OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

THE CITY OF, NEW YORK,

DECISION NO. B-8-77

Petitioner

DOCKET NO. Bcb-269-77

-and-

SOCIAL SERVICE EMPLOYEES UNION,
LOCAL 371, AFSCME, AFL-CIO,

Respondent.

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DECISION AND ORDER

Request for Arbitration
Motion to Reopen

On March 16, 1977, Respondent filed a Request for Arbitration of a grievance of Thomas Washington, formerly employed as a Community Trainee (Model Cities) by the New York City Police Department. The Request for Arbitration states as the grievance to be arbitrated, "Grievant was improperly terminated from his position as a Community Assistant with the Police Department. Respondent claims violation of Article VII, Section 1(E), of the "Second Collective Bargaining Contract" between the parties which covers Model Cities Titles for the

period July 1, 1974 to June 30, 1976. The Request for Arbitration is filed pursuant to Article-VII, Section 4(a), Step D, of the contract which provides, inter alia, that the Union may appeal decisions of the Office of (Municipal) Labor Relations involving grievances brought under Article VII, Section l(E), of the contract to the Office of Collective Bargaining (OCB) for impartial arbitration pursuant to the Consolidated Rules of OCB. The Request for Arbitration seeks as remedy, "Grievant's restoration to his position, with all benefits and salary, as if he had never been terminated, and any other just and proper remedy."

Petitioner, appearing by the office of Municipal Labor Relations (OMLR), filed a Petition Challenging Arbitrability on March 31, 1977. The petition contends, inter alia, that the Request for Arbitration does not raise an arbitrable issue and should be dismissed.

Also at issue is Respondent's Motion to Reopen the instant matter filed on June 15, 1977, subsequent to our original consideration of the above outlined pleadings on June 1, 1977, and subsequent to a Board direction, at the June lst meeting, that a Decision and Order be drafted for Board signature. Petitioner, in a letter dated June 17, 1977, opposes the Motion to Reopen and requests that a hearing on the Motion to Reopen be held.

Background

According to the decision of this grievance rendered by OMLR on February 25, 1977, grievant started working as a Community Trainee (Model Cities) for the Police Department on August 19, 1971. He was suspended by the Department on October 25, 1974, after being arrested on charges alleging he committed murder and arson. The indictment against grievant was dismissed by order entered in Supreme Court, Kings County, July 21, 1976, on the ground that the defendant (grievant) had been denied his constitutional right to a speedy trial. Grievant then applied for a return to duty.

Departmental charges against grievant, stemming from the circumstances surrounding his October 1974 arrest, were filed on August 16, 1976. A hearing was held on the Departmental charges and a report, recommending termination of grievant's services, was issued on October 1, 1976. Grievant was notified by letter dated December 3, 1976 that his services were terminated effective midnight, November 24, 1976. It should be noted that grievant was never restored to duty and remained on suspension until his termination.

As stated, grievant was employed in the title Community Trainee (Model Cities) which, at the time of his hire, was not classified in the Civil Service and the incumbents in the title held the status of provisional employees. On April 29, 1976, by resolution of the New York State Civil Service Commission, the title of Community Trainee (Model Cities) was changed to the Civil Service title of Community Assistant and the incumbents in the title were granted non-competitive Civil Service status. With respect to grievant's Civil Service status at the time of his termination, the OMLR decision states:

> Since grievant was a provisional employee at the time of his arrest and 'suspension' by the Department on October 25, 1974, and since he remained 'suspended' on the Department's payroll until the termination of his services by letter from the Department effective November 24, 1976, it is apparent that he never acquired the Civil Service status of a non-competitive employee.

In denying the grievance, the OMLR Hearing Officer reasons:

> Neither the action taken October 25, 1974 nor the letter of December 3, 1976 state or disclose reasons for the termination of this provisional employee. There are no procedural safeguards with Yespect to termination of employment guaranteed to provisional employees Grievant, a provisional employee, cannot allege job tenure rights. No such rights exist by law. Also, there is no contractual provision concerning the retention or termination of a provisional employee.

