HHC v. NYSNA, 69 OCB 21 (BCB 2002) [Decision No. B-21-2002 (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-21-2002
Docket No. BCB-2235-01
(A-8977-01)

Petitioner,

-and-

NEW YORK STATE NURSES ASSOCIATION,

Respondent.

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DECISION AND ORDER

New York City Health and Hospitals Corporation ("HHC") filed a petition on August 27, 2001, challenging the arbitrability of a grievance brought by the New York State Nurses Association ("Association") on behalf of Juliet R. Skyers ("Grievant"). The grievance asserts that HHC wrongfully disciplined Skyers when it denied sick leave and, instead, deducted pay in violation of the parties' collective bargaining agreement ("CBA") and the Citywide Agreement. HHC argues that it did not have notice of the wrongful disciplinary claim during the earlier steps of the grievance process because the Association had not cited to the provisions concerning discipline in the CBA until the Request for Arbitration but had claimed only a violation of sick leave policy under the Citywide Agreement. The Association contends that it orally asserted the wrongful disciplinary claim in both hearings during the grievance process and that HHC had ample opportunity to resolve the dispute. This Board finds that issues as to whether claims were

properly raised during the grievance process should be submitted to an arbitrator; therefore, we send this case to arbitration.

BACKGROUND

For the summer of 2000, Skyers, a Head Nurse at Gouverneur Diagnostic and Treatment Center ("Hospital"), sought three weeks of vacation: May 30 to June 7, 2000, July 31 to August 4 and August 7 to August 11, 2000. When the Hospital informed her that she could take only two weeks during the summer, she chose July 31 to August 11. On June 5, 6, and 7, 2000, Skyers called in sick. Upon her return to work, she submitted a physician's note and completed the appropriate form for sick leave. The Hospital denied the request for sick leave and instead deducted three days' pay.

On June 20, 2000, the Association filed a Step I(A) grievance for the Hospital's failure "to grant sick leave in accordance with Personnel Rules and Regulations and contractual agreement." According to an affidavit submitted by Eunice Baskett, Nursing Representative of the Association, a hearing was held on October 17, 2000, before Howard Kritz, Director of Labor Relations for HHC's South Manhattan Network. Baskett asserts that the core of the dispute concerned the Hospital's allegation that Skyers took sick leave from June 5 to June 7, 2000, under false pretenses. At the hearing, Baskett argued on behalf of Skyers that the denial of sick leave, despite Skyers's compliance with relevant policies, was an act of discipline and that the loss of pay was punitive.

Kritz's November 24, 2000, decision, which does not mention the hearing, stated that the

grievance alleges that Skyers was "improperly denied use of sick leave for an unscheduled absence . . . ," a violation of Article V, § 5, of the Citywide Agreement. Under this section, Kritz wrote, approval for sick leave is discretionary with the agency, and the employee must provide proof of disability satisfactory to the agency. Kritz agreed with the Hospital that the documentation was not satisfactory. Since the sick leave occurred during a week in which the Hospital had denied the requested annual leave, Kritz said, the Director of the Nursing Department rightfully exercised discretion in denying use of sick leave; therefore, HHC did not violate Article V, § 5, of the Citywide Agreement. In her affidavit, Baskett asserts that Kritz's decision to frame the grievance narrowly and exclusively to Article V, § 5, disregarded the Association's distinct argument that the loss of pay constituted discipline as well as a breach of the sick leave provisions of the Citywide Agreement.

The Association's December 7, 2000, letter appealing to Step II simply enclosed the grievance and Kritz's response. Again, Baskett states in her affidavit that at the Step II conference on March 1, 2001, she argued that the denial of sick leave violated the provisions of the Citywide and was an act of discipline. On March 21, 2001, HHC's Review Officer, Alma Robinson wrote, without explanation, that "there has been no violation of Article V, Section 5." Baskett states in her affidavit that Robinson's characterization of the grievance was narrow and ignored the Association's argument.

On March 23, 2001, the Association appealed to Step III "in accordance with our contractual agreement" and attached the grievance and two decisions. Without a hearing, Caryn Stein, Review Officer for the City of New York Office of Labor Relations, found on June 27,

2001, that the previous decisions correctly addressed the complaint concerning denial of sick leave and that HHC properly exercised its discretion in denying leave pursuant to Article V, § 5(a)(i), of the Citywide Agreement.

On July 19, 2001, the Association filed a Request for Arbitration, in which it grieves: "A claimed wrongful disciplinary action taken against an employee. Denial of sick leave," in violation of Article VI, § 1(D), of the CBA and Article V, § 5, of the Citywide. As a remedy, the Association seeks to have HHC make Grievant whole by restoring three days' pay and, instead, deducting those days from her sick leave bank.

