

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

THE CITY OF NEW YORK,

Petitioner,

-and-

DISTRICT COUNCIL 37, AFSCME,
AFL-CIO,

Respondent.

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DECISION NO. B-12-81

DOCKET NO. BCB-479-81
(A-1176-81)

DECISION AND ORDER

This matter concerns the arbitrability of a grievance stated in a Request for Arbitration (the "Request") filed by District Council 37, AFSCME, AFL-CIO (the "Union") on January 23, 1981. The City of New York, appearing by its Office of Municipal Labor Relations (the "City"), challenged the arbitrability of the grievance in a Petition Challenging Arbitrability (the "Petition") filed on February 6, 1981. The Union filed its Answer to the Petition on February 27, 1981. The City did not file a reply.

The Union seeks to arbitrate a group grievance on behalf of seven employees of the New York City Department of Personnel (the "Department") who claim that at least since 1972 they have not received payment of an assignment differential "for the regular performance of work involving the preparation, reconciliation, certification and/or auditing of payrolls of City

personnel."¹ The Union claims that provision for payment of differentials to employees performing such work was included in the Clerical-Administrative Employees contract for the period July 1, 1971 to June 30, 1974 and has been continued in subsequent contracts including the 1978-1980 agreement (collectively referred to as the "Agreement"). The Union seeks correction of the contract violation and payment of the differentials retroactive to 1972.²

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Grievants Muriel Cox and Bernice Greenwald allegedly began performing work entitling them to the assignment differential in 1971. Grievants Lucille Whitley, Mamie Sheppard, Rose Farkas, Beatrice Stern and Harvey Bandolick allegedly began performing such work in 1972.

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The following provisions for payment of an assignment differential appear in Article III, Sections 7(d) and 7(e) of the July 1, 1971-June 30, 1974 contract; in Article III, Sections 8(c) and 8(d) of the July 1, 1974 June 30, 1976 contract; and in Article III, Sections 7(c) and 7(d) of the July 1, 1976-June 30, 1978 contract and the July 1, 1978 - June 30, 1980 contract:

(c) An assignment differential in the pro-rated annual amount of \$300 shall be continued for each person employed in the class of positions of Senior Clerk who are assigned regularly to the preparation, reconciliation, certification and/or auditing of payrolls of City personnel, in the office title of Payroll Clerk or Payroll Examiner, as determined by the agency head.

(d) An assignment differential in the pro-rated annual amount of \$400 shall be continued for persons employed in a class of positions of Supervising Clerk who are assigned regularly to the preparation, reconciliation, certification and/or auditing of payrolls of City personnel, in the office title of Payroll Clerk or Payroll Examiner, as determined by the agency head.

BACKGROUND

The grievance herein involves seven individuals, two of whom claim that they have been performing the duties entitling them to the payment differential since 1971, the remaining five since 1972.

According to the Union's Answer, in January 1975, the grievants initially complained of the lack of payment in a written statement to Charles R. Foy, Jr., Deputy Personnel Director. The grievants claim that they waited until 1975 to submit a complaint "because they had been told by the Director of Personnel that, as employees of that office in particular, they could not file grievances." The Union claims that the Department did not provide a written reply as was required under the Agreement then in effect.

In February 1980, a formal grievance was filed directly at Step II of the grievance procedure. According to the Union, no action was taken between 1975 and 1980 because "it was only at that time that [the grievants] were informed that they were entitled to use the contractual grievance procedure."

The City thereafter initiated a Step III review which resulted in a denial of the grievance by Hearing Officer Marianna M. Riordan on December 5, 1980.

In her denial of the grievance, Review Officer Riordan found that the differential was not allowable on the merits and also that the Union's failure in 1975 to proceed to the next step of

grievance procedure "constituted an abandonment of the grievance.

Upon receipt of the Step III denial, the Union on January 23, 1981 filed its Request for Arbitration.

POSITION OF THE PARTIES

The City's Position

The City challenges arbitrability on two grounds. Under the Agreement a grievance is to be presented "verbally or in the form of a memorandum ... no later than 120 days after the date on which the grievance arose. Here allegedly the grievances arose no later than 1972 but the grievance was not filed until 1980. The City, therefore, asserts that "[s]ince the grievance was filed far in excess of the contractual time period, any processing of the dispute to arbitration is barred by the terms of the Agreement."

The City also asserts the equitable defense of laches as a bar to the Union's claim asserting that the delay of more than five years has "severly prejudiced" its position. The City argues that the delay has substantially increased potential liability if the requested relief, back pay plus interest, is ultimately granted. Claiming that the Union's failure in 1975 to proceed to the next step of the grievance procedure led it to believe that the grievants had "abandoned their claim," the

City by implication asserts that there is no excuse for the delay and that denial of arbitrability on the basis of laches is appropriate.

