

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

THE CITY OF NEW YORK,

DECISION B-20-79

Petitioner,

DOCKET NO. BCB-327-79
(A-849-79)

-and-

PATROLMEN'S BENEVOLENT ASSOCIATION,

Respondent.

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DECISION AND ORDER

This decision concerns a challenge to arbitrability filed on May 28, 1979 by the City of New York, appearing by its Office of Municipal Labor Relations (hereinafter "OMLR" or "the City"). The petition challenges the arbitrability of a group grievance stated in a request for arbitration filed on May 1, 1979 by the Patrolmen's Benevolent Association (hereinafter "PBA" or "the Union").¹

The PBA requests arbitration of its claim that:

"The Association members are being precluded to present claims to recover time charged to annual leave or compensatory time balances as a result of absence(s) and/or lateness(es) caused by transit failures on January 20, February 6, 7 and 8, 1978, due to the snows storms on January 20, and February 6, 1978.

The PBA contends that this action violates Article X, section 5 of the collective bargaining agreement and demands arbitration

¹ The processing of this case was delayed by several adjournments of dates to file papers with this office requested and agreed to by the parties.

under Article XXIII. As remedy, the Union seeks: "Recover time charged to annual leave or compensatory time."

BACKGROUND

The grievance was apparently initiated at Step III of the contractual grievance procedure in a letter dated February 9, 1979 from Edward J. Thompson, PBA Assistant Director of Labor Relations, to Deputy Inspector Charles E. Reuther, Commanding Officer of the Department's Office of Labor Policy (hereinafter "OLP"). In the letter, the PBA claimed that "police officers should be permitted to present claims to recover time charged to annual leave or compensatory time balances as a result of absence(s) and/or lateness(es) caused by transit failures..." on the four days stated above. At Step IV of the grievance procedure, the Police Commissioner, in a letter dated April 11, 1979, answered:

Our agreement calls for members of the
Patrolmen's Benevolent Association to re-
ceive excusals granted to all other personnel
employed by the City. There is, however, a
qualifying condition as to the type of ex-
cusals that makes them a category of special
excusals. The time that your association is
requesting does not fall under this category
and consequently this grievance is denied.
(Emphasis in original)

The PBA argues that police officers "are being precluded" from presenting claims to recover charges against annual leave and/or compensatory time in violation of Article X, section 5 of the contract, which states:

Special Excusals

Excused time accorded to other personnel employed by the City under circumstances such as excusals for the Dr. Martin Luther King, Jr. and the Senator Robert F. Kennedy funerals and the Moon Landing Observation Day shall be granted equally to employees covered by this Agreement. All compensating days off shall be subject to exigencies of the Department.

The Union asserts that its claim is within the definition of grievances the parties have agreed to arbitrate stated in Article XXIII, sections 1(a)(1) and 1(a)(2):

For the purposes of this Agreement the term, 'grievance,' shall mean:

1. a claimed violation, misinterpretation or inequitable application of the provisions of this Agreement;
2. a claimed violation, misinterpretation or misapplication of the rules, regulations, or procedures of the Police Department affecting terms and conditions of employment, provided that, except as otherwise provided in this section 1(a), the term, 'grievance' shall not include disciplinary matters;

Section 8 of Article XXIII sets forth procedures for submitting unresolved grievances "to impartial arbitration pursuant to the New York City Collective Bargaining Law and the Consolidated Rules of the New York City Office of Collective Bargaining."

POSITIONS OF THE PARTIES

The City contests arbitrability on several grounds. OMLR points out that the absences and/or latenesses allegedly occurred on January 20, February 6,7 and 8, 1978 and that the grievance herein was filed one year later, on February 9, 1979. The City argues that the filing is untimely under Article XXIII of the contract and, moreover, that arbitration is barred by the Union's laches in initiating the claim. The City states, "An unconscionable delay in a matter such as this involving individual factual circumstances will result in a loss of evidence on both sides and the possible failure of witnesses to remember the events with sufficient clarity."

The City also asserts that nothing in the papers filed by the PBA indicate that its "membership has been deprived of an excusal day granted to all other City employees." OMLR contends that no violation of Article X, section 5 has occurred and that there is no other alleged violation of the contract or of departmental rules, regulations or procedures. Because it fails to state a specific claimed violation of contract provision or of department rule, regulation or procedure, the request for arbitration is "insufficient," the City concludes, and it requests that arbitration of the grievance be denied.

The PBA answers that the alleged grievance is encompassed within the parties' agreement to arbitrate "any" claimed violation, misinterpretation or misapplication of contract provisions and/or of the rules, regulations, or procedures of the Police Department, affecting terms and

conditions of employment. The PBA maintains that the grievance concerns both "a clear misapplication" of departmental rules, regulations and procedures, to the "severe monetary detriment" of officers, and a violation of Article X, section 5 of the contract. The Union also asserts that the grievance arbitration clause "is extremely broad and does not define violations in restrictive language."

