NYSNA v. HHC, 67 OCB 39 (BCB 2001) [Decision No. B-39-2001 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper Practice Proceeding

-between-

NEW YORK STATE NURSES ASSOCIATION,

Petitioner,

Decision No. B-39-2001
Docket No. BCB-2192-01

-and-

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Respondent.

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DECISION AND ORDER

On February 16, 2001, the New York State Nurses Association ("NYSNA" or "Union") filed a verified improper practice petition against the New York City Health and Hospitals Corporation ("HHC"), alleging that HHC unilaterally assigned disciplinary duties to head nurses at Bellevue Hospital Center without engaging in collective bargaining. The Union claims that HHC's actions violated Section 12-306a(1) and (4) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"). HHC asserts that because the Union filed a group grievance alleging an out-of-title claim, the Board must defer to arbitration on the matter. Since the Union's claims are founded in a unilateral change to a subject that is addressed in the parties' collective bargaining agreement, we will defer the improper practice claim to the parties' contractual grievance process.

BACKGROUND

HHC's position description for the title "head nurse" states: "directs the development, implementation and evaluation of the nursing regimen for patients/clients within the unit." It also states that the head nurse: "Develops and maintains a system of evaluation of nursing care, practice and procedures, including evaluation of nursing personnel within a unit."

In March 1987, HHC implemented Operating Procedure 20-10, "Employee Performance and Conduct." The procedure sets forth the steps a supervisor/manager must take when implementing disciplinary action.

According to the Union, on January 24, 2001, Bellevue Hospital Center notified its head nurses for the first time that they would be required to formally counsel and warn other nurses in accordance with Operating Procedure 20-10. The City claims, however, that on January 24, 2001, head nurses were simply reminded of their duties under Operating Procedure 20-10. On February 1, 2001, the Union filed an improper practice petition claiming that HHC failed to bargain over its unilateral action. On February 9, 2001 the Union filed an out-of-title grievance on behalf of Bellevue head nurses.

POSITIONS OF THE PARTIES

Petitioner's Position

The Union argues that the job description for head nurse does not include discipline. Operating Procedure 20-10 states that the job of a supervisor/manager is to deal with discipline. According to the Union, January 24, 2001, was the first time that head nurses at Bellevue were notified that they are required to counsel and warn other nurses. This additional responsibility is a unilateral change in the head nurses' terms and conditions of employment over which HHC has refused to bargain. The Union contends that if it can show that additional tasks are not an

essential duty of the head nurse position and if the additional task has a practical impact on terms and conditions of employment, then HHC has an obligation to bargain.

Respondent's Position

HHC argues that the petition must be dismissed because: (1) the Board should defer the improper practice petition to the grievance-arbitration process since the Union has filed an improper practice and out-of-title grievance on the same issue; (2) job assignment is a management right under 12-307b of the NYCCBL; (3) the job description for head nurse includes evaluating nursing personnel, and on January 24, 2001, the head nurses were merely reminded of their disciplinary duties; and (4) the Board cannot make determinations regarding bargaining units.

DISCUSSION

In the present case, the Union has filed an improper practice petition charging that HHC failed to bargain over the alleged additional responsibilities it assigned to head nurses. The Union has also filed a group grievance alleging that the head nurses at Bellevue Hospital Center were assigned out-of-title duties. This Board will defer the improper practice claim to the contractual grievance-arbitration process.

It is an improper practice under §12-306a(4) of the NYCCBL for a public employer or its agents:

> to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees;

An employer's unilateral action on a mandatory subject of bargaining may violate this provision.[1]

[1] *E.g.*, *LaRiviere,* Decision No. B-36-87 at 9.

However, in *Correction Officers Benevolent Ass'n,* Decision No. B-39-88 at 15, this Board stated that when the basis of the claimed statutory violation is derived from a provision of the collective bargaining agreement, this Board's jurisdiction under NYCCBL §12-306a(4) may not be invoked. The Union should raise any such claim in the context of the grievance procedure and not in an improper practice proceeding.[2]

In addition, §205.5(d) of the Taylor Law (Civil Service Law, Article 14), which applies to this Board as well as to PERB, provides in pertinent part:

> . . . the board shall not have the authority to enforce an agreement between a public employer and an employee organization and shall not exercise jurisdiction over an alleged violation of such an agreement that would not otherwise constitute an improper employer or employee organization practice.

PERB has consistently interpreted this provision of the Taylor Law to deprive it of jurisdiction over improper practice charges of failure to negotiate when the underlying disputes are essentially contractual.[3] A jurisdictional issue must be addressed at the outset if the "agreement is a reasonably arguable source of the right to the charging party with respect to the same subject matter as the improper practice charge" or, "even if the agreement does not address specifically the particular allegations of the improper practice charge if the agreement is a source of right to the charging party with respect to the subject matter of the charge."[4]

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[2] *See Civil Serv. Technical Guild*, Decision No. B-11-99 at 9; *United Probation Officers Ass'n*, Decision No. B-38-91 at 17*; Patrolmen's Benevolent Ass'n*, Decision No. B-24-87 at 7, *aff'd sub. nom. Caruso v. Anderson*, 138 Misc.2d 719, 525 N.Y.S.2d 109 (N.Y. Co. 1987), *aff'd*, 145 A.D.2d 1004, 536 N.Y.S.2d 689 (1st Dept. 1988), *lv. denied*, 73 N.Y.2d 709, 540 N.Y.S.2d 1004 (1989).

[3] *E.g., County of Nassau*, 25 PERB ¶ 3071 (1992).

[4] *County of Nassau*, 23 PERB ¶ 3051, at 3108 (1990).

In the present case, we find that Article VI, Section 1c, – the out-of-title provision of the parties collective bargaining agreement – is a reasonably arguable source of the Petitioner's right to dispute the assignment of additional duties to head nurses at Bellevue Hospital Center. Therefore, we defer the improper practice claim to the parties' contractual grievance process, which has already been commenced.

The allegation concerning HHC unilaterally assigning disciplinary duties to the head nurses, arguably covered by the CBA, must be deferred to the parties' grievance process because this Board lacks jurisdiction to consider the improper practice charge at this time. Permitting such dispute to proceed first to arbitration is consistent with the declared policy of the NYCCBL "to favor and encourage . . . final, impartial arbitration of grievances between municipal agencies and certified employee organizations."[5] We have stated these principles in past decisions; however, to the extent that other prior decisions are inconsistent with this determination, they will no longer be followed.[6]

The petition is administratively deferred, subject to a motion to reopen should the City successfully raise in the grievance arbitration context any argument which forecloses a determination regarding the merits of the grievance or should any award be repugnant to rights under the NYCCBL.

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[5] *United Probation Officers' Ass'n,* Decision No. B-38-91 at 13; *see also Uniformed Sanitationmen's Ass'n,* Decision No. B-68-90 at 16.

[6] *See Int'l Bhd. of Teamsters,* Decision No. B-38-92.

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 improper practice petition filed by New York State Nurses Association be, and the same hereby is, deferred until such a time as an arbitrator renders a determination, and issues an opinion and award upon which this Board may further determine whether an improper practice was committed by the Health and Hospitals Corporation.

Dated: October 29, 2001
New York, NY

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

RICHARD A.WILSKER
MEMBER

BRUCE H. SIMON
MEMBER