NYC Health and Hospitals Corp. V. L 1199 51 OCB 14 (BCB 1993) [Decision No.B-14-93]

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

New York City Health and Hospitals Corporation and the City of New York,

Petitioners,

-and-

Local 1199, Drug, Hospital and Health Care Employees Union,

Respondent.
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Decision No. B-14-93
Docket No. BCB-1537-92
(A-4438-92)

ORDER AND DETERMINATION

On November 2, 1992, the New York City Health and Hospitals Corporation ("HHC") and the City of New York (the City"), appearing by the Office of Labor Relations ("OLR"), filed a petition challenging the arbitrability of a grievance filed by Local 1199 of the Drug, Hospital and Health Care Employees Union ("the Union"). The grievance alleged that some pharmacists employed at Lincoln Hospital were denied promotion in violation of Article XI of the Citywide Agreement between District Council 37, AFSCME, AFL-CIO and the City ("the Citywide Agreement").[1]

[1]Article XI of the Citywide Agreement, entitled "Civil, Service, Career Development". provides,:

Section 1.
When vacancies in promotional titles covered by this Agreement are authorized to be filled by the appropriate body and the agency with such vacancies decides to fill them, a notice of such vacancies shall be posted in all relevant areas of the agency involved at least five (5) working days prior to filling except when such vacancies are to be filled on an emergency basis.
Present agency agreements on this subject shall not be affected by

(continued ...)

1(... continued)
this Section.

Section 2.
a. The duly certified union representative shall be given

The Union requested, and was granted,, an extension of time in which to file an answer, which was filed an November 30, 1992.

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a copy of proposed changes in job specifications for any title certified to such union for its perusal at least five (5) working days in advance of the final approval of such changes.

b. Notice of final revisions shall be distributed to all affected agencies and shall be posted in appropriate areas for thirty (30) days.

Section 3.
The Employer's contribution to all existing and any newly negotiated Training Fund agreements may be applied, by the agreement of the parties, to a mutually agreed upon Training Trust Fund for the purpose of establishing and administering a plan to provide opportunities for training and education for covered employees beyond those provided by the Department of Personnel. The Training Trust Fund shall plan, administer and coordinate all training programs to be financed by the Training Fund. Such training programs shall be designed to increase the effectiveness and efficiency of employees covered by the agreement and to prepare such persons for advancement and upgrading.

The Training Trust Funds and training programs shall be subject to fiscal audit by the Comptroller of the City of New York and to prior approval and performance audit by the Department of Personnel.

All factual data necessary to evaluate the programs shall be furnished to the Department of Personnel by the Training Trust Fund. The Department of Personnel shall respond within thirty (30) days stating its objection, if any, to the proposed program.

Section 4.
After promotion, if an employee is returned to his/her former title in accordance with existing City Personnel Director’s rules and regulations,, the employee may request of the Employer a conference to discuss the basis for the employee's return to the former title. The Employer's decision is neither arbitrable nor reviewable under the civil Service Law or the Rules and Regulations of the Health and Hospitals Corporation.

The City did not request an extension of time in which to file its reply, which was filed an December 21,1992

Background

HHC and the Union were parties to a unit contract running from October 1, 1990 to December 31, 1991,, which provides a grievance and arbitration procedure at Article VI.[2] The title Pharmacist is also covered under the Citywide Agreement, which provides a grievance and arbitration procedure at Article XV.[3]

The Union brought a grievance at Stop II on behalf of some pharmacists at Lincoln Hospital, alleging that more senior pharmacists were passed over for promotion in favor of junior pharmacists, and that jobs in the same title but on different

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[2]Article VI of the unit contract provides, in relevant part:

Section 1.
DEFINITION: The term "Grievance" shall mean:

(B) 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;...

Article VI, Section 2 provides a grievance and arbitration procedure culminating in binding arbitration.

[3]Article XV of the Citywide Agreement,, entitled "Adjustment of Disputes", provides, in relevant part:

Section 1.
Definition: The term "grievance" shall mean a dispute concerning the application or interpretation of the terms of this Agreement.

Article XV, Section 2 provides a grievance and arbitration procedure culminating in binding arbitration.

levels were not being posted. The grievance vas denied at Step II on the grounds that "the movement from one level to another within the same job title does not have to be posted nor is the issue of who gets moved grievable."

