City v. DC37, 21 OCB 2 (BCB 1978) [Decision No. B-2-78 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of

THE CITY OF NEW YORK

DECISION NO. B-2-78

DOCKET NO. BCB-279-77
(A-666-77)

-and-

DISTRICT COUNCIL 37, AFSCME,
AFL-CIO
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DETERMINATION AND ORDER

District Council 37, American Federation of State, County and Municipal Employees, AFL-CIO (D.C. 37), filed a request for arbitration on July 21, 1977, concerning the claims of eight Key Punch Operators (the grievants) for retroactive pay for out-of-title work performed between July 1975 and November 1976. D.C. 37 contends that the out-of-title assignments constitute arbitrable grievances within the meaning of Article VII, Section 1(c), of the parties' collective bargaining agreement, which provides as follows:

> "Article VII
>
> Grievance Procedure
>
> Section 1.
>
> Definition: The term 'grievance' shall mean
>
> (c) A claimed assignment of employees to duties substantially different from those stated in their job specifications."

On August 8, 1977, the City of New York by its Office of Municipal Labor Relations, filed a petition challenging arbitrability alleging that D.C. 37's request for arbitration is untimely under the contract, barred by laches, and that the requested relief for retroactive pay is proscribed by law.

It is undisputed that in April 1975, the Police Department hired eleven Transcribing Typists (CETA), including the grievants herein, and, in July 1975, reassigned these individuals to serve as Key Punch Operators. In November 1976, these employees were officially reclassified by the Department of Personnel to the Key Punch Operator (Civil Service) title and in May 1977, received back pay retroactive to their November appointment date constituting the difference between the salary rates for the title Transcribing Typist (CETA) and the title Key Punch Operator. The grievants are now seeking the pay differential between the two titles for the period July 1975 to November 1976.

The City takes the position that the grievants are guilty of laches for waiting until April 1977, to initiate their grievances in light of the fact that they were admittedly aware in August 1975, of the disparity in salary rates of the two titles. The City also contends that the grievances are contractually time barred because no filing was made within 120 days of the alleged act which is the subject of the grievance. The City cites a recent Appellate

Division ruling for the proposition that "the question of compliance with contractual time limitations is a question to be dealt with by the Court, not by an arbitrator." (In re Mills, NYLJ, Dec. 19, 1977).

D.C. 37 correctly points out that the alleged violation of the "120 day - contractual limitation" is a claim of procedural timeliness and, based on decisions both of the Court of Appeals and of this Board,[1] properly reserved for the arbitrator for decision. In response to the laches charge, D.C. 37 counters that the City has not only failed to document its contention that the union is guilty of unconscionable delay but has made no showing of "injury, change of position, intervention of equities, loss of evidence, or other disadvantage resulting from such alleged delay."

In its Reply, filed with this office on December 6, 1977, the City maintains that it has been prejudiced by the delay for if the grievance had been timely brought it "would have had the opportunity to rectify the situation if the facts so warranted, thus limiting its potential liability." In addition, the City alleges that because of the untimely filing it lost the opportunity to

[1] See Long Island Lumber Co., v. Martin, 259 NYS2d 142, 147(1965); Central School Distinct No.1, Etc., v. Litz, 304 NYS2d 372, 375(1969); City School District v. Poughkeepsie Tch. Assoc.; 364 NYS2d 492, 497(1974); Board Decisions Nos. B-7-68, B-18-72, B-6-75, B-11-77.

obtain, at a time near the alleged occurrences, evidence and potential witnesses.

There being no dispute surrounding the events which serve as the basis of this grievance, it would seem to follow that the City's claim of prejudice concerning its inability to gather evidence and contact potential witnesses is groundless. Furthermore, D.C. 37 contends that it had no actual or constructive knowledge that the grievants' claims for retroactive pay would not be honored until April 1977, when the grievants found out that they would soon be receiving back pay to the date of their official reclassification in November 1976, but no further remuneration. We feel that the City is sufficiently protected against any prejudice suffered as a result of unexplained union delay by the procedural objection available to it if the case proceeds to the arbitral forum.