POSITIONS OF THE PARTIES

HHC's Position

HHC challenges the arbitrability only of that portion of the Request for Arbitration that alleges a "claimed wrongful disciplinary action taken against an employee." HHC argues that since the Association did not specifically plead wrongful discipline in the earlier written grievance filings and did not cite to Article VI, § I(D), of the CBA, the Board should dismiss that allegation as a new claim.[1] The Association was required to put the disciplinary claim in writing. Furthermore, the Step IA and Step II decisions refer only to Article V, § 5, of the Citywide Agreement.[2] Thus, Petitioner contends, the Association was obligated to inform HHC that the

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[1] Article VI states, in relevant part, that the term "Grievance" shall mean:
§ 1(D) A claimed wrongful disciplinary action taken against an employee.

[2] Article V, § 5, reads, in relevant part:
a. i. Except as provided in Section 5(a)(ii), sick leave shall be used only for personal illness of the employee. Approval of sick leave in accordance with

claim was broader than what the Review Officers indicated the scope of the grievance to be. According to HHC, the Board's cases show that an employer will be deemed to have suffered prejudice if a union fails specifically to plead all of its claims at the early steps of the grievance process.

The Association's Position

The Association argues that HHC was aware of the nature of the grievance – the loss of pay in lieu of sick leave – from the outset of the proceedings. According to the Association, Baskett's affidavit establishes that at both hearings, the Association made clear its position that the Hospital's docking three days' pay, allegedly for taking sick leave under false pretenses, constituted discipline. Since Skyers had submitted the appropriate forms, the hearings focused on the Hospital's punitive action, and Respondent's failure to cite to the CBA's wrongful discipline provision in writing did not affect the Step decisions. Having received adequate notice and having suffered no harm, HHC, the Association contends, should not avoid arbitration of the disputed provision.

DISCUSSION

The question in this case is whether HHC had notice during the step process of a claim of wrongful disciplinary action against Grievant, and, if not, whether that claim must be precluded from arbitration. We now hold that this Board will no longer determine whether a respondent

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> the Leave Regulations is discretionary with the agency and proof of disability must be provided by the employee, satisfactory to the agency within five (5) working days of the employee's return to work. . . .

raised a belated claim and that the parties here should proceed to arbitration, at which point Petitioner may raise the issue of notice before an arbitrator.

We begin this analysis with the background of this Board's determinations concerning questions of arbitrability. Section 12-309(a)(3) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") provides that the Board shall have the power "to make a final determination as to whether a dispute is a proper subject for grievance and arbitration procedure established pursuant to section 12-312 of this chapter."[3] This section gives the Board unique power as an administrative body. Neither the National Labor Relations Board nor the Public Employment Relations Board decides cases challenging arbitrability; such cases are within the exclusive jurisdiction of the courts. With the enactment of the NYCCBL in 1967, the City of New York ("City") and the municipal labor unions vested this Board with the power to make decisions as to what is a proper subject for arbitration, rather than go to the courts for these rulings.

In keeping with the parties' goals, this Board has enunciated a policy to promote arbitration as the selected means for resolution of disputes. NYCCBL § 12-302 states explicitly: "It is hereby declared to be the policy of the city to favor and encourage . . . final, impartial arbitration of grievances between municipal agencies and certified employee organizations." *See New York City Dep't of Sanitation v. MacDonald*, 87 N.Y.2d 650, 642 N.Y.S.2d 156 (1996); *Local 924, District Council 37*, Decision No. B-24-91; *District Council 37, AFSCME*, Decision No. B-14-74.

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[3] NYCCBL § 12-312 promulgates the parties' rights and responsibilities in arbitrations and the agency's role in administering an arbitration panel.

To determine arbitrability, this Board uses a two prong test: (1) whether the parties are in any way obligated to arbitrate a controversy, absent court-enunciated public policy, statutory, or constitutional restrictions, and, if so (2) whether "the obligation is broad enough in its scope to include the particular controversy presented." *Social Service Employment Union*, Decision No. B-2-69; *see also District Council 37, AFSCME*, Decision No. B-47-99; *Uniformed Fire Officers Ass'n*, Decision No. B-46-97, *annulled sub nom. City of New York v. DeCosta*, 176 Misc. 2d 936, 675 N.Y.S.2d 517 (S.Ct. N.Y. Co. 1998), *aff'd*, 263 A.D.2d 3, 699 N.Y.S.2d 355 (1st Dep't 1999); *aff'd*, 95 N.Y.2d 273, 716 N.Y.S.2d 353 (2000) (arbitration stayed on public policy grounds).

