

City v. DC37, 25 OCB 4 (BCB 1980) [Decision No. B-4-80 (Arb)]

OFFICE OF COLLECTIVE BARGAINING  
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

THE CITY OF NEW YORK,

DECISION NO. B-4-80

Petitioner,

DOCKET NO. BCB-339-79  
(A-888-79)

-and-

DISTRICT COUNCIL 37, AFSCME,  
AFL-CIO,

Respondent.

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#### **DECISION AND ORDER**

On July 24, 1979, District Council 37 (hereinafter the Union or D.C. 37) filed a request for arbitration of the grievance of Yetta Obligin seeking "back-pay for out-of-title work." The City of New York, appearing by its Office of Municipal Labor Relations (hereinafter OMLR or the City),, challenged the arbitrability of the grievance in a petition filed August 7, 1979.

#### **BACKGROUND**

Grievant, employed in the Health and Hospitals Corporation (hereinafter HHC), initially filed an out-of-title work grievance on July 7, 1978. In a Step I Decision dated August 16, 1978, grievant was informed that the employer was "not in a position to give you an upgrading at this time...." While commending grievant for assuming additional work, the Step I Decision advised grievant, "Until such time as your position can be upgraded, please perform only duties that are suitable to your title of Sr. Stenographer." It is not disputed that shortly before the Step II hearing,

scheduled for January 16, 1979, a union representative was notified on January 12, 1979 that grievant "would be given an Administrative Assistant position effective December 18, 1978" and the Step II hearing was cancelled. On April 3, 1979, the Union notified HHC that the Union was reinstating the grievance for the purpose of seeking a complete resolution of the matter, that is, retroactive pay for grievant from July 1, 1976 to December 18, 1978. HHC refused to grant the claim on the grounds that the parties on January 12, 1979 reached a settlement which constituted "the total adjustment made by the Corporation and accepted by the Union in resolution of [the] grievance." The grievance was appealed to Step III of the procedure and was denied by OMLR in a decision dated June 18, 1979.

The Union claims violation of Article VII, section 1 c of the July 1, 1976 to June 30, 1978 unit contract covering clerical and related titles (hereinafter unit contract). The clause defines "grievance" as: "A claimed assignment of employees to duties substantially different from those stated in their job specifications. The Union seeks arbitration under Article VII, section 2, Step IV of the contract which provides an appeal to the Office of Collective Bargaining (OCB) for impartial arbitration of "an unsatisfactory determination at Step III."

**POSITIONS OF THE PARTIES**

The City challenges the arbitrability of the grievance on the grounds, inter alia, that the claim was untimely filed, that the claim is barred by laches, that the claim seeks an illegal remedy, and that the claim is moot.

The City admits that grievant, then a Senior Stenographer, started performing the duties of a higher level title, Administrative Assistant, approximately July 11, 1976. The City maintains that grievant voluntarily performed the higher level duties until August 16, 1978, when she was advised that her position would not be upgraded and she should perform only duties within the scope of her title, Senior Stenographer. The City points out that grievant's position was upgraded to the title Administrative Assistant and grievant began receiving increased pay effective December 11, 1978.

The City notes that Article VII, section 2, Step I of the unit contract provides a 120 day limit after a claim arises to file a grievance. The City argues that the claim is, accordingly, barred from arbitration because the alleged out-of-title work commenced July 11, 1976 and the grievance was filed July 7, 1978 well beyond the 120 day limit to file after the claim arose.

OMLR also argues that the grievance cannot be sustained

because grievant is guilty of laches and waived her contractual rights by not filing the claim until two years after it arose. The City maintains that it has been prejudiced by the delay because: "Timely filing of the grievance would have afforded [the City] the opportunity to rectify the situation within the perimeters of then existing law if the facts so warranted which was done after the grievance was initiated." The City also claims that, as a result of the delay, its liability is increased if an arbitrator should sustain the grievance and award back pay. OMLR further contends that the delay in filing denies it "a timely opportunity to obtain evidence and potential witnesses and preserve same."

The City argues that arbitration is barred because the grievance seeks back pay for out-of-title work performed during a period of time when such remedy was illegal. In its reply to the Union's answer, the City argues at length, citing statutory and decisional authority, that an amendment to Civil Service Law section 100(1),<sup>1</sup> permitting arbitral relief of back pay for out-of-title work, was intended to be prospective in effect and only apply to out-of-title work performed after

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<sup>1</sup> Laws of 1978, Chapter 255, Section 1.

the effective date of the amendment, June 5, 1978. The City contends that the delay in filing the grievance has resulted in a "great disadvantage" to it because if the claim had been timely filed after the alleged out-of-title work commenced, "the City would not now have to face a claim that the amendment to Civil Service Law 5100 is applicable herein." OMLR also maintains that "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" citing Burnell v. Anderson.<sup>2</sup>

The City claims that the out-of-title work grievance was rendered moot when grievant was ordered on August 16, 1978 to cease performing the higher level duties and when she was upgraded to the higher level effective December 18, 1978.

