NYCHA v. Superior Officers Ass. of NYCHA, 17 OCB 3 (BCB 1976) [Decision No. B-3-76 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

NEW YORK CITY HOUSING AUTHORITY

Petitioner,

-and- DECISION NO. B-3-76

SUPERIOR OFFICERS ASSOCIATION OF THE NEW YORK CITY HOUSING AUTHORITY POLICE, DOCKET NO. BCB-247-75

Respondent.

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DECISION AND ORDER

Petitioner, New York City Housing Authority, challenges a request for arbitration filed by Superior Officers Association of the NYC Housing Authority Police (SOA) on behalf of Captains and Lieutenants employed by the Authority. The petition was filed on January 5, 1976.[1]

The SOA request for arbitration under Article XIX of the Captain's contract and Article XXIII of the Lieutenant's contract was filed on February 2, 1975.[2] It states the grievance to be arbitrated as: "failure to compensate employees for weekend standby duty," and requests a remedy of compensation.

[1] At the request of the parties, the matter was held in abeyance between February 2, 1975, the date of the request for arbitration, and January 5, 1976, the date of the petition challenging arbitrability. During this period settlement efforts were under way which included a total of 10 telephone and in person conferences between the parties and Mr. Thomas Laura, Deputy Chairman - Disputes, office of Collective Bargaining.

[2] The contracts have a term January 1, 1971 - June 30, 1973.

The Union claims violation of Articles III, IV and V of the Captains contract and Articles III, IV, V and VI of the Lieutenant's contract,[3] and contends the grievance arose out of an order of the NYC Housing Authority Police Department dated June 17, 1970, and subsequent orders related to the subject of weekend standby duty.

APPLICABLE CONTRACT TERMS

The initial order, memorandum number 25, dated June 17, 1970, subject - "standby duty-superior officers," states in part:

> "In an effort to provide for the availability of a Member of the Force, in the rank of Captain and above, during weekends, a program of standby procedures in this connection is hereby implemented..."

Subsequent memoranda amend Memorandum No. 25.

Memorandum No. 71, dated September 20, 1971, rescinded the standby directives "Effective 0001 hours, Tuesday, September 21, 1971..."

The concerned memoranda make no mention of Members of the Force in the rank of Lieutenant, nor does the SOA clarify the Lieutenants' interest. The Housing Authority has not challenged the grievance of the Lieutenants by the SOA in the instant case.

[3] Articles III, IV and V of the Captain's contract and Articles III, IV, V and VI of the Lieutenant's contract pertain to Hours and Rates of Compensation.

Article XIX, of the Captain's contract and Article XXIII, of the Lieutenant's contract provide identical grievance procedures consisting of three steps culminating in a Step III determination by the General Manager.

These provisions are, in pertinent part:

> "§4 Under the grievance procedure herein a grievance must be initiated within 120 days following the date on which the grievance arose or the date on which the grievant should reasonably have learned of the grievance or the execution date of this agreement, whichever date is the latest . . .
>
> §6 The grievance procedure established herein before is designed to operate within the framework of, and is not intended to abolish or supersede, existing rules and procedures providing for additional methods of redress. These include, but are not limited to, the existing rights of a grievant to request an interview with the Police Chief.
>
> §7 Any or all of the foregoing grievance steps may be waived by the written consent of both parties.
>
> §8 Within (20) days following receipt of the General Manager's Step III decision, the Union shall have the right to bring grievances unresolved at Step III to impartial arbitration pursuant to the New York City Collective Bargaining Law and the Consolidated Rules of the New York City Office of Collective Bargaining...”

POSITIONS OF THE PARTIES

The petition of the New York City Housing Authority, filed on January 5, 1976, argues that:

> "Respondent's Request for Arbitration is barred by laches, in that the Respondent became aware on as early as June 17, 1970 of the alleged contractual violation following an order of the Housing Authority Police Department relating to the subject of the dispute herein. Petitioner alleges that the subject order of the Housing Authority Police Department was rescinded on September 20, 1971,"

and thus

> ". . . the alleged arbitrable claim arose on June 17, 1970, in any event, no later than September 20, 1971."
> (emphasis in original)

The Authority contends that "Respondent, however, did not initiate any step of the grievance machinery provided by its contracts until on or about February 18, 1975, nearly 5 years after its alleged actionable grievance arose (emphasis in original)

The petition asserts that "the failure of the Union to prosecute the alleged contractual claims for nearly five years imposes upon Petitioner a heavy burden breeding unjustifiable uncertainty and unsound labor relations." The Housing Authority contents that "Respondent's admitted failure to process its grievance through the grievance

steps outlined in its contracts must be held to be a bar to its institution of its present request for Arbitration . . . Petitioner does not waive its request to require Respondent's compliance with the agreed upon grievance mechanisms."