This is not the first time the City has found itself in a situation where a claim for back pay for work performed in a higher title is being pressed by the "aggrieved" employees. Knowledge of all the ensuing problems that might arise as a result of an out-of-title assignment can fairly be imputed to the City. The equitable defense of laches should not be employed to protect the City from the resulting consequences of prohibited out-of-

title assignments.[2]

Applicability of
Burnell v. Anderson

The City, citing Burnell v. Anderson,[3] NYLJ, Nov. 26, 1975, p.8, Sup. Ct., N.Y. Co. Sp. Term, contends that the relief sought by D.C. 37 herein, payment for the performance of alleged out-of-title work, is prohibited by law and, therefore, the Board is proscribed from sending the case to arbitration because an award which would order the City to perform an illegal act might issue therefrom. In response, D.C. 37 argues that an arbitrator is not confined to simply granting or denying the requested relief but rather has the power to fashion an appropriate remedy upon finding a contract breach.

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[2] Civil Service Law §61. Appointment and promotion.

"2. Prohibition against out-of-title work. No person shall be appointed, promoted or employed under any title not appropriate to the duties to be performed and, except upon assignment by proper authority during the continuance of a temporary emergency situation, no person shall be assigned to perform the duties of any position unless he has been duly appointed, promoted, transferred or reinstated to such position in accordance with the provisions of this chapter and the rules prescribed thereunder..."

[3] Appeal procedures were commenced by the Communication Workers of America, the union representing one of the grievants in the Burnell case, but the issue was mooted by the terms of a written stipulation, dated August 2, 1976, between the City and CWA, wherein the parties agreed that lump sum payments and salary adjustments would be made to aggrieved employees in return for which the City would be released from all claims arising out of several disputes including the one which had precipitated the Burnell decision.

The possibility that an arbitrator might render an award which would violate a specific statutory proscription is not grounds enough for denying an otherwise valid request for arbitration. Neither this Board nor the parties should anticipate that an arbitrator will fashion improper, illegal or inappropriate relief.[4]

In Board of Education, Yonkers City School District v. Cassidy, App. Div., 2d Dept., 399 NYS 2d 20, Oct. 24, 1977, a case, similar in certain important respects to the one before us for determination, the Court refused to stay arbitration of a dispute involving a decision of the Yonkers Board of Education not to pay salary increases due under a collective bargaining agreement. The Board of Education's decision was based on one of the provisions of the Financial Emergency Act (FEA) of November 1975, for the City of Yonkers, which suspended all salary increases for employees which were to take effect after that date pursuant to labor agreements. When the union invoked arbitration, the Board of Education moved for a stay on the ground that the matter sought to be arbitrated was illegal and bound by the dictates of the FEA.

[4] See Appellate Division cases Matter of Auto Mechanics Lodge No. 1053, 259 NYS 2d 510, and National Equipment Rental Ltd. v. American Pecco Corp., 314 NYS 2d 838.

In refusing to grant the stay, the Court stated that the arbitrator appointed would not be limited to ordering immediate payment of the contractual increase in disregard of the statute, but, rather, would have at his disposal broad power to fashion an appropriate remedy upon finding a contract violation.

> "[It would be a] false assumption that the only possible award an arbitrator could make would be to order immediate payment of the salary increase provided in the agreement in disregard of the provisions of section 10 of the FEA suspending the payment of such increases for at least one year. But we do not read the grievance sought to be remedied as being so limited, nor do we believe that the arbitrator would be so limited in his potential award. While it is clear that since the FEA is a valid exercise of the police power, the arbitrator is barred thereby from ordering an immediate payment of the increase allotted under the contract, he may, as our Court of Appeals said in Matter of Board of Educ. of Yonkers City School Dist. v. Yonkers Federation of Teachers, 40 N.Y.2d 268, 276, 386 N.Y.S.2d 657, 661 . . . 'fashion the remedy appropriate to the circumstances, if it is determined that the agreement has been breached.'"

