CIR v. HHC (Lincoln Hospital), 67 OCB 40 (BCB 2001) [Decision No. B-40-2001 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper Practice Petition

-between-

COMMITTEE OF INTERNS AND RESIDENTS,
SEIU, AFL-CIO,

Petitioners,

Decision No. B-40-2001
Docket No. BCB-2103-99

-and-

NEW YORK CITY HEALTH AND HOSPITALS
CORPORATION (LINCOLN HOSPITAL),

Respondents.

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DECISION AND ORDER

The Committee of Interns and Residents, SEIU, AFL-CIO ("CIR" or "Union") filed a verified improper practice petition alleging that the New York City Health and Hospitals Corporation ("HHC") refused to bargain in good faith with the Union over HHC's obligation to provide meals to House Staff Officers ("HSOs"). The Union claims that HHC violated § 12-306a (4) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"). HHC contends that the claim, derived from a provision of the collective bargaining agreement, should be raised in the context of the grievance procedure and not in an improper practice proceeding. 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 petition to the parties' contractual grievance process.

BACKGROUND

Article XIX, § 15 of the parties' collective bargaining agreement states:

> The Corporation shall provide at no charge to House Staff Officers who are paid directly by the Corporation up to three meals per day (breakfast, lunch, and dinner) in the employee cafeteria while they are on duty at a Corporation facility. Facilities which currently have a more beneficial HSO meal practice than is set forth above, are encouraged to continue such practice.

House Staff Officers at Lincoln Hospital receive their meals at the cafeteria while on duty. On October 21, 1999, representatives of both the Union and HHC met to discuss the prospect of closing the cafeteria at Lincoln Hospital. At the meeting, the Union was told that the cafeteria would be replaced by a private contractor. The Union states that it demanded information regarding the date of the planned closure.

On November 8, 1999, the Union filed a Step II grievance, alleging that HHC violated Article XIX, § 15 of the parties' contract by, among other things, refusing to provide information regarding the closing date of the hospital cafeteria or plans for providing meals when the cafeteria closes. An informal conference was held on February 9, 2000, and HHC denied the grievance on March 24, 2000. On April 14, 2000, the Union filed a request for arbitration based upon the Step II grievance. On January 23, 2001, the parties mutually agreed to adjourn a scheduled February 8, 2001, arbitration, and did not schedule a new date.

As of March 20, 2000, the pleadings were complete, and the cafeteria had not yet been closed. After an inquiry by the Trial Examiner, the Union represented that to the best of its knowledge, the cafeteria had closed on April 30, 2000. HHC maintained that the cafeteria was closed on April 1, 2000.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that at the October 21, 1999, meeting, HHC refused to discuss any of its plans regarding the date of the cafeteria's closure and HHC's plans to provide meals to the HSOs once the cafeteria was closed. Additionally, the Union demanded bargaining over the way meals were to be provided once the cafeteria was closed, the hours at which those meals would be provided, and the sufficiency of the meals that HHC is required to provide. HHC refused to negotiate those subjects with the Union and refused to discuss a Union proposal for the provision of meals after the cafeteria was closed. The Union asks that the Board direct HHC to bargain with the Union regarding the provision of meals to HSOs.

The Union does not ask that the Board enforce the collective bargaining agreement between the parties or entertain a contract violation, but asks that the Board order HHC to bargain over a subject, the provision of meals, that it claims is a mandatory subject of bargaining. While agreeing that the source of its right to the specific meal plan is the collective bargaining agreement, the Union contends that in the face of an announcement by HHC that it has decided to implement a new meal plan, the Union has an independent right to demand bargaining over the impact of the new meal plan, which may include a charge for the meals, prior to implementation.

