City v. L.371, SSEU, 25 OCB 38 (BCB 1980) [Decision No. B-38-80 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of

THE CITY OF NEW YORK,

Petitioner,

-and-

SOCIAL SERVICE EMPLOYEES UNION, LOCAL 371, A.F.S.C.M.E., AFL-CIO,

Respondent.

DECISION NO. B-38-80

DOCKET NO. BCB-424-80 (A-1043-80)

DECISION AND ORDER

This matter concerns the arbitrability of a grievance stated in a request for arbitration filed by Social Service Employees Union, Local 371, AFSCME, AFL-CIO (hereinafter "the Union") on May 9, 1980. The City of New York, appearing by its Office of Municipal Labor Relations (hereinafter "the City"), challenged the arbitrability of the grievance in a petition filed on May 16, 1980. The Union answered the petition on June 30, 1980[1] and the City decided not to file a reply.

REQUEST FOR ARBITRATION

The Union seeks to arbitrate the grievance of Peter Prestia, who holds the Civil Service title Senior Human Resources Specialist and is employed in the Office of Contract Compliance/ Construction of the Bureau of Labor Services. The grievance alleged is:

[1] The parties agreed to extend the Union's time to answer.

> Grievant, a Senior HRS, functioned out-of-title as a Principle HRS, for the period 8/77-6/16/79. For those additional out-of-title responsibilities, he was promised a $3,000 per annum salary increase.

As relief, the Union asks, "Appropriate compensation with interest thereon, and any other just and proper remedy."

The Union claims violation of Article VII, section 1 of the collective bargaining agreement between the City and the Union. The provision cited states:

> The term 'grievance' shall mean:
>
> (c) A claimed assignment of employees to duties substantially different from those stated in their job specifications....[2]

The Union also alleges violation of Personnel Policy and Procedure No.510-78, dated August 23, 1978. The Personnel Policy concerns the then recent amendment of Civil Service Law section 101(1), to permit arbitral awards of back pay for out-of-title work, and sets forth procedures to deal with out-of-title work problems.

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[2] The Union cites the provision contained in the July 1, 1976 to June 30, 1978 unit contract. The grievance was initiated on April 9, 1979 at a time when the parties were in a period of negotiations for the successor unit contract and the 1976 unit contract was in force pursuant to the status quo provisions of the NYCCBL, §1173-7.0d. The contract clause was continued in the 1978 unit contract, Article VI, §1c.

The Union seeks arbitration pursuant to Article VII, Section 2 of the 1976 unit contract, which, in pertinent part, provides:

> Step IV - An appeal from an unsatisfactory determination at Step III may be brought solely by the Union to the Office of Collective Bargaining for impartial arbitration....

POSITIONS OF THE PARTIES

City Position

The City claims that the grievance is filed pursuant to Article VI of the 1978-1980 unit contract. In relevant part, the City quotes the following provisions of section 2 of Article VI of the contract

> All grievances must be presented in writing at all steps in the grievance procedure. For all grievances as defined in Section 1c.[3] no monetary award shall in any event cover any period prior to the date of the filing of the Step I grievance unless such grievance has been filed within thirty (30) days of the assignment to alleged out-of-title work.
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> Step I - The employee and/or the Union shall present the grievance 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 ....

[3] The terms of section 1(c) of the contract are identical to the terms of section 1(c) of the predecessor contract, which are quoted on page 2, supra.

The City notes that the instant grievance was not filed until April 9, 1979, although grievant alleges he started working out-of-title in August 1977.

The City argues that the grievance is untimely under section 2 of the 1978 unit contract and that, therefore, arbitration is barred by the terms of the contract.

The City further contends that grievant waited several years after he became aware of the out-of-title assignment before filing a grievance and that the delay has "severely prejudiced [the City's] position." The City maintains that the delay denied it a timely "opportunity to ascertain grievant's alleged entitlement, if any" and has "foreclosed [the City] from obtaining evidence and potential witnesses in support of its position." The City concludes that arbitration is barred under the equitable doctrine of laches.

For these reasons, the City asks that the Board deny the request for arbitration.

Union Position

The Union admits that the grievance was filed on April 9, 1979 and alleges performance of out-of-title duties commencing in August 1977, but the Union denies that the grievance was filed in excess of contractual time periods and barred by the terms of the contract. The Union also denies that grievant failed to pursue his claim and that the City has been prejudiced. The Union asserts that the claim is not

barred by laches.

