

City v. CWA, 25 OCB 19 (BCB 1980) [Decision No. B-19-80 (Arb)]

OFFICE OF COLLECTIVE BARGAINING  
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

THE CITY OF NEW YORK,

Petitioner,

Decision No. B-19-80

-and-

Docket No. BCB-411-80  
(A-1015-80)

COMMUNICATIONS WORKERS OF AMERICA,  
AFL-CIO,

Respondent.

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**DECISION AND ORDER**

On March 19, 1980, the Office of Collective Bargaining received a request for arbitration, dated March 14, 1980, in which the Communications Workers of America ("CWA") sought to arbitrate a grievance concerning the failure by the City of New York ("City") to pay the grievant, Jan Cohen, full retroactive promotional increase for out-of-title work performed.

On April 10, 1980 the City filed a Petition Challenging Arbitrability ("Petition") on the single ground that the request for arbitration was untimely. On April 29, 1980, CWA filed its Answering Affirmation ("Answer") denying the City's contentions.

**NATURE OF THE GRIEVANCE**

On December 4, 1978, grievant, a Principal Administrative Associate [Level I] ("Level I employee") with the Roosevelt Income Maintenance Center #37 of the Department of Social Services allegedly was assigned duties of a Principal Administrative Associate [Level III ("Level II employee"). He claims that he was ordered to do so by his Director; the Agency contends that he began acting in the position on a promise of promotion.

On February 19, 1979, the promotion became official and from that date on grievant received payment for duties performed as a Level II employee. On May 24, 1979, grievant attended his certification meeting at the Human Resources Administration ("HRA") for Level II.

On June 27, 1979, grievant filed a grievance under Article VII, Section 1(C) of the January 1, 1977 - June 30, 1978 Administrative Assistant and Related Titles Contract (the "Agreement") requesting payment for the period December 4, 1978 to February 19, 1979 during which time he performed the work of a Level II employee but only received payment as a Level I employee (hereinafter referred to as the "differential payment").

The Step II decision dated October 16, 1979 indicates that the matter was resolved since the grievant did receive

a sum of money for the period December 4, 1978 to February 19, 1979. However, as indicated in the Step III decision dated January 18, 1980, this sum did not include the differential payment that was the subject of the grievance. At Step III, among other reasons, the grievance was denied as time-barred in that it was filed "six months after the onset and 129 days after the cessation of the alleged 'out-of-title' work."

#### POSITIONS OF THE PARTIES

Article VII, Section 2 of the Agreement reads in relevant part as follows:

"Step 1. - The employee and/or the Union shall present the grievance verbally or in the form of a memorandum to the person designated for such purpose by the agency head no later than 120 days after the date on which the grievance arose."

In its Petition, the City contends that

"[a]t least by February 19, 1979, the date the grievant was promoted to Principal Administrative Associate (Level II), the grievant was aware that he would not receive the higher compensation retroactive to December 4, 1978. Yet he let 129 days elapse before filing his grievance."

The City, therefore, urges dismissal because the petition was not filed within the 120 days stipulated by the Agreement.

CWA in its Answer maintains that the grievant was not aware of the City's refusal to pay him retroactive to December 4, 1978 until May 24, 1979, the date of his Level II certification meeting at HRA although no explanation of what occurred

at that meeting is provided. The June 27th filing of the grievance was well within the permissible time limit according to CWA; hence, the City's Petition should be denied.

The issue for determination in this case is whether the grievance is time-barred because it was not filed within 120 days of the date on which the dispute arose as required by the Agreement.

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### **DISCUSSION**

The City asserts that the dispute arose on February 19, 1979 while the Union maintains that it arose May 24, 1979. Even assuming that the City is correct, a fact that the Board need not decide, nevertheless, not more than 129 days would have elapsed until the filing of the grievance on June 27, 1979. Given the lack of any claim of prejudice by the short delay, this case falls squarely within the line of decisions in which the Board has ruled consistently that matters of procedural arbitrability are for an arbitrator to resolve.<sup>1</sup> Such questions frequently present factual issues which an arbitrator in analyzing the entire matter is uniquely qualified to decide.

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### **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 is, and the same hereby is, denied; and it is further

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

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<sup>1</sup> Decision Nos. B-4-80; B-3-80; B-14-79; B-7-78 B-6-78; B-11-77; B-14-76; B-9-76; B-3-76; B-28-75; B-25-75; B-6-75; B-18-72; B-7-68; B-6-68.

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DATED: June 24, 1980  
New York, New York

ARVID ANDERSON  
CHAIRMAN

DANIEL G. COLLINS  
MEMBER

EDWARD J. CLEARY  
MEMBER

EDWARD F. GRAY  
MEMBER

JOHN D. FEERICK  
MEMBER

FRANKLIN J. HAVELICK  
MEMBER