The answer of the SOA "specifically denies that the request for arbitration is barred by laches, and affirmatively asserts the demand for arbitration was timely filed."

Under Article XIX, §4, of the Captain's contract and Article XXIII, §4 of the Lieutenant's contract, a formal grievance procedure is provided. Although the SOA did not process the grievance through all steps of the applicable grievance procedure, the Union explains that in lieu of the formal mechanism, it was in negotiations with three successive Chairmen of the Housing Authority in an attempt to settle the grievance amicably,[4] and that such informal means of redressing a grievance are recognized by Article XIX, §6, of the Captain's contract and Article XXIII, §6, of the Lieutenant's contract. The SOA contends that Decision No. B-18-74 supports its position on this point.

[4] Respondent's answer dated January 23, 1976, asserts the grievance was discussed with former Chairmen Walsh and Golar, as well as with the present Chairman Joseph Christian.

The SOA argues that Article XIX, §6 of the Captain's contract and Article XXIII, §6 of the Lieutenant's contract provide that the formal grievance procedure is not intended to abolish or supersede existing rules and procedures providing for additional methods of redress, and that

> ". . . it has been a long standing practice of both the SOA and the Authority to discuss matters of this nature with the Authority's Chairman as part of its grievance procedure. This practice was observed when both Messrs. Walsh and Golar were Chairmen of the Authority, and the grievance presented herein was discussed with them and Chairman Christian in accordance with this practice prior to submission to formal arbitration. Upon information and belief, this practice goes back to the establishment of the Housing Police as a separate Police Department over twenty years ago."

The SOA argues that the demand for arbitration is not barred by laches as the controversy was repeatedly brought before various Chairmen of the Authority on numerous occasions from 1970 through the present, and " . . . the right to grieve the claim only arose at such time as the claim was formally denied by [the present] Housing Authority Chairman Joseph Christian."

The Reply of the Housing Authority denies that the controversy was repeatedly brought before various Chairmen of the Authority from 1970 to the present and denies that the demand for back pay was not definitively denied until the present chairman ruled on it.

DISCUSSION

It is agreed by both parties that the initial order of the New York City Housing Authority Police Department relating to the subject of standby duty was issued on June 17, 1970, and was rescinded on September 20, 1971. Thus, this case presents the circumstance in which the Union's request for arbitration was filed on February 18, 1975, a period of 3 1/2 to 4 2/3 years from the time of the alleged wrongful employer action.

Decision No. B-18-74 is not controlling in the instant case. There, the grievant attempted to grieve a matter regarding his assignment, or chart. He did not file a formal grievance but did discuss the matter with his supervisors. The grievant contended that he was transferred "because he complained to his superiors about his chart", and that his transfer was an arbitrary and discriminatory punishment imposed for this reason. The Union (SOA) claimed "it has been a longstanding practice of the SOA to discuss matters such as the one involved in this case with the Chairman of the Housing Authority."

The Board stated, "In speaking with his superiors [the grievant] used an informal means of redress which is recognized by Article XIX, §6....[5] The right to use additional methods of redress does not require use of the formal grievance machinery." The issue before the Board in Decision No. B-18-74 was "whether or not the Employer's decision to transfer [the employee] was a proper exercise of discretion or a retaliatory act in violation of Housing Authority procedures and in response to [the party's] reliance on Article XIX, §6." It held that these "are decisions which relate to contract interpretation and are, therefore, for an arbitrator."

Decision No. B-18-74 bears sole relation to the instant case in that it acknowledges the Union's claim that negotiations with the Chairman of the Housing Authority to redress a grievance would indeed be permitted under Article XIX, §6, and that such informal means may be used as well as the formal grievance procedure in the contract between the parties. However, B-18-74 does not hold, as

[5] Article XIX, §6, in Decision B-18-74 is identical to §6 noted in the present case.

the Union contends, that the informal grievance procedure replaces contractual steps before arbitration. Although there are two grievance mechanisms recognized by the contract, the components of the two are not interchangeable. The formal grievance mechanism provides that on completion of the three-step grievance procedure the matter may then go to arbitration. The informal mechanism under §6 of the contract has no such arbitration provision. The Union did not follow the formal grievance procedure; it allegedly chose to rely upon the informal method of redressing a grievance. Moreover, the City expressly states that it does not waive the steps of the grievance procedure leading to arbitration.