In support of its position, the Union submits a series of memoranda and correspondence authored by grievant and various City officials, which are dated from November 10, 1977 to January 19, 1979 and which concern the promotion of and salary increases for the grievant. The following is an outline of the documents and their content:

> November 10, 1977 - Memorandum from John T. Burnell, Director of Office of Labor Management Relations, to Donald D. Kummerfeld, First Deputy Mayor, regarding personnel changes in staff, "Peter Prestia [the grievant] from Sr. Human Resources Specialist to Principal Human Resources Specialist - MI (Sal: $22,100). This will fill the Principal Human Resources Specialist vacancy...."
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> January 19, 1978 - Memorandum from grievant to Joseph DeVincenzo, Assistant to the Mayor, regarding upgrading grievant to the M-I position.
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> March 23, 1978 - Letter from grievant to Deputy Mayor Basil Paterson. Grievant asks for meeting to discuss his position with the agency in light of appointment of new Director. Grievant indicates that he seeks to assume permanently the position of Director of the Office of Contract Compliance/Construction, which duties grievant states that he had been performing, at the time, for a period of eight months.
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> August 7, 1978 - Letter from Deputy Mayor Paterson to grievant concerning an attached letter from an official of the federal Department of Housing and Urban Development which, in part, commends grievant for his

work on behalf of the City in dealings with the federal agency. In his letter to grievant, Deputy Mayor Paterson states, "I am very pleased to know that the Bureau of Labor Services has been so well represented."

August 23, 1978 - Letter from grievant to Deputy Mayor Paterson requesting appointment to discuss grievant's position in light of the recent appointment of a new Director of the Bureau of Labor Services. Grievant mentions that he has been Acting Director of the Bureau's Office of Contract Compliance/Construction since June 1977.

September 27, 1978 - Memorandum from Charles E. Williams, III, Director of the Bureau, to Mr. DeVincenzo, regarding salary increase for grievant. The memorandum, in pertinent part, states, "Prior to the Mayor's freeze on hiring and promotion, the Office of Deputy Mayor Basil Paterson had approved a raise of $3,000 for Peter A. Prestia of my office. I have been requested by Bob Linn to request that said increase be effectuated."

November 2, 1978 - Memorandum from Robert W. Linn to Mr De Vincenzo inquiring about the status of the raise for Peter Prestia.

November 8, 1978 - Memorandum from grievant to Bureau Director Williams forwarding descriptions of duties performed by grievant in connection with the "upgrading of [grievant's] present salary to be commensurated with [grievant's] duties."

November 9, 1978 - Memorandum to grievant from Bureau Director Williams stating that the Director understands that a $3,000 increase for grievant has been approved.

November 13, 1978 - Memorandum to Mr. DeVincenzo from Bureau Director Williams explaining "the $3,000 salary increase for Mr. Peter A. Prestia...."

January 18, 1979 - Memorandum to Thomas Ryan, Manager of Cost Analysis, from Gerald Dunbar, Liaison, regarding personnel actions pending at the Bureau of Labor Services at the time of Mr. Williams' departure. Included in a listing in the memorandum is the following statement: "Increment for Peter A. Prestia .... This item is apparently in Mr. Devincenzo's office awaiting final processing."

January 19, 1979 - Memorandum to Mr. Dunbar from grievant asking Mr. Dunbar's help in having effectuated the $3,000.salary increase which had been approved by Deputy Mayor Paterson.

The Union also includes in the packet of materials an undated document addressed to grievant from Andrew Petrez, whose title is not given, in which it is stated that grievant and two other people have been listed in the Planned Action Reports for promotion by Mr. Burnell since October 1977 and continuously thereafter. The October 1977 Planned Action Report is stated to have been signed by Mr. Burnell on August 30, 1977.

The Union relies on Board Decision No. B-3-80 in which, the Union claims, the Board held that "there may be compelling reasons, 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 the grievants waited so long to file their grievances and which would render the entire claim arbitrable." The Union asserts that in

B-3-80, "The Board concluded 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." The Union maintains that, in light of the above outlined "extensive evidence of written notice to the employer of complaints of out-of-title work made prior to the filing of the grievance" and the "extensive evidence of written responses from the employer to these complaints," there is a basis to establish, in an arbitration, sufficient excuse for the delay in initiating the claim. Thus, the Union argues, under the rationale of Decision No. B-3-80, the entire claim is arbitrable and the petition should be dismissed.

In the alternative, the Union contends that the Board in Decision No. B-3-80 indicated that it would not deny arbitral consideration of an entire claim allegedly barred by laches.. Rather, according to the Union, the Board held that where grievants allege they were continually performing out-of-title duties during the entire period in question and the contract permitted the filing of a grievance within 120 days after it arose, then the part of the grievance alleging performance of out-of-title work from 120 days prior to the filing of the grievance is not barred by laches. The Union claims that similarly in this matter, grievant alleges to have performed continually out-of-title work from August 1977 to

the time of the filing of the grievance. The Union also notes that the collective bargaining agreement between the parties provides for the filing of a grievance within 120 days after it allegedly arose. Thus, the Union argues, the instant grievance is, at the very least, not barred and is timely from December 11, 1978, which is 120 days before the date grievance was filed.

