HHC v. L. 420, DC 37, 69 OCB 9 (BCB 2002) [Decision No. B-9-2002 (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,

Petitioner,

-and-

LOCAL 420, DISTRICT COUNCIL 37, AFSCME,

Respondent.

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Decision No. B-9-2002
Docket No. BCB-2246-01
(A-9037-01)

DECISION AND ORDER

New York City Health and Hospitals Corporation ("HHC") filed a petition on October 29, 2001, challenging the arbitrability of a grievance brought by Local 420, District Council 37, ("Union") on behalf of Cynthia Charlton ("Grievant"). The grievance asserts that HHC wrongfully reduced Charlton's salary in violation of Article III of the Hospital Technicians Unit Agreement, the parties' collective bargaining agreement ("CBA"). HHC argues that the Union cited Article III for the first time in its Request for Arbitration, and, therefore, that HHC did not have proper notice of the claim during the earlier steps of the grievance procedure. The Union contends that HHC understood the claim and had ample opportunity to resolve the dispute. Since this Board finds that HHC did have notice of the claim, we deny the petition and instruct the parties to proceed to arbitration.

BACKGROUND

Cynthia Charlton, a Rehabilitation Technician, worked at Bellevue Hospital from 1984 to 1991, when she was laid off and put on a preferred list. Reinstated in 1992, she worked at Coler Hospital, where she was paid a salary between the minimum and maximum range for her position, as delineated in Article III of the CBA.[1] HHC continued paying her at that rate, and, with increases, her salary remained under the maximum for her range. In the fall of 1997, HHC reduced Grievant's salary to the minimum for her position. Neither party has indicated a reason for that reduction.

On October 17, 1997, the Union filed a Step IA grievance, stating that HHC's reducing Charlton's salary and failure to discuss the reduction violated Article IX, Section 8(a) and (b) of the Citywide Agreement.[2] The remedy sought is "that any deductions or demotion cease and

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[1] Article III of the CBA sets forth the minimum and maximum salaries for hospital technicians.

[2] Article IX, § 8(a), provides for amounts to be recouped when both parties agree that overpayment was erroneous. That section continues:

> In the event the employee disputes the alleged erroneous overpayment, the employee or the union, except as provided in Section 8(b), may appeal to the Office of Labor Relations ("OLR") within 20 days of a notice by the employer of its intent to recoup the overpayment and no deduction for recoupment shall be made until OLR renders a decision, which decision shall be final. Nothing contained above shall preclude the parties or affected individuals from exercising any rights they may have under law.

Article IX, § 8(b), provides:

> In the event of a dispute by an employee of the Health and Hospitals Corporation ("HHC") concerning an alleged erroneous overpayment, the employee shall send notice of the appeal to both OLR and HHC's Office of the Vice President for Human Resources within 20 days of the notice by HHC of its intent to recoup said overpayment.
> HHC will attempt within 21 days to resolve the dispute and execute a stipulation

desist and for member's pay to stay the same or to up-grade member to the appropriate level."

In a response on February 13, 1998, Howard Kritz, Director of Labor Relations at Coler Hospital, noted that "the grievance alleges that the overpayment was not discussed and agreed to by both parties. The remedy sought is grievant's pay not be reduced." Kritz stated that from June 1992 until September 1997, Charlton was paid "at a rate higher than the salary rate established by collective bargaining." Subsequently, her pay was "adjusted down to the correct rate of pay pursuant to her collective bargaining agreement." Acknowledging its own error, the Hospital was not requesting reimbursement; therefore, Kritz said, HHC did not violate Article IX, § 8(a) and (b), concerning recoupment of overpayments, and the Union had not presented a grievable issue.

The Union's December 14, 1998, request for a Step II hearing was denied on January 13, 1999, as untimely.

In a Step III Reply on March 30, 1999, Andrew R. Joppa of OLR wrote that the Union's allegations concerned the failure of the parties to discuss the cessation of an overpayment of salary and that the "remedy requested is that any deduction or demotion cease and desist and for the grievant's pay to remain the same." Joppa determined that Coler had "correctly aligned" Charlton's pay "with the rate set forth pursuant to the collective bargaining agreement," that § 8(a) and (b) of Article IX was inapplicable, and that the Step II request was untimely.

For reasons that neither party has articulated, OLR issued a second Step III decision on

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of settlement. Copies of any such stipulation of settlement shall be sent to the employee, the Union, and the OLR. If after 21 days the dispute remains unresolved or upon notification by HHC that no resolution can be reached, the OLR shall render a decision pursuant to Section 8(a).

June 15, 2001, following a conference on June 4, 2001. Review Officer Caryn S. Stein wrote that HHC has not recouped wages but rather "has adjusted the Grievant's rate of pay to reflect the correct rate as set forth within Article III, Section 3" of the CBA. Stein also found Article IX, § 8(a) and (b), inapplicable and the Step II request untimely.

In its Request for Arbitration, filed August 28, 2001, the Union states that HHC wrongfully reduced the grievant's salary in violation of Article III of the CBA. The demand for arbitration is made under Article VII, § 2, Step IV, of the CBA.[3] The Union seeks an award ordering HHC to pay Charlton her previous salary and back pay with interest.

