

City v. L.94, UFA, 25 OCB 20 (BCB 1980) [Decision No. B-20-80
(Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of

THE CITY OF NEW YORK,

DECISION NO. B-20-80

Petitioner,

DOCKET NO. BCB-403-80
(A-971-79)

-and-

UNIFORMED FIREFIGHTERS ASSOCIATION,
LOCAL 94, IAFF, AFL-CIO,

Respondent.

DECISION AND ORDER

On January 7, 1980, the Uniformed firefighters Association, Local 94, IAFF, AFL-CIO (the "Union") filed a Request for Arbitration seeking arbitration of an individual grievance on behalf of Fireman Richard E. Hannon ("Fr. Hannon") and a group grievance on behalf of Fr. Hannon and other firemen arising out of the Fire Department's (the "Department") denial of the opportunity to work overtime in the period November 26, 1975 to December 23, 1975. On March 28, 1980 the City of New York, filed a Petition Challenging Arbitrability (the "Petition"). On May 14, 1980, the Union filed its Answer to Petition Challenging Arbitrability (the "Answer") together with Respondents' Memorandum In Opposition to Petition Challenging Arbitrability ("Memorandum").

NATURE OF THE GRIEVANCE

By memorandum dated November 26, 1975, Fire Department Chief of Staff Joseph Flynn ("Chief Flynn") informed the Deputy Chief of Department Division 5 that certain firemen in Division 5 had "earned large amounts of overtime which may have an effect" on the City's fiscal position; therefore, to "forestall any undue drain on the City's finances or the resources of the Article 1-B Pension Fund," effective "on receipt," fifteen named firemen, including Fr. Hannon, would "not be permitted to work minimum manning overtime ["MMOT"] until February 1, 1976." (hereinafter referred to as the "Flynn Memorandum" or "circular" Similar instructions apparently were issued to other Division Deputy Chiefs.

On December 3, 1975, Fr. Hannon initiated a grievance at Step I of the grievance procedure as set forth in the 1974-1976 collective bargaining agreement between the Union and the City (the "Contract") with respect to the Flynn Memorandum. That same day the grievance was heard and a report issued stating that "[n]o decision or solution presented at this level, due to insufficient authority to do so."

Fr. Hannon appealed his grievance to Step II, also on December 3, 1975. After a hearing on December 9, 1975,

Deputy Chief Gormley issued his decision, presumably on that date although the decision report is undated, denying the grievance because "I have no authority to deviate from this order as directed in the Flynn Memorandum)."

On December 17, 1975 Fr. Hannon appealed the denial of his grievance to Step III. In his Formal Grievance Presentation (hereinafter "Step III Presentation") Fr. Hannon requested the following relief:

"To permit me to work MMOT within guidelines enumerated above, the same as all other members of the Department in my rank."

By memorandum dated December 23, 1975, Deputy Chief Purcell revoked Chief Flynn's November 26, 1975 order prohibiting MMOT by the previously named firemen.

On January 2, 1976, Fr. Hannon submitted a memorandum to Chief Flynn requesting permission to perform tours of duty equivalent to the number of tours of duty he had been denied as a result of Chief Flynn's November 26, 1975 order. This request was approved on January 2, 1976 by Fr. Hannon's Company Commander and on January 3, 1976 by his Battalion Chief. On January 4, 1976, his Deputy Chief stated in writing with respect to the request:

"The order from the Div. of Personnel dated 12/23/75 revoked the restrictive order dated Nov. 26, 1975. If the intent is to revert to the date of 11/26/75 as far as offered overtime is concerned, then this request is approved."

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However, on January 5, 1976, Deputy Chief Purcell disapproved Fr. Hannon's request thus overruling the three prior approvals.

An undated grievance was filed at Step III by the Union sometime in March 1976 complaining that Fr. Hannon and 14 other members of the Fire Department "were prohibited from working overtime from November 26, 1975 to February 1, 1976"; the remedy sought was stated as follows:

"That practice of restriction of over-time be discontinued and that affected members be recompensed for overtime that they were wrongfully denied during period of prohibition."