DISCUSSION

As in many other arbitrability cases involving claims of back pay for out-of-title work, the parties in the instant matter do not contest that the subject of the dispute is covered by the grievance-arbitration clause of their collective bargaining agreement. There is no issue of substantive arbitrability. Rather, the pleadings of the parties raise issues relating to the timeliness of the grievance.

The objection to arbitration based on alleged failure to comply with the 120-day provision stated in the contractual grievance-arbitration procedure can be dealt with summarily. In numerous decisions, we have held that questions of procedural arbitrability, including the timeliness of a request for arbitration under a contract, are for an arbitrator to resolve.[4]

[4] See, Decisions Nos. B-6-68; B-7-68; 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; B-20-79; B-3-80; B-4-80; B-9-80; B-13-80; B-19-80; B-20-80; B-23-80; B-29-80.

The principal issue in this case is the claim that arbitration is barred by laches because of grievant's prejudicial delay in initiating the grievance. We have held that unexplained or inexcusable delay in asserting a known right which causes injury or prejudice to another party, such as loss of evidence or a change in position in reliance on the claimant's silence, can constitute laches and bar arbitration of the grievance.[5] In Decisions Nos. B-3-80 and B-4-80, we expanded the holdings on the laches issue in ruling that the City is implicitly prejudiced by an extended delay in filing a grievance in an out-of-title case which seeks back pay because the passage of time may increase the City's liability, which may have been reduced had the grievance been filed timely. In addition, however, we recognized that there may be reasons, "such as fraud, duress or a written notice to the employer of a complaint of out-of-title work made prior to the grievance, which explains why grievant[ ] waited ... to file [his grievance]." We decided that claims of excusable delay are best resolved in the arbitral forum, where the City would also have an opportunity to be heard on the question of delay.

[5] See, for example, Decisions Nos. B-11-77; B-7-79.

In the instant matter, the Union presents evidence intended to explain grievant's delay in filing his claim. A memorandum written by the then director of the agency which employs the grievant indicates that as early as November 1977 the agency planned to promote grievant and increase his salary. This is not to say that the evidence presented sufficiently explains the delay in filing so as to excuse it. The point is that the Union has presented, in our opinion, more than enough evidence indicating that there may be reasons explaining the delay which meet the criteria stated in Decision No. B-3-80 for submitting such disputes to arbitration.

Therefore, we deny the petition challenging arbitrability and grant the request for arbitration.

We note that in presenting their respective positions, the City and the Union rely on different collective bargaining agreements. In its request for arbitration, the Union claims that grievant worked out-of-title "for the period 8/77 - 6/16/79" and alleges violation of the terms of the 1976-1978 unit contract. In its petition challenging arbitrability, the City cites the provisions of the 1978-1980 unit contract as being applicable in this case. In its responsive pleading, the Union admits that there is 1978-1980 unit contract between the parties and, inferentially, that the terms of the contract apply to this

dispute. The 1978-1980 unit contract contains a provision not stated in the 1976-1978 unit contract; section 2 of the grievance-arbitration provision of the 1978-1980 con tract provides that for all grievances alleging assignment to duties substantially different from those stated in an employee's job specification "no monetary award shall in any event cover any period prior to the date of the filing of the Step I grievance unless such grievance has been filed within thirty (30) days of the assignment to alleged out-of-title work."

However, the question of which contract to apply and the differences between the two contracts relate not to the substantive arbitrability of the grievance but to the question of remedy if the grievance is found meritorious. The additional provision of the 1978-1980 unit contract covers monetary awards for out-of-title work. Issues involving remedy are, of course, for the arbitrator.[6]

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

[6] See, Decisions Nos. B-9-71; B-5-74; B-14-74; B-19-74.

ORDERED, that the petition challenging arbitrability filed by the City of New York be, and the same hereby is, denied; and it is further

ORDERED, that the request for arbitration filed by Social Services Employees Union, Local 371, AFSCME, AFL-CIO be, and the same hereby is, granted.

DATED: New York, N.Y.
October 1, 1980

ARVID ANDERSON
CHAIRMAN

DANIEL G. COLLINS
MEMBER

WALTER L. EISENBERG
MEMBER

JOHN D. FEERICK
MEMBER

MARK J. CHERNOFF
MEMBER

EDWARD J. CLEARY
MEMBER

* Alternate City Member Franklin J. Havelick took no part in the decision of this case.