

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

THE CITY OF NEW YORK AND RELATED
PUBLIC EMPLOYERS

DECISION NO. B-11-77

DOCKET NO. BCB-274-77
A-655-77

-and-

DISTRICT COUNCIL 37 and LOCAL
1321, A.F.S.C.M.E., AFL-CIO

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DETERMINATION AND ORDER

Local 1321 and District Council 37, American Federation of State, County and Municipal Employees, AFL-CIO (collectively referred to hereafter as "the Union") filed a request for arbitration on June 3, 1977, concerning the termination of grievant, Joseph P. Occhiuto. The Union contends that the termination of Mr. Occhiuto constitutes a violation of Article XIII, Section 7 of the parties' collective bargaining agreement which provides, in part, as follows:

Article XIII
LAYOFF OF EMPLOYEES

Section 7

"Notwithstanding any provision above, blind employees and employees with a verified physical handicap shall have absolute preference in retention regardless of original date of employment.

'Physical Handicap' shall be defined according to the New York City Commission

on Human Rights survey report, issued September, 1973, pursuant to Mayor's Executive Order No. 49, dated October, 1971"¹

On June 20, 1977, the Queens Borough Public Library by the City's Office of Municipal Labor Relations (petitioner), filed a petition challenging arbitrability alleging that the Union's request for arbitration is barred by laches and untimely under the contract.

The grievant was informed a week before his June 2, 1976 termination date of the Library's decision to lay him off for economic reasons. On June 7, 1976, the Library's adjudication committee handed down its denial of grievant's claim for retention based upon a disability handicap.² Petitioner contends that this action finalized the Library's decision to terminate the grievant and that the time to file a grievance began to run as of that date.

¹ Executive Order No. 49 provides that:
"the term 'handicapped' means a person who is disabled because of a medically identifiable physical psychiatric or mental defect resulting from accident, illness or congenital condition and whose disability in any way could affect his employability."

The New York City Commission on Human Rights defines "physically handicapped" as: (Law on Human Rights, As Amended May, 1972)

"a person who, because of accident, illness or congenital condition may depend upon a brace, crutch, cane, seeing eye dog, hand controlled car or such other device or appliance in performance of his daily responsibilities as a self-sufficient, productive and complete human being."

The Board notes that it was unable to find a New York City Commission on Human Rights survey report dated Sept. 1973. The only definition which the NYC Comm. on Human Rights could supply is the one quoted above dated May 1972. Resolution of any dispute as to the appropriate definition of "handicapped" to be applied in this case would be a proper issue for submission to the arbitrator.

² Grievant claims that he sustained injuries to his back while on the job in November, 1975.

The instant claim having first been submitted to a contractual grievance procedure on March 24, 1977, petitioner contends that the grievance is barred by laches. It argues that the failure of the grievant to "act with reasonable promptness has subjected the City to ever-increasing sums of back pay for an employee not on the job which an arbitrator might be called upon to award if the matter goes to arbitration."

As a second ground for relief, petitioner argues that the claim is untimely under the contract in that it was not filed within sixty (60) days after the grievance arose as mandated by Article XII, Section 2, subsection 2 of the parties' collective bargaining agreement. On this point, petitioner submits that it is the responsibility of the Board of Collective Bargaining to "declare non-arbitrable claims which are patently untimely, and thus preserve the integrity of contract grievance procedures."

The Union counters that petitioner did not render a final determination on grievant's claim for retention until January 26, 1977, and therefore the filing of the grievance on March 24, 1977 fell within the sixty (60) day limitation established by the contract. The Union bases its argument on the fact that the first verification of grievant's physical disability occurred in early January 1977, when an impartial medical examination by a physician associated with the Workmen's Compensation Board was completed. The results

of such examination, the Union alleges, were reviewed by the Library and were the subject of the Library's letter of January 26th, which correspondence marked the final denial of grievant's claim. Even assuming arguendo that the filing was untimely, the Union states that matters of procedural arbitrability concern questions of contract interpretation which are solely within the province of an arbitrator to resolve.

On the issue of laches, the Union's position is that there was no undue delay in the commencement of this proceeding and thus no prejudice to the employer. In addition, Workmen's Compensation proceedings to which the Library was a party, have been pending since the grievant sustained his injuries in November 1975. Therefore, the Union concludes, the Library knew that the grievant's claim for job retention was based upon the identical facts supportive of his Workmen's Compensation claim, which contradicts the Library's assertion "that the grievant abandoned his claim and that the employer was so led to believe."

DISCUSSION

In Decision No. B-6-75, the Board, finding a union grievance barred by laches on account of a two year delay in prosecution, stated:

"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)." (emphasis supplied)

In the instant case, there is a factual dispute as to when the Library's decision to discharge the grievant became final. However, assuming petitioner's recounting of the facts to be accurate, only 9-1/2 months passed between the time the grievance arose and the date of the initial filing of a Step I grievance. During this period of time, knowledge of grievant's pending claim with the Workmen's Compensation Board can be imputed to petitioner because of the latter's indirect involvement with the matter. Therefore, petitioner's claimed reliance on the Union's failure to raise the grievance at an earlier date and petitioner's interpretation of that failure to constitute an abandonment of any right grievant would otherwise now have to raise the issue is misplaced.

The United States Court of Appeals for the Fourth Circuit has ruled that in order for laches to bar a request for arbitration there must be "an unexplained or inexcusable delay in asserting a known right which causes injury or prejudice

to the defendant." ³ We find that the "delay" occasioned herein is neither unexplained nor inexcusable. The Court further specified the two kinds of prejudice which might support a defense of laches: ⁴

- "(1) the delay has resulted in the loss of the evidence which would support the defendant's position, or
- (2) the defendant has changed his position in a way that would not have occurred if the plaintiff had not delayed."

Petition, herein, does not contend that the "delay" has occasioned a loss of evidence or a change in posture that might have been avoided if the grievance had been more timely pursued. Rather, petitioner argues that the failure of the Union to act with "reasonable promptness" has subjected the City to a demand for "ever-increasing sums of back pay." The fact that the grievant had initially challenged the Library's termination decision and continued to pursue his Workmen's Compensation remedy, knowledge of which can be imputed to the Library, should have put petitioner on notice of its potential liability for back pay. In any event, this is the first case in which we have been presented with a laches defense where the elapsed period of alleged delay is less than

³
Tobacco Workers v. Lorillard Corp., 78 LRRM 2293, 2280 (1971).

⁴ Ibid.

one year in duration. In view of the circumstances of this particular case, wherein the Union has presented a tenable explanation for its alleged delay in invoking the processes of the grievance procedure, the Board does not find that the passage of 9-1/2 months constitutes a "long delay" as that term was used in Decision No. B-6-75 and thus holds that the instant grievance is not barred by laches.

Petitioner's second ground for relief concerns the timeliness of the grievance under the contract. As we have often stated in the past, untimeliness or delay arising out of the failure of a party to follow a grievance procedure time-table as provided in a collective bargaining agreement is a matter to be passed upon by an arbitrator whose function it is to apply and interpret the contract. (See Board Decisions Nos. B-7-68, B-18-72, B-6-75).

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 City's petition challenging arbitrability be, and the same hereby is, denied; and it is further

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

DATED: New York, N.Y.
August 24, 1977

ARVID ANDERSON
CHAIRMAN

WALTER L. EISENBERG
MEMBER

ERIC J. SCHMERTZ
MEMBER

VIRGIL B. DAY
MEMBER

FRANCES M. MORRIS
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EDWARD J. CLEARY
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EDWARD F. GRAY
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