

City, DEP v. DC37, 25 OCB 29 (BCB 1980) [Decision No. B-29-80  
(Arb)]

OFFICE OF COLLECTIVE BARGAINING  
BOARD OF COLLECTIVE BARGAINING  
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In the Matter of

DECISION NO. B-29-80

THE CITY OF NEW YORK, DEPARTMENT  
OF ENVIRONMENTAL PROTECTION,

DOCKET NO. BCB-429-80  
(A-1055-80)

Petitioners,

-and-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

Respondent.  
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**DECISION AND ORDER**

On August 6, 1979 District Council 37 (hereinafter "DC 37" or "the Union") filed a grievance alleging that Sewage Treatment Workers and Senior Sewage Treatment Workers in the Bureau of Water Pollution of the Department of Environmental Protection have been performing out-of-title duties for at least seven years. The grievance was filed pursuant to Executive Order 83 (hereinafter E.O. 83) which defines the term "grievance" in pertinent part as "a claimed assignment of a grievant to duties substantially different from those stated in his or her job classification."<sup>1</sup> Before this Board, the Union also alleges a violation of "written rules or regulations of the agency by whom grievant[s] are] employed affecting terms and conditions of employment."<sup>2</sup> The grievance was denied by the Office of Municipal Labor Relations (hereinafter "the City" or "OMLR") at Step IV in a decision dated April 11, 1980.

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<sup>1</sup> E.O. 83 §5 b(C).

<sup>2</sup> E.O. 83 §5 b(B).

The Union filed a request for arbitration dated May 20, 1980<sup>3</sup> seeking "removal of the job duties (unless and until the parties negotiate a change in the job duties and specifications with additional remuneration for the extra jobs performed)." The City filed its petition challenging arbitrability on May 23, 1980.

### **BACKGROUND**

The job specifications for the title Sewage Treatment Worker include under the heading "Examples of Typical Tasks" the duty of "taking samples." The job specifications for the title of Senior Sewage Treatment Worker include the supervision of Sewage Treatment Workers. Grievants allegedly are and have been performing, in addition to the listed duties, five tests on liquid effluent at sewage treatment plants. These tests are to determine the nature and amount of treatment required to bring the liquid effluent to acceptable standards. According to OMLR's Step IV decision, the tests involve reading appropriate levels in a measuring glass, comparing test colors with a standard after the addition of a reagent, and counting items with the naked eye.

The grievance is brought pursuant to Executive Order 83 because there is no collective bargaining agreement between the

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<sup>3</sup> E.O. 83 §5 d provides that "[a]n employee organization certified for the unit of which grievant is a member shall have the right to bring grievances unresolved at Step 4 of the general procedure to impartial arbitration. It further provides that "[t]he arbitration shall be conducted in accordance with the Consolidated Rules of the Office of Collective Bargaining."

parties covering the subject matter of the grievance.<sup>4</sup> The procedure for bringing a grievance under E.O. 83 is set forth at section 5a(2) thereof and requires that the grievance be presented "not later than 120 days after the date on which [it] arose

### POSITIONS OF THE PARTIES

The City maintains that the request for arbitration should be denied on the ground that grievants were aware of facts constituting the grievance and failed to file a claim for at least seven years. This delay, the City contends, has "severely prejudiced" its position in that it is now unable to determine grievants' entitlement, if any, and is prevented from obtaining evidence and from locating witnesses to testify in its behalf. The City asserts that the doctrine of laches should be applied to bar grievants' claim.

D.C. 37 claims that the requirement that grievants perform tests on liquid effluents constitutes "assignment to duties substantially different from those stated in ... [the] ... job classification"<sup>5</sup> and, further, that such assignments violate "written

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<sup>4</sup> E.O. 83 §5a provides as follows:

(1) The following grievance procedure shall be applicable to all mayoral agency employees who are eligible for collective bargaining under the New York City Collective Bargaining Law except:

(A) Members of the police force of the Police Department and

(B) All other employees in a bargaining unit for which the collective bargaining representative recognized or certified to bargain on wages, hours and working conditions has executed a written collective bargaining agreement containing a grievance procedure.

<sup>5</sup> E.O. 83 §5 b(C).

rules or regulations of the mayoral agency by whom grievant[s are] employed...,<sup>6</sup> specifically, the Civil Service Law and rules and regulations promulgated thereunder by the New York City Department of Personnel which, the Union alleges, have been incorporated in Agency rules.

The Union asserts further that the assignment to out-of-title duties is an ongoing violation of the Civil Service Law and is "always timely because the acts prohibited are always illegal." The Union also maintains that the equitable defense of laches is unavailable to the City because of the latter's 'knowing and intentional' violation of E.O. 83 and Civil Service Law. D.C. 37 urges the application of the unclean hands doctrine to overcome the City's defense.