As stated above, we considered the then filed pleadings in this matter at our meeting on June 1, 1977. At that time, no Answer to the Petition Challenging Arbitrability had been served on the office of Collective Bargaining (OCB) or on Petitioner. On June 15, 1977, Respondent filed a Motion to Reopen with the OCB, in which counsel for Respondent affirms that, "[01n April 5, 1977, a six page affirmation in opposition was mailed by affirmant to Thomas Laura, Deputy Chairman, office of Collective Bargaining at 250 Broadway, New York, New York 10007," a copy of which is annexed to the Motion to Reopen. A search of the mail records of the OCB reveals that no correspondence was received from Respondent during the period March 16, 1977, the date the Request for Arbitration was filed, to June 15, 1977, the date the instant Motion to Reopen was filed. Counsel for Respondent further affirms that he heard nothing further about the Request for Arbitration until May 31, 1977, when the Vice-President of the union informed counsel for Respondent that Deputy Chairman Laura had stated that he had never received the Answer to the Petition Challenging Arbitrability and that the matter was in default. Counsel for Respondent affirms that he confirmed this fact with

Mr. Laura in a telephone conversation on June 1, 1977. (Deputy Chairman Laura's file on this case indicates that the phone conversation with counsel for Respondent took place on June 6, 1977.) After a telephone conversation on June 8, 1977 with OCB Assistant General Counsel Eleanor S. MacDonald regarding this case, counsel for Respondent filed the instant Motion to Reopen on June 15, 1977. Petitioner opposes the Motion to Reopen "on the grounds that the facts alleged in the Motion strain credulity and,requests that a hearing, under oath, be held."

Positions of the Parties

With regard to the Request for Arbitration, Petitioner argues that the alleged contractual violation asserted by Respondent does not constitute a grievance as that term is defined in Article VII, Section l(E), of the contract. That section states:

> The term 'grievance' shall mean
>
> (E)A claimed wrongful disciplinary action taken against a non-competitive employee with three (3) or more months of seniority;. . . "

Petitioner points out that grievant was suspended from his duties on October 25, 1974, was never restored to duty and remained on suspension until his termination on November 24, 1976. Therefore, Petitioner contends, grievant never obtained the non-competitive status granted to employees in the new Civil Service title Community Assistant when the old title, Community Trainee (Model Cities), was changed to the new title by the New York State Civil Service Commission on April 29, 1976. Petitioner further argues that:

> Even if the grievant had achieved non-competitive status, by virtue of the Civil Service Resolution of April 29, 1976, grievant never served in the title of Community Assistant and thus, lacked the three or more months of seniority required by the contract to bring the claim within the Article VII, Section L(E) definition of a grievance.

Thus, Petitioner prays that the Respondent's Request for Arbitration be denied and that the Board grant such other relief as it may deem proper.

When we first considered this matter, Respondent's position on the arguments raised by Petitioner was unknown as there had been no Answer served or filed by Respondent at that time. Respondent now requests that the Board reopen this case and consider Respondent's

papers in Opposition to the Petition Challenging Arbitrability. Respondent argues, "The fact that the Board did not receive affirmant's papers in time prior to default was not affirmant's fault and nothing more could have been done to insure its receipt save hand delivery." Counsel for Respondent also states, "Inasmuch as said papers were never returned to affirmant and, upon information and belief, never received by the Board, affirmant must assume they were either lost in delivery or misdelivered." Respondent further contends that its oversight in failing to serve its "opposing papers" on Petitioner "at the time the papers were mailed to the Board" and the Respondent's failure to "precisely follow the rules of the Office of Collective Bargaining" can now be corrected without any harm or prejudice being suffered by Petitioner. Counsel for Respondent respectfully submits that:

> To deny grievant the opportunity for his arguments to be considered as to the issue of whether or not arbitration should pertain, is to put form before substance. The issues presented are substantial and meaningful, the arguments meritorious, and the Board's decision are too important to grievant to allow its decision to be reached by default.

Petitioner opposes the Motion to Reopen and requests that a hearing be ordered on the issues raised, arguing that "the facts alleged in the Motion strain credulity . . . . "

Discussion

Counsel for Petitioner affirms that she served the Petition Challenging Arbitrability on Respondent by mail on March 31, 1977, at 817 Broadway, New York, New York, in a Proof of Service annexed to the Petition.

Section 7.8 of the Revised Consolidated Rules of the OCB states:

> Answer-Service and Filing. Within ten (10)days after service of the petition respondent, shall serve and file its answer upon petitioner and any other party respondent, and shall file the original and three (3) copies thereof, with proof of service, with the Board. Where special circumstances exist that warrant an expedited determination, the Director, in his discretion, may order respondent to serve and file its answer within less than ten (10) days.

Section 13.5 of the OCB Rules states:

> Time-Service by Mail. Where a period of time is measured from the service of a paper, and service is by mail, three (3) days shall be added to the prescribed period.

Thus, Respondent's Answer to OMLR's Petition was due on April 13, 1977. At our meeting on June 1, 1977, we considered the then.filed pleadings in this matter, and, after so considering, we denied the Request for Arbitration. We directed that a draft Decision and order be circulated for Board Member's signature, denying the Request for Arbitration for the following reasons.

