City v. L.371, SSEU, 25 OCB 3 (BCB 1980) [Decision No. B-3-80 (Arb)]

Office of Collective Bargaining
Board of Collective Bargaining

In the Matter of

The City of New York,

Petitioner, Decision No. B-3-80

-and- Docket No. BCB-334-79
(A-862-79)

Social Service Employees Union,
Local 371, DC-37, AFSCME, AFL-CIO

Respondent

Decision and Order

"This proceeding was commenced with the filing on September 24, 1979 of a petition by the City of New York, appearing by its Office of Municipal Labor Relations (hereinafter "OMLR" or "the City"). The petition challenges the arbitrability of a grievance stated in a request for arbitration filed on June 7, 1979 by Social Service Employees Union, Local 371 (hereinafter "SSEU" or "the Union"). The request names four grievants and claims that: "Grievants have been working out of title in Supervisor I positions. They are caseworkers." In the request, the Union contends that this action is in violation of Article VII, section la and Article III of the "SSEU-371 Contract"; Department of Personnel policy, "HRA/DSS policy"; and "D.C. 37 Contract, Article IX, Section 10."[1] The Union demands arbitration under Article

[1] In a letter dated November 2, 1979, the Union amended its request for arbitration by deleting an alleged violation of Personnel Director Rule 5.1.1 and reaffirmed all other alleged violations stated in the text above.

VII, section 2 of the SSEU contract and, as remedy, seeks: "Compliance, Appropriate Compensation for all out-of-title work, including interest thereon, and any other just and proper remedy."

The City contests arbitrability on the grounds, inter alia, that the grievance is barred by laches, that-it is untimely under the contract, and that the relief sought is/was prohibited by law.

BACKGROUND

In a claim dated November 2, 1978 filed at Step II of the grievance-arbitration procedure, the four grievants stated:

> As caseworkers we have been assigned to Liaison and Adjustment a Support Section which according to staff charts is to be staffed by only Supervisor I's. We have been working along side Supervisor I's in L & A performing the same job tasks and assignments as the Supervisor I's. We wish to grieve this situation as per Personnel Policy and Procedure #510-78 Out of Title Work.

The Step III decision reveals that Grievant A allegedly started working out-of-title in July 1973; Grievant B allegedly was assigned out-of-title in February 1974; Grievant C allegedly commenced out-of-title duties in September 1977; and Grievant D allegedly began out-of-title duties in July 1978. The four grievances were denied at Step III in a decision dated May 16,

1979.

The contractual provisions claimed by the Union to have been violated are: The 1976-1978 SSEU, Local 371 unit contract, Article III, entitled "Salaries," which sets forth, inter alia, the salary ranges and various pay increases for the titles Case - worker and Supervisor I; Article VII section lc which provides that "grievance" shall mean:

> A claimed assignment of employees to duties substantially different from those stated in their job specifications;

and the 1976-1978 City-Wide Contract, Article IX, section 10, which provides:

> a. Interest on wage increases shall accrue at the rate of three percent (3%) per annum from one hundred-twenty (120) days after execution of the applicable contract or one hundred-twenty (120) days after the effective date of the increase, whichever is later, to the date of actual payment.
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> b. Interest on shift differentials, holiday and overtime pay, shall accrue at the rate of three percent (3%) per annum from one hundred-twenty (120) days following its earning or one hundred twenty (120) days after the execution of this Contract, whichever is later, to the date of actual payment.
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> c. Interest accrued under a.or b. above shall be payable only if the amount of interest due to an individual employee exceeds five dollars ($5.00).

Also claimed violated are an undefined "HRA/DSS Policy" and Personnel Policy and Procedure No. 510-78, entitled "Out-of Title work," promulgated by the Department of Personnel on August 23, 1978 and which established procedures "to monitor

and control" out-of-title work problems.

SSEU seeks arbitration of the claims pursuant to Article VII, section 2 of the 1976 unit contract which sets forth a grievance procedure that at Step IV provides for arbitration of an unsatisfactory determination at Step III of the procedure.

POSITIONS OF THE PARTIES

The City argues that arbitration is barred by laches because the grievants waited for periods of up to 5 years, 4 months from the date the grievance arose before initiating their grievance. OMLR maintains that as a result of the delay, the City's potential monetary liability is increased and that evidence and witnesses concerning the claims will be difficult to obtain. In addition, the City contends that it has continued to assign other caseworkers to the work grievants-caseworkers herein assert is out-of-title. OMLR argues that grievants and the Union, in not presenting their claim for such a long period of time, have acquiesced to such assignments and should now be barred from arbitrating their claim.

