City & HHC v. L. 237, CEU, 69 OCB 6 (BCB 2002) [Decision No. B-6-2002 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of the Arbitration

-between-

CITY OF NEW YORK and THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Petitioners,

Decision No. B-6-2002
Docket No. BCB-2226-01
(A-8888-01)

-and-

CITY EMPLOYEES UNION, LOCAL 237, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Respondent.
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DECISION AND ORDER

The City of New York ("City") and the New York City Health and Hospitals Corporation ("HHC") filed a petition challenging the arbitrability of a grievance filed by Local 237, City Employees Union ("Union"). The Union alleges that although the parties' collective bargaining agreement ("agreement") specifies a range of salaries for employees in the title Associate Ultrasound Technologist ("AUT"), HHC maintains a policy of paying the minimum salary for all AUT's. HHC primarily alleges that the Union has failed to show a nexus between the act complained of and the provisions of the agreement. Since we find that the Union has demonstrated the required nexus, we deny HHC's petition.

BACKGROUND

Niranjani Reddy is employed by HHC as an AUT. On May 26, 2000, the Union filed a

Step I grievance on Reddy's behalf, alleging that Reddy was performing out-of-title work in violation of Article VII, § 1(c), of the agreement.[1] The Union requested a pay raise for the high volume of work and for work performed out-of-title. HHC did not respond to the Step I grievance, so the Union, on November 3, 2000, filed the same grievance at Step II. On January 30, 2001, HHC denied the Step II grievance, stating that there was no violation of Article VII, § 1(c), of the agreement.

On February 5, 2001, the Union appealed the Step II determination, claiming that HHC failed to give the grievant a raise because of a policy that does not permit individuals from earning more than the incumbent rate. The Union claimed HHC violated Article III of the agreement, which sets forth the minimum and maximum salaries for Hospital Technicians. Article III, § 2(h), of the agreement specifies the minimum Hiring Rate for AUT's as $44,725, the minimum Incumbent Rate as $47,928, and the Maximum Rate as $52,720. On March 26, 2001, the City denied the grievance, stating that Article III merely delineates the minimum and maximum salaries for various titles and that it does not require granting increases beyond those contractually specified at certain dates during the term of the contract.

On June 8, 2001, the Union filed a Request for Arbitration, reiterating the substance of the grievance, and claiming violations of Article III and Article VII, § 1(a), (b), and (c), of the agreement.[2] The Union asks that HHC be ordered to cease and desist the policy of paying

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[1] Article VII, § 1(c), of the agreement states that the term grievance shall mean, "[a] claimed assignment of employees to duties substantially different from those stated in their job specifications."

[2] Article VII, § 1(a), defines the term "grievance" as "A dispute concerning the application or interpretation of the terms of this Agreement."

(continued...)

Ultrasound Technologists only the minimum/incumbent salary for their title. The Union also asks for an increase in grievant's salary commensurate with her experience and/or an order that HHC reconsider grievant's salary. Along with the Request for Arbitration, the Union filed a waiver, which states the grievance to be arbitrated as "[the] failure to give the grievant a raise because of a policy which violates Article III of the contract."

POSITIONS OF THE PARTIES

City's Position

The City argues that the Union submitted an invalid waiver because the waiver, while including Article III, failed to include the additional claims alleging violations of Article VII, § 1 (a), (b), and (c). The City also argues that the Union's failure to consistently identify its claims prevented these parties from attempting to resolve their differences, contrary to the purpose of the multi-level grievance process, and the Union should not be allowed to arbitrate a claim that it first raised only at Step III of the grievance procedure.

The City contends that the proponent of arbitration must establish the existence of a nexus between the grievance in question and the source of the right being invoked. *L. 1549, District Council 37*, Decision No. B-20-90; *District Council 37*, Decision No. B-19-90. Though

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[2](...continued)
Article VII, § 1 (b) defines the term "grievance" as:

A claimed violation, misinterpretation or misapplication of the rules or 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 Personnel Rules and Regulations of the City of New York or the Rules and Regulations of the Health and Hospitals Corporation with respect to those matters set forth in the first paragraph of Section 7390.1 of the Unconsolidated Laws shall not be subject to the grievance procedure or arbitration . . .

Article III sets out the minimum and maximum salary ranges for employees within various covered titles, there are no conditions other than that the employee's salary fit within that range. The Union admits that grievant receives a salary equal to the minimum for the AUT position, and the Union failed to identify any language in Article III that requires grievant to receive more than the minimum salary. Accordingly, the Union has not demonstrated a nexus between Article III of the agreement and the grievant's desire for an increase in salary.

Similarly, the City argues that the Union has not provided a nexus between Article VII, § 1 (a), (b), or (c), and the grievance. Article VII, § 1(a) and (b) merely defines the term "grievance," and the Board of Collective Bargaining ("Board") has held that a citation to the definitional section of the grievance procedure does not define or create substantive rights and, therefore, does not furnish an independent basis for a grievance. *L. 30, Int'l Union of Operating Engineers*, Decision No. B-16-98; *United Probation Officers Ass'n*, Decision No. B-4-94. The Union has also failed to cite to a specific substantive provision of the agreement or to a rule, regulation, written policy or order of HHC. Assuming that the Union cited a rule promulgated pursuant to § 7390.1 of the Unconsolidated Laws, such claims are specifically excluded from the grievance/arbitration procedure under Article VII, § 1(b) of the agreement. The Union has also failed to demonstrate a nexus with Article VII, § 1 (c) of the agreement because the grievant did not allege that she was performing any out-of-title duties, and it appears that grievant abandoned her out-of-title grievance by failing to mention out-of-title duties after Step II, other than merely citing the section of the agreement in the Request for Arbitration.