D.C. 37 explains that any delay on its part is due to the fact that requests that grievants perform out-of-title duties have "increased substantially so as to provoke the grievance." The Union contends that, in any case, the City has not been prejudiced by any delay on the Union's part because the issue of whether grievants have been required to perform out-of-title work may be determined by consulting existing job specifications for the titles involved and by examining the nature of the tasks which grievants are presently assigned. This information, the Union asserts, may be obtained through witnesses who are present and available.

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<sup>6</sup> E.O. 83 §5 b(B).

### DISCUSSION

Sewage Treatment Workers and Senior Sewage Treatment Workers, grievants in this case, are "section 220 employees," that is, their wages are determined pursuant to section 220 of the New York State Labor Law rather than through collective bargaining. Although Sewage Treatment Workers may negotiate a contract covering working conditions, they have not been parties to such an agreement since 1971. Therefore, they may avail themselves of the grievance procedure set forth at section 5 of Executive Order 83.<sup>7</sup>

There is no dispute that the Union has stated a grievance under E.O. 83 §5 b(C) by alleging that grievants are performing duties substantially different from those stated in the job classification.<sup>8</sup> As in several cases recently-decided by this Board involving alleged assignments to out-of-title work, the objections to arbitrability focus upon the timeliness of the claim.

Laches has been defined by this Board as "unexplained or inexcusable delay in asserting a known right which causes injury or prejudice to the defendant."<sup>9</sup> A finding of laches is warranted where a party's delay in asserting a claim places an undue burden on the defense as, for example, where evidence is lost as a result of

delay or where a party has changed its position in reliance on

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<sup>7</sup> See n.4 supra. Board Decisions B-12-77; B-13-77; B-1-78.

<sup>8</sup> Therefore, we need not address the issue of whether the Union Ras also stated a grievance under E.O. 83 55 b(B) by alleging a violation of the Civil Service Law and regulations promulgated there under. This would require a preliminary finding that said law and such regulations are rules-and regulations of the agency by which grievants are employed affecting terms and conditions of employment.

<sup>9</sup> Board Decisions B-11-77; B-3-70; B-3-80.

claimant's silence.<sup>10</sup>

In the instant matter, the Union attributes its delay to the fact that the number of requests that grievants perform the alleged out-of-title duties has "increased substantially" and that this increase provoked the bringing of a grievance. Whether such an explanation is sufficient to warrant a finding that the delay of, conceitedly, at least seven years was nevertheless excusable neglect need not concern us here. The violation, if any, is alleged to be a continuing one and the remedy sought by the Union is limited to the removal of the out-of-title job duties. The Union qualified its demand for relief by suggesting that, if and when the parties negotiate a change in the job duties, with additional remuneration for the extra jobs performed, grievants would consent to perform the duties complained of. However, there is no indication that the Union now seeks or would seek under changed job specifications back pay for the grievants herein.<sup>11</sup> As to the issue of compliance with the 120-day provision for initiating a grievance under E.O. 83, this Board has long held that matters of procedural arbitrability (such as timely compliance

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<sup>10</sup> Board Decisions B-4-76; B-29-76; B-3-80.

<sup>11</sup> The Office of Collective Bargaining has been informed that a working conditions contract covering grievants herein was concluded during the recent negotiations between the City and D.C. 37 and that no changes in the job duties of Sewage Treatment Workers were made.

with a grievance procedure) are for determination by an arbitrator.<sup>12</sup>

Further, we find no merit in the City's claim that it has been "severely prejudiced" by the Union's delay. In arguing that the delay has foreclosed Petitioner from obtaining evidence and potential witnesses in support of its position, the City seems to assume that the Union seeks retroactive relief for grievants which, as stated above, is not the case.<sup>13</sup> Since the violation, if any, is ongoing, witnesses and evidence necessary to a determination of the merits of the grievance are in existence and are available to both parties.

For the above-stated reasons, we shall grant the Union's request for arbitration. However, it should be noted, our decision is conditioned upon the fact that the only remedy sought is prospective (removal of the alleged out-of-title duties); the Union shall be precluded from seeking retroactive relief at arbitration.

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**ORDER**

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 be, and the same hereby is, denied; and it is further

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<sup>12</sup> See, e.g. Board Decisions B-7-68; B-18-72; B-6-75; B-14-76; B-6-78.

<sup>13</sup> The City claims that "[t]imely filing of the grievance would have afforded Petitioner the opportunity to ascertain grievants' alleged entitlement, if any." (Emphasis added)

ORDERED, that the Union's request for arbitration be, and the same hereby is, granted upon the condition that the Union be precluded from seeking retroactive relief at arbitration.

DATED: New York, N.Y.  
September 4, 1980

ARVID ANDERSON  
CHAIRMAN

WALTER L. EISENBERG  
MEMBER

DANIEL G. COLLINS  
MEMBER

FRANKLIN J. HAVELICK  
MEMBER

JOHN D. FEERICK  
MEMBER

MARK J. CHERNOFF  
MEMBER

EDWARD J. CLEARY  
MEMBER