The Union claims that Article X, section 5 of the contract "is clear and unambiguous and provides excusal time accorded to other municipal employees by the City is also applicable to police officers...." The PBA maintains that the City was made aware of the nature of the alleged contract violation in the February 9, 1979 letter addressed to Deputy Inspector Reuther.

The PBA further argues that the City has not been "adversely affected by the length of time this matter has taken to come to fruition." The Union contends that the City has waived the defense of laches and is estopped from asserting the defense in this proceeding. The Union points out that the laches defense was not raised by OLP in the prior proceedings under the four-step grievance procedure and argues that the City and its agent, OMLR, are bound in the instant matter by the waiver of the laches defense by another agent of the City, OLP, in the earlier proceedings.

The Union concludes that the City has violated Article X, section 5 of the contract "by failing to accord police

officers excusal time offered to other employees by the City" and the Union prays that the request for arbitration be granted.

In reply, the City disputes the Union's broad interpretation of the definition of grievance set forth in the contract. OMLR argues that a grievance is clearly defined in the contract and that the Union "cannot point to a provision of the Agreement or a rule, regulation or procedure of the Department which has been violated, misinterpreted or misapplied." The City also maintains that it has not waived its defense of laches and argues that the defense has been raised at the appropriate time. Again citing the PBA's "unconscionable delay" in filing the instant grievance, the City claims that the delay "clearly indicates the PBA's knowledge that Article X, section 5 of the Agreement is of no avail in this proceeding."

DISCUSSION

The parties' pleadings present three issues for resolution in determining the arbitrability of the grievance: Whether laches (extrinsic delay) applies to bar arbitration; whether contractual time limits were violated (intrinsic delay) and, if so, does the violation foreclose arbitration; and if arbitration is not ruled out on grounds of untimeliness, whether the Union states an arbitrable grievance as defined by the parties' contract.

We have defined laches as "unexplained or inexcusable delay in asserting a known right which causes injury or

prejudice to the defendant" such as by the loss of evidence or where a party has changed its position in reliance on the claimant's silence.² Laches arises from a party's extrinsic delay in not diligently asserting its claim, thereby placing an undue burden on the defense.³ In the instant matter, it is difficult to determine the length of the extrinsic delay, if any, in initiating the claim because, as will be discussed, it is unclear when the grievance arose. In any event, the City has failed to show harm or prejudice resulting from the delay in initiating the grievance, other than offering the conclusory statement that the delay "will result in a loss of evidence on both sides and the possible failure of witnesses to remember the events with sufficient clarity." The Board has held that a showing of prejudice, suffered by the party claiming laches as a result of a delay, is necessary for the doctrine of laches to apply.⁴ Because the delay in filing the grievance herein was not unreasonable, as discussed below, and because there is no evidence of harm or prejudice suffered by the City as a result of the delay, we will not apply laches to bar arbitration of the instant matter.

² Decisions Nos. B-11-77; B-3-79

³ Decisions Nos. B-29-76; B-4-76.

⁴ Decisions Nos. B-4-76; B-11-77.

However, we point out that contrary to the Union's argument that the City has waived the defense, the Board has held that challenges to arbitrability are properly raised when the union files a request for arbitration and that participation in the first four steps of the grievance procedure does not estop a party from asserting an objection to arbitration when the request for arbitration is made.⁵

Questions of procedural arbitrability, including contentions concerning adherence to contractual grievance procedure time requirements, have repeatedly been held matters for an arbitrator to resolve.⁶ The City's arguments concerning the timeliness of the instant grievance under the contract are directed to arbitration. A party's failure to controvert before the Board allegations of procedural untimeliness will not bar arbitration of the issue because matters of procedural arbitrability have typically been delegated to the arbitral forum for resolution.

There remains the issue whether the PBA has alleged a dispute within the definition of a grievance stated in the parties' agreement to arbitrate certain matters. The nature or subject of the parties' dispute in this case is not clearly stated. The PBA contends that police officers should be permitted under Article X, section 5 of the contract to present

⁵ Decisions Nos. B-20-72; B-8-74.

⁶ Decisions Nos. B-6-68; B-7-68; B-18-72; B-6-75; B-25-75; B-28-75; B-3-76; B-9-76; B-14-76; B-11-77; B-6-78; B-3-79; B-14-79.

claims to recover time charged to annual leave or compensatory leave when officers were either absent or late due to transit failures on four days in January and February 1978 resulting from the snowstorms on January 20 and February 6, 1978. The PBA argues that the right to present such claims under Article X, section 5 derives from the fact that other City employees are being "accorded" "excusal time." However, there is no allegation showing that an officer presented such a claim and was denied nor does the Union identify a declaration or document issued by a City official which excused employees for lateness or absence on January 20 and February 6, 7 and 8, 1978.