The City also contends that the grievances are time barred under Article VII, section 2 of the unit contract as they were filed more than 120 days after the claims arose.

OMLR asserts that the out-of-title work prohibition set forth in Civil Service Law section 61 applies to both the

Union and the City and argues that the delay in initiating the claim should not be allowed to effect a circumvention of law in an arbitration concerning alleged out-of-title work and monetary relief. In this connection, OMLR claims:

> Payment for the performance of alleged out-of-title work performed prior to June 5, 1978 is prohibited by law and the Board of Collective Bargaining ... cannot direct an arbitrator to consider an award which would order a party to perform an act proscribed by law Matter of Burnell v. Anderson, NYLJ, November 26, 1975 p. 8 cols.1-2 ....

The City argues that a 1978 amendment[2] to Civil Service Law section 100(l), permitting an arbitral award of monetary relief for out-of-title work claims, is prospective in its application, that is, from June 5, 1978 and thereafter.

The Union disputes the City's assertions concerning the timeliness of the grievances. SSEU contends that the grievants caseworkers have been assigned to functions "traditionally and properly performed by Supervisor I's within the Liaison and Adjustment Unit" and that, upon information and belief, "all of [the] grievants are still employed in the disputed positions at the present time, and at the same location, to date [September 20, 19791]." The Union notes that the four grievants have worked in the disputed positions for different periods of time, 5 years, 4 months; 4 years, 9 months; 14 months; and 4 months, prior to the initiation of the grievance. The Union maintains that the delay

[2] Laws of 1978, chapter 255, section 1.

in filing the grievances was due to "excusable ignorance" because it appears that grievants were not aware they could protest and seek compensation for the out-of-title assignments until Personnel Policy and Procedure No. 510-78 was issued on August 23, 1978. The Union claims that the grievance herein was timely filed sixty-nine days after the issuance of 510-78.

The Union argues that the City has not established "unexplained or inexcusable delay in asserting a known right which causes injury or prejudice to the defendant" which the Board has used in previous cases as the standard for a laches defense.[3] SSEU contends that the City has not alleged the point in time when the grievants should have become aware of their claim nor has the City showed that any of the grievants unduly rested on a claim for an unreasonably lengthy period of time. The Union also maintains that the City's claim that it will have difficulty in obtaining evidence and witnesses concerning the grievances because of the delay in filing is without merit and groundless because the City has not identified unavailable evidence or witnesses or given reasons for the unavailability and because the grievants are still working in the disputed position and thus current evidence and-witnesses are obtainable. SSEU further disputes the City's claim of prejudice resulting

[3] The Union cites Decisions Nos. B-3-79 and B-11-77.

from the delay because of the continued assignment of other caseworkers to the Liaison and Adjustment Unit in light of the lack of objections to such assignments. The Union maintains that the reason no objections have been raised could be that the other caseworkers were not assigned to the same positions as grievants herein and that, in any event, the absence of complaint should not inure to the detriment of grievants herein. In fact, the Union points out, the absence of claims for a number of years indicates a lack of prejudice suffered by the City because of the alleged delay since it was not required to account for its improper action during that time.

The Union argues that OMLR's claim that the grievance is time barred under Article VII, section 2 of the contract is without merit "since it is well-established that questions of procedural arbitrability under a contract are for the arbitrator to decide, and not the Board."[4]

The Union also contends that the City's argument alleging that the 1978 amendment to Civil Service Law section 100 is only prospective in effect is inconsistent with 0MLR's claim that the delay in this case "has significantly increased the potential monetary liability of [the City]." The Union also claims that there is no evidence in the language of the amendment or related documents of an intent to apply the law expressly

[4] The Union cites Decisions Nos. B-7-68; B-18-72; B-6-75; B-6-78; and B-3-79.

permitting arbitral monetary relief only prospectively and not retroactively. SSEU argues that the Burnell v. Anderson decision, relied upon by the City as holding that arbitration of out-of - title work claims seeking monetary relief is barred by Civil Service Law, is no longer in effect given the amendment to Civil Service Law section 100(l). In any event, the Union concludes, arguments and contentions concerning monetary relief relate to remedy which is for an arbitrator to decide based on the merits of the case and interpretation of the current state of the law.

DISCUSSION

The instant case is another in a series of out"of-title work grievances filed since Personnel Policy and Procedure No. 510-78 was issued in August 1973. OCB records show that there are 121 unresolved grievances on which arbitration has been requested since August 1978, of which 40 request arbitration of grievances alleging out-of-title work. We also take administrative notice that there are twelve arbitrability disputes concerning alleged out-of-title work, of a total of 58 cases, pending before this Board. In eleven of the out-of-title arbitrability cases, a laches defense, inter alia, is asserted by the City as a bar to arbitration of the grievance. The instant matter is typical of a number of the cases wherein there is no dispute that the Union has alleged a claim which the parties have contractually agreed-to arbitrate; the objections to arbitrability and counter-arguments concern the timeliness of the grievance and alleged statutory and decisional bars to arbitration of the claim.

