HHC v. NYSNA, 67 OCB 41 (BCB 2001) [Decision No. B-41-2001 (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-41-2001
Docket No. BCB-2215-01
(A-8786-01)

Petitioner,

-and-

NEW YORK STATE NURSES ASSOCIATION,

Respondent.

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DECISION AND ORDER

New York City Health and Hospitals Corporation ("Corporation," "HHC" or "Petitioner") filed a petition on May 24, 2001, challenging the arbitrability of a grievance brought by the New York State Nurses Association ("Union" or "Respondent") on behalf of nurse Donna Bryant ("Grievant"). The grievance asserts that the Corporation wrongfully disciplined Grievant when she disobeyed an order from a supervisor to direct a nurse employed by the Corporation ("staff nurse") to cover an assignment which Grievant believed could be handled instead by a nurse employed by a private agency ("agency nurse"). The request for arbitration also asserts violations of an agreement between the Union and the Corporation relating to nurse assignments and of a stipulation settling an earlier improper practice petition about the same issue. Petitioner disputes the arbitrability of the Union's claims with regard to the nursing assignment agreement and stipulation. (Petitioner does not challenge the arbitrability

of the disciplinary grievance.) This Board finds that Respondent is precluded from arbitrating claimed violations of the floating assignment agreement and stipulation because they were belatedly asserted in the grievance process. Accordingly, we grant Corporation's petition.

BACKGROUND

On July 6, 1999, while Grievant was on duty in Metropolitan Hospital Center's Labor and Delivery Unit, she was directed by Assistant Director of Nursing to send a staff nurse to the Post-Partem Unit. Grievant suggested that an agency nurse be sent there instead. The supervisor again directed Grievant to send a staff nurse. Grievant did not send the staff nurse but rather the agency nurse.

On February 28, 2000, Grievant was served with Notice and Statement of Charges citing misconduct for failing to adhere to a directive given to her by the Assistant Director of Nursing. On April 18, 2000, following a conference in which the Union representative defended against the disciplinary charges, a Step IA determination recommended a ten-day suspension as a penalty. On August 28, 2000, the penalty was upheld on appeal at Step II and on March 9, 2001, a Step III hearing was denied.

The Union filed the Request for Arbitration in the instant matter on March 27, 2001, claiming violation of the following:

> (1) Violation of the City of New York and New York City Health and Hospitals Corporation Collective Bargaining Agreement: Article VI, Section 1D. (2) HHC NYSNA Contract, Floating Assignments December 7, 1998. Improper Practice Stipulation of Settlement, Appendix BCB 1139-89 April 12, 1991. (3) Appendix 2 – Only if insufficient staffing remains shall nurse referrals be utilized.

Article VI, § 1D cited by the Union, defines a grievance as, among other matters, a "claimed wrongful disciplinary action taken against an employee." The floating assignment agreement cited by the Union states the Corporation policy concerning "floating" assignments for registered nurses represented by the Union. It contains a proviso that, notwithstanding the other terms of the agreement, "when, in the judgment of the Director of Nursing or the Director's designee, adherence to this policy would compromise the delivery of patient care, floating assignments will be made as required." Appendix 2, which the Union also cites as having been violated, is attached to the stipulation settling the earlier improper practice petition and, at paragraph two, contains the language cited by the Union as having been violated.[1] That paragraph of Appendix 2 is also the section under which the demand for arbitration is made.

POSITIONS OF THE PARTIES

Corporation's Position

The Corporation argues that it has no duty to arbitrate any issue arising from either the floating assignment agreement or the stipulation settling the earlier improper practice petition and that, even if the stipulation or floating assignment agreement were to create such a duty, public policy would require that such a claim be maintained in a separate proceeding.

Even if the stipulation and the floating assignment agreement created a duty to arbitrate, the Union has failed to specify any alleged violation of either document and, thus, has failed to prove a nexus between either of those documents and the grievant's suspension.

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[1]It states, in relevant part, "Only if insufficient staffing remains shall Nurse Referrals, Inc. ('NRI') be utilized."

The Corporation also argues that, throughout the prior steps of the contractual grievance procedure, the Union consistently described the grievance as an appeal only of disciplinary action. Citing *District Council37, AFSCME*, Decision No. B-31-86, the Corporation argues that the Union was obligated under the NYCCBL to put the public employer on notice that the claimed violation was broader than the conference holder stated it to be. In neither the request for a Step II conference nor the request for a Step III hearing did the Union specifically cite the stipulation or the floating assignment agreement. Even if the Union had asserted such violations orally at the lower steps, the Union was obligated to plead those issues specifically. Finally, citing *District Council 37, AFSCME*, Decision No. B-22-74, the Corporation argues that permitting the Union to amend its request for arbitration at this time to include such claims would fail to effectuate policies inherent in the collective bargaining agreement.