This test is consistent with the two-step inquiry enunciated by the Court of Appeals for state court arbitrability determinations: (1) whether arbitration claims regarding a particular subject matter fall within the "lawfully permissible scope" of arbitrability, including whether the subject matter is authorized by the terms of the N.Y. Civil Service Law (Taylor Law), Article 14, §§ 201-214, and, if so (2) whether there is a reasonable relationship between the subject matter of the dispute and the general subject matter of the CBA. *Matter of Acting Superintendent of Schools of Liverpool Central School District [United Liverpool Faculty Ass'n]*, 42 N.Y.2d 509, 513, 399 N.Y.S.2d 189, 192 (1977), and reiterated in *Matter of Board of Education [Watertown Education Ass'n]*, 93 N.Y.2d 132, 137-138, 143, 688 N.Y.S.2d 463, 467, 471 (1999).

In its 1977 *Liverpool* decision, the Court expressed skepticism concerning public sector arbitration. 42 N.Y.2d at 512, 399 N.Y.S.2d at 191. Twenty-two years later, the Court in *Watertown* eliminated any "anti-arbitrational presumption" in the public sector labor

environment because experience proved that the grievance procedure in the public sector thrived. *Watertown,* 93 N.Y.2d at 139, 142, 688 N.Y.S.2d at 468, 470. The Court wrote:

> Arbitration in the public arena is no longer unfamiliar or unaccepted. It is a reality, and it is widespread.
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> The enormous growth in the use of collective bargaining agreements has generated vast experience in drafting arbitration clauses. Public sector parties may now use phrases that have been litigated into familiarity. They are free to negotiate language that will define disputes in areas of the broadest permissible scope. Parties are likewise free to negotiate exclusions, and to word arbitration clauses with sufficient clarity for a court to be able to tell, on a threshold determination, whether they intended a permissible subject or type of dispute to be arbitrable or not.

93 N.Y.2d at 141-142, 688 N.Y.S.2d at 470.

Watertown rejects the notion that the reviewer whose function it is to determine arbitrability ought to conduct a particularized analysis into the relationship between the specific CBA provision cited and the express wording of the arbitration demand. New York State courts have embraced *Watertown's* less-stringent examination of the relationship between the contract and the specific grievance. *See, e.g.*, *Matter of City of Schenectady [Police Benevolent Ass'n]*, 285 A.D.2d 725, 727 N.Y.S.2d 748 (3d Dep't 2001); *New York City Transit Authority v. Amalgamated Transit Union of America, AFL-CIO, Local 1056*, 284 A.D.2d 466, 726 N.Y.S.2d 694 (2d Dep't 2001), *appeal denied*, 97 N.Y.2d 610 (2002); *Matter of Van Scoy and Holder [Batavia Teachers' Ass'n]*, 265 A.D.2d 806, 695 N.Y.S.2d 834 (4th Dep't 1999).

This Board will continue to discharge its statutory obligations to determine whether there is a nexus, that is, a reasonable relationship, between the subject matter of the dispute and the

general subject matter of the CBA, and we will do that in light of *Watertown*. In the instant case, we need not address issues concerning nexus since HHC has raised none. Rather, we focus our attention on HHC's assertion that it was surprised by a novel claim in the Association's request for arbitration.

This Board is a unique administrative tripartite body created and appointed by the City and municipal labor unions. The parties, through the NYCCBL, formalized the collective bargaining process and provided a structure for the bargaining relationship between the municipal labor unions and the City. Thus, the Board's rulings on allegedly belated claims reflect a strong desire to protect the parties' multi-step grievance process and ensure its proper use. As a result, the Board has sustained challenges to arbitrability when the union could not demonstrate that the City had notice of the claim sufficient to allow an early opportunity for meaningful dispute resolution prior to the arbitration demand. In *District Council 37, AFSCME*, Decision No. B-20-74 at 14, the union sought to amend its request for arbitration to remove the two sole grievants, who were not unit members, and transform the arbitration into a group grievance. This Board explained:

> The primary function of arbitration as the terminal point of a grievance machinery is to provide: (1) a process for the orderly disposition of disputes, and, (2) a foundation for stable labor-management relations. The entire grievance procedure is a medium for the orderly and prompt elimination of sources of friction which unavoidably arise in the work situation. It encourages a more careful consideration of disputes at each step and their voluntary adjustment at various levels of authority.
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> Under the grievance process, the parties are required to follow certain definite steps which offer the possibility of self-adjustment by the parties, before any matter can be submitted to final and

> binding arbitration by an outside neutral. Ideally, sound, effective, and speedy grievance procedure entails the clear formulation of the issues at the earliest possible moment, adequate opportunity for both parties to investigate and argue the grievance under discussion, and encouragement by the parties or their representatives to explore and conclude settlements at the lower steps of grievances which do not involve broad questions of policy or of contract interpretation. Obviously, none of these elements is achievable if easy amendment of the grievance at the penultimate moment, i.e., at the arbitration step, were to be permitted.

