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,

-and-

Decision No. B-42-2001
Docket No. BCB-2202-01
(A-8637-01)

NEW YORK STATE NURSES ASSOCIATION,

Respondent.

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DECISION AND ORDER

The New York City Health and Hospitals Corporation ("HHC" or "Petitioner") filed a petition on March 23, 2001, challenging the arbitrability of a grievance filed by the New York State Nurses Association ("Union" or "NYSNA") on behalf of Head Nurse Christopher Olosunde. The grievance asserts that Bellevue Hospital Center violated the Collective Bargaining Agreement ("CBA"), by failing to follow a past practice when it reassigned Olosunde without taking account of his seniority. HHC argues that no nexus exists between the subject of the grievance and the CBA. For the reasons stated below, we grant HHC's petition.

BACKGROUND

Christopher Olosunde, a Head Nurse at Bellevue, was reassigned from Tour III to Tour II. The Union filed a Step I grievance on his behalf on March 12, 2000, alleging that Bellevue violated its past practice of using seniority to reassign a Head Nurse. The Union's grievance did not allege a violation of any specific provision of the CBA. On March 21, 2000, HHC denied the

grievance stating that past practice was not a basis for a grievance issue and that there were no provisions in the CBA that applied to that particular issue. On April 17, 2000, the Union filed a Step II grievance that was denied on May 9, 2000. A Step III grievance was denied on November 13, 2000. On January 16, 2001, the Union filed a request for arbitration. As the contract provision, rule or regulation it claims was violated, the Union lists Article VI, § 1.[1] The request for arbitration states the grievance to be arbitrated as follows:

> Violation of Article VI – Grievance Procedure, Section I A, B, C, and D. Management failed to follow a past practice of using seniority to reassign Head Nurse from Tour III to Tour II.

For the first time in its answer, the Union cites to Article VIII of the CBA which requires that an employee receive two weeks advance notice of a reassignment.[2] Pursuant to Article VI,

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[1] Article VI, § 1 of the CBA states the following:
The term "Grievance" shall mean:
(A) A dispute concerning the application or interpretation of the terms of this collective bargaining agreement;
(B) 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; provided disputes involving the Rules and Regulations of the New York City Civil Service Commission or the Rules and Regulations of the Health and Hospitals Corporation . . . shall not be subject to the grievance procedure or arbitration;
(C) A claimed assignment of employees to duties substantially different from those stated in their job specifications;
(D) A claimed wrongful disciplinary action taken against an employee.

[2] Article VIII of the CBA states the following:
All routine, non-emergency changes of assignments of an involuntary nature will be given to the employee in writing two weeks in advance and shall state the duration of the assignments, if known.

§ 2, Step IV of the CBA, the Union demanded arbitration.[3] The Union seeks to have Olosunde returned to his original work tour (Tour III).

POSITIONS OF THE PARTIES

HHC's Position

HHC argues that the Union's Request for Arbitration must be dismissed because: (1) the parties have not agreed to arbitrate alleged violations of past practice; (2) Article VI, § 1 of the CBA cited in the arbitration request defines the grievance procedure and fails to state an arbitrable claim; (3) the Union fails to allege any nexus between Olosunde's reassignment and Article VI, § 1, of the CBA; and (4) the Union's claim that HHC allegedly violated Article VIII of the CBA was improperly raised for the first time in the Union's answer.

NYSNA's Position

Throughout the lower stages of the grievance process, the Union alleged a failure to follow past practice with respect to the use of seniority in determining reassignments. The Union consistently cited Article VI, § 1, of the CBA, the definitional section of the grievance procedure, as the provision which authorized this grievance. For the first time in its answer, the Union alleges a violation of Article VIII which requires that an employee receive two weeks advance notice of a reassignment and be informed of the duration of the new assignment. The Union argues that: (1) past practice has demonstrated that Article VIII has been interpreted to require

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[3] Article VI, § 2, Step IV provides in relevant part:
An appeal from an unsatisfactory determination at Step III may be brought solely by the Union to the Office of Collective Bargaining for impartial arbitration within fifteen (15) working days of receipt of the Step III determination . . . .

that reassignments be made with regard to seniority; and (2) HHC violated Article VIII when it reassigned Olosunde without regard to seniority.

DISCUSSION

At issue is the arbitrability of the Union's claim that HHC violated Article VI, § 1, of the CBA when it reassigned Head Nurse Olosunde without regard to seniority. The 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 Union's grievance is not arbitrable.

When a union's request for arbitration is challenged, we must determine whether the parties are obligated to arbitrate their controversies and, if so, whether an arguable nexus exists between the grievance and the contract provision alleged to have been violated.[4] The burden is on the union to establish such a nexus.[5] Failure to demonstrate the required nexus prevents this Board from submitting a grievance to arbitration. The parties in this case agree that they are obligated to arbitrate unresolved grievances pursuant to their collective bargaining agreement.

We find that there is no arguable nexus between the grievance and Article VI, § 1, of the CBA, which merely defines the term "grievance." We have consistently held that an alleged violation, misinterpretation or misapplication of the definitional provision of a contract does not, by itself, furnish the basis of a grievance.[6] Article VI, § 1 does not include an alleged violation of

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[4] *See District Council 37, Local 1549,* Decision No. B-18-99 at 7; *Social Serv. Employees Union, Local 371,* Decision No. B-7-98 at 5; *District Council 37, Local 1795,* Decision No. B-19-89 at 5.

[5] *See Communications Workers of Am*., Decision No. B-1-2001 at 8; *District Council 37, Local 1549*, Decision No. B-50-98 at 7.

[6] *See New York State Nurses Ass'n,* Decision No. B-30-2001 at 11; *New York State Nurses Ass'n,* Decision No. B-2- 97 at 9; *see, e.g*., *Correction Officer's Benevolent Ass'n,* Decision No.

a past practice within the definition of a grievance. Since the Union failed to claim a violation of a specific rule, regulation, written policy or order, this Board finds that no arbitrable grievance has been stated. Therefore, there can be no nexus between Olosunde's reassignment and the cited section of the CBA.

The Union's claim throughout has been a failure to follow a past practice regarding consideration of seniority. Article VIII, on its face, concerns advance notice of reassignments and says nothing about either selection for reassignment or the use of seniority. Moreover, this Board has long held that an alleged violation of a past practice may not serve as an independent basis for arbitration unless such violations fall within the contractual definition of a grievance.[7] Here, the definitional section does not include claimed violations of past practice.

Accordingly, the Union's request for arbitration must be dismissed in its entirety.

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 petition challenging arbitrability filed by the New York City Health and Hospitals Corporation, be and the same hereby is, granted; and it is further

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B-41-82 at 6; *Patrolmen's Belevolent Ass'n,* Decision No. B-21-80 at 6-7; *Patrolmen's Benevolent Ass'n,* Decision No. B-15-79 at 14-15.

[7] *District 1, MEBA*, Decision No. B-14-99; *District Council 37*, Decision No. B-1-99; *Local 333, United Marine Div.*, Decision No. B-35-89; *Local 237, IBT*, Decision No. B-20-72.

ORDERED, that the request for arbitration filed by the New York State Nurses Association, be and the same hereby is, denied.

Dated: November 19, 2001
New York, New York

MARLENE A. GOLD
CHAIR

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

BRUCE H. SIMON
MEMBER

CHARLES G. MOERDLER
MEMBER

RICHARD A. WILSKER
MEMBER