By letter dated July 21, 1992, a representative of the Union replied to OLR that:

> [c]areer ladder opportunities are denied to [some pharmacists]. Seniority is not taken into account... [M]anagement obviously gave opportunities to some pharmacists ... so that other pharmacists, qualified to do any job function would not have the experience nor training to advance...The collective bargaining agreement outlines levels in pharmacy with salary ranges as set forth by the HHC. It is usual and customary in all HHC institutions that in fact pharmacists are advanced from one level to another with higher pay increases at each level. Therefore, the argument that one title exists is in reality not true in HHC.

The grievance vas denied at Step III on the grounds that "the manner in which advancements from level to level occur within the Pharmacist title are not subject to the grievance procedure" and that "the protested action represents a managerial prerogative."

The Union filed a request for arbitration dated October 21, 1992, alleging a violation of Article XI of the Citywide Agreements, and basing its claim for arbitration an Article VI of the unit contract and Article XV of the Citywide Agreement. As a remedy, it seeks that more senior pharmacists be promoted "to the level C given to less senior pharmacists."

Positions of the Parties

City's Position

The City cites Section 12-307b of the Nov York City Collective Bargaining Lav ("NYCCBL")[4] for the proposition that the decision whether to promote an employee is a right reserved to management. It states that in Decision No. B-37-80, the Board found that the City "has the solo right to promotes and that "decisions on promotions, unless specifically limited by contract,, are not arbitrable."

The City maintains that the parties have not limited its rights regarding promotions, either im the Citywide Agreement or the unit contract. Thus, the City contends, the parties have not agreed to arbitrate disputes regarding promotions.

The City argues that the Union has failed to establish a nexus between the action complained of and the contractual

[4]Section 12-307 (b) of the NYCCBL provides:

> It is the right of the city, or any other public employer, acting through its agencies, to determine the standards of services to be offered by its agencies,, determine, the standards of selection for employment; direct its employees; take disciplinary action; relieve its employees from duty because of lack of work or for other legitimate reasons; maintain that efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work. Decisions of the city or any other public employer on those matters are not within the scope of collective bargaining, but, notwithstanding the above, questions concerning the practical impact that decisions on the above natters, have on employees, such as questions of workload or manning, are within the scope of collective bargaining.

provision cited as the basis of the grievance. It notes that the Union relied on Article XI of the Citywide, Agreement, which it claims does not limit the City's right to promote. The City contends that the Board is limited in this matter to a threshold determination of arbitrability,, since it cannot create a duty to arbitrate where none exists.

In its reply, the City addresses the Union's argument concerning a procedural violation by contending that the Union has failed to allege a procedural violation. It maintains that the Union "failed to establish a nexus in this instance in that it failed to allege facts that support a procedural violation related to promotions."

Union's Position

The Union states that Article XI of the Citywide Agreement applies to employees at Lincoln Hospital and refers to the subject of promotions, which is the subject of its grievance. It notes that a claimed violation of Article XX is governed by the parties' grievance and arbitration procedures.

The Union claims that once the board determines that the subject matter of a dispute is encompassed within the parties' collective bargaining agreement and in subject to the grievance and arbitration procedure, any further inquiry is an unwarranted intrusion into the merits of the dispute and the jurisdiction of the arbitrator. Whether or not the Union will prevail in its

claim or achieve its desired remedy through arbitration, the Union contends, in not an issue of arbitrability and is not before the board. The Union cites to Decision Nos. B-47-88 and B-31-82 for the proposition that the question of whether management complied with appropriate promotion procedures is properly the subject of arbitration, even assuming that the ultimate decision regarding promotion is insulated from arbitration.

Discussion

When a public employer challenges the arbitrability of a grievance, this Board must first determine whether the parties are in any way obligated to arbitrate controversies and, if they are, whether that contractual obligation is broad enough to include the act complained of by the Union.[5] Here, there is no dispute that the parties have agreed to arbitrate controversies and have provided grievance and arbitration procedures in their collective bargaining agreements. The City, however, contends that the Union has failed to establish the necessary nexus between the action complained of and Article XI of the Citywide Agreement,, which it claims does not limit its right to promote. The Union claim that Article XI of the Citywide Agreement. applies to employees at Lincoln Hospital and refers to the subject of promotions, which is the subject of its grievance.

[5]Decision Nos. B-74-89; B-52-88; B-35-88; B-13-87.

