City v. L.237, IBT, 25 OCB 23 (BCB 1980) [Decision No. B-23-80 (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-23-80
DOCKET NO. BCB-397-80
(A-977-79)

-and-

LOCAL 237, INTERNATIONAL BROTHERHOOD OF TEAMSTERS (CIVIL SERVICE BAR ASSOCIATION),

Respondent.

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**DECISION AND ORDER**

This proceeding was commenced by the-Civil Service Bar Association, Local 237, International Brotherhood of Teamsters (hereinafter CSBA or the Union) by the filing on January 9, 1980 of a request for arbitration. The grievance concerns the reinstatement of Zebbia Friedman, Esq. to the position of Civil Service Attorney with the New York City Department of Housing Preservation and Development. Specifically, the Union alleges that the employer:

> 1. ...unduly delayed the effective date of reinstatement from the proper effective date of December 30, 1977 to the incorrect and wholly arbitrary date of April 20, 1978; and,
>
> 2. ignored the provisions of all applicable Collective Agreements (1970-1979) bearing upon the correct computation of annual pay for the Grievant upon reinstatement and arbitrarily established an Incorrect figure of $15,725 per annum;

> 3. used that wrong pay rate of $15,725, as its base figure for subsequent salary adjustments (increases) which (led] to the establishment of Grievant's present salary, $18,225 which is wrong. The Grievant's annual salary correctly computed to date should be $24,695. (Step I Grievance).

The City, appearing by its Office of Municipal Labor Relations (hereinafter the City or OMLR),challenges arbitrability on the ground that the request does not raise an arbitrable issue since the contract provisions concerning reinstatement are clear. The City also alleges that grievant failed to comply with time limitations of the contractual grievance procedure and that the claim is barred by the equitable doctrine of laches.

**BACKGROUND**

On April 20, 1970, Zebbia Friedman was appointed to the position of provisional Attorney with the Housing and Development Administration (HDA), the predecessor to the Department of Housing Preservation and Development (HPD), at an annual salary of $13,500. On April 10, 1971, she was appointed from a civil service list to the permanent title of Assistant Attorney at an annual salary of $12,000 and immediately took a leave of absence in order to continue to serve in the higher-paying title of provisional Attorney. Subsequently, grievant was appointed to the title of provisional Associate Attorney at an annual salary of $18,600 and continued in this position even after her promotion by civil service examination to the title of Attorney (annual salary: $16,400). On January 21, 1977

grievant left HPD, on a personal leave of absence without pay. Her provisional appointment as Associate Attorney was terminated immediately, but her leave of absence from the civil service Attorney title continued until May 20, 1977, when grievant resigned her leave status and withdrew all monies from the New York City Employees' Retirement System. Upon termination of her provisional appointment, grievant's salary in that title was $21,550. Upon termination of her leave of absence from the permanent appointment, the pay rate for the permanent civil service line was $17,525.

On December 30, 1977, Ms. Friedman returned to HPD, which was permitted since her return was within one year of her resignation. Grievant came back to the agency as a provisional Attorney, pending formal approval by the Department of Personnel of her reinstatement as a permanent Attorney, the title grievant held on the date of separation. Reinstatement was effective an April 20, 1978. Grievant received notice of this fact on May 25, 1978.

Upon her return to HPD on December 30, 1977, Ms. Friedman received a salary of $15,725, the minimum basic salary for the Attorney title on that date. The following week, her salary was adjusted to $18,225, the new minimum for the title effective January 1, 1978. Grievant's salary upon reinstatement was determined in accordance with the Alternative Career and Salary Pay Plan Regulations which are incorporated by reference into the contract between the parties. Regulation Thereof provides as follows:

> V. Appointments, Reinstatements, Promotions, Demotions, and Transfers.
>
> 1. Appointments and reinstatements shall be made at the minimum basic salary for the re-

> spective class of positions to which such appointments or reinstatements are made, as set forth in the Implementing Personnel Order or as otherwise authorized for a specific position or positions by a Certificate of the Mayor. In the event that a different appointment or reinstatement salary is authorized for a specific position or positions by a Certificate of the mayor as herein provided, no other employee in a position in the same class of positions receiving a rate different from the rate authorized in such certificate shall be automatically entitled to have his salary adjusted to the rate or rates authorized in such certificate for the specific position or positions (emphasis supplied).

The collective bargaining agreement contains at Article VI, a detailed grievance procedure. A "grievance" is defined as:

> (A) A dispute concerning the application or interpretation of the terms of this Agreement;
>
> (B) A claimed violation, misinterpretation or misapplication of the written rules or written regulations, existing written policy or written orders of the agency which employs the grievant affecting the terms and conditions of employment;....

## POSITIONS OF THE PARTIES

### City Position

The City contends that the CSBA's request for arbitration should be dismissed because there is "not even an arguable violation of the contract." The City notes that grievant received the salary upon reinstatement which is mandated by the Alternative Career and Salary Pay Plan Regulations incorporated into the contract the minimum basic salary for the Attorney title as set forth at Appendix A of the collective bargaining agreement.[1] OMLR calls to our

[1] In fact, it is Article III, Section 2a which sets forth the salary range for each Attorney title and defines the minimum and maximum at each level.

attention this Board's Decision B-10-79 wherein we noted the absurdity that would result if subjects on which the parties rights were specifically limited by contract were found arbitrable: even disputes involving contract provisions specifically barring such disputes from the grievance procedure would be sent to arbitration. Since the contract language clearly defines the parties' rights on the subject of reinstatement, says the City, the grievance brought here is not within the scope of the contractual obligation to arbitrate disputes.

The City also contends that the request for arbitration should be denied because the grievant failed to comply with the 120-day limit of the contractual grievance procedure. Ms. Friedman brought her grievance at Step 1 on May 15, 1979, almost a year and a half after her return to HPD on December 30, 1977, and almost a year after being notified of her status on May 25, 1978.

In addition to its assertion that grievant's claim is time - barred under the collective bargaining agreement, the City maintains that the claim is barred by laches. OMLR asserts that grievant's delay in filing prejudiced its position by substantially increasing its potential liability should the requested relief be granted and by preventing it from obtaining evidence and potential witnesses. In particular, the City claims that an important witness, the Deputy Commissioner for HPD (Administration) is no longer working for the City and cannot be called to testify on its behalf.

The City asks that the Board dismiss the Union's request for arbitration.

**Union's Position**

CSBA denies that Article III, Section 1 (Salaries) and Appendix A of the parties' contract are so clear as to warrant excluding the grievance from arbitration. It maintains that Board Decision Number B-10-79 is inapplicable because it applies only where there is "exclusionary language" in a contract, which it not the case here, according to the Union. In addition, CSBA asserts that "no two of the three earlier 'determinations' of grievant's claim are based [on) the same rationale or contract provision".[2] Thus, the Union implies that the City itself was unable to give a conclusive interpretation to the contract.

The Union maintains that the Alternative Career and Salary Pay Plan Regulations, which provide that reinstatements shall be made at the minimum basic salary, are inapplicable to this case. It relies on OCB Case Number A-550-76, Matter of the Arbitration between the City of New York and Civil Service Bar Association, to support its contention. In that case, CSBA alleged that the City had, unilaterally and without notice to the Union, appointed or promoted members of the bargaining unit from a lower to a higher

[2] The Union asserts that the City's denial of the grievance was Eased, alternatively:
- solely on the inability of grievant to come within the terms and conditions of the Arbitrator's Award on Attorney titles (depart mental memorandum dated March 12, 1979),
- on the unavailability to grievant in 1974 of provisions for "folding-in" from a provisional to a Permanent title at no salary reduction (Step II determination),
- on "'facts' not Present in this case," and 'a hodge-podge' of references to collective agreements, Agency rules, Alternative Career and Salary Plan, and a recitation of grievant's selection of fictitious 'options'" (Step III determination).

attorney classification at a salary rate higher than the minimum rate prescribed by the collective bargaining agreement. The Union maintained that the City was thereafter required, pursuant to a side-letter agreement dated July 25, 1974, to raise the minimum salary rate for each attorney classification by adding the same dollar increase as was given to the member appointed or promoted at a salary rate higher than the minimum for the classification. The City contended that although the collective bargaining agreement provides minimum rates for the various classifications, it does not mandate appointments at such minimum rates. Personnel Order 21/67 which includes the Alternative Career and Salary Pay Plan Regulations, provides that appointments or promotions may be made at a salary other that the minimum basic salary, if authorized by a certificate of the Mayor. From this the arbitrator concluded that: "in the absence of explicit language pointing to some other authoritative source for the payment of minimum pay rates, there appears no justification to presume the conclusiveness of the incorporation by reference of the Alternative Career and Salary Pay Plan Regulations."

CSBA also refutes the City's contention that grievant failed to take timely action under the collective bargaining agreement, offering evidence of two memoranda written to her supervisor within 120 days of May 25, 1978, the date on which grievant received notification of her reinstatement status. These memoranda advised the City of the allegedly incorrect date of grievant's reinstatement and of the fact that she was not given the title and salary upon reinstatement which had been promised her.

The Union further suggests that any delay in its filing of a request for arbitration was due to the delay of the Deputy Personnel Officer of HPD in responding to inquiries regarding grievant's correct salary. Subsequent to grievant's memoranda to her supervisor, on October 26, 1978, an administrative manager wrote to the Deputy Personnel Officer seeking a review of grievant's case and, on February 1, 1979, the grievant herself wrote to the Deputy Commissioner for Administration in an attempt to get some response to the request for review. The Deputy Personnel Officer's memorandum in which, the Union notes, she apologized for her delay in responding, was dated March 12, 1979. CSBA filed its grievance at Step 1 on May 15, 1979.

CSBA denies, for reasons mentioned above, that its commencement of the grievance procedure was untimely so as to support a claim of laches. The Union further denies that the City was prejudiced by any delay, asserting that "the major portion of the case is based in records maintained by the City" and "the same personnel involved at every step of this matter are still in the employ of and are available to the employer." CSBA states that the "undue burden" which a party seeking to assert a laches defense must prove requires that the City have changed its position in reliance of the belief that the grievant had abandoned her claim. No such reliance has been shown here, according to the Union.

The Union requests that the City's petition challenging arbitrability be dismissed.

**DISCUSSION**

The Board of Collective Bargaining has consistently adhered to the position that, in determining the arbitrability of a grievance, it must first decide whether the parties are obligated by the collective bargaining agreement to arbitrate their disputes and, if so, whether a particular controversy falls within the contractual obligation.[3] The 1978-1979 collective bargaining agreement between CSBA and the City includes at Article VI a detailed grievance procedure culminating in arbitration upon appeal to the Board from an unsatisfactory determination at Step III of the procedure. Thus, we conclude, the parties to the instant proceeding are obligated to arbitrate grievances.

We now turn to the question of whether the grievance alleged is within the scope of the agreement to arbitrate. The Union claims that grievant's salary rate and date of reinstatement were incorrect under the contract. Article III, section 2 and Appendix A) sets forth the applicable salary rates and ranges for attorney titles. The salary grievant received as of January 1, 1978 ($18,225) and the amount she claims she should be receiving ($24,695) are both within the salary range for the title of Attorney. Article III also incorporates by reference the Alternative-Career; and Salary

[3] Board Decisions B-2-69; B-5-76; B-5-77; B-10-77.

Pay Plan Regulations.[4] Regulation V of which provides that reinstatements "shall be made at the minimum basic salary or as otherwise authorized by a Certificate of the Mayor." Since resolution of the dispute between the parties requires interpretation of Article III (Salaries) and Alternative Career and Salary Pay Plan Regulation V on reinstatement, we find that a grievance as defined in Article VI, Section 1(A) of the contract ("a dispute the application of the terms of this Agreement") has been stated.

Specifically, we find that the Union's claim that the Alternative Career and Salary Pay Plan Regulations are not controlling, because of the arbitration award in OCB Case No. A-550-76, is a question of contract interpretation.[5] It is well settled that

[4] Article III, Section 1 of the contract provides as follows: (a) This Article III is subject to the provisions, terms and conditions of the Alternative Career and Salary Pay Plan Regulations, dated March 15, 1967 as amended to date, except that the specific terms and conditions of this Article shall supersede any provisions of such Regulations inconsistent with this Agreement subject to the limitations of applicable provisions of law.

[5] In fact, any attempt by the Unio to rely on the arbitration award rendered in that case is misplaced as the two cases are factually dissimilar. The award in A-550-76 was rendered pursuant to a side-letter agreement intended as a rider to the 1974-1975 contract between CSBA and the City. This agreement provided that the City had the unilateral right to change the minimum salary rates for certain attorney titles, provided that the minimum for each title was changed by the same dollar amount at the same time. There is no such rider to the current agreement between the parties.

(Footnote continued next page)
such questions are for determination by an arbitrator.[6] Further,

such a question goes to the merits of the controversy. This Board has long held that, in deciding questions of arbitrability, it will not inquire into the merits of a dispute.[7]

Having determined that the parties are obligated to arbitrate the grievance presented, we must next decide whether the right of the Union to proceed to arbitration is nonetheless barred by a failure to bring its grievance in a timely fashion.

The City alleges that CSBA failed to comply with the contractual 120-day time limit for bringing a grievance. Since the

[5] continue

Further, the decision in A-550-76 concerned the effect of the appointment of one attorney at a salary rate higher that the minimum for the title on the other members of the bargaining unit in the same and other attorney titles. Here, the issue is whether an attorney (grievant) may be reinstated at a salary rate higher than the minimum for the title, not the effect of such reinstatement on other employees, and not even whether this grievant is entitled, based on the arbitrator's award, to something more than she received. We note that the final supplemental award issued in A-550-76 limits entitlement to the lump sum payment and salary rate increase provided for therein to employees in the eligible attorney titles as of December 16, 1977, the date of the supplemental award. Grievant was plainly not in any attorney title on December 16, 1977. She had resigned seven months earlier and did not return to City employment until December 30, 1977.

[6]. Board Decisions B-8-68; B-4-72; B-25-72; B-1-76; B-2-77; B-5-77; B-6-77; B-10-77. The United States Supreme Court in United Steelworkers of America v. American Mfg. Co. held that:

> Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator....[T]he moving party should not be deprived of the arbitrator's judgment, when it is his judgment and all that it connotes that was bargained for.
>
> The courts therefore have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim.

grievant returned to work on December 30, 1977 and had notice of her reinstatement status on May 25, 1978, at the latest, the City argues that the commencement of the formal grievance procedure at Step I on May 15, 1979 is untimely. Whether memoranda written by grievant to her supervisor in September of 1978 should, as the Union contends, be considered the commencement of the grievance

procedure (within 120 days of the date on which grievant received formal notification of her status) is not a question for this Board. Questions concerning compliance with time limits of a contractual grievance procedure are for an arbitrator.[8]

[6] Continue

> The agreement is to submit all grievances to arbitration, not merely those the court will deem meritorious. (Emphasis supplied). 46 LRRM 2414, 2415 (1960).

The position taken by the Supreme Court has been followed consistently by this Board which, in its Decision No. B-10-77, explained:

> There is no requirement ... that a grievant must do anymore than allege a contractual violation within the definition of a grievance agreed to by the parties and incorporated by them into their contract. No "proof" need be presented to this Board regarding the merits of the grievance; such proof is to be put before the arbitrator who must decide the grievance. The Board's function in determining arbitrability is to "decide whether the parties are in any way obligated to arbitrate their controversies and, if so, whether the obligation is broad enough in its scope to include the particular controversy presented." OLR v. SSEU, Decision No. B-2-69.

[7] Board Decisions B-12-69; B-8-74; B-19-74; B-1-75; B-5-76; B-10-77.

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

However, it is for the Board to determine whether the Union has been guilty of laches and whether CSBA should, on this ground be precluded from having its grievance heard by an arbitrator. Laches or extrinsic delay differs from procedural untimeliness (intrinsic delay) in that it does not involve interpretation of contract provisions. In determining whether the defense of laches is available, this Board has adopted the standard of the United States Court of Appeals for the Fourth Circuit which required a finding of "unexplained or inexcusable delay in asserting a known right which causes injury or prejudice" to the party relying upon the defense.[9]

As mentioned above, there is evidence that grievant made informal attempts as early as September 1978, less than four months after receiving notification of her reinstatement status, to correct the date and salary rate at which she was reinstated. Formal action was not initiated until May 15, 1979, almost one year after grievant received such notice. Even if we allow that the grievant knew or had reason to know of the existence of her claim on May 25, 1978, however - rather than only on March 12, 1979, the date of the agency's memorandum informing grievant that the terms of her reinstatement were correct - we do not feel that a finding of laches is warranted.

This Board has held that unexplained failure to prosecute a claim of contractual violation until two years after the claim allegedly arose warrants the conclusion that the party has abandoned its claim and a finding of laches.[10] However, we have also held

[9] Board Decision B-11-77.

[10] Board Decision B-6-75; B-29-75; B-3-76; B-4-76.

that the passage of 9½ months in initiating a grievance does not constitute "long delay."[11] In the latter decision, we noted that the grievant had initially pursued his claim with the Workmen's Compensation Board, thus putting the employer on notice of its potential liability. Similarly, the grievant in the instant case took preliminary steps - she wrote memoranda to her supervisor - which gave notice to the City of her claim. In B-6-75, we denied the claim of laches because the alleged delay was less than one year in duration, the delay was neither unexplained nor inexcusable, and there was no abandonment of the grievance.

We cannot, however, decide the laches question in the case before us solely in reliance upon our decision in B-6-75. In that case the employer did not contend that the delay in filing resulted in a loss of evidence or other prejudice which might have been avoided had the grievance been timely filed. In the instant case, the City alleges that it was prejudiced by grievant's delay. The City claims generally that it was prevented from obtaining evidence and that witnesses, in particular, a Deputy Commissioner, are unavailable to testify on the City's behalf. The unavailability of a single witness does not seem to us a sufficient basis, without more, for a finding of prejudice to the City. We feel justified in presuming that the City has maintained records - the documents attached to the pleadings are evidence of this fact. Any prejudice caused to the City by the unavailability of one witness will be largely neutralized by the availability of such records.

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[11] Board Decision B-6-75.

OMLR also claims that grievant's delay has substantially. increased its potential liability. The City does not specify, however, how its liability will, be increased. It relies on Board Decision B-4-80 where, even though the City did not show any direct proof of harm, we found that it was "inherently prejudiced" by the increased potential liability caused by delay. However, B-4-80 concerned a claim that the grievants had been working out of title for two years without filing a claim for compensation. Each day the Union delayed in asserting its grievance, the period during which the City, had it known that its employees were performing out-of-title work, could have exercised its option to instruct grievants to perform only, duties of the lower title, lengthened. Because of the Union's failure to file, the meter on the City's liability continued to run. In the case now before us, no such option exists. Ms. Friedman was entitled to reinstatement either on December 30, 1977 or on April 20, 1978. She is entitled either to the rate of pay she has been receiving or a higher rate. If the Union prevails at arbitration on either point, the City's liability will not beany greater than it would have been had the claim been filed earlier. The City's liability, if any, is fixed.

Furthermore, the delay in this case of sixteen months, at most, is neither unexplained nor inexcusable. Grievant relying upon promises made to her by her superiors, sought to have the alleged errors rectified informally beginning in September 1978. The delay in bringing a formal grievance was conceitedly due, at least in part, to the agency's failure to respond promptly to requests made as early as October 1978 for a review of, grievant's

case. Neither has the City produced convincing evidence of injury or prejudice resulting from the Union's delay. Further, the cited decision wherein the Board found "inherent prejudice" is inapplicable because it is factually dissimilar to the instant case.

We find and conclude, therefore, that the Union has stated an arbitrable grievance under its contract and has not been guilty of laches. We shall grant the Union's request for arbitration and dismiss the City's petition challenging arbitrability. This decision is in keeping with the Board's policy, which is consistent with the New York City Collective Bargaining Law, to promote and encourage arbitration as the selected remedy to redress grievances.[12]

**ORDER**

Pursuant to the power 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

[12] NYCCBL §1173-2.0. Board Decisions B-8-68; B-12-71; B-1-75; B-11-76; B-12-77; B-13-77; B-14-77; B-1-78.

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

DATED: New York, New York
June 24, 1980

ARVID ANDERSON
Chairman

DANIEL G. COLLINS
Member

EDWARD J. CLEARY
Member

EDWARD F. GRAY
Member

JOHN D. FEERICK
Member

FRANKLIN H. HAVELICK
Member