The Board has placed great importance on full utilization of the three step grievance procedure prior to submitting the grievance to arbitration. In Decision No. B-22-74, where the Union sought to amend the grievance at the arbitration stage, the Board said:

> "The purpose of the multi-level grievance procedure is to encourage discussion of the dispute at each of the steps. The parties are thus afforded an opportunity to discuss the claim informally and to attempt to settle the matter before it reaches the arbitral stage. Were this Board to permit either party to interpose at this time a novel claim based on a hitherto unpleaded grievance, we would be depriving the parties of the beneficial effect of the earlier steps of the grievance procedure and foreclosing the possibility of a voluntary settlement."

And in Decision No. B-20-74, a similar case, the Board held

> "Under the grievance process, the parties are required to follow certain definite steps which offer the possibility of self-adjustment by the parties, before any matter can be submitted to final and binding arbitration by an outside neutral. Ideally, sound, effective, and speedy grievance procedure entails the clear formulation of the issues at the earliest possible moment, adequate opportunity for both parties to investigate and argue the grievance under discussion, and encouragement by the parties of their representatives to explore and conclude settlements at the lower steps of grievances which do not involve broad questions of policy or of contract interpretation."[6]

[6] See also Decision No. B-27-75.

In the instant case, the Housing Authority "does not waive its request to require Respondent's compliance with the agreed upon contractual grievance mechanisms." The Union admits that it did not fully process the grievance through all steps of the applicable grievance procedure. Under §4 of Article XIX and XXIII, respectively, of the Captain's and Lieutenant's contracts, a grievance must be initiated within 120 days following the date on which the grievance arose or the date on which the grievant should reasonably have learned of the grievance or the execution date of this agreement, whichever date is the latest . . . ." It is not in dispute that "the alleged arbitrable claim arose on June 17, 1970 and, in any event, no later than September 20, 1971. The Union does not deny the Housing Authority's claim that the Union "did not initiate any step of the grievance machinery provided by its contracts [... for] nearly 5 years after its alleged actionable grievance arose." This period of time is far in excess of the 120 days allotted under §4 of the applicable contracts.

The Board has held that questions of procedural arbitrability, including the timeliness of a request for arbitration under a contract, are for the arbitrator. However, in Decision No. B-6-75, the Board denied the Union's request for arbitration by finding the Union guilty of laches for its belated prosecution of a claim where the grievance was not filed until two years after the alleged contract violation arose and three years after the contract creating the grievant's rights had terminated. The Board cited Flair Builders, Inc. v. I.U.O.E., 80 LRRM 2441, in which a distinction between "intrinsic" delay and "extrinsic" delay was noted by the Court. Intrinsic delay denotes a failure to observe time limitations for the processing of grievances as set down in the contract, and extrinsic delay denotes a lack of diligence in initiating a claim, thereby imposing upon the defense an undue burden. The instant case is an example of extrinsic delay, as the Union has filed a request for arbitration no less than 3-1/2 years from the time the alleged grievance arose. In Decision B-6-75 the Board stated,

> "laches 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 extrinsic burden."[7]

[7] In Decision No. B-29-75, laches was applied where the delay was almost two years.

The SOA could well have availed itself of informal negotiations under §6 of the contract, and when the grievance was not satisfactorily adjusted, it could have filed a formal grievance within the 120 days alloted for such claims. The Union offers no answers as to why it failed to act with reasonable promptness, nor does it offer any proof of negotiations between the parties beyond the mere assertion they took place. In a letter dated March 7, 1975 to Thomas Laura, Deputy Director OCB, Mr. Stephen Davis, Counsel for the Union stated "The SOA has conducted many negotiations in an attempt to amicably resolve these differences . . . ." In this regard, the Housing Authority in its Reply dated January 27, 1976, specifically denies each of the Union's allegations regarding negotiations. Thus, the Union's contention that the grievance did not arise until the Chairman of the Housing Authority denied the claim is without merit. There is no evidence, nor has any been cited, that "negotiations" took place. Even if informal negotiations had occurred, such negotiations would not have been pursuant to the formal grievance procedure leading to arbitration, but would have been pursuant to §6 cited by the Union. Therefore, those negotiations would not have tolled the contractual time periods of the actual grievance procedure.

In denying arbitration in Decision No. B-6-75 under the concept of extrinsic laches, the Board noted that had the issue been timely grieved at an early stage it might have been amenable to adjustment, and that "the Unions 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."

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 petition challenging arbitrability, and deny the Union's request for arbitration.

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

May 12, 1976

ARVID ANDERSON
CHAIRMAN

WALTER L. EISENBERG
MEMBER

ERIC J. SCHMERTZ
MEMBER

EDWARD F. GRAY
MEMBER

THOMAS J. HERLIHY
MEMBER