IA PART 56

JUSTICE SCHWARTZ

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 56

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IN THE MATTER OF THE COMMITTEE OF INTERNS AND RESIDENTS,

Index No. 13452/92

Petitioner,

DAVID DINKINS, as Mayor of the City OF NEW YORK; JAMES F. HANLEY, as Commissioner of the NEW YORK CITY OFFICE OF LABOR RELATIONS; and THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, OFFICE OF COLLECTIVE BARGAINING and CHARLESETTA BROWN,

Respondents.

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Motions #45 and #49 on this Court's motion calendar of June 16, 1992 and #44 on the motion calendar of June 30, 1992 are consolidated for determination.

Petitioner moves by Order to Show Cause for an order directing respondents David Dinkins as Mayor of the City of New York, New York City Office of Labor Relations and New York City Health and Hospitals Corporation (NYC HHC),to proceed to immediate arbitration of a grievance involving NYCHHC's obligation to provide legal representation and indemnification to Dr. Peter Anyakore, a member of NYCHHC, and to temporarily stay the action, of Brown v NYCHHC et al. pending the outcome of the arbitration. Respondents Mayor, New York City Office of Labor

Relations and NYCHHC cross-move to dismiss for failure to join necessary parties and for failure to state a cause of action, and for a permanent stay of arbitration. The subsequently added respondent, Office of Collective Bargaining, cross-moves to dismiss the petition for failure to state a cause of action.

On September 22, 1991, while Dr. Peter Anyakora was Chief Resident in the Obstetrics/Gynecology Department of Harlem Hospital, it is alleged that he refused to admit Charlesetta Brown who was in labor. Ms. Brown gave birth in the admitting room attended by emergency medical service personnel. She instituted a medical malpractice action against the NYCHHC and Dr. Anyakora which is now pending in this county. A criminal misdemeanor proceeding was brought against Dr. Anyakora for violation of Public Health Law §2805-b and that proceeding is still pending. NYCHHC filed disciplinary charges against Dr. Anyakora and these charges are presently the subject of another arbitration.

Dr. Anyakara is covered by a collective bargaining agreement between NYCHHC end petitioner, Committee of Interns and Residents (Committee). Article XIII of the agreement provides for full indemnification for any malpractice judgment and for the corporation counsel of the City of Now York to appear and defend such action brought against an intern or resident represented by

the Committee

Article XIV provides for grievance procedures arising out of the bargaining agreement as follows:

> Section 1
>
> The term 'grievance' shall mean:
>
> (A) A dispute concerning the application or interpretation of the terms of this collective bargaining agreement;
>
> (B) A claimed violation, misinterpretation, or misapplication of the rules or regulations, authorized existing policy, or orders of the corporation affecting the terms and conditions of employment;
>
> *** * * * [.]**

Dr. Anyakora sought to have the corporation counsel represent him in the malpractice action and to assure indemnification coverage but it was refused. He filed a notice of arbitration pursuant to the agreement on May 14, 1992 but it is NYCHH's position that the arbitration provisions may not be invoked. Dr. Anyakora does not have legal representation and is now in default in the Brown malpractice action.

Briefly stated, it is the position of respondents Mayor, Office of Labor Relations and NYCHHC that public policy bars the

invocation of the legal representation and indemnification provisions of the bargaining agreement. They argue that if Dr. Anyakora is found guilty of the criminal misdemeanor charged for refusal to admit Ms. Brown to Harlem Hospital (Public Health Law §2805-b), he would be in breach of strongly articulated public policy. Such a breach would require sanctions and would foreclose the legal representation and indemnification provisions otherwise available.

The State has made it clear that arbitration is encouraged (see, e.g, Matter of Civil Serv. Employees Assn. V Lombard, 50 AD2d 708, 709). The grievance clause in the bargaining agreement which permits arbitration is extremely broad and our courts are generally liberal to interpreting the ambit of such clauses (see Matter of Acting Superintendent of Schools of Liverpool Cent. School Dist. [United Liverpool Faculty Assn.] 42 NY2d 509, 512). Thus, "courts have held that controversies between the parties [to a labor contract] fall within the scope of the arbitration clause unless the parties have employed language which clearly manifests an intent to exclude a particular subject matter" (id.). Exceptions to the grievance definition in the collective bargaining agreement here are specifically set forth in Article XIV (2)(E) and do not pertain to the facts here.

As respondents point out, a court may also intervene and stay

arbitration an public policy grounds (Board of Education Great Neck Union Free School Dist. v Areman, 41 NY2d 527, 531). Respondents rely upon Public Health Law §2805-b and General Municipal Law §50-k as evidence of a public policy against representing Dr. Anyakora in the Brown action. As stated previously, Public Health Law §2805-b renders a medical practitioner's refusal to admit or treat an emergency patient a misdemeanor. General Municipal Law §50-k requires the City of New York to defend and indemnify its employees in civil actions brought against them in connection with their employment. The duty to indemnify does not apply where the employee acted "in violation of any rule or regulation of his agency" or where the employee engaged in intentional wrongdoing or reckless conduct (General Municipal Law §50-k[3]). Section 50-k(5) grants the City the discretion to withhold representation and indemnification when the act or omission upon which the action against the employee is based was or is also the basis of a disciplinary proceeding against the employee. Section 50-k(5) does not mandate that the City withhold representation and indemnification in such circumstances. Additionally, representation and indemnification may not be withheld where the employee has been exonerated in the disciplinary proceeding (General Municipal Law §50-k[5]).

This court finds it significant that section §50-k(3) bars

indemnification in certain circumstances but in silent as to the duty to defend in those circumstances, and that section 50-k(5) does not compel the City to deny representation and indemnification where disciplinary charges are also pending. In light of that fact that neither the disciplinary charges nor the criminal charges against Dr. Anyakora have been finally resolved, the court discerns no strong public policy barring arbitration of Dr. Anyakora's grievance seeking to compel the city to defend hit in the Brown action.

Since the Brown action is not before this Trial Part, it is better practice not to stay that action and to allow that Trial Justice the flexibility of dealing with Brown as circumstances develop.

The cross notion of the Office of Collective Bargaining to be removed from this proceeding as an unnecessary party with only the ministerial function of providing for arbitration procedures is denied. Particularly since Dr. Anyakora's default in the Brown action may require quick disposition of the arbitration, it is important to have the Office of Collective Bargaining before the court as a party subject to it's directions.

The cross motions of the other respondents are denied.

Settle order.

DATED: October 8, 1992

J.S.C