The Union's Position

With respect to the City's assertion that the alleged failure to comply with the 120 day requirement for filing the Petition bars arbitrability, the Union responds that the City's position raises a question of procedural arbitrability that under Board precedent is for an arbitrator to decide.

The Union also challenges the City's laches argument by stating that the long delay is "explainable and excusable" because the grievants were told in 1975 by Deputy Personnel Director Foy that "they could not file grievances."

Additionally the Union asserts that the delay in complying with the Agreement's terms should be excused because the City itself did not abide by the Agreement when it failed to respond in writing to the 1975 memo as required.

The Union also counters the City's argument that the long delay has prejudiced its position by increasing its potential liability. The Union argues that unlike an out-of-title case where the liability can be cut off by ceasing the out-of-title work, here the grievants were not working out-of-title. The City's liability would continue whether the claims were made

now or eight years ago. The grievants are and have been performing appropriate work for which they "only wish to be properly compensated."

DISCUSSION

The City's challenge to arbitrability raises issues relating to the timeliness of the grievances. The first of the City's bases for challenge, the Union's failure to comply with the time requirement imposed by the Agreement for filing of grievances, can be dealt with summarily. In numerous decisions, the Board has held that questions of procedural arbitrability, including the timeliness of a request for arbitration under a contract, are for an arbitrator to decide.³ This rule of procedural arbitrability applies as well to the Union's argument that the City is precluded from challenging arbitrability because of its failure to respond in writing to the 1975 memo as required by the Agreement. The significance, if any, of the City's failure is for an arbitrator to determine.

The second basis for the City's challenge is that the instant claim is barred by laches because of the grievants' prejudicial delay in initiating the grievance. We have held

³See, 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-29A-80; B-38-80.

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.⁴ 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[I waited ... to file this 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. I The instant case, however, is not an out-of-title case. The Union makes the argument that no prejudice resulted to the City by the delay because grievants would have continued to perform the work entitling them to the differential whether the grievance had been filed in 1972 or in 1980; they were

⁴See, for example, Decisions Nos. B-11-77; B-7-79; B-38-80.

not working out-of-title. This argument implies that the City had no choice but to assign the grievants extra work during the period in question. The City in fact, had it known of the grievants' claims in 1972, 1973 or 1974, might well have cut back on the grievants' duties even though such duties were appropriate to the grievants' titles. Therefore, the City's claim of prejudice, although not substantiated, cannot be so lightly dismissed; nor, however, can the argument that the City was on notice of the grievants' claim at least since 1975 when the grievants wrote their memorandum to the Deputy Director of the Department of Personnel. Had the City chosen to cut off potential liability, it could have done so, at least as of the date of the 1975 memo.

The Union asserts that the delay in presenting the claim to the Department and the subsequent long delay in filing its grievance are excused because allegedly the Deputy Director informed the grievants that they could not file grievances. We have ruled in the past, that ignorance of the law and of the contracts governing the employment relationship is no excuse for the failure to comply with the terms of those contracts.⁵ However, where the excuse as in this case involves more than the mere allegation of ignorance of the law or the

⁵See, Decision No. B-3-80.

contract, we believe that the parties should be given the opportunity in the arbitral forum to present evidence sufficient to excuse the delay. In this case, the Union should be given the opportunity to prove and the City afforded the chance to rebut the charge that the Deputy Director of the Department of Personnel told the grievants that they could not file grievances and the ramifications thereof, if any. If the City prevails, arbitration of the grievances should be denied with the following exception. Since the grievance alleges a continuing violation, arbitration of the claim for the period 120 days prior to the filing of the grievance, that is from and including October 29, 1979, will go forward, in any event, since that period is timely under the Agreement.

If the Union succeeds on its claim of excusable delay, arbitration will go forward but we feel that there is no reason to extend the City's potential liability to a period earlier than January 1975 when the grievants notified the Department of their demand. Therefore, arbitration will be limited to claims involving work performed after that date.

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 claims for an assignment differential for work performed by grievants from and including October 29, 1979 to the present, with the provision that as to assignment differentials prior to October 29, 1979, an arbitrator shall determine whether there are compelling reasons to excuse the grievants for the delay in filing their claims, in which event the arbitrator may also consider, where applicable, and remedy, if necessary, a claim or claims herein for assignment differentials from and including January 1975 to October 29, 1979.

DATED: April 8, 1981
New York, N.Y.

ARVID ANDERSON
CHAIRMAN

DANIEL G. COLLINS
MEMBER

WALTER L. EISENBERG
MEMBER

JOHN D. FEERICK
MEMBER

EDWARD F. GRAY
MEMBER

CAROLYN GENTILE
MEMBER