It is sometimes difficult to determine valid issues of substantive arbitrability without crossing the line separating them from issues which involve the merits of the particular case. We have hold, and continue in the view, that it is proper for us to make incursions on the realm of the arbitrator which are essential and unavoidable in determining threshold questions of arbitrability, and we will continue to do so.[6] In addition, when the City asserts that a disputed procedure may not be challenged because it is a matter of management prerogative, the Union must show that a substantial issue under the collective bargaining agreement has been presented.[7] This requires close scrutiny by the Board.[8]

The City argues that HHC has the right, derived from Section 12-307b of the NYCCBL, to promote pharmacists at Lincoln Hospital

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[6]Decision Nos. B-19-92; B-51-91; B-23-90; B-54-87; B-9-83.

[7]See, Decision No. B-46-86, in which we stated:

> We are concerned here to formulate a rule that will strike a balance between the City's right to exercise discretion and the employee's right to fair and reasonable treatment... We will require, in cases such as this, that the union allege more than the mere conclusion that discretion has been exercised in an arbitrary manner. In any case in which the City's discretionary action is challenged on a basis that the discretion has been exercised in an improper manner, the burden will be on the union to establish initially, to the satisfaction of the Board, that a substantial issue exists in this regard.

See also. Decision Nos. B-29-92; B-52-91; B-74-89; B-16-87; B-8-81.

[8]See, Decision Nos. B-19-92; B-52-91; B-23-90; B-54-87; B-9-83.

to various levels within the title Pharmacist. The Union argues that HHC right to promote pharmacists is limited by Article XI of the Citywide Agreement. This presents us with a threshold question of arbitrability.

Although both parties have framed their arguments as if the subject of the instant grievance were promotion of pharmacists, this is technically not the case. Promotions from one title to another are governed by Civil Service regulations. The Department of Personnel also maintains formal descriptions of job titles, some of which contain official Assignment Levels by which employees in a title may be promoted to different levels within a title. At least one other title in the Pharmacist series contains assignment levels (Senior Associate Pharmacist.) Since at least 1959, however, there have boon no official Assignment Levels within the title Pharmacist; it promotes only to the title Senior Pharmacist. According to a document submitted into the record by the City, the Union alleges that Lincoln Hospital has created de facto, Assignment Levels, with varying levels of responsibility and compensation, within the title Pharmacist.

The sole limitation we find within the contract on the City's rights regarding procedures of promotion in Section 1 of Article XI, which refers to posting vacancies in promotional titles. No reference in made in Article XI to any other promotion procedures. The instant grievance alleges that Lincoln Hospital has not posted vacancies in the de facto promotional

levels it has created within the title Pharmacist. We find an arguable nexus between this claim and article XI, Section 1 of the Citywide Agreement. Whether the posting requirements were intended to apply to "promotions" from one de facto level to another involves the interpretation of Article XI, which is a matter for an arbitrator.

The Union argues further that the question of whether management complied with appropriate procedures in promoting more junior pharmacists and failing to promote senior pharmacists is properly the subject of arbitration. The City argues that the Union has failed to allege facts that support a claim of procedural violation related to promotions. Our jurisdiction concerns a claimed violation, misinterpretation or misapplication of the rules or regulations, written policy or orders of the employer. No evidence has been presented here concerning procedures followed by HHC, or whether those procedures have been violated. We cannot find a nexus based on conclusory allegations of procedural violations. The question of whether Lincoln Hospital instituted procedures which conflict with the Civil Service Law or the Rules and Regulations of the City Personnel Director might appropriately be raised in other forums, but is not within our jurisdiction.[9]

Section 2.2-307b of the NYCCBL grants HHC the right "to direct its employees; ... maintain the efficiency of governmental

[9]See, e.g., Decision No. B-42-80.

operations; [and] determine the methods, moans and personnel by which government operations are to be conducted .... Parties to a collective bargaining agreement may voluntarily agree to restrict a matter that falls within an area of management prerogative.[10] Here, we find only a limitation concerning posting of vacancies, and to that extent only we find the grievance arbitrable.

[10]Decision Nos. B-19-92; B-64-89; 8-67-88; B-53-88; B-31-87; B-14-87; B-29-82.

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 and the City of New York be, and the same hereby is, granted in part and denied in part; and it is further,

ORDERED, that the petition filed by Local 1199 of the Drug, Hospital and Health Care Union be, and the same hereby is, granted as to the claim regarding posting of vacancies, pursuant to Article XI, Section 1 of the Citywide Agreement, and denied as to other claims.

Dated: New York, New York
March 24, 1993

MALCOLM D. MACDONALD
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