We have defined laches as "unexplained or inexcusable delay in asserting a known right which causes injury or prejudice to the defendant" such as by the loss of evidence or where a party has changed its position in reliance on the claimant's silence.[5] Laches arises from a party's extrinsic delay in not diligently asserting its claim, thereby placing an undue burden on the defense.[6] In the instant matter, the Union attributes the delay in filing the claims to the grievants' "excusable ignorance" of their right to file an out-of-title work grievance until Personnel Policy and Procedure No. 510-78 was issued on August 23, 1978. We point out that the New York City Collective Bargaining Law (NYCCBL), since its enactment in 1967, has defined the term "grievance," in pertinent part, as "a claimed assignment of employees to duties substantially different from those stated in their job classifications...[7] We note that all of the unit contracts covering caseworkers since 1971 also define grievance, in pertinent part, as "a claimed assignment of employees to duties substantially different from those stated in their job specifications...." Thus, while grievants may not have actually known of their right to-grieve out-of-title work assignments until August 1978, they certainly should have known, based on both the law and the contracts governing their employment relationship, of their right to seek redress for assignment to out-of-title work when they were first assigned to the alleged out-of-title work.

Evidence of implicit harm suffered by the City as a result of the delay in filing the claims is revealed by examina-

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[5] Decisions Nos. B-11-77; B-3-79.

[6] Decisions Nos. B-29-76; B-4-76.

[7] NYCCBL, Section 1173-3.0(o)(3).

tion of each of the claims. If Grievant A, who claims he started working out-of-title in July 1973, had timely initiated his grievance, the City's potential liability, if any, to pay at a higher rate for the performance of higher level duties may have been reduced by as much as five years. Or, the City may have, voluntarily or by order, ceased assigning the grievant several years ago to the alleged out-of-title work and, as a result, would not be faced with a demand for back pay for five years, four months. Similarly, had Grievants B and C timely filed their complaints, the City's potential liability, if any, in the present matter would have been reduced to back pay for 2 years, five months and ten months with respect to each grievant. only the claim filed by Grievant D was not so untimely as to cause prejudicial harm to the City in defending the action, for reasons to be discussed.

Thus, in light of the long delay in filing three of the grievances and the resultant exposure of the City to increased liability, there appears to be a basis for barring arbitration. However, several factors present in this case, and, we expect, in future similar cases to be presented to the Board, persuade us that it would be inequitable to deny any arbitral consideration of the claims. The parties have agreed, in Article VII, section 2, Step I of the 1976-1978 unit contract, that a grievance filed within 120 days after the claim arose is timely.[8] We note

[8] Our research reveals that in the July 1, 1978 to June 30, 1980 social services titles unit contract between the parties, Article VI, section 2, the parties agree that for all grievances alleging performance of out-of-title work, "no monetary award shall in any event cover any period prior to the date of the filing of Step I grievance unless such grievance has been filed within thirty (30) days of the assignment to the alleged out-of-title work."

that in this matter the grievants allege they have continually worked out-of-title during the entire periods in question. Applying the parties' agreement to arbitrate to the circumstances of this case, we find that the part of the grievances alleging performance of out-of-title work from July 5, 1978 (which is 120 days prior to the filing of the grievances) to the present is not barred by laches.

However, there may be reasons more compelling than "excusable -ignorance," such as fraud, duress or a written notice to the employer of a complaint of out-of-title work made prior to the filing of the grievance, which explains why grievants waited so long to file their grievances. We believe that the parties should be given the opportunity, in the arbitral forum, to present evidence of fraud, duress or prior written notice, if any exist, sufficient to excuse the delay in initiating the claims. of course, the City is to be given the opportunity to rebut such evidence, if presented to the arbitrator. However, we limit arbitral consideration of the merits of the claims under any circumstance, and even if the delay in filing the claims is excused, to allegations of out-of-title work performed after the effective date of the contract under which the claims are filed, i.e., January 1, 1976.[9]

[9] The grievance was filed on November 2, 1978 pursuant to the terms of the January 1, 1976 to June 30, 1978 social service unit contract. The claim was filed during the status quo period as the terms of the successor unit contract were not agreed to until October 24, 1979, and therefore the 1976-1978 unit contract governs this case.