While it appears that the Union has not alleged a violation of the contract, the request for arbitration and the papers filed with it do state a dispute concerning interpretation of the contract. We take administrative notice of an arbitration award issued on October 12, 1978⁷ which adjudicated, inter alia, the issue whether the City violated a section of the City-Wide contract "by charging annual leave or compensatory time for lateness or early departures of over two hours or absences on January 20, 1978 and February 6, 1978 and succeeding days that were caused by snowstorms on those dates..." The arbitrator, in pertinent part, awarded:

⁷ OCB Docket No. A-720-78.

1. The City will establish a procedure to review absences claimedly due to hardship resulting from the January 20 and February 6, 1978 snowstorms. The City's determination whether an absence shall be excused shall be final.
2. The City shall also review claims that latenesses or early departures exceeding the time permitted should be excused. Claims not resolved through the review procedure shall be presented to me at a consolidated hearing for final and binding determination regarding each of these claims.
3. Employees who worked during the snowstorm days and succeeding days shall not be granted compensatory time.⁸

In the February 9, 1979 letter submitted to Deputy inspector Reuther, the Union seeks an interpretation of Article X, section 5 that "police officers should be permitted to present claims to recover time charged to time" for absence or lateness due annual leave or compensatory to transit failures on January 20 and February 6,7 and 8, 1978. The Police Commissioner, on April 11, 1979, denied the PBA's claim on the grounds that the parties' contract contains "a qualifying condition as to the type of excusals that makes them a category of special excusals" and that the PBA's claim "does not fall under this category and consequently this grievance is denied."

⁸ In its May 18, 1979 edition, The Chief reported that, "About 4,000 city employees who were unable to get to work or were excessively late because of the severe snowstorms early in 1978 have been excused without charge to annual leave"

In the instant proceeding, the Union disputes the Commissioner's interpretation of Article X, section 5. The parties have agreed to arbitrate "a claimed ... misinterpretation ... of the provisions of this Agreement" (Article XXIII, section 1(a)(1)). The merits of the PBA's interpretation of the clause and whether the contract provides police officers the right to be excused for absence or lateness on days that other City employees are excused are issues concerning the interpretation of the contract and, under Board precedent,⁹ within the province of an arbitrator.

In this connection, we point out that the City's claim of laches is dismissed not only because there has been no showing of harm or prejudice, but also on the ground that the period of delay is not unreasonable because the grievance did not arise until the disputed interpretation of the contract was rendered - either by the Commissioner on April 11, 1979 or by a Department official at an earlier time but after latenesses or absences on January 20 and February 6, 7, and 8, 1978 were charged to annual or compensatory leave balances. In addition, an arbitrator may find that the Union filed its grievance within the 120 day period required by the contract.

⁹ Board Decisions Nos. B-8-68; B-4-72; B-25-72; B-1-76; B-2-77; B-5-77; B-6-77; B-10-77.

We recognize that the request for arbitration does not expressly state the grievance as involving a misinterpretation of the contract. But, as the Board pointed out in Decision No. B-9-79, "We will not dismiss an otherwise valid request for arbitration where insignificant omissions or oversights do not obscure the real issues as to which arbitration is sought." In that case, we construed the same contract and grievance-arbitration clause at issue herein and held that "the collective bargaining agreement requires no 'underlying case or controversy' as a condition precedent to arbitration, but merely a dispute over interpretation of the agreement." On many occasions, we have pointed out that there is in New York City an express public policy of the public employer favoring arbitration of grievances,¹⁰ which has been judicially recognized,¹¹ and that doubtful issues of arbitrability are to be resolved in favor of arbitration.¹² Thus, for the reasons stated above, we dismiss the petition challenging arbitrability and order arbitration of the dispute concerning the interpretation of Article X, section 5 of the contract.

¹⁰ NYCCBL Section 1173-2.0. See Board Decision Nos. B-9-68; B-12-71; B-1-75; B-11-76; B-12-77; B-13-77; B-14-77; B-1-78; B-7-79; B-9-79; B-10-79; B-15-79.

¹¹ City of New York v. Anderson, N.Y.L.J. July 21, 1978, p.5 (N.Y. Cty., Sp. Term, Kassal, J.).

¹² Board Decisions Nos. B-14-74; B-18-74; B-12-75; B-28-75; B-28-75; B-13-77; B-14-77; B-1-78; B-7-79.

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 herein by the City of New York be, and the same hereby is, dismissed; and it is further

ORDERED, that the request for arbitration filed herein by the Patrolmen's Benevolent Association be, and the same hereby is, granted.

DATED: New York, New York

November 26, 1979.

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

FRANKLIN J. HAVELICK
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MARK CHERNOFF
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