City v. L.300, SEIU, Civil Service Form, 17 OCB 9 (BCB 1976) [Decision No. B-9-76 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

CITY OF NEW YORK

-and-

LOCAL 300, THE CIVIL SERVICE FORUM, SEIU

DECISION NO. B-9-76

DOCKET NO. BCB-258-76 (A-571-76)

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DECISION AND ORDER

The Union requests arbitration on behalf of 32 fingerprint technicians. The Union alleges "that the Police Department has violated provisions of the City-wide contract and prior departmental custom in denying grievants a shortened summer work schedule" in 1974 and 1975.[1]

The City challenges arbitrability of the instant grievance which was filed on May 18, 1976 on the following grounds:

1. That the Union received its copy of the Step III decision on or before April 13, 1976, but the Request for Arbitration was not filed until May 18, 1976. Therefore, the City alleges that, since the Request was not within the 15 working days, as Article XIV 52 of the Agreement provides, the grievance has been abandoned.

2. That part of the Union's claim relates to the summer hours of 1974 and as such, was untimely filed by the Union, since the grievance was filed on or about July 3, 1975. This would put the filing well past the 120 day limit that the Agreement at Article XIV §2 specifies.

[1] The Union's grievance, brought under the City-wide grievance procedure, apparently relies on a claim that Article V 517(c) has been violated.

3. That the grievance alleges, in part that Petitioner has violated Article V §17(d)[2] of the Agreement by denying the grievants' summer hour privileges in 1975. "Article V §17(d) does not confer the privilege of a shortened workday on employees who had theretofore not enjoyed such privilege."

4. That the grievance as far as it relates to shortened workdays in 1974, "does not concern the application or interpretation of a term of the Agreement and is not arbitrable."

5. That "on information and belief, Respondent has known, since the summer of 1974 that Petitioner did not and would not confer on the employees in question the privilege of a shortened workday during the term of the Agreement."

6. That the Union "has inequitably delayed resolution of this claim to the prejudice of Petitioner" and, therefore, "by reason of Respondent's laches this grievance should be dismissed."

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[2] In neither the Union's Request for Arbitration, nor in the Step III Decision of April 7, 1976, does it appear that the Union is relying on Article V 517(dl The Step III Decision refers only to Article V §17(c).

The union's Reply, buttressed by copies of correspondence between the Union's attorney and Deputy Chairman Laura,[3] indicates that the Union wrote to this office requesting arbitration within the 15 day time limit, but due to its counsel's unfamiliarity with OCB procedures, did not submit the proper Request for Arbitration form (#6-1) on time.

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[3] Martin Schaum, Esq., Counsel for Fingerprint Technicians, Local 300, SEIU, wrote to Deputy Chairman Laura, on April 13, 1976. His letter requests a "Step IV Hearing on the denial by the Office of Labor Relations over the issue of summer hours in 1974 and 1975."

Deputy Chairman Laura, responded to Mr. Schaum in a letter dated April 15, 1976. Deputy Chairman Laura returned the letter requesting arbitration and enclosed copies of OCB form #6-1 (Request for Arbitration) and a copy of BCB Decision No. B-19-75. His letter states:

> "I am returning it because (1) you must use OCB Form 46-1 and supply the pertinent information as outlined regarding the grievance and (2) a reading of BCB Decision No. B-19-75 will disclose that only DC 37 or the City of New York may formally initiate the arbitration request under the City-wide contract.
>
> In view of the above I would suggest that either you or your client talk with District Council 37 concerning the grievance to avoid arbitrability litigation."

The Union's Reply, dated June 8, 1976, as to the issue of the late filing of the Request for Arbitration is as follows:

1. "A request for arbitration was made within fifteen working days of the receipt of the Step III decision by correspondence submitted to the Office of Collective Bargaining under date of April 13, 1976.

2. Due to the impossibility of procuring the necessary consents from District Council 37 the completed request for arbitration was not perfected but complete disclosure and information was supplied so that the Petitioner herein cannot claim of surprise in any manner."

As to the laches issue, the Union alleges:

3. "Respondent respectfully contends that Petitioner should be barred at this late date from complaining as to the date of the filing of the original grievance inasmuch as the parties have proceeded through the entire grievance machinery without this objection having been raised."

In fact, however, the Review Officer, Patrick O'Shea, in denying the grievance at the Step III hearing on April 6, 1976 notes: "Additionally, the Review Officer wishes to point out that the claim for the 1974 period was not timely filed."