The Fire Department responded to the Union's Step III grievance by a letter dated March 31, 1976 from Battalion Chief Philip Weiss stating in its entirety the following:

"The Step III Grievance submitted (date omitted) Re: Fr. Richard E. Hannon, Rescue Company 3, and 14 other members prohibited from working overtime from November 26, 1975 to February 1, 1976.

"There is no need to set a hearing date because your solution to the problem was Granted.

"See photo copy attached."
(Emphasis in original.)

Enclosed as an attachment presumably was a copy of the Purcell Memorandum dated December 23, 1975 revoking Chief Flynn's November 26, 1975 order.

By letter dated February 8, 1977, the Union submitted a Step IV grievance to the Office of Labor Relations, now known as OMLR. It is not clear from the letter which grievance was being appealed, Fr. Hannon's original grievance of December 3, 1975 or the Union's later Step III grievance or both; however, Estelle 11. Karpf, OMLR Chief Review Officer, in her Step IV Decision, dated December 18, 1979, ruled that the appeal was only of the Union's grievance, finding that Fr. Hannon's December 3, 1975 grievance requesting permission to work MMOT had been effectively dealt with by the December 23, 1975 revocation of the Flynn Memorandum. In denying the grievance Review Officer Karpf stated the following:

"In any event both the Hannon individual grievance and the Union grievance were rendered moot by the December 23, 1975 rescission of the Flynn circulars. What remained for discussion is that of the amplified requested remedy of the Union's grievance. The Union seeks '... restoration of the lost opportunity ...', as eloquently pleaded for by the Union's Counsel at the Step IV Conference. Money damages are not sought. However, this Review Officer finds that the aggrieved's assumptions of lost opportunities depended on too many presumptions and variables, i.e., that the opportunities to work the overtime actually would have presented themselves through injuries, various emergencies, vacation and other possibilities for absences, and also that the aggrieved would have been both available and eligible pursuant to the specified criteria set forth in Article XXVIII-FIVE-MANNING, at the 7/1/76-6/30/78 Fireman Contract. What opportunities were lost or

if there were such losses is, at best, a very 'iffy' question and one in the area of conjecture."

The Union appealed the denial at Step IV of the grievance procedure by filing on January 7, 1980 a Request for Arbitration dated January 3, 1980, naming as grievants both the Union and Fr. Hannon. The relief requested is as follows:

"Affected firemen should be given the opportunity to work overtime which they were denied by November 26, 1975 Fire Department circular for period from November 26, 1975 to December 23, 1975 when circular was revoked."

On March 28, 1980 the City filed its Petition challenging arbitrability on the single ground that the matter is time barred pursuant to the Contract.

POSITIONS OF THE PARTIES

The City's Position

In urging denial of the request for arbitration, the City relies on Article XXII, Step I of the Contract wherein it states:

"Step I.-A. Within 120 days following the date on which the grievance arose, an aggrieved employee shall initiate his grievance, in writing, on the prescribed form to the Company Commander."

The City argues that while the grievants were der overtime "in 1975," the "instant grievance was not filed until February 7, 1977." According to the City, "Thus, the grievance was filed far in excess of the contractual time

period and is clearly, barred by the terms of the agreement. (Petition ¶ TENTH). The City claims prejudice by the allegedly late filing of the grievance and urges application of the "equitable doctrine of laches." (Petition ¶¶, ELEVENTH and TWELFTH).

The Union's Position

Denying that the matter is time-barred, the Union presents the following arguments for denial of the City's Petition:

A. Questions of procedural arbitrability are for the arbitrator to decide, not the Board of Collective Bargaining;

B. The 120-day requirement was either complied with or is inapplicable in that i) Fr. Hannon's December 3, 1975 Step I grievance was filed 7 days after the grievance arose by virtue of Chief Flynn's directive on November 26, 1975, well within the 120-day requirement for filing of a Step I grievance; and ii) neither the Union's direct filing of its grievance at Step III in March 1976 nor the subsequent appeal to Step IV on February 8, 1977 is subject to the 120-day requirement because under the Contract the 120-day requirement is applicable only to filings at Step I;

C. There has been no laches by the Union for the following reasons:

i) There has been no delay in filing of the grievances and the delay in processing the grievances through the grievance procedure is excusable. Both Fr. Hannon

and the Union initiated their grievances promptly and complied with the contract's time periods at least through Step III. The period from March 31, 1976 when the Step III appeal was denied to the February 8, 1977 filing of the appeal at Step IV, an eleven month delay, can be explained by one of two assumptions on the part of the Union; first, based on the March 31, 1976 letter in which it was stated "There is no need to set a hearing date because your solution to the problem was Granted," the Union believed that the firemen would be permitted to work the overtime they had been denied; or second, that the grievance would automatically be advanced to Step IV because at Step III the City had failed to comply with the hearing requirement of the contract thus triggering applicability of the following contractual provision:

"In the event that the Department or the City fails to comply with the time limits prescribed herein, the grievance automatically shall be advanced to the next step." (Contract, Art. XXII, Section 2).

The Step IV decision was not rendered until December 18, 1979 so that the January 3, 1980 filing of the request for arbitration at Step V was timely.

ii) There has been no prejudice to the City by the mere passage of time since 1975 either in the form of loss of evidence or a detrimental change in position. The it "essential evidence" with respect to the grievance is

"primarily documentary," and the relevant documents have been presented or are readily available. Persons with knowledge of the facts are available to be called as witnesses. The additional amount of overtime that might ultimately be awarded by an arbitrator either has been determined or is easily ascertainable. Thus, the passage of time will not result in any increase in the City's liability.

DISCUSSION

The City challenges the timeliness of the grievance by focusing on February 8, 1977 in relation to November 26, 1975, the date on which the grievance arose. February 8, 1977, however, was not the date of initiation of the grievance procedure but rather was the date on which the appeal to Step IV was filed.¹

This case, therefore, as pleaded by the City, involves a question of procedural timeliness within the meaning of the contract, especially the timeliness of an appeal to Step IV. This Board has ruled consistently that such questions are for an arbitrator to resolve.²

¹ Fr. Hannon filed his grievance at Step I on December 3, 1975; the Union filed directly at Step III in March 1976.

² Decision Nos. B-4-80; B-3-80; B-14-79; B-3-79; B-7-79; 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.

In addition, the eleventh-month delay in processing the grievance to Step IV does not constitute laches since delay or untimeliness, a contractual defense, has been distinguished from laches, an equitable defense B-6-75. The Board has often made the distinction between delay that can be characterized as "intrinsic delay," to which laches does not apply, as opposed to "extrinsic delay," to which the defense of laches would be appropriate. B-6-75; B-29-75; B-9-76; B-4-76; B-3-76.

In the case of Flair Builders, Inc. v. I.U.O.E., 80 LRRM 2441 (1972), a case often cited by the Board, a distinction between such "intrinsic delay" and "extrinsic delay" was noted by the United States Supreme Court:

"Intrinsic delay denotes a failure to observe time limitations that the contract provides for processing a grievance, whereas extrinsic delay denotes a lack of diligence in initiating a claim thereby placing an undue burden on the defense."

The alleged delay in this case involves the "processing of a grievance" from one step to another rather than a delay in initiating the grievance procedure. Such an "intrinsic delay" has not been held by this Board to be subject to the equitable defense of laches.

In reaching its decision in this case, the Board also notes that the City may not be in the best position to be

asserting denial of arbitration on the basis of union delay. The OMLR has raised the question of delay for the first time in its Petition; no issue of delay was raised at either Step III or at Step IV. In addition, the Union claims that the appeal to Step IV was automatic because the City failed to comply with Step III time periods for holding a hearing. Finally, the City itself took in excess of two and a half years to render its Step IV decision contrary to specific contractual time limitations. Given these facts, whether or not the Union complied with the grievance procedure will be left to an arbitrator.

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

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

DATED: June 24, 1980
New York, N.Y.

ARVID ANDERSON
CHAIRMAN

DANIEL G. COLLINS
MEMBER

EDWARD J. CLEARY
MEMBER

EDWARD F. GRAY
MEMBER

JOHN D. FEERICK
MEMBER

FRANKLIN J. HAVELICK
MEMBER