HHC's Position

HHC maintains that at the October 21, 1999, meeting, the Union was told that the date of the closure of the cafeteria was unknown, and as soon as more information became known the Union would be told. Further, the gravamen of the claim is not a refusal to bargain, but a claim that would require contract interpretation because the subject matter of Article XIX, § 15 of the

parties' collective bargaining agreement is the provision of meals to HSOs at HHC facilities. The Board has held that it has no jurisdiction over a claimed contractual violation and that any such claim is subject to the grievance-arbitration procedure.[1]

The Board has further held that an improper practice claim of failure to bargain in good faith under § 12-306a(4) fails to state a *prima facie* improper practice claim when that claim is derived from a provision of the collective bargaining agreement, and thus, that section of the NYCCBL may not be invoked. The Board has stated that it has no jurisdiction over a claimed contractual violation and that any such claim should be raised in the context of the grievance procedure and not in an improper practice proceeding.[2] While the Union may argue that it has not alleged a claimed violation of a provision of the agreement, nevertheless, the Union refers to and relies upon a specific provision in the agreement. HHC contends that the Union already had filed a Step II grievance alleging that Article XIX, § 15 was violated on November 8, 1999, and that by its arguments and actions, the Union does believe Article XIX, § 15 sufficiently sets forth members' rights with regard to the provision of meals. HHC notes that PERB has consistently held that:

> [a] jurisdictional question must be addressed at the outset if the agreement is a reasonably arguable source of 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.[3]

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[1] *Patrolmen's Benevolent Ass'n*, Decision No. B-24-87.

[2] *Correction Officers Benevolent Ass'n*, Decision No. B-39-88.

[3] *County of Nassau*, 25 PERB ¶ 4564 (1992), at 4665.

The Union has also alluded to a claim of practical impact, which must fail because a finding by the Board of the existence of a practical impact in a scope proceeding is a condition precedent to the duty to bargain to alleviate such an impact. No such proceeding has been initiated in this matter, and no such finding has been made. Furthermore, the Union has put forth mere unsupported allegations and conclusory statements that an impact has occurred or will occur.

DISCUSSION

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.[4] However, in *Correction Officers Benevolent Ass'n*, Decision No. B-39-99 at 15, we held that the Board's jurisdiction under § 12-306a(4) of the NYCCBL may not be invoked when the basis of the claimed statutory violation is derived from a provision of the collective bargaining agreement. The Union should raise any such claim in the context of the grievance procedure and not in an improper practice proceeding.[5]

Section 205.5(d) of the Taylor Law (Civil Service Law, Article 14), which applies to this

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

[5] *See 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).

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.[6] 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."[7]

We find that the Union's claims are founded in a unilateral change to a subject that is addressed in the parties' collective bargaining agreement, namely Article XIX, § 15, and, therefore, we will defer the improper practice claim to the parties' contractual grievance process, which has already commenced. While the Union characterizes its improper practice as a refusal to bargain over the provision of meals to HSOs, which it contends is a mandatory subject of bargaining, the parties have already negotiated this subject, as Article XIX, § 15 indicates. In essence, the Union does not claim merely that HHC failed to negotiate on a matter which by definition is a term and condition of employment subject to mandatory collective bargaining. Here, the Union alleges that HHC unilaterally changed a working condition expressly covered by

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

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

the agreement. Under these circumstances, § 205.5(d) of the Taylor Law precludes our exercise of jurisdiction to consider this claim as an improper practice charge.

Moreover, this Board has stated that permitting a 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."[8] We have stated these principles in past decisions; however, to the extent that other prior decisions conflict with this determination, they will no longer be followed. Therefore, the charge is administratively deferred, subject to a motion to reopen should HHC 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.

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 The Committee of Interns and

[8] *United Probation Officers' Ass'n,* Decision No. B-38-91 at 13; *Local 831,Uniformed Sanitationmen's Ass'n, IBT, AFL-CIO*, Decision No. B-68-90 at 16.

Residents, docketed as BCB-2103-99 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 New York City Health and Hospitals Corporation.

Dated: October 29, 2001
New York, New York

MARLENE A. GOLD
CHAIR

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

BRUCE H. SIMON
MEMBER

RICHARD A. WILSKER
MEMBER