In order to protect the integrity of the step grievance process, the Board prohibited parties from interposing at the arbitration stage a claim that was not previously part of the grievance process. *See District 37, Local 1549*, Decision No. B-40-86 at 15 (adding out-of-title claim in request for arbitration to the prior discipline claim would "frustrate the purposes of a multi-step grievance procedure"); *Uniformed Fire Officers Ass'n, Local 854*, Decision No. B-6-80 at 9-10 (in dispute concerning training programs, belatedly appending a different program to the request for arbitration was beyond the scope of the initial grievance); *District Council 37, AFSCME*, Decision No. B-22-74 at 4 (permitting amendment to interpose a novel claim would not effectuate policies of grievance procedure).

At the same time, this Board has not dismissed requests for arbitration because of technical omissions when a petitioner's ability to respond to the request or prepare for arbitration was not impaired. *See Local 420, District Council 37*, Decision No. B-9-2002. In *Communications Workers of America*, Decision No. B-29-89, in which HHC denied the grievant's request for sick leave and, instead, withheld two days' pay, the union cited to a provision in the CBA during the step process and then, for the first time in its request for arbitration, claimed a violation of the Citywide Agreement, Article V, § 5, the sick leave

provision. We found that despite the union's failure to refer specifically to the Citywide Agreement earlier in the grievance process, HHC had notice of the facts underlying the claim and was not prejudiced in proceeding to arbitration. *Id*. at 12, 13.

In *City of New York v. MacDonald*, 223 A.D.2d 485, 636 N.Y.S.2d 793 (1st Dep't 1996), the Appellate Division affirmed a Board decision, *Communications Workers of America*, Decision No. B-27-93 at 14, finding that the City had constructive notice of the union's claim and the parties should proceed to arbitration even though the union had failed to cite a specific contract provision prior to the submission of its answer to the arbitrability challenge. *See also District Council 37, Local 1549*, Decision No. B-3-2002 at 6-7 (though union belatedly identified controlling agency guide provision, parties should proceed to arbitration); *Communications Workers of America, Local 1180*, Decision No. B-35-87 at 8-9 (City had knowledge of claim despite union's failure to cite particular provision at the lower steps); *Doctors Council*, Decision No. B-21-84 at 9-10 (while union belatedly cited contractual provision in the request for arbitration, grievance was arbitrable because parties had ample opportunity to settle dispute before arbitration).

Following the holding and spirit of the Court of Appeals decision in *Watertown*, we recognize that 35 years after our law was written, arbitration between the parties over whom we have jurisdiction is an everyday occurrence. While we continue to support the integrity of the step process, our historic concerns over nurturing the grievance process are no longer needed. The parties now have vast experience in this process and have become sophisticated in negotiating contract language which suits their mutual needs. Therefore, we leave to the parties'

discretion the drafting of specific grievance provisions with the broadest possible scope or the narrowest of exclusions. Adhering to our statute's mandate to favor and encourage arbitration, we will refer to an arbitrator any questions as to whether claims and provisions were properly raised during the step grievance process.[4] To the extent that other Board decisions differ from this finding, they are overruled.

We now direct the parties to proceed to arbitration for a determination on the merits of the claim as well as on the issue whether the Association's disciplinary claim under the CBA was belatedly asserted and, consequently, should be precluded from the arbitration of the sick leave claim previously raised under the Citywide Agreement.

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[4] Our holding is consistent with determinations by state courts, which have declined to entertain questions about arbitrability relating to the lower steps of the grievance process. *See Matter of Enlarged City School District of Troy v. Troy Teachers Ass'n*, 69 N.Y.2d 905, 907, 516 N.Y.S.2d 195, 197 (1987) (arbitrator should decide employer's argument that union failed to attempt to resolve dispute informally before submitting a written grievance, as the parties' CBA required); *Policemen's Benevolent Ass'n of the Village of Spring Valley v. Rosenthal*, 207 A.D.2d 492, 616 N.Y.S.2d 53 (2d Dep't 1994) (arbitrator should decide whether grievant waived right to submit claim of entitlement to sick leave benefits); *Board of Education of Cattaraugus Central School v. Cattaraugus Teacher's Ass'n*, 84 A.D.2d 685, 686, 447 N.Y.S.2d 51, 53 (4th Dep't 1981), *aff'd*, 55 N.Y.2d 951 449 N.Y.S.2d 193 (1982) (since no provision in the CBA addressed the amount of detail required in a demand for arbitration, employer's contention that the CBA required more detail in the demand should be left to an arbitrator as "incidental to the conduct of the arbitration proceeding").

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 HHC's petition challenging arbitrability, docketed as BCB-2235-01, be, and the same hereby is, denied; and it is further

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

Dated: July 9, 2002
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

RICHARD A. WILSKER
MEMBER

ERNEST F. HART
MEMBER

BRUCE H. SIMON
MEMBER

GABRIELLE SEMEL
MEMBER