

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

THE OFF-TRACK BETTING CORPORATION,

DECISION NO. B-4-76

Petitioner

DOCKET NO. BCB-250-76

-and-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

Respondent

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DECISION AND ORDER

On February 6, 1976, District Council 37 (the Union) requested arbitration of its grievance that I. Allen Hanover, a former employee of the Off-Track Betting Corporation (07-B), was being denied "his rights under Article IX of the City-wide Contract (7/1/70 - 6/30-73)¹ to examine and Photostat evaluatory statements placed in his personnel file which concern his work performance and conduct which have never been shown to

¹ Article IX of the 1970-1973 City-wide Contract reads:

An employee covered by this Contract shall be entitled to read any evaluatory statement of his work performance or conduct prepared during the term of this Contract if such statement is to be placed in his permanent personnel folder whether at the central office of the Department or in another work location. He shall acknowledge that he has read such material by affixing his signature on the actual copy to be filed, with the understanding that such signature merely signifies that he read the material to be filed and does not necessarily indicate agreement with its content. The employee shall have the right to answer any material filed and his answer shall be attached to the file copy. (Footnote by the Board).

him." As relief, the Union seeks "to examine and photostat evaluatory statements and to expunge those not given the grievant; reinstatement of grievant with back pay."

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Decision No. B-4-76

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Petitioner, appearing by the Office of Labor Relations, contends that the Request for Arbitration fails to raise an arbitral issue and must be dismissed. In addition, Petitioner argues that the claim of alleged contractual violation is barred by laches, citing Board of Collective Bargaining Decisions Nos. B-6-75 and B-29-75.

B A C K G R O U N D

I. Allen Hanover started working for OTB as a probationary cashier on March 4, 1972. Still a probationary employee, he was accused of being \$98 "short" and discharged without a hearing by his supervisor, Jules Epstein, on July 25, 1972. The grievant, in an affidavits, sworn to November 9, 1972, denied any wrongdoing in connection with the events of July 25, 1972 and accused Epstein of improper activity. Subsequently, the Union states, "[b]oth Epstein and grievant were subjected to polygraph tests which OTB paid for. The polygraph reading exonerated grievant. Epstein was discharged by OTB."

Commencing on July 26, 1972, the Union several times requested that OTB conduct a hearing on the termination of Mr. Hanover. These requests were denied because, in the opinion of OTB, Mr. Hanover, terminated during his probationary period of employment, had no contractual rights to a hearing. Three other such requests were made by the Union, the last on April 10, 1974, all of which were denied by OTB.

A memorandum was sent to Mr. Hanover on may 17, 1973 by Neil Kantrow, Manager of Personnel Services. The memorandum, addressed "To whom it may concern," states, in part, "The fact that Mr. Hanover could not perform to the satisfaction of the Corporation is in no way to construe that his honesty or integrity was ever questioned."

The Union relates that Mr. Hanover sought employment with the Greenpoint Savings Bank in or about June 1973. According to the Union, the bank checked Mr. Hanover's qualifications with OTB's personnel office. The Union states, "The Bank's personnel manager told grievant that he had heard from OTB and grievant was refused a position at the Bank."

On March 12, 1975, the Union requested that OTB, pursuant to Article of the 1973-1976 City-wide Contract,² permit Mr. Hanover to examine and photostat statements concerning his work performance and conduct. OTB denied this request on March 18, 1975, stating that since Mr. Hanover was employed by OTB from February 10, 1972 to July 25, 1972, any rights that he may have would be defined under Article IX of the 1970-1973 City-wide Contract, which had expired.

When OTB did not respond to the Union's request for a Step III grievance hearing on this matter, the Union filed a Request for Arbitration on May 6, 1975. Petitioner herein challenged that request (BCB-223-75). Because the grievance was never presented at a hearing, the Union requested and was permitted to withdraw its Request for Arbitration without prejudice, and the matter was remitted to a Step IV grievance hearing.

