City v. L. 371, SSUE, 15 OCB 6 (BCB 1975) [Decision No. B-6-75 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of

THE CITY OF NEW YORK, DECISION NO. B-6-75

petitioner, DOCKET NO. BCB-171-74
A-362-74

-and-

SOCIAL SERVICE EMPLOYEES UNION,
LOCAL 371,

Respondent

DECISION AND ORDER

The City has petitioned this Board challenging the arbitrability of a Local 371 grievance which alleges a failure by the City to implement a provision off the 1969-1970 collective bargaining agreement between the parties. The provision in question (Article VIII, Section 1(d), paragraph 3 of the agreement] reads as follows:

> "Following the Department's completion of reorganization, vacancies which are filled in positions evaluated as Supervisor I (all specialties), Supervisor II (all specialties), Senior Hospital Care Investigator and Supervising Hospital Care Investigator shall be filled from appropriate civil service lists on a basis of one promotion from such list for each two vacancies filled by the transfer or assignment of an "earmarked" over-quota employee as described in 2(a) below."

Background

At the time the parties were negotiating a now agreement in early 1969, the Federal government mandated the separation of the income maintenance and the social service functions within the Department of Social Services, a process that entailed taking from Caseworkers and Supervisors I and II, who had formerly performed both these functions, the financial tasks associated with determining the eligibility and level of benefits of welfare clients. The latter tasks were to be assigned to clerical workers (Income Maintenance Specialists).

No one knew how long the separation process would take. The Union succeeded in negotiating contract provisions preventing the demotion or discharge of unit employees as a result of the separation process; at the same time, fearful that separation would destroy the promotional opportunities of Caseworkers and Supervisors I, the Union negotiated Article VIII, which assured that for every two "unearmarkings" of Supervisors I and II, one person from an existing promotional list for those titles would be appointed.[1]

[1] In point of fact, the only promotional opportunities actually in dispute herein are those of Supervisor 1, that is, the claims of some 30-35 Caseworkers who were on the Supervisor I list during the term of the 1969-70 contract which contains Article VIII. Hospital Care Investigators are now employed only in the Health and Hospitals Corporation.

However, Article VIII did not contemplate that the promotional appointments from the existing lists would be made continuously, on the one-for-two basis, as positions were unearmarked, but that they would be made "following the Department's completion of reorganization." Article VIII does not elaborate what is meant by "completion of reorganization."

The contract containing Article VIII was signed on July 17, 1969, and ran from January 1, 1969 to December 31, 1970. The reorganization had not been completed when the 1969-70 contract was superseded by a contract, executed July 28, 1971, running from January 1, 1971 to December 31, 1973. The successor contract contained no such language as Article VIII of the 1969-70 agreement. Subsequently, the current contract, running from January 1, 1974 to December 31, 1975 was executed. This, too, contains no provision like that of Article VIII of the 1969-70 agreement.

The parties are in conflict as to when reorganization of the Department was in fact completed. The Union maintains that separation of the income maintenance from the social service function was completed in October 1971, and that this marked the end of the reorganization which Article VIII fixed as the time when the City was obligated to make the one-for-two appointments of Supervisors I from the then existing list. Statements of some management representatives seem to confirm this. On the other hand,

some management representatives incline to the view that October 1971, the end of separation, was only the end of the first phase of the departmental reorganization, and that the reorganization was completed only in August 1973, when the last social worker was taken off income maintenance work and returned to social work. A major problem in deciding this case has been the delay of the City in supplying data relevant to determining the date of the completion of reorganization.

Positions of the Parties

Article VIII of the 1969-70 contact-does not define what is meant by "the Department's completion of reorganization," although that is the time when vacancies in Supervisor I are to be filled from the promotion list on the basis of one promotion from such list for every two vacancies-filled by "unearmarking." Nor does the Article indicate when this eventuality was anticipated by the parties.

The Union maintains that reorganization was completed by October 1971, when the income maintenance and the social work functions were separated - that is, no employees any longer performed both income maintenance and social work duties, although some social work employees were assigned exclusively to income maintenance

duties. The Department contends that the separation of functions was~ only the first phase of the depart mental reorganization, and that the reorganization was completed only when the last of the Caseworkers and Supervisors, who had been temporarily assigned to purely income maintenance work, were reassigned to social work duties. This last phase of reorganization, it is alleged, occurred in the period between October 1971 and August 1973.

The City maintains that Local 371's right to grieve and arbitrate the non-implementation of Article VIII of the 1969-70 contract did not survive the expiration of that contract. It contends that the successor 1971-73 contract contains no language like Article VIII, hence, whatever promotional rights were created by the 1969-70 contract died with that contract.

The Union takes the position that the 1969-70 contract vested promotional rights in those persons who were on the Supervisor I list during the term of the contract, and that although these vested rights remained inchoate until earmarking and unearmarking (separation of functions) was completed, they ripened into full bloom as enforceable claims when the reorganization was completed in October 1971, and the Department then had the obligation to implement them. The failure of the Department

to do so at that time, the Union asserts, is grievable under the arbitration clause of the 1971-73 contract (or that of the 1974-75 contract), even though those contracts do not perpetuate the language of Article VIII Of the 1969-70 contract. The Union declares that the 1971-73 contract contains general language which appears to carry forward the rights created in the 1969-70 agreement.

The 1969-70, 1971-73, and the 1974-75 contracts all authorize arbitration of a grievance growing out of the application or interpretation of contract.

The City responds that since the negotiations for the 1971-73 contract were in progress during the reorganization process, but prior to completion of the "separation of function" in October 1971, the parties were aware of the events around them, but nevertheless included no language securing the promotional rights created in Article VIII in the successor contract.

The Union counters that:

> "It was the obvious intent of the Petitioner and the Respondent that certain promises made in the 1969-70 contract would be fulfilled after the contract was terminated. The promise in question would be performed following the completion of reorganization of the Department. Logic dictates that the parties understood that the completion of reorganization would not happen overnight and would very likely occur after the expiration of the contract."

Essentially; the Union relies upon John Wiley & Sons v. Livingston, 55 LRRM 2769, to support its view that the promotional rights created by Article VIII of the 1969-70 contract, having vested during the life of that contract, survived the, termination of the contract, and that the fact that the reorganization was completed at a date subsequent to the contract expiration date merely postpones the right of the Union to seek arbitration but does not negate it. As the court said in Wiley:

> "We see no reason why the parties could not, if they so chose, agree to the accrual of rights during the term of an agreement, And their realization after the agreement has expired."

In addition to the underlying dispute as to the survival of the promotional rights created by the 1969-70 contract and the right of the Union to seek arbitration of such rights under a successor contract, the City advances as an affirmative defense the claimed laches of the Union in bringing the grievance. If, as the Union contends, the departmental reorganization was completed in October, 1971, the City raises the question why the Union did not file a grievance alleging a violation oil Article VIII until September, 1973, two years after the vested promotional rights and their benefits had come to fruition, and three years after the contract creating the rights had terminated.

The Union made no answer whatever in its pleadings to this defense. When invited by a Board agent to explain the lapse of time, the Union made no response.

Analysis

Because we find that the Union is guilty of laches in prosecuting its claim of alleged contract violation, we find it unnecessary to comment upon the other issues raised by the petition - matters which are essentially matters of contract interpretation - and which would normally be within the domain of-the arbitrator.

It is well established that untimeliness or delay arising out of the failure of a party to follow the grievance procedure time table in a collective bargaining agreement is a matter to be passed upon by the arbitrator whose function it is to apply and interpret the contract (Decisions B-7-68, B-18-72). Such delay or untimeliness, however, is distinguishable from the defense of laches which may exist even where the grievance procedure sets forth no time limits as to filing. Laches is an equitable defense, not a contractual one, which arises from the recognition that the belated prosecution of a claim imposes upon the defense efforts an additional, extraneous burden. Long delay in bringing a suit or grievance gives an advantage to the petitioner because of his own inaction, while at the same time subjecting the defense to a greater risk of liability because of actions taken, or not taken, in reliance an the petitioner's apparent abandonment of the claim (Prouty v. Drake, 182 NYS 2d 271).

The United States Supreme Court decision in Flair Builders Inc. v. I.U.O.E., 80 LRRM 2441, 1972, cited by the Union, incisively sets forth the division of authority between the court or administrative agency, on the one hand, and the arbitrator, on the other, in respect to the issue of untimeliness in prosecuting a grievance or claim of right. The Circuit Court below had drawn a distinction between "intrinsic" untimeliness, that is, procedural questions which arise solely because of the requirements of a contract, and "extrinsic" untimeliness, the delay or neglect in seeking enforcement of a right of action even when it is permitted by contract or by the statute of limitations, and had concluded that the untimeliness involved in the Flair case, was of the extrinsic variety. The Circuit Court, therefore, held that it had authority to decide that this delay (laches) justified non-enforcement of the right, for "we are not indulging in the judicially unwarranted task of interpreting the collective bargaining agreement." The Union maintained that all delay or untimeliness, whether extrinsic or intrinsic, was for the arbitrator and not for the Federal court to decide. The Supreme Court did not reach the question posed by the Union, since it found that the parties had, in fact, agreed to arbitrate the laches (extrinsic untimeliness) issue under a broad arbitration clause which authorized arbitration on "any difference," whatever it might be, not settled within 48 hours of occurrence. The Supreme Court stated:

> "There is nothing to limit the sweep of this language or to except any dispute or class of disputes from arbitration. In that circumstance, we must conclude that the parties meant what they said - that 'any difference', which would include the issue of laches raised by respondent at trial, should be referred to the arbitrator for decision. The District Court ignored the plain meaning of the clause in deciding that issue.
>
> Of course, nothing we say here diminishes the responsibility of a court to determine whether a union and employer have agreed to arbitration. That issue, as well as the scope of the arbitration clause, remain a matter for judicial decision."

The arbitration clause in the instant case is not a broad one of the type in Flair. It is the standard grievance clause contained in all City contracts, detailing specific situations which may be brought to arbitration by the parties. No issue of procedural untimeliness is here involved, and the issue of the Union's alleged laches remains properly one for the Board.

Adopting the Union's version that the departmental reorganization was completed in October 1971, there is left unexplained by the Union why, under circumstances which permitted diligence, it neglected to prosecute the claim for two years after it alleges the claim arose. The Union's silence with respect to its failure to act with reasonable promptness warrants the conclusion that the Union abandoned

its claim, and that it would be inequitable now to permit that claim to be enforced or the relief sought to be accorded. Our conclusion not to compel the submission of the dispute to arbitration is further buttressed by the considerations that the vaguely delineated issue, had it been timely grieved at an early stage of the evolving reorganization process, might have been amenable to adjustment, and that the Union's delay subjected the City to ever-increasing potential financial liability which the arbitrator might be called upon to remedy if the matter were submitted to arbitration. Moreover, it should be remembered that the parties themselves did not see fit to continue Article VIII, the clause creating the promotional rights, in the 1971-73 or 1974-75 contracts, indicating that they did not wis h to continue the arrangement after December 31, 1970, and leaving suspended the rights allegedly vested prior to that date. Finally, influencing our decision, is the fact that the Supervisor I list from which appointments presumably would have to be made if the Union prevailed in arbitration, expired in December 1971.

Accordingly, we find and conclude that the Union has been guilty of laches in bringing the grievance herein, and we shall grant the City's position challenging arbitrability, and deny the union's request for arbitration (A-362-74).

O R D E R

Pursuant to the power vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

ORDERED, that the City's petition challenging arbitrability be, and the same hereby is granted and it is further

ORDERED, that the Union's request for arbitration be, and the same hereby is denied.

Dated: New York, New York
March 24, 1975.

ARVID ANDERSON
Chairman

ERIC J. SCHMERTZ
Member

THOMAS J. HERLIHY
Member

EDWARD F. GRAY
Member

N.B. Rember Eisenberg did not participate in this decision.