

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

THE CITY OF NEW YORK,

DECISION NO. B-17-82

Petitioner,

DOCKET NO. BCB-528-81
(A-1311-81)

-and-

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

Respondents

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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 August 20, 1981. 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 September 11, 1981. The Union answered the petition on November 13, 1981, and the City submitted its reply on December 18, 1981.

Request for Arbitration

The Union seeks to arbitrate the grievance of Richard Farmer, who holds the civil service title Community Associate and is employed in the Department of Sanitation.

Decision No. B-17-82
Docket No. BCB-528-81
(A-1311-81)

2.

The grievance alleged is:

Grievant, a Community Associate, has been working out-of-title as a Community Coordinator based on the promise by his superiors of a promotion into that title.

The grievance was initiated at Step II of the grievance arbitration procedure on September 9, 1980, with an addendum filed on October 1, 1980. It is alleged that grievant has been performing out-of-title duties continuously since May 1972.

The Union cites violations of "SSEU Local 371 Contract Article III, Article VI, Section I, Personnel Policy 510-78, 510-79, Mayor's Directive 7903, Department of Sanitation Policy 560-79." As relief, the Union seeks, "[c]ompliance, appropriate compensation for all out-of-title work with interest thereon, promotion to Community Coordinator, and any other just and proper remedy."

Positions of the Parties

City's Position

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 and that the relief sought is prohibited by law.

The City notes that Article VI, 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 May, 1972 and the grievance was filed September 30, 1980, 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. The City asserts that it has been "severely" prejudiced by the delay in filing the grievance 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." The City also claims that, as a result of the delay, its liability is increased, and thus warrants barring arbitral consideration of the time period prior to May 30, 1980.

In addressing the remedies requested by the grievant, the City maintains that the remedies available to the grievant are constrained in three significant respects:

1. Section 100 of the Civil Service Law (1978), permitting monetary awards for employees assigned to out-of-title work in violation of a collective bargaining agreement is available retroactively only for grievances which had been

brought but were undetermined at its effective date,¹ ,
i.e. June 5, 1978

2. Section 2 of Article VI of the Agreement, it is alleged, further limits a monetary award to the date of the filing of the Step I grievance unless the grievance has been filed within thirty days of the assignