

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE-BARGAINING

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In the Matter of

THE CITY OF NEW YORK,

Petitioner,

-and-

SOCIAL SERVICE EMPLOYEES UNION,
LOCAL 371,

Respondent.

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DECISION NO. B-15-81

DOCKET NO. BCB-439-80
(A-1037-80)

DECISION AND ORDER

On July 18, 1980, the City of New York, through its Office of Municipal Labor Relations (hereinafter the City or OMLR) commenced this proceeding by filing a petition challenging the arbitrability of a grievance filed by the Social Service Employees Union, Local 371 (hereinafter SSEU or the Union). The Union claimed that the grievant, a Senior Human Resources Technician, worked out of title from 1970 to June 18, 1979 in violation of the 1976-1978 collective bargaining agreement, Department of Personnel Policy and Procedure No. 510-78 and policy of the Human Resources Administration (hereinafter HRA), by whom the grievant is employed.

SSEU obtained three successive extensions of time in which to answer the City's petition based on anticipated settlement of the case. On February 25, 1981, the Trial

Examiner requested that either the parties to this matter promptly submit written confirmation of a settlement or that the Union file its answer to the petition. The Union filed and served its answer on March 3, 1981. The City did not file a reply.

BACKGROUND

In 1970, Mary Roquemore, the grievant, was employed in the Department of Employment in Region 8, Brooklyn, and held the civil service title Senior Human Resources Technician (hereinafter Sr. HRT). She was assigned to perform the duties of a vocational counselor and to interview and process clients for the CETA program, alleged to be duties of a Human Resources Specialist. Human Resources Specialist is the civil service title in a direct line of promotion from the grievant's title of Sr. HRT. In 1976, the grievant was transferred to a different work location (Region 10) where she continued to perform the alleged out-of-title duties.¹

On February 16, 1979, Ms. Roquemore submitted a grievance for out-of-title work to her director. on February 28, 1979, a Step II grievance was filed. Pursuant to a Step II decision, dated July 9, 1979, the grievant ceased performing the con-

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It is not clear from the statement of the grievance which of the assigned duties were properly those of a Senior Human Resources Technician, if any, and which were "out-of-title" duties. However, there appears to be no dispute as to the fact that the grievant was performing out-of-title work from 1970-1979.

tested duties. A Step III decision denying the grievance was rendered on December 6, 1979 and a request for arbitration was filed on April 28, 1980.

The Union claims that the assignment of the grievant to perform the duties of a Human Resources Specialist violates the 1976-1978 collective bargaining agreement between SSEU and the City which defines the term grievance to include:

A claimed assignment of employees to duties substantially different from those stated in their job specifications (Article VII, Section 1(C)).

The Union also claims that the assignment violated Personnel Policy and Procedure No. 510-78, entitled "Out-of-Title Work," which was promulgated by the Department of Personnel on August 23, 1978. This policy established procedures to monitor and control out-of-title work in the wake of a 1978 amendment to the Civil Service Law permitting monetary awards for employees assigned to out-of-title work in violation of a collective bargaining agreement.² In addition, the Union claims violation of HRA policy as expressed in the agency's Informational No. 78-57 dated December 18, 1978 also on the subject of out-of-title work.

²Civil Service Law §100 (1)(d) (1978). L. 1978, ch. 255 §1, eff. June 5, 1978.

SSEU seeks arbitration of its claims pursuant to Article VII, Section 2 of the 1976-78 unit agreement 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

City Position

The City rests its entire case on the argument that arbitration is barred by the doctrine of laches as the grievant waited for nine years before initiating a grievance. OMLR maintains that the grievant must have been aware that the duties she was performing were out-of-title; yet she failed to file a grievance or take any action which would have put the City on notice of this fact. The City claims that the passage of so much time reasonably leads it to believe that the grievant had abandoned her claims, if any.

The City also asserts that its position has been severely prejudiced by the delay because, after the grievance arose, the Civil Service Law was amended to permit monetary awards for out-of-title work. Therefore, the City's potential liability has increased both in magnitude and in kind.

Union's Position

SSEU maintains that this case is governed by the Board's Decisions Nos. B-3-80³ and B-38-80⁴ which also involved out-of-title work grievances and a defense by the City that arbitration was barred by laches. In those cases, the Union asserts, the Board found, and should find in the instant case, that:

"...that part of the grievance alleging performance of out-of-title work for a period 120 days prior to the filing of the grievance is not barred by laches; and

[the union] should be given the opportunity, in the arbitral forum, to present evidence of a compelling reason sufficient to excuse the delay in initiating the claim, such as fraud, duress or prior written notice (of a complaint of out-of-title work]. If such evidence can be adduced, and if the delay in filing is excused, arbitral consideration can be given to allegations of out-of-title work from the effective date of the contract under which the claim is filed."

³City of New York v, Social Service Employees Union, Local 371, Docket No. BCB-334-79 (A-862-79).

⁴City of New York v. Social Service Employees Union, Local 371, Docket No. BCB-424-80 (A-1043-80).

SSEU therefore claims to be entitled to arbitrate, at the very least, that part of the claim relating to alleged out-of-title work performed from October 31, 1978, which is 120 days prior to the filing of the grievance.⁵ The Union also asserts that evidence exists in this case of a compelling reason sufficient to excuse the delay in grievant's initiating her claim. SSEU contends that, under the rule of Board Decision No. B-3-80, it should be given the opportunity to present such evidence in the arbitral forum so that consideration can also be given to allegations of out-of-title work performed by the grievant from January 1, 1976, the effective date of the contract under which the claim was filed.