POSITIONS OF THE PARTIES

HHC's Position

HHC's sole contention is that it lacked notice of Charlton's claim. In the request for arbitration, the Union "failed to appeal the June 15, 2001, Step III decision," and, instead, raised for the first time a claimed violation of Article III of the CBA. (Petition § 12.) Therefore, HHC says, the Union should now be barred from raising this claim at the arbitration stage. According to Petitioner, even if the Union referred orally to Article III at the Step III conference, the claim should have been pleaded specifically. Furthermore, the Step IA and the first Step III decisions refer only to the Citywide Agreement. Thus, Petitioner argues, the Union was obligated to inform HHC that the claim was broader than what the Step decisions indicated the scope of the grievance to be.

[3] Article VII, § 2, Step IV, enunciates the procedures to initiate a Step IV appeal.

Union's Position

The Union asserts that from the outset, it informed HHC of Grievant's claim that her wage reduction was improper. The initial Step IA grievance requests that "any deductions or demotion cease and desist" and that Grievant's pay stay the same or be raised to the "appropriate level." The hearing officer noted that "the remedy sought is grievant's pay not be reduced." (Answer §§ 18, 19.) The Union points out that the first Step III decision of March 30, 1999, similarly restates the nature of the remedy.

According to Respondent, Belford Whitted, Union representative for both Step II and the second Step III, submitted relevant pages from Article III of the CBA. He added a handwritten calculation of Charlton's wages from 1992 to 1997 and compared them with a Rehabilitation Technician's minimum salary as listed in Article III. At the June 15, 2001, hearing, Whitted also specifically discussed the way Charlton's salary fit within the Article III pay scale. That the June 15 decision refers to Article III, Section 3, the Union argues, demonstrates that HHC was aware of the basis for the claim. Therefore, an arbitrator should determine the factual issues Respondent has raised.

DISCUSSION

The only issue in this case is whether HHC had notice of the Union's claim before the Union submitted the dispute to arbitration. This Board finds that HHC was apprised of the claim and is not prejudiced in going forward. Accordingly, this dispute should be decided by an arbitrator.

This Board does not dismiss requests for arbitration because of technical omissions when a petitioner's ability to respond to the request or prepare for arbitration was not impaired. *Detectives' Endowment Ass'n,* Decision No. B-73-89 at 6. In *Detectives' Endowment Ass'n*, the Union conceded that it had not specifically cited to the one CBA provision directly concerning rates of pay; however, the Union had clearly articulated from the outset that the grievance was based on an allegedly incorrect rate. This Board found that since both parties were aware of the claim, petitioner had ample opportunity to address the issue before arbitration. *Id.* at 5, 6.

In *Communications Workers of America, Local 1180*, Decision No. B-35-87 at 8-9, we found that the grievant's statement of the dispute adequately raised the issue despite the Union's failure to cite a particular provision at the lower steps. We said: "Although the City did not fully explore this issue below, we cannot say that it lacked notice or was in any way surprised by a novel claim." *Id*. at 10. *See also Communications Workers of America*, Decision No. B-27-93 at 14, 17, *aff'd sum nom. City of New York v. MacDonald*, No. 405350 (S.Ct. N.Y. Co.), Sept. 29, 1994, *aff'd*, 223 A.D.2d 485, 636 N.Y.S.2d 793 (1st Dep't 1996) (though Union did not specifically refer to particular article of CBA, petitioner had "clear notice" of claim); *Doctors Council*, Decision No. B-21-84 at 10 (same).

While HHC correctly states that we have granted petitions challenging arbitrability when claims in the request for arbitration are novel, *see, e.g., New York State Nurses Ass'n*, Decision No. B-30-2001; *District Council 37, Local 1549, AFSCME*, Decision No. B-40-86, the instant case is not one in which Petitioner was surprised by an unexpected claim. As in *Detectives' Endowment Ass'n,* Decision No. B-73-89, *supra,* a case concerning rates of pay, the instant case

is arbitrable because the Union articulated its claim with clarity from the outset even though the Union failed to cite Article III in writing until the request for arbitration.

The initial grievance stated that the remedy sought is that Grievant's pay not be reduced. Kritz, in the Step I decision, acknowledged that the grievance centered on salary ranges. He wrote that Charlton's rate of pay was "higher than the salary rate established by collective bargaining," and that, subsequently, her wages were adjusted to "the correct rate of pay pursuant to her collective bargaining agreement" (emphasis added). The first Step III decision also noted the requested remedy of discontinuing the pay reduction and found that Coler Hospital had "correctly aligned" Charlton's pay "with the rate set forth pursuant to the collective bargaining agreement" (emphasis added). HHC and OLR review officers were thus aware that the salary provision of the parties' CBA was at the heart of the claim. In addition, Review Officer Stein referred specifically to Article III, § 3, in the second Step III decision. That HHC did not address the issue and attempt to resolve the controversy over pay reduction is not dispositive. Because HHC had notice, an arbitrator should decide the merits of this case.

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 be, and the same hereby is, denied; and it is further

ORDERED, that the request for arbitration filed by Local 420, District Council 37, AFSCME, be, and the same hereby is, granted.

Dated: April 30, 2002
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

RICHARD A. WILSKER
MEMBER

EUGENE MITTELMAN
MEMBER

CHARLES G. MOERDLER
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BRUCE A. SIMON
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