NYSNA v. HHC & Bellevue, 69 OCB 2 (BCB 2002) [Decision No. B-2-2002 (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-2-2002
Docket No. BCB-2174-00

-and-

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION AND BELLEVUE HOSPITAL CENTER,

Respondents.

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DECISION AND ORDER

The New York State Nurses Association ("NYSNA") filed a verified improper practice petition on December 22, 2000, and an amended improper practice petition on March 29, 2001, against New York City Health and Hospitals Corporation ("HHC") and Bellevue Hospital Center. NYSNA alleges that in violation of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"), HHC filled three nursing positions in the Department of Psychiatry with Assistant Directors of Nursing instead of Head Nurses and that HHC did not bargain over the unilateral change. NYSNA asserts that HHC's actions have resulted in a practical impact because they have deprived NYSNA's members of promotional opportunities. Respondents argue that they had no obligation to bargain over the filling of positions because such action involves the exercise of a managerial right. For the reasons set forth below, NYSNA's petition is dismissed.

BACKGROUND

From August 30, 2000, through September 8, 2000, Bellevue Hospital Center posted three Head Nurse positions and one Staff Nurse position in its Department of Psychiatry. The Head Nurse positions were for three different units on Tour 2. The posting stated that the vacant positions constituted transfer/promotion opportunities. When the posting period had ended, the hospital realized that the posting had mistakenly indicated that transfer/promotion opportunities were available. The hospital rescinded the posting and re-posted from September 22 through September 29, 2000, for three Head Nurse positions indicating that the positions were only available for *individuals already in the Head Nurse title*. No applicants responded to the second posting.

Having failed to fill the three Head Nurse positions through lateral transfers, Bellevue restructured the positions and posted for a third time. From October 11 through October 18, the hospital posted for three Assistant Directors of Nursing[1] in the Department of Psychiatry. The posting indicated that the three Assistant Director of Nursing positions were for rotating tours. The hospital received three responses: two from Head Nurses within Bellevue, and one from a non-HHC employee. The two Head Nurses were transferred effective December 18, 2000, and the non-HHC employee was hired effective January 7, 2001. These three individuals filled the Assistant Director of Nursing positions.

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[1] Assistant Director of Nursing is not in any existing bargaining unit. It is not listed in the promotional line for titles in NYSNA's unit.

POSITIONS OF THE PARTIES

Petitioner's Position

NYSNA argues that three newly-hired Assistant Directors of Nursing perform the same duties as Head Nurses and supervise only one nursing unit. NYSNA contends that it requested bargaining over the facility's decision to fill the nursing positions with Assistant Directors of Nursing, and Respondents' failure to bargain in good faith was a violation of NYCCBL §12-306a(4). By violating NYCCBL §12-306a(4), HHC derivatively violated §12-306a(1)[2], because failure to bargain with the collective bargaining representative interferes with employees rights under 12-305 to bargain collectively through certified employee organizations of their own choosing.

HHC's act of hiring Assistant Directors of Nursing instead of Head Nurses to fill nursing positions has resulted in a practical impact because it has deprived NYSNA's members of promotional opportunities. Furthermore, Respondents violated Operating Procedure 20-16 when it failed to forward copies of the postings to the local NYSNA representative on the first day of the posting.

Respondent's Position

Respondents argue that the petition should be dismissed because: (1) NYSNA has failed

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[2] NYCCBL §12-306a provides, in relevant part, that it shall be an improper practice for a public employer to:

> (1) interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;
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> * * *
>
> (4) 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.

to demonstrate a violation of NYCCBL § 12-306a(1), that Respondents' actions were undertaken for the purpose of interfering with, restraining or coercing a public employee in the exercise of his/her rights; (2) NYSNA's allegations are insufficient to prove a violation of NYCCBL §12-306a(4) because Respondent was not obligated to bargain over the non-mandatory subject of utilizing Assistant Directors of Nursing instead of Head Nurses to fill nursing positions; (3) HHC's determination that it would be more efficient to hire Assistant Directors of Nursing because they can supervise more than one nursing unit and work rotating tours is within its management right to assign employees and determine which personnel should perform a specific job function; (4) there has been no showing that hiring Assistant Directors of Nursing has resulted in a practical impact on a term or condition of employment; (5) the Board lacks jurisdiction over the alleged contract violation (Operating Procedure No. 20-16).

