12]

Furthermore, nothing in the record contradicts the conclusion that Grievants were seeking lateral, not promotional transfers. Nor does Respondent explain its assertions that, on the one

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[10] *New York City Office of Labor Relations & New York City Office of the Comptroller and Dist. Council 37, AFSCME,* B-47-99 at 7; *City of New York & New York City Dep't of Sanitation and Local 246, Serv. Employees Int'l Union,* B-32-99 at 9; *City of New York and Corr. Officers Benevolent Ass'n,* B-12-94 at 8.

[11] *City of New York and Patrolmen's Benevolent Ass'n,* Decision No. B-41-88 at 6; *City of New York and Patrolmen's Benevolent Ass'n,* Decision No. B-4-88 at 4.

[12] *Cf. City of New York and Libert,* Decision No. B-1-97 at 6, *petition dismissed sub. nom. Libert v. New York City Bd. of Collective Bargaining*, No. 401234/97 (N.Y. Co. Sup. Ct. June 10, 1998).

hand, HHC did not post the vacant positions pursuant to the Citywide Agreement and Op. Pro. 20-16, and, on the other, that HHC did post the vacancies in the Emergency Room but denied Grievants the opportunity to apply for them. The Association has failed to articulate any facts to support a claim that the hospital violated a contractual provision or policy in refusing to transfer Powerful and Brown.

Finally, the Union's citing Article VI, §1(B), of the collective bargaining agreement is unavailing. The definitional provision of the contract does not, by itself, provide the basis for a grievance.[13] Therefore, since the Association has not established a nexus, this Board grants the petition and dismisses the request for arbitration.

ORDER

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

[13] *City of New York & New York City Dep't of Housing Pres. and Dev. and City Employees' Union, Local 237, Int'l Bhd. of Teamsters,* Decision No. B-31-99 at 9-10.

City Collective Bargaining Law, it is hereby

ORDERED, that HHC's petition challenging arbitrability be, and the same hereby is granted ; and it is further

ORDERED, that the Union's request for arbitration be, and the same hereby is denied.

Dated: July 19, 2001
New York, New York

MARLENE A. GOLD
CHAIRMAN

DANIEL G. COLLINS
MEMBER

EUGENE MITTELMAN
MEMBER

I dissent. GABRIELLE SEMEL
MEMBER

I dissent. VINCENT BOLLON
MEMBER