It is Board po licy, pursuant to §1173-5.0(a)(7) of the New York City Collective Bargaining Law, that the Rules Of the OCB are to be construed liberally,[1] and we have so construed them in the past.[2] However, in several cases, where a Respondent had failed to interpose an Answer although the time to do so had expired, we have deemed the default to constitute an admission of the allegations in the Petition Challenging Arbitrability and have granted the Petition.[3] Accordingly, we shall deny the instant Request for Arbitration.

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[1] Revised Consolidated Rules of the OCB, §15.1 2

[2] For example, see Board Decisions Nos'. B-5-74 and B-9-76.

[3] BCB Decisions Nos. B-5-70; B-9-70; B-7-75.

The Draft Decision and order was circulated and four Board Members had signed the Order denying the Request for Arbitration by June 15, 1977. Respondent now requests that we reopen the instant matter and consider its Answer to the Petition Challenging Arbitrability. We shall deny Respondent's Motion to Reopen.

Serving as an analogy, the New York Civil Practice Law and Rules (CPLR) sets forth the basis on which an unanswered pleading will be grounds for default judgment. CPLR 53012(a), "Service of Pleadings," states inter alia:

> Service of an answer or reply shall be made within twenty days after service of the pleading to which it responds.

CPLR §3215(a), "Default and Entry," states inter alia

> When a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed, the plaintiff may seek a default judgment against him.

The CPLR also provides that such default judgment, at the discretion of the court, may be set aside. CPLR R.5015, "Relief from Judgment or order," states inter alia:

> (a). On Motion. The Court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct upon the ground of:
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> 1. excusable default, if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party, or, if the moving party has entered the judgment or order, within one year after such entry . .

It has consistently been held that,"A motion pursuant to CPLR 5015 (subd.[a], par [1]) is directed to the sound discretion of the court and is only granted upon a showing of 'excusable default' and a meritorious defense. "Malasky v. Mayone, 54 A.D. 2d 1059, 1061, 388 N.Y.S. 2d 943, 945 (1976).[4]

It is our considered opinion that, in the instant case, there was not even minimal compliance with the Revised Consolidated Rules of the OCB by Respondent. The Answer to the Petition Challenging Arbitrability was not timely served and filed with the OCB. Rule 7.8 of the

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[4] See also Inserra v. Porto, 33 A.D. 2d 1092, 308 N.Y.S. 2d 255 (1970); Bridger v. Donaldson, 34 A.D. 2d 628, 309 N.Y.S. 2d 375 (1970); Wall v. Bennett, 33 A.D. 2d 827, 305 N.Y.S. 2d 728 (1969).

Revised Consolidated Rules of the-OCB, as aforementioned, dictates that Respondent serve and file its Answer upon the Petitioner. Respondent has admitted that it failed to serve Petitioner, characterizing its failure to do so as an "oversight." A majority of court decisions have held that law office failures are not sufficient to excuse delays and defaults. [5]

To reopen the instant case on the basis of allegations of Post Office failures and mere "oversight" would, in our opinion, stretch the procedural rules of the OCB beyond the breaking point. Had Respondent timely served its Answer on either the OCB or on Petitioner, we would be inclined to excuse Respondent's failure of full compliance with the Revised Consolidated Rules of the OCB. Here, there is no evidence Respondent did either. For this Board to ignore such failure to adhere at least minimally to the OCB Rules would, in our opinion, render the Rules a nullity, work a substantial injustice on Petitioner, and cause continuing and permanent damage to the orderly administration of the New York City Collective Bargaining Law and the effective functioning of this agency.

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[5] Allen v. Berton, ____ A.D. 2d ___ 1 391 N.Y.S. 2d 239 (1977); McIntire Associates, Inc. v. Glen-Falls Insurance Co., 41 A.D. 2d 692, 342 N. Y.S. 2d 819 (1973); Renne v. Roven, 29 A.D. 2d 966, 288 N.Y.S. 2d 415 (1968).

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 Petition Challenging Arbitrability filed by the City of New York herein, be, and the same hereby is granted; and it is hereby

ORDERED, that the Request for Arbitration filed by Social Services Employees Union, Local 371, AFSCME, AFL-CIO, be, and the same hereby is denied; and it is hereby

ORDERED, that the Motion to Reopen filed by Social Service Employees Union, Local 371, AFSCME, AFL-CIO, be, and the same hereby is denied.

DATED: New York, New York
July 20, 1977.

ARVID ANDERSON
C h a i r m a n

ERIC J. SCHMERTZ
M e m b e r

WALTER L. EISENBERG
M e m b e r

DANIEL L.PERSONS
M e m b e r

VIRGIL B. DAY
M e m b e r

EDWARD SILVER
M e m b e r