DISCUSSION

The April 13, 1976 correspondence from the Union's counsel to Deputy Chairman Laura requesting arbitration (see footnote 3) was within the fifteen working day time limit prescribed by Article XIV §2 of the Agreement. This constitutes substantial compliance with Board procedures. The mere fact that the Request for Arbitration form (#6-1) was not returned at that time, is not a fatal defect. Petitioner was in no way prejudiced by the Union's actions, and therefore it is in no way inequitable for the Board to find that the Union's letter of April 13, 1976 satisfies both OCB procedure and policy.

However, we determine that Petitioner's allegation of laches as to the 1974 summer hours is valid. Previous Board decisions[4] have distinguished the question of procedural arbitrability, which is normally a matter to be determined by the arbitrator,[5] from that of the equitable defense of laches.

[4] City of New York and Social Service Employees Union Local 371, Decision No. B-6-75; City of New York and Probation and Parole Officers, Local 599, Decision No. B-29-75; New York Housing Authority and Superior Officers Assoc. of the N.Y.C. Housing Authority Police, Decision No. B-3-76.

[5] OLR v. Social Service Employees Union, Decision No. B-7-68; N.Y.C. Health and Hospitals Corp. and Local 1579, D.C. 37, Decision No. B-18-72.

Decision No. B-6-75 (City of New York and Social Service Employees Union, Local 371), which found the Union's claim barred by laches for a two year delay in prosecuting its claim, states:

> 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 on petitioner's apparent abandonment of the claim (Prouty v. Drake, 182 NYS 2d 271).

The above-cited decision and the subsequent ones Decision No. B-29-75, and Decision No. B-3-76, refer to the case of 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 United States Supreme Court. Intrinsic delay denotes a failure to observe time limitations that the contract provides for processing a grievance, whereas extrinsic delay denotes a lack of diligence in initiating a claim, thereby placing an undue burden on the defense. The instant case is an example of extrinsic delay.[6]

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[6] Our finding of laches is supported by a recent New York State, Appellate Division,(1st Dept.) case, Matter of Kolson, ___A.D. 2d ___ NYLJ, 7/8/76 p.6.

The Appellate Division affirmed a finding of laches where a plaintiff delayed for more than one year in pursuing an Article 78 proceeding, by which he sought reinstatement to his former employment.

The Union allowed the entire summer of 1974 to go by without filing a grievance; indeed, the Union did not see fit to grieve on the issue of summer hours until the following summer of 1975. The Union should have known that by its failure to grieve promptly, it was allowing the City to continue to implement its policy in apparent ignorance of the Union's objections. Had the Union sought to grieve promptly during the summer of 1974, the question of summer hours might well have been resolved before the summer of 1975 began; thus the City's financial liability would have been considerably lessened. Decision No. B-29-75 (City of New York and Probation and Parole officers, Local 599), which found the Union's claim barred by laches by reason of a three year delay, states, "the consequences of the City's alleged breach of contract were compounded every payday during the interim, yet no explanation or excuse is given for the inordinate delay by the Union." This rationale is certainly applicable to the instant case.

We, therefore, find the Union's claim barred by laches as to the 1974 summer hours, and dismiss that claim as nonarbitrable. We cannot help but note, additionally, that even if the 1974 claim, had been found appropriate for arbitration, an arbitrator most likely would have been hard pressed to find grievant's claim was not barred by the 120 day time limit specified in the Agreement. We determine, however, that the

part of the grievance that relates to-the summer hours of 1975, which was timely filed, is suitable for arbitration. Petitioner's allegations regarding the interpretation of the applicable Contract provisions relate to the merits of the grievance and would therefore be properly reserved for an arbitrator. See, Decision No. B-4-72 (City of New York and Social Service Employees Union, Local 371, D.C. 37).

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, as to the 1974 Summer hours be, and the same hereby is, granted; and it is further

ORDERED, that the City's petition, as to the 1975 Summer hours be, and the same hereby is, denied; and it is further

ORDERED, that the Union's request for arbitration, as to the 1974 Summer hours be, and the same hereby is, denied; and it is further

ORDERED, that the Union's request for arbitration, as to the 1975 Summer Hours be, and the same hereby is, granted.

DATED: New York, N.Y.

August 11, 1976

ARVID ANDERSON
C h a i r m a n

WALTER L. EISENBERG
M e m b e r

ERIC J. SCHMERTZ
M e m b e r

THOMAS J. HERLIHY
M e m b e r

JOSEPH J. SOLAR
M e m b e r

EDWARD F. GRAY
M e m b e r

VINCENT D. McDONNELL
M e m b e r