The Office of Labor Relations denied the grievance on the basis that it was filed beyond the 120 day filing period provided by the contract (which

² Article X of the 1973-1976 City-wide Contract reads:

An employee shall be required to accept a copy of any evaluatory statement of his work performance or conduct prepared during the term of his Contract if such statement is to be placed in his permanent personnel folder whether at the central office of the agency or in another work location. Prior to being given a copy of such evaluatory statement, the employee must sign a form which shall indicate only that he was given a copy of the evaluatory statement filed and the answer shall be attached to die file copy. Any evaluatory statement with respect to the employee's work performance or conduct, a copy of which is not given to the employee, may not be used in any subsequent disciplinary actions against the employee.

incorporates Executive Order 52) and asserting that the claim was barred by laches. The decision notes that the Union dropped its allegation of a violation of Article X of the 1973-1976 City-wide Contract at the Step IV hearing. The Union then filed the instant Request for Arbitration.

POSITIONS OF THE PARTIES

The Union argues that the refusal of OTB to allow grievant to see and copy the pertinent materials in his personnel file constitutes a continuing violation of Article IX of the 1970-1973 and Article X of the 1973-1976 Citywide Contracts and thus the request for arbitration is not barred by laches.

OTLB has violated and is continuing to violate Article a of the 1970-1973 City-wide Contract, because, the Union claims, the grievant has a continuing right under that Article to see and copy what the grievant believes to be false and disparaging statements contained in grievant's personnel file. The Union asserts that this right exists because the statements in the file will continue to be a cause of harm to grievant as, "Any employee [sic] (present or prospective) may call upon OTB and be told the false story reflected in the OTB file on grievant."

Since the violation is continuing, the Union contends, the laches doctrine may not be applied. The Union questions whether grievant could have known on July 25, 1972 that he would be asked to execute the November 9, 1972 affidavit, that he would be subjected to a lie detector test in December 1972, or that he would be refused employment in June 1973. The Union further argues, "To sustain the defense of laches, which is discretionary with the Board, Petitioner must show prejudice as a result of its altered position in reliance upon grievant's delay in bringing this proceeding."

The Union believes that Petitioner has not suffered any prejudice because of the alleged delays in bringing this proceeding, because all it has to do is turn over the file for grievant's inspection and copying. The Union concludes that the question of timeliness in filing a grievance is for the arbitrator, referring to Board Decision No. B-25-75 and cases cited therein.

Petitioner agrees that questions of procedural timeliness are for the arbitrator, but asserts that the issue in this dispute, extrinsic untimeliness or laches, is for the Board to decide. From an analysis of when the grievance arose, an examination of Respondent's explanation of the delay and a showing of the prejudice incurred by OTB as a result of Respondent's delay, Petitioner reasons that the Board must find the Union's claim to be barred by laches.

Petitioner maintains that the grievance arose no later than July 25, 92, the day grievant was discharged, and that it would be impossible for any grievance to have arisen with respect to grievant after that date. Moreover, Petitioner argues that the Union's claim of a continuing contractual violation is not relevant to the issue of laches, as such determination concerns when the grievable act first arose, not how long the grievable act continued. Petitioner bases this argument on City of New York v. Probation and Parole Officers Association, Local 599, B-29-75, where the Board found that a claim of improper salary payments, a continuing violation in the sense that the alleged contractual violation occurred each payday, was barred by laches because it was not pursued until two and one-half years after the grievance arose. Petitioner notes that no

formal grievance was filed herein until may 6, 1975, two years, nine months and eleven days from July 25, 1972.

Petitioner also suggests that Respondent has offered no explanation of its delay; the absence of such explanation being a factor in the Board's finding of laches in both B-6-75 and B-29-75.

Although not agreeing that a showing of prejudice is necessary in order to successfully maintain the defense of laches, Petitioner does assert prejudice resulting from the delay. To begin, Petitioner's defense of Respondent's claim is made more difficult because of Respondent's delay, especially defending against a claim of loss of job opportunity in June 1973. Financial liability, i.e., the possible award of reinstatement with back pay, is more extensive because of Respondent's delay. Moreover, had Respondent timely prosecuted its claim, Petitioner (and related public employers covered by the contract) would have known the extent of their liability under Article IX of the 1970-1973 City-wide Contract, which knowledge could have been used in the negotiations of the successor Article X of the 1973-1976 City-wide Contract. Ever increasing financial liability (B-6-75; B-29-75) and subsequent contract negotiations (B-6-75) have been accepted by the Board as establishing sufficient prejudice to support a defense of laches.

Petitioner concludes that this Request for Arbitration falls squarely within the Board decisions discussed, and must therefore be denied for laches.