To summarize our holding herein, if the arbitrator finds evidence of fraud, duress or written notice concerning the out-of-title work rendered prior to the filing of the grievance which compels excusal of the delay in filing the claims, the arbitrator then may consider the merits of the allegations of out-of- title work performed from January 1
1976 to the present. If there is not a compelling basis to excuse the delay, the arbitrator may consider the merits of the allegations of out-of-title work performed from July 5, 1978 (which is 120 days prior to the filing of the grievance) to the present.

Our application of both the equitable doctrine of laches and the parties' contract to the circumstances of this case, we believe, strikes a balance among policy considerations related to arbitrability of grievances. While we recognize that it is unfair to require the City to arbitrate now a number of apparently stale claims of out-of-title work performed over long periods of time, claims ostensibly initiated as a result of the City's effort stated in Personnel Procedure 510-78 to reduce and eliminate out-of-title work Problems we find that a determination of whether the delay in filing a claim is excusable because of compelling reasons is best left to the arbitral forum which the parties have agreed to use to resolve their disputes. If the arbitrator decides that there are compelling reasons to excuse the delay, we feel that there is no reason to extend the City's potential liability to a period earlier than the contract under which grievant filed

his or her claim. If the arbitrator finds that there is not a sufficient basis to excuse the delay, there is no equitable reason to deny, at the Board level, arbitral consideration of the claim, and defenses, of continuous out-of-title work performed during the 120-day period the parties' contract provides to file a grievance. We stress that our decision is in no way a departure from past Board holdings that questions of procedural arbitrability, including contentions concerning adherence to contractual grievance procedure time requirements, are matters for an arbitrator to resolve.[10] Our application of the 120-day period for filing a grievance set forth in the collective bargaining agreement is not a ruling on the merits of the timeliness of the grievances under the contractual grievance arbitration procedure, an issue long-held arbitrable in both the private sector and the public sector.[11] Rather, our decision only recognizes the 120 days as a period which the parties by contract have agreed would not form the basis of a claim of prejudicial, unexplained delay.

With regard to the City's other objection to arbitrability based on the alleged proscription on remedies for out-of-title work performed prior to June 5, 1978, we point out that the Board has long held that the possibility that an arbitrator might render

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[10] Decision NOS. B-6-78; B-7-78; 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; B-3-79; B-14-79.

[11] See, for example, John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964); Long Island Lumber Co., 15 N.Y. 2d 380 (1965); Triborough Bridge and Tunnel Authority v. District Council 37, 44 N.Y. 2d 967 (1978), affirming 56 A.D. 2d 890.

an award that would violate a statutory proscription is no basis for denial of an otherwise valid request for arbitration.[12] We recognize that an arbitrator may not render an enforceable award which is illegal or improper and we believe that it is inappropriate for the Board or the parties to assume that an arbitrator will fashion illegal or improper relief. We point out that the delay in filing the claims herein may be found not excused and, therefore, there may not be arbitral consideration of claims of work performed prior to June 5, 1978. In addition, we note that whether an arbitrator may legally award back pay for out-of-title work performed prior to June 5, 1978 has not been definitely ruled upon by the courts of New York State.[13] In our opinion of ordering arbitration of the grievances herein, as delimited by the above holdings, will only afford an arbitrator the opportunity to consider the merits of the grievance and fashion a remedy if needed, appropriate to the circumstances of the particular case and within the limits of applicable law.

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

[12] Decision Nos. B-6-78; B-7-78; 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; B-3-79; B-14-79.

[13] A discussion of the reasons for our not accepting the Burnell decision as dispositive of this point can be found in Board Decision No. B-2-78, pp. 5-8.

hereby

ORDERED, that the request for arbitration filed herein by Local 371, Social Service Employees Union be, and the same hereby is, granted insofar as the request seeks arbitration of claims of out-of-title work performed by grievants from and including July 5, 1978 to the present, and is denied insofar as the request seeks arbitration of claims of out-of-title work performed by grievants prior to July 5, 1978, unless the arbitrator determines there are compelling reasons to excuse the grievant for the delay in filing the claim(s), in which event the arbitrator may also consider, where applicable, and remedy, if necessary, a claim or claims herein of out-of-title work performed from and including January 1, 1976 to July 5, 1978.

DATED: New York, N.Y.
February 25, 1980

ARVID ANDERSON
CHAIRMAN

WALTER L. EISENBERG
MEMBER

ERIC J. SCHMERTZ
MEMBER

MARK CHERNOFF
MEMBER

CAROLYN GENTILE
MEMBER

FRANKLIN J. HAVELICK
MEMBER

EDWARD SILVER
MEMBER