Union's Position

The Union argues that the terms of the stipulation of settlement may be arbitrated because, first, the parties' collective bargaining agreement does not bar enforcement of the stipulation, and, second, public policy espoused in the NYCCBL favors arbitrability. The Union cites *Correction Officers Benevolent Ass'n*, Decision No. B-12-94, for the proposition that any doubt about the arbitrability of a disputed claim should be resolved in favor of arbitration. Although the stipulation of settlement precludes its use as evidence "for any purpose or for any administrative, judicial or other proceeding," the Union contends that the stipulation's terms may be offered to enforce obligations arising under it.

As to the requisite nexus, the Union argues that determinations concerning the

disciplinary issue at the lower steps also contained references to the manner in which floating assignments were made. The Union thus asserts that the request for arbitration states on its face that the contract provisions claimed to have been violated are the collective bargaining agreement's provision relating to wrongful discipline, the floating assignment agreement of December 7, 1998, and the provision in an appendix to the stipulation of settlement concerning floating assignments in the event of staffing shortages.

According to Respondent, both at the lower steps of the grievance procedure and in the request for arbitration, the Union has stated a "colorable" nexus between the employer's discipline of the grievant and both the stipulation of settlement and the floating assignment agreement, documents which the Union claims are the source of its asserted right to grieve.[2]

Finally, the Union states that its claims were not belatedly asserted. Determinations at the lower steps recounted the Union's position about the use of agency nurses to fill vacancies and noted that the December 7, 1998, floating assignment agreement amended the parties' collective bargaining agreement by specifying that floating assignments of staff nurses be used as a "last resort."

The Union asks that Grievant be made whole, that the ten-day suspension be rescinded, that all salary and benefits be restored, that the reference to the disciplinary matter be expunged from her personnel record, and that the matter be referred to the Department of Nursing for what the Union calls "appropriate action."

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[2] *Patrolmen's Benevolent Ass'n*, Decision No. B-30-89, *Patrolmen's Benevolent Ass'n*, Decision No. B-15-98, and *Committee of Interns and Residents*, Decision No. B-55-91.

DISCUSSION

Where, as here, the parties do not dispute that they have agreed to arbitrate their controversies, the question before the Board on a petition challenging arbitrability is whether the particular controversy at issue is within the scope of the parties' agreement to arbitrate. *District Council 37, L. 375*, Decision No. B-12-93, *aff'd sub nom. N.Y.C. Dep't of Sanitation & City v. Malcolm D. MacDonald*, Index No. 402944/93 (Sup. Ct. N.Y. Co. 1993).[3]

In the instant request for arbitration, the Union describes claimed violations of the parties' (i) collective bargaining agreement, (ii) the floating assignment agreement, and (iii) an appendix to the stipulation settling BCB-1139-89. However, the Corporation contends that at no time before the request for arbitration was filed had the Union cited the floating assignment agreement and stipulation as having been violated; therefore, only the claim relating to the wrongful discipline definition of a grievance was timely asserted at the lower steps of the grievance procedure. We will first consider this timeliness issue.

Our review of the record at the lower steps of the grievance procedure reveals that the matter before us arose in response to disciplinary action initiated by the Corporation. In that regard, the Union sought review of the employer's action through the procedures provided by the parties' collective bargaining agreement. At the lower steps of the grievance procedure, the Union raised the floating assignment policy as a defense to the disciplinary action and as a justification for Grievant's actions but not as an independent violation for which the Union sought review. Because the grievance was filed and pursued as a means of defending against the

[3]*See also City Employees' Union, L. 237, Int'l Brotherhood of Teamsters*, Decision No. B-31-99 at 7.

disciplinary charges brought by the Corporation and seeking review of the employer's disciplinary action, we find that the basis for arbitration is limited to the allegation of wrongful discipline, in violation of Article VI, § 1D of the agreement. The Union's arguments with regard to the floating assignment agreement and stipulation relate to alleged justification for Grievant's actions which the Union may seek to raise in defense or mitigation of the wrongful discipline charge. The Corporation does not dispute the arbitrability of the wrongful discipline claim, and that claim will proceed to arbitration.

We have consistently denied arbitration of claims raised for the first time in a request for arbitration because permitting arbitration of such claims would frustrate the purpose of a multi-level grievance procedure, which is to encourage discussion of the dispute at each step of the procedure. *New York State Nurses Ass'n*, Decision No. B-2-97 at 10. Here, the Union did not specifically grieve independent violations of the floating assignment agreement or the stipulation settling the earlier improper practice petition until the request for arbitration was filed. At that point, such claims were raised too late in the grievance process to be considered as independent grounds for arbitration. For these reasons, we do not reach the Union's "nexus" arguments.

Accordingly, we grant the Corporation's petition challenging arbitrability with respect to claimed violations of the December 7, 1998, floating assignment agreement and stipulation of settlement in the improper practice petition docketed as BCB-1139-89 with the understanding that the Union may raise the floating assignment agreement and stipulation as a defense to Grievant's discipline or in mitigation thereof.

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

ORDERED, that the instant request for arbitration be, and the same hereby is, denied, except as to the claimed violation of Article VI, § 1D of the collective bargaining agreement.

Dated: November 19, 2001
New York, New York

MARLENE A. GOLD
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

BRUCE H. SIMON
MEMBER

CHARLES G. MOERDLER
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MEMBER