

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

THE CITY OF NEW YORK

DECISION NO. B-3-79

-and-

DOCKET NO. BCB-317-79

COMMUNICATIONS WORKERS
OF AMERICA, AFL-CIO

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DECISION AND ORDER

On February 28, 1979, the Communications Workers of America filed its request for arbitration herein alleging that "Grievant was never paid the salary increase promised." The relief sought is "salary at maximum for the grade, plus back pay to January 1, 1974." The City's petition contesting arbitrability was filed on March 8, and the Union's answer was received by the Board on March 26, 1979.

The papers filed by the parties show that Grievant, Pauline Bernstein, an Administrative Assistant in the Human Resources Administration (HRA), worked on loan in Mayor Beame's office as a "secretary and assistant" to Deputy Mayor Gibson and his assistant, Sidney Baumgarten, Esq., for four years beginning in January, 1974. A letter dated August 9, 1978, from Mr. Baumgarten to Thomas Roche, former Director of the Department of Personnel, contains assertions of fact which have not been denied by the City. The letter states that:

"At the time [Grievant] joined us, Deputy Mayor Gibson and I both promised [Grievant] the maximum salary in whatever Civil Service title and grade she then had or would be named to.

"[Grievant] filled a highly sensitive and demanding position that was not only equivalent to, but was, in fact, a managerial position.

"These duties were performed during a period of severe fiscal crises in the City's administration and it was solely for that reason that the promised increases were not effectuated at that time. There were continued promises, however, to Mrs. Bernstein, that if she continued performing the aforesaid services, the increases would, indeed, be forthcoming."

In January, 1974, when she began work in the Mayor's Office, Grievant held the title of Supervising Clerk. In January, 1977, she was promoted to Administrative Assistant. Grievant returned to HRA on January 3, 1978, at the beginning of the Koch Administration. On September 19, 1978, Grievant filed a Step I grievance. Apparently, Grievant had been attempting to press her claim administratively prior to this time as evidenced by the August 9 letter from Mr. Baumgarten to Mr. Roche which was written for the purpose of urging the latter to grant Grievant an increase in salary.

The papers submitted by the parties are not entirely clear as to what is meant by the demand for "salary increase promised." However, taken together, all the documents indicated that Grievant seeks back pay for out-of-title work from

January 1974 until January 1977, during the time Grievant was a Supervising Clerk, and also the "maximum salary" for the title of Administrative Assistant into which she was promoted in January of 1977.

APPLICABLE CONTRACT TERMS

The Union cites Article III of the contract which sets forth minimum and maximum salaries for the employees represented by the CWA, including Administrative Assistant. The bargaining unit does not include employees in the title of Supervising Clerk. Article 111, §7 provides:

"When any City employee covered by this contract is ordered to assume a new position (the duties of which are substantially different from those stated in his or her job classification) and does not sign a waiver of any claim to higher compensation and is promised in writing an appointment as of that date to a higher level title by a person authorized to appoint to such title (provided such employee is then qualified as determined by non-competitive examination or, if such title is in the competitive class, provided such employee is then on an eligible list for such title and provided his/her name has been duly certified from such list for such appointment), and such employee subsequently receives appointment to such title commensurate with his or her newly assigned position, duties and responsibilities, which appointment is retroactive to, the date of such promise, the City agrees to pay the employee a lump sum predicated upon the difference between the amount which the employee would have received had his or her promotion been effectuated as promised, and the amount he or she did receive as a payment for services performed from the date he or she actually began working in a higher level title to the date his or her promotion was effectuated."

_____ Article VII sets forth the grievance procedure under the contract. Section 1 defines a grievance as, inter alia, "a dispute concerning the application or interpretation of the terms of this collective bargaining agreement" and "a claimed assignment of employees to duties substantially different from those stated in their job specifications."

Positions of the Parties

The City opposes arbitration on the ground that the grievance was filed "more than 120 days from the date on which it arose" in violation of time limits provided by the contractual grievance procedure. The City argues that the grievance is also barred by laches in that the Grievant waited "nearly four and one-half years after the alleged initial occurrence of the grievance to initiate it." Due to the fact that the events underlying the grievance arose during a former mayoral administration, the City asserts that it has been "severely" prejudiced by the delay in filing the grievance because "many of the City's potential witnesses are no longer available" and the liability of the City for monetary damages has been increased by the long delay.

The City further argues that payment for performance of out-of-title work is prohibited by law for the period in question. Although acknowledging that Civil Service Law §100 was amended on June 5, 1978, to permit an arbitrator to award back pay for out-of-title work performed in violation of a collective bargaining agreement, the City asserts that the amendment is prospective only.¹ In support of its argument as to the

¹ Chapter 255, Laws of 1978.

state of the law prior to the amendment, the City cites Burnell v. Anderson, NYLJ, Nov. 26, 1978, p.8, in which Justice Asch of the Supreme Court, Special Term, held that a dispute concerning back pay for out-of-title work could not be submitted to an arbitrator.