DISCUSSION

The instant case, like many of its predecessors in the area of out-of-title work grievances, does not involve a dispute as to the substantive arbitrability of the Union's claim. The City does not dispute the fact that the grievant performed out-of-title duties from 1970 to June 18, 1979. The parties are obligated by contract to submit to arbitration "a claimed assignment of employees to duties substantially

⁵In fact, October 31, 1978 is 120 days prior to the filing of the Step II grievance. The statement of the grievance filed at Step II indicates that a Step I grievance was filed on February 16, 1979. This fact is confirmed in the Step III Review Officer's decision where reference is made to the initial filing of the grievance on 2/16/79. Therefore, the 120 day period immediately prior to the filing of the grievance commenced October 15, 1978.

different from those stated in their job specification..."⁶
Thus, the controversy presented comes within the parties' contractual obligation to arbitrate their disputes.

The City challenges the arbitrability of the Union's grievance, however, on the ground that it was untimely filed and should be barred by the doctrine of laches. Laches has been defined by the Board as "unexplained or inexcusable delay in asserting a known right which causes injury or prejudice to the defendant."⁷ Here, the City claims that the grievant was aware that she was performing out-of-title work and yet she waited nine years before taking any action to put the City on notice of this fact. OMLR also claims to have been prejudiced by the grievant's delay in light of the amendment to Civil Service Law §100(1) permitting monetary awards for out-of-title work. In a case where an employee seeks back pay for out-of-title work, the Board has ruled that the City is implicitly prejudiced by an extended delay in filing because the mere passage of time may increase its liability.⁸ In light of this holding and the fact that the Union offered no explanation or excuse for its extended delay, the City's argument could have merit.

⁶1976-1978 Social Services Titles Agreement, Article VII, Section 1(C).

⁷City of New York v. District Council 37 and Local 1321, Board Decision No. B-11-77 citing Tobacco Workers v. Lorillard Corp., 78 LRRM 2263, 2280 (4th Cir., 1971).

⁸Board Decisions Nos. B-3-80; B-4-80; B-38-80.

However, there is a factor present in the instant matter which persuades us not to apply an absolute equitable bar to arbitration. The grievant claims to have performed out-of-title duties continuously from an unspecified date in 1970 until June 18, 1979. Thus, the instant grievance asserts a continuing violation - one which arose every day of the period during which the out-of-title duties were performed. In the grievance procedure of their contract, the parties agreed that a grievance may be filed within 120 days after the date on which it arose (Article VII, Section 2, Step I). Under this provision, therefore, the grievant's claim of out-of-title work performed from October 15, 1978⁹ to June 18, 1979, when the duties ceased, was timely asserted and should not be barred from arbitral consideration.

In Decision Nos. B-3-80 and B-4-80, the Board recognized, additionally, 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, which explain why the grievant waited so long to file his claim. In those cases, the Board found that assertions of excusable delay could best be resolved in the arbitral forum, where the City would also have an opportunity to be heard on the question of delay.¹⁰ If the arbitrator found that compelling

⁹See note 5 supra.

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The Board noted that the decision to refer to an arbitrator evidence and arguments indicating fraud, duress, or prior written notice that would explain the delay was consistent with the policies of the New York City Collective Bargaining Law favoring arbitration of disputes and with the parties' contract.

reasons excused the delay in initiating the grievance, the Board held, the arbitrator might then consider the merits of the grievant's claim prior to the 120-day period provided for in the agreement. In no event, however, could an arbitrator consider allegations of out-of-title work performed before the effective date of the contract under which the claims were filed.¹¹

In Decision No. B-38-80, the Board refined the position taken in B-3-80 and B-4-80 and itself considered evidence presented by the Union to explain the grievant's delay in filing his claim. While leaving for the arbitrator the question of whether the delay should be excused, the Board made a preliminary determination that there was "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."

We have long held that the question of laches or extrinsic delay, as distinguished from intrinsic delay, which denotes a failure to observe contractual time limitations, is for

¹¹In Decision No. B-3-80, the Board stated its intention to strike a balance between conflicting policy considerations underlying the equitable doctrine of laches and the parties' contract permitting arbitration of grievances. The Board limited the City's potential liability to a period commencing no earlier than the effective date of the contract under which the grievant filed his claim in recognition that it would be 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."

resolution by the Board.¹² Thus, it is proper that the Board make a threshold determination concerning the probable sufficiency of the Union's excuse for delay in filing beyond 120 days prior to the time the grievance arose. In the instant case, the Union has stated only that:

Upon information and belief,
evidence exists in this case
of a compelling reason
sufficient to excuse the
delay in grievant's initiating
her claim herein.

We find in this bare allegation no basis for allowing an arbitrator to consider evidence of compelling reasons which might excuse the delay. Therefore, the Board finds that the doctrine of laches should be applied to bar arbitration of the grievant's claim except for that part of the grievance alleging performance of out-of-title work for a period 120 days prior to the filing of the grievance. We add as a further caveat, however, that our decision is in no way a departure from past Board holdings that questions of procedural arbitrability, including adherence to contractual grievance procedure time limitations, are for the arbitrator to resolve.¹³ Our decision only recognizes 120 days as a period which the parties, by contract, have agreed would not form the basis of a claim of prejudicial, unexplained delay.

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Board Decisions Nos. B-6-75; B-29-75; B-3-76; B-4-76; B-9-76.

¹³

Board 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.

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 request for arbitration filed herein by the Social Service Employees Union, Local 371 be, and the same hereby is, granted insofar as the request seeks arbitration of the claim of out-of-title work performed by the grievant from and including October 15, 1978 to June 18, 1979, and is denied insofar as the request seeks arbitration of the claim of out-of-title work performed by the grievant prior to October 15, 1978.

DATED: New York, N.Y.
July 7, 1981

ARVID ANDERSON
CHAIRMAN

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