DISCUSSION

It is an improper practice under NYCCBL § 12-306a 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." Mandatory subjects of bargaining generally include wages, hours, and working conditions and any subject with a significant or material relationship to a condition of employment. *See District Council 37*, Decision No. B-35-99 at 12. The petitioner must show that the matter to be negotiated is a mandatory subject of bargaining. *See Doctors Council*, Decision No. B-21-2001 at 7*; DeMilia*, Decision No. B-14-80 at 5. Not every decision of a public employer that may affect a term and condition of employment automatically becomes a mandatory subject of negotiation. *See Lieutenants Benevolent Ass'n*, Decision No. B-14-92 at 7. Although the parties remain free to

bargain over non-mandatory subjects, generally there is no requirement that they do so. *Id*.

According to NYCCBL § 12-307b, the employer is afforded the right:

> to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees. . . ; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted . . . ; and exercise complete control and discretion over its organization and the technology of performing its work. . . .

In *District Council 37*, Decision No. B-3-69 at 6, the Board found that the subject of promotional opportunities is not a mandatory subject of bargaining and held that "the creation of new titles comes under the right of the City to determine the methods, means and personnel by which governmental operations are to be conducted." In *New York State Nurses Ass'n*, Decision No. B-2-81 at 7, HHC reorganized two units of Bronx Municipal Hospital, created two new titles to work in the new units, reassigned registered nurses who did not want to work in the new positions to other parts of the hospital, and filled vacancies created by the promotion of registered nurses to the new positions. The Board held that direction of employees and assignment of personnel, including assignment to a higher title, is a management right and that there was no mandatory duty that HHC bargain over those subjects. Similarly, we found in *New York State Nurses Ass'n*, Decision No. B-46-92 at 6, that HHC had the right to unilaterally implement adjusted work assignments or schedules as it deemed necessary because the City had a broad managerial authority to direct its employees. In the present case, HHC's act of filling three nursing positions in the Department of Psychiatry with Assistant Directors of Nursing instead of Head Nurses is within management's right and is not a mandatory subject of

bargaining.[3]

NYSNA also alleges that HHC's actions resulted in a practical impact because it has deprived NYSNA's members of promotional opportunities. We addressed the matter of a claimed practical impact on promotional opportunities in *Patrolmen's Benevolent Ass'n,* Decision No. B-39-93, in which the Department issued Bulletin No. 28, which announced vacancies in the newly-created civilian title of Investigator Trainee in the Applicant Processing Division. By using civilian personnel, uniformed officers currently assigned the duties of Investigator Trainee in the Division would be reassigned to more traditional law enforcement duties. The Union alleged that Bulletin No. 28 had a "definite and negative substantial career impact" on its members in that the Department's plan to hire civilians could limit the chances of some Union members for appointment to detective duties. This Board found that since Bulletin No. 28 did not create any additional eligibility requirements and because it did not disqualify public employees from becoming eligible for consideration for appointment to detective detail, the Union failed to state a claim for practical impact on the promotional opportunities of its members.

We find the instant case to be similar to *Patrolmen's Benevolent Ass'n,* Decision No. B-39-93, in that by hiring Assistant Directors of Nursing rather than Head Nurses to fill nursing positions, HHC was merely exercising its management right to assign employees and determine which personnel should perform a specific job. As in the PBA case, the employer did not create a new eligibility requirement for existing employees. This situation may be contrasted with that

[3] Since we do not find HHC to have violated NYCCBL § 12-306a(4), NYSNA's allegation that HHC derivatively violated § 12-306a(1) is dismissed.

which existed in *Comm. of Interns and Residents*, Decision No. B-38-86 at 24-25, where we found managerial prerogative to have had an impact on promotional opportunities. In that case, HHC required residents who were seeking appointment as the third-year Chief Resident to obtain a New York State medical license as a condition of appointment to the position. The Board held that "if the licensing requirement, in effect, removes from any resident professional opportunities for which they were eligible to compete when they entered the residency program," a practical impact would be found to exist. No such licensing or eligibility requirement has been imposed in the present case. Therefore, we find no merit to NYSNA's allegation that hiring Assistant Directors of Nursing instead of Head Nurses has resulted in a practical impact on promotional opportunities for its members.

Lastly, this Board has no jurisdiction over Petitioner's claim that Respondent violated Operating Procedure 20-16. Petitioner's only recourse for an alleged contract violation lies in the parties' grievance and arbitration procedure. *See Local 1182, Communications Workers of Am.*, Decision No. B-14-95 at 10; *LaRiviere*, Decision No. B-36-87 at 9.

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 docketed as BCB-2174-00 be, and the same hereby is, dismissed in its entirety.

Dated: January 30, 2002
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

RICHARD A. WILSKER
MEMBER

EUGENE MITTELMAN
MEMBER

I dissent. GABRIELLE SEMEL
MEMBER

I dissent. VINCENT BOLLON
MEMBER