The Union argues that the instant matter concerns a claim which the parties have agreed to arbitrate and, therefore, should be found arbitrable. The Union contends that "grievant had no actual or constructive knowledge that she would not be paid the total retroactive pay back to July 1, 1976 until July 3, 1978, and thereupon filed a grievance." D.C. 37 maintains that the claim that the grievance was untimely filed under the contract is a matter of procedural arbitrability

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<sup>2</sup> New York Law Journal, November 26, 1975, p. 8 (sup Ct, N.Y. City Asch, J.)

and for an arbitrator to decide. The Union claims that there was no undue delay in filing the grievance but that even if there was a delay, "the Petition fails to include factual allegations showing injury, change of position, intervention of equities, loss of evidence or other disadvantage resulting from such alleged delay."

D.C. 37 also disputes the City's claims concerning the arbitrability of the grievance and the legality of the remedy sought. The Union contends that the impact of the amendment to Civil Service Law section 100(1) to the instant grievance is a matter of statutory interpretation appropriate for arbitral consideration and that the assumption that an arbitrator will fashion a particular remedy is not grounds for denying arbitration of the grievance, citing Board Decision B-2-78.

The Union further maintains that the grievance is not moot because the claim seeks pay retroactive to July 1, 1976 and grievant has been paid at the higher level only since December 18, 1978. D.C. 37 argues that the Board "may not allow [the City] to reap the benefit of its illegal conduct and use its simple statement ... of 'cessation' or its recognition of its conduct by upgrading grievant to claim to render the instant grievance moot.

#### **DISCUSSION**

This dispute is another in a series of matters wherein

the arbitrable issue concerns not whether the parties have agreed to arbitrate a grievance but whether the claim is so untimely that it would be inequitable to order the City now to arbitrate the grievance.

The following table indicates the chronology of events in this case:

| <u>Date</u>       | <u>Significance</u>  |
|-------------------|--|
| July 11, 1976     | Grievant allegedly commences out-of-title work   |
| July 7, 1978      | Grievant files out-of-title work grievance   |
| August 16, 1978   | Grievant notified claim denied and is advised to cease out-of-title work   |
| December 18, 1978 | Effective date of upgrading of grievant's position and concomitant increase in pay.                                    |
| January 12, 1979  | Union and grievant informed by letter of upgrading and pay increase effective December 18, 1978.                       |
| April 3, 1979     | Union notified HHC that grievance reinstated to recover back pay for work performed July 1, 1976 to December 18, 1978. |

No explanation is offered for the delay in filing the grievance from the time the higher level work allegedly commenced, July 11, 1976, until July 7, 1978 except that grievant is said to have had "no actual or constructive knowledge that she would

not be paid" for the higher level duties until July 3, 1978. Indeed, there is nothing in the pleadings of the parties which indicates why grievant realized two years after she allegedly started the work that the duties were out-of-title. While the City does not offer direct proof of harm which it has suffered as a result of the delay, implicitly the City is prejudiced by the increased potential liability it now faces because grievant performed the work for two years before she decided to grieve. Had grievant timely filed her complaint, the City would not now be facing a claim for back pay for 2 years, five months of out-of-title work. Thus, there is a basis to apply laches to deny part of the instant claim of back pay for out-of-title work because grievant waited without explanation approximately two years to file the grievance during which time the meter was running on the City's potential liability.

However, as discussed in Decision No. B-3-80, there are several factors present in the instant matter which persuade us not to apply an absolute equitable bar to arbitration of the grievance herein. Grievant claims that she continuously performed out-of-title duties during the period July 11, 1976 to December 18, 1978. In Article VII, "Grievance Procedure," section 2, Step I of the unit contract, the parties agreed that a grievance may be filed within 120 days after the claim arose. Applied to this instant case, grievant's claim of out-of-title work performed from March 9, 1978 to December 18,



1978, the day her position was upgraded, was timely asserted under the parties' agreement and is not barred from arbitral consideration.

We also recognize that there may be compelling reasons such as fraud, duress or written notice to the employer of a complaint of out-of-title work made prior to the filing of the grievance, to excuse grievant's delay in initiating the grievance. Rather than conduct our own proceeding to rule on the merits of a claim of excuse for the delay, we believe it is more consistent with the policies of the New York City Collective Bargaining Law (NYCCBL) and the parties' contract to refer to an arbitrator evidence and arguments indicating fraud, duress, or prior written notice that would explain the delay in initiating the claim. If such a case is presented to the arbitrator, the City will, of course, have an opportunity to rebut the explanation for the delay.