Finally, the City argues that an arbitrator would have no jurisdiction to award that part of the relief requested by Grievant which relates to the demand for salary at the maximum of the grade. The City asserts that "determination of an employee's salary within a particular title's salary grade is a management right pursuant to Section 1173-4.3(b) of the New York City Collective Bargaining Law and the City has never voluntarily bargained on the subject."

The Union asserts that the dispute is arbitrable. It contends that the City's objections go to the merits of the grievance and "are properly for the arbitrator to decide." In response to the City's defense of laches, the Union asserts that:

"The alleged violation did not become grievance until the grievant became aware that no administrative remedies would be forthcoming. As late as August 9, 1978, grievant was attempting to resolve the dispute through administrative means and had never received a denial of her claim."

Discussion

For purposes of our discussion, the claim asserted by the grievance may be divided into two components. Grievant seeks back pay for out-of-title work from January 1974 to January 1977, when she held the title of Supervising Clerk but allegedly performed duties in a higher title; and Grievant seeks back pay from January 1977, amounting to the difference between the rate at which she was paid following the promotion to Administrative Assistant and the maximum rate for the title.

That part of Grievant's claim which requests back pay for out-of-title work while Grievant was a Supervising Clerk may not be arbitrated under the contract between the parties. The Union herein is not certified to represent Supervising Clerks and has no standing to bring grievances to arbitration on their behalf. The contract between the CWA and the City does not grant any rights to Supervising Clerks and does not authorize the arbitration of their out-of-title claims. There being no agreement between this Union and the City to arbitrate grievances on behalf of Supervising Clerks, the Board may not order arbitration of the Grievant's out-of-title claim, and the demand for arbitration of this part of the grievance must be dismissed.

We turn now to a consideration of the demand for additional pay pursuant to the alleged promise to pay the Grievant at the maximum for the title of Administrative Assistant.

_____The City asserts that this claim was not timely filed under the grievance provisions of the contract. Of course, it is well-settled that assertions of untimeliness under the specific limits set forth in the grievance procedure constitute matters of procedural arbitrability which are solely for consideration by the arbitrator and not by this Board.² It may be that Grievant should have filed her claim within 120 days of her promotion to Administrative Assistant or within 120 days of her return to HRA, or at some other time; however, the resolution of that issue is for the arbitrator under the mutually agreed provisions of the contract.

The Board has defined laches as "unexplained or inexcusable delay in asserting a known right which causes injury or prejudice to the defendant" through the loss of evidence or where the defendant has changed its position in reliance on the claimant's silence.³ The Grievant's delay here is explained by her uncontested assertion that she was seeking the salary increase through administrative means and that the increase was not formally denied before she filed the Step I grievance. Further, although the City

² See 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.

³ Decision No. B-11-77.

alleges that "many" potential witnesses are not available, it does not identify these witnesses nor the reasons for their present unavailability, if any. We note that Mr. Baumgarten testified at Step III of the grievance procedure and that there is no allegation that he is unavailable at this time. We find that laches is not an appropriate defense in this cases.

Finally, we consider the City's argument that an arbitrator would have no jurisdiction to award a salary increase to Grievant. The Union does not seek to have Grievant promoted to a higher title; it merely seeks to have her paid a higher salary pursuant to a promise allegedly made to Grievant by a Deputy Mayor and his assistant. Wages are a mandatory subject of collective bargaining and there can be no serious question that a matter relating to the proper salary to be paid an employee is arbitrable. In this case, the grievance alleges that a higher salary was promised to the Grievant. Questions such as whether the promise was made and whether the promise is enforceable in arbitration under the contract between the parties go to the merits of the dispute and are within the province of the arbitrator. Therefore, we find that the grievance is arbitrable insofar as it relates to an alleged promise of a higher salary while Grievant was employed as an Administrative Assistant.

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 contesting arbitrability of that part of the grievance herein seeking back pay for out-of-title work be, and the same hereby is, granted; and it is further

ORDERED, that the City's petition contesting arbitrability of that part of the grievance seeking a higher salary in the title of Administrative Assistant be, and the same hereby is, denied; and it is further

ORDERED, that the parties shall proceed to arbitration of that part of the grievance herein which seeks a higher salary for Grievant in the title of Administrative Assistant commencing January 1977.

DATED: New York, New York.
April 17, 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
M e m b e r

EDWARD SILVER
M e m b e r

EDWARD J. CLEARY
M e m b e r