A ruling upholding the arbitrability of the instant matter, therefore, will only afford an arbitrator the opportunity to consider a remedy and fashion one if needed, appropriate to the circumstances of this particular case and within the limits of applicable law. The Court of Appeals

has stated that arbitration is analogous to a proceeding in equity and an arbitrator, like a chancellor, is not strictly limited to remedies requested by the parties but is empowered to "reach a just result regardless of the technicalities."[5]

The Board notes one important aspect of this case which distinguishes it from the factual situation in Burnell. The grievants herein, at the time they were performing the alleged out-of-title work, were CETA employees. Employment pursuant to the Comprehensive Employment Training Act is subject to federal law. The basic tenet underlying the manner in which the CETA program is to be implemented and the treatment and compensation CETA employees are to receive is one of equality with other employees performing the same or similar work.[6] We are not saying that the provisions of the Civil Service Law are inapplicable to CETA employees, only that

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[5] See Board of Education, Bellmore-Merrick v. Bellmore-Merrick United Secondary Teachers, 383 NYS 2d 242(1976) and Matter of Associated Teachers of Huntington v. Board of Education, Town of Huntington, 351 NYS 2d 670(1973).

[6] Section 208(a)(2) of the Comprehensive Employment and Training Act states that:

> "persons employed in public service jobs under this Act shall be paid wages which shall not be lower than ... the state or local minimum wage for the most nearly comparable covered employment, or ... the prevailing rates of pay for persons employed in similar public occupations by the same employer."

See also Section 96.34 of the Rules and Regulations of the Comprehensive Employment and Training Act.

there are additional considerations and equities in this situation which should be presented to and weighed by an arbitrator before the conclusion is reached, as the City would have us do, that the decision of the Court in Burnell is necessarily controlling.

The additional considerations that need to be addressed in this matter are the same ones which proved persuasive in Carritue v. Beame, NYLJ, Nov. 26, 1975, p. 12, Sup. Ct., N.Y. Co., a case concerning the use of CETA monies to hire laid-off New York City firefighters. In Carritue, where CETA eligibility requirements involving residency clashed with the method for filling vacancies as prescribed by Section 81 of the Civil Service Law, the Court held that such inconsistencies and differences must be resolved in accordance with the dictates of the CETA program. Similarly, the applicability of the claimed Burnell prohibition against arbitration of out-of-title cases must be tested against the federally mandated requirement that the compensation of CETA employees be equal to that received by employees doing comparable work, i.e. - Key Punch Operators.

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.
February 2, 1978

ARVID ANDERSON
CHAIRMAN

WALTER L. EISENBERG
MEMBER

ERIC J. SCHMERTZ
MEMBER

EDWARD F. GRAY
MEMBER

EDWARD J. CLEARY
MEMBER

I dissent. THOMAS J. HERLIHY
MEMBER

I dissent FRANCES M. MORRIS
MEMBER

Alternate City Members Morris and Herlihy's dissent follows on page 11.

Dissent of Alternate City Members
Thomas J. Herlihy and Frances Morris

The fact that employees involved in this request for arbitration are paid out of funds received by the City under the Comprehensive Employment and Training Act does not impair the applicability of the decision in Burnell vs. Anderson. The eligibility for appointment by the City to a CETA position is restricted to City residents and to certain economically disadvantaged persons, including the unemployed under the need criteria established by the Federal Government. However the duties and responsibilities of the positions to which they are appointed are the same as with those filled by the competitive civil servants who enter through the normal examination process and work side by side with them at the same tasks.

The policy of the Federal government is that these employees shall receive the same treatment for pay and benefit purposes insofar as authorized, as a comparable City-funded employee, and that they be held to the same performance standards. Since they are to receive the same treatment as other civil service employees, the Burnell vs. Anderson decision must necessarily apply. The situation in Carritue v. Beame, where the CETA program establishes a residence requirement does not alter the situation. For many years the City operated with a residence law commonly referred to as the "Lyons Law", which limited to some degree the application of Section 81 of the Civil Service Law. The application of residence standards has no impact on the operation of the laws and regulation concerning job classification and job description and in no way affects Burnell vs. Anderson.

In developing the rationale for the decision in this matter an excerpt from a recent Court of Appeals decision dealing with the non-implementation of a teacher's contract by a Board of Education is cited. The court pointed out that the barrier to implementation of the wage provision of the contract was legally sound but that an arbitrator could "fashion the remedy appropriate to the circumstances if it is determined that the agreement has been breached." The out-of-title situation was corrected in November of 1976 and the arbitrator in view of Burnell vs. Anderson does not have the power to order payment for the period when the out-of-title work was being performed, which is the relief being sought. It seems futile to send this matter to an arbitrator solely for the purpose of putting him through an intellectual exercise that is bound to be unprofitable.