D I S C U S S I O N

Examining the chronology of events in the instant matter, we find and conclude that the request for arbitration must be denied.

There is no evidence of either the grievant or the Union demanding to examine and copy statements concerning grievant's work performance and conduct prior to the Union's letter to am dated March 12, 1975. The denial of grievant's alleged right to do so was not formally grieved until May 6, 1975, which, as Petitioner points out, is two years, nine Months and eleven days from the date of grievant's discharge. Such delay in initiating a grievance has been previously characterized, by the Board as extrinsic delay (See, City v. Probation and Parole Officers Association, Local 599, B-29-75). The arbitration clause of the contract under which grievant claims his right is a standard City grievance clause, which the Board has determined does not include laches as an issue for the arbitrator and has held that the issue is to be resolved by the Board. (See, City v. Social Service Employees Union, Local 371, B-6-75).

The Union asserts, however, that the delay in initiating the grievance does not give rise to laches because OTB has violated and continues to violate the contract. It would be more accurate to say that the action taken by the Employer on July 25, 1972 has consistently been treated by the employer from that date to the present as final and that the employer has refused to accede to any of the various demands addressed to it since that date by grievant with regard to that action. That grievant had full and fair notice of that action and of its implications such as would have constituted the basis for invocation of the grievance and arbitration provisions of the contract is beyond question. The point is that instead of seeking redress by that means, grievant followed routes of his own devising from July 1972 until May 6, 1975. The Employer action complained of here does not constitute a continuing contract violation in any sense

which would preserve rights of grievance and arbitration. Having waited so long to assert whatever rights he may have had under the contract, and providing no explanation for such delay, grievant is deemed to have abandoned any such rights and cannot be heard to assert them now. His allegations with regard to the rejection of his application for employment by Greenpoint Savings Bank as well as his speculations as to possible adverse material in his personnel file³ are immaterial; proof of such harm or potential harm should not have been a condition precedent to any timely claim of rights under pertinent provisions of the contract. Grievant's right to inspect the file, if such a right were provided him by the contract, was absolute and unconditional. By the same token, his belated allegations of harm are equally immaterial and ineffectual for purposes of enlarging the time prescribed by the contract for commencing grievance and arbitration proceedings.

Having found Respondent guilty of delay in initiating this grievance, the question arises whether a showing of prejudice suffered by Petitioner as a result of the delay is necessary in order to uphold the laches defense. In B-29-75, the Board stated:

"[E]xtrinsic delay denotes a lack of diligence in initiating a claim, thereby imposing an undue burden on the defense. The undue burden comes as a result of the defense acting or not acting in reliance that the grievant has abandoned his claim."

³ As stated by Petitioner in a footnote in its Brief, Respondent has not affirmatively alleged the existence of these evaluatory statements; Respondent alleges only that grievant has reason to believe that the statements exist. Indeed, the Union did not establish that grievant was refused the position with the Greenpoint Savings Bank because of alleged statements in his personnel file.

Implicit in the statement is that the doctrine of laches will not apply unless the delay has occasioned some prejudice. Petitioner has shown prejudice resulting from the unexplained delay in prosecuting this claim.

The Board does recognize that Respondent may be arguing that the grievance did not arise until grievant's request to examine and copy statements in his personnel file was rejected by OTB on March 18, 1975. If that be the basis of the Union's "continuing" violation argument, we also would deny the request for arbitration. At the time of his request to examine the personnel file, grievant was not an Employee of OTB; he was not covered by the collective bargaining agreement taken in effect (1973-1976 City-wide Contract); and he had no rights under that contract. The employer is not obligated to arbitrate the claims of a person who is not an employee at the time that the grievance arose and who is not covered by the contract under which the request for arbitration is made.

Thus, regardless of whether the grievance is alleged to have arisen on the date of grievant's discharge or subsequent thereto, the matter is not arbitrable. If the former, arbitration is barred by laches. If the latter, there is no contractual obligation which binds the employer to arbitrate the dispute. Accordingly, we shall grant the petition challenging arbitrability and deny the request for arbitration.

O R D E R

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 Off-Track Betting Corporation'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

ERIC J. SCHMERTZ
MEMBER

WALTER L. EISENBERG
MEMBER

EDWARD F. GRAY
MEMBER

THOMAS J. HERLIHY
MEMBER