Union's Position

In response to the City's arguments that the waiver is invalid, the Union contends that

§ 12-312 (d) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") requires that the grievant and the Union waive their rights to submit the "underlying dispute" to another tribunal.[3] The statute contains no requirement to specify each contract provision; so long as the submission of the underlying dispute to another forum is waived, the statutory requirement has been satisfied. The sections of the contract defining a grievance, which were not cited in the waiver, are only significant in that they relate to Article III, and the underlying dispute is a violation of Article III. Therefore, the waiver, indicating that the grievant and the Union waive the right to litigate a violation of Article III in another forum, is sufficient to satisfy the statutory requirement.

Although Article III was not specified by name in the Step I grievance, the requested remedy is a pay raise, and the provision in the agreement that covers salary and wage increases is Article III of the agreement. Article III was specifically mentioned at Step III, both by the grievance and the denial of the grievance, and the City cites only Board decisions that address new issues raised at the arbitration stage of the grievance process or later. The City was fully advised of the Union's grievance prior to arbitration, and has not been deprived of the opportunity to resolve this matter at a lower level.

The Union argues that the nexus between the grievance and the agreement is unmistakable. Article VII, § 1 (a), defines a grievance as a "dispute concerning the application or

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[3] Section 12-312 (d) of the NYCCBL states:

As a condition to the right of a municipal employee organization to invoke impartial arbitration under such provisions, the grievant . . . shall be required to file with the director a written waiver of the right, if any, of said grievant . . . to submit the underlying dispute to any other administrative or judicial tribunal except for the purpose of enforcing the arbitrator's award.

interpretation of the terms of [the agreement]." The grievance alleges that HHC has adopted a policy that violates a term of the agreement, Article III. Article III of the agreement sets a range of salaries for AUT's, but HHC has adopted a policy that forecloses any opportunity to earn more than the minimum salary for their title. Thus, the alleged violation – HHC's policy – is arguably related to a provision of the agreement – Article III – so the grievance is arbitrable. Also, the Union has alleged the violation of a specific contract provision, and not merely the definition of a grievance.

DISCUSSION

The first matter we will discuss is the HHC's assertion that the Union has amended the nature of its grievance. Although the Board has consistently denied arbitration of claims raised after a union has filed a request for arbitration, *see, e.g., New York State Nurses Ass'n*, Decision No. B-30-2001, here, the Union raised the Article III claim at Step III of the grievance procedure. While not explicitly raised at the earliest stages in the grievance procedure, the assertion of the Article III claim at Step III was sufficient to place the City on notice of the nature of the claim and attempt to resolve the grievance before arbitration. Additionally, we agree with the Union's arguments that the waiver is sufficient because the underlying dispute is a violation of Article III, the provision cited in the waiver.[4]

To determine arbitrability, we must first ascertain whether the parties are contractually obligated to arbitrate disputes, and, if they are, whether the acts alleged in the grievance are

[4] We note that the Article VII claims are more properly referred to in the section of the request for arbitration titled, "Section of agreement, rule or submission under which the demand for arbitration is made."

covered by that contractual obligation. *See, e.g., Detectives' Endowment Ass'n*, Decision No. B-4-96; *District Council 37, AFSCME*, Decision No. B-52-91; *District Council 37, AFSCME, Local 1795*, Decision No. B-19-89. Here, the contract provides a grievance and arbitration procedure, but the parties disagree as to whether the instant matter is arbitrable within the meaning of the contract. Where an employer challenges the arbitrability of an issue, the burden is on the Union to show an arguable relationship between the contract provisions it claims as its source of right and the City's actions. *Doctors Council*, Decision No. B-28-92; *Local 2021, District Council 37*, *AFSCME*, Decision No. B-58-90.

Article VII, § 1 (a), of the agreement defines the term grievance as "[a] dispute concerning the application or interpretation of the terms of this Agreement." The Union claims that HHC forecloses any opportunity for AUT's to earn more than the minimum salary for their title, while HHC maintains that it is within their rights to pay only the minimum salary. Those salary provisions are incorporated into Article III of the agreement. Since the alleged violation, regarding salary levels, is arguably related to a provision of the agreement, Article III, that addresses those salary levels, the Union has fulfilled its burden to establish a nexus between the act complained of and the contract, and the grievance may proceed to arbitration. An arbitrator, not the Board, must decide whether Article III has been applied or interpreted improperly.[5] Accordingly, the HHC's petition challenging arbitrability is dismissed.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York

[5] To the extent that the Union's waiver addresses only the Article III claim, we limit the arbitrator's consideration of the dispute to that claim, submitted under Article VII, § 1 (a) of the agreement.

City Collective Bargaining Law, it is hereby,

ORDERED, that the petition challenging arbitrability filed by the City and HHC be, and the same hereby is, denied as to issues arising under Article III, and granted as to the remaining claims under the collective bargaining agreement; and it is further

ORDERED, that the request for arbitration filed by the Local 237, City Employees Union, be, and the same hereby is, granted as to issues arising under Article III of the collective bargaining agreement.

Dated: March 20, 2002
New York, New York

MARLENE A. GOLD
CHAIR

DANIEL G. COLLINS
MEMBER

BRUCE H. SIMON
MEMBER

RICHARD A. WILSKER
MEMBER