In summary, unless the arbitrator is convinced that compelling reasons exist to excuse the delay in initiating the claim herein, the grievant's failure to act timely in grieving her claim constitutes laches and gives rise to an equitable bar to arbitration of the grievance except for the part of the claim alleging performance of out-of-title work from March 9, 1978 (which is 120 days prior to the filing of the grievance) to December 18, 1978. If the arbitrator does find that compelling reasons excuse the delay in initiating the grievance, the arbitrator then may consider the merits of

grievant's claim for back pay for out-of-title work from July 11, 1976 to December 18, 1978 since the entire period is covered by the unit contract under which the claim is filed.<sup>3</sup> We emphasize that our holding in this case is not a determination of the procedural arbitrability issue of adherence to contractual grievance procedure time requirements, which is raised by the City. We reaffirm that procedural arbitrability issues are matters for an arbitrator to resolve, a principle long recognized and applied by this Board<sup>4</sup> and court decisions in private and public sector arbitrability cases.<sup>5</sup>

The three other bases of the argument against arbitrability, in our opinion, do not warrant denial of arbitration. The claim that grievant voluntarily performed the additional duties, even after being advised not to, relates to the merits of the grievance and is appropriately for consideration by an arbitrator. Similarly, the argument that the matter was mooted

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<sup>3</sup> Compare Decision No. B- 3 -80 (BCB-334-79), wherein we denied arbitral consideration under any circumstance of the part of the grievance filed therein which alleged performance of out-of-title work prior to the effective date of the contract under which the grievance was filed.

<sup>4</sup> 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.

<sup>5</sup> 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.

when grievant's position was upgraded effective December 18, 1978 is a claim which should be addressed to an arbitrator because it concerns the merits of grievant's contention that she is still owed back pay.

In Decision No. B-3-79, we rejected an argument similar to the claim in the instant case that Civil Service Law section 100(1) was amended to have only prospective effect and that arbitration of out-of-title work grievances seeking monetary relief prior to June 5, 1978, is barred under the state of law in effect at that time. The Board's rationale in that Decision was based on our long-held belief that the possibility that an arbitrator might render an award that would violate a statutory proscription is no basis for denial of an otherwise valid request for arbitration.<sup>6</sup> The Board recognized that an arbitrator may not render an enforceable award which is illegal or improper and we stated that it is inappropriate for the Board or the parties to assume that an arbitrator will fashion illegal or improper relief. Moreover, we point out that neither the Board nor the parties know, at this moment, whether an arbitrator will find merit in the out-of-title work grievance or award back pay if the grievance is sustained. It has long been the Board's policy that the best way to decide the merits of a grievance and to fashion relief, if necessary, is to rely on

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<sup>6</sup> See Decision Nos. B-1-75 and B-2-78.

the procedures the parties have agreed to for resolving employee grievances. In this case, as in many others, the parties have agreed to arbitrate certain unresolved grievances, including out-of-title work claims. Ordering arbitration of the grievance herein, as delimited by our holding above, will only afford an arbitrator the opportunity to consider a remedy and fashion one if needed, appropriate to the circumstances of the particular case and within the limits of applicable law.

The issue whether an arbitrator may legally award back pay as remedy for out-of-title work performed prior to June 5, 1978 has not been definitively ruled upon by the courts of New York State.<sup>7</sup> In this connection, we note that the City has moved, pursuant to CPLR Article 75, in Supreme Court, New York County, to set aside a recent arbitration award which granted back pay to eight civilian employees of the Police Department for out-of-title work performed between December 1, 1975 and November 15, 1976.<sup>8</sup> The City's Position in the court litigation, as in the matter before the Board, is that the Civil Service Law barred the relief awarded at the time the out-of-title work was performed. The court decision of

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<sup>7</sup> A discussion of the reasons for our not accepting the Burnell decision as dispositive of the issue concerning the powers of an arbitrator to award back pay for out-of-title work can be found in Board Decision No. B-2-78, pp.5-8.

<sup>8</sup> City of New York and District Council 37, AFSCME, AFL-CIO, Index No. 42546/79 (Matter of the Arbitration between the City of New York and District Council 37, AFSCME, AFL-CIO OCB Docket No. A-666-77, Opinion and Award dated June 18, 1979.)

the City's motion to vacate and the Union's cross-motion to confirm the award in that case is pending. However, we find that arbitration of the instant grievance, delimited by our balancing the equitable doctrine of laches and the provisions of the collective bargaining agreement between the parties, is not barred on the basis of the legality of a possible award an arbitrator might render if the arbitrator sustains the merits of the grievance.

**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 request for arbitration filed herein by District Council 37, AFSCME, AFL-CIO be, and the same hereby is, granted insofar as the request seeks arbitration of the claim of out-of-title work performed by grievant from and including March 9, 1978 to December 17, 1978, and is denied insofar as the request seeks arbitration of the claim of out-of-title work performed by grievant prior to March 9, 1978, unless the arbitrator determines there are compelling reasons to excuse the grievant for the delay in filing the claim, in which event the arbitrator may also consider and remedy, if necessary! the claim herein of out-of-title work performed from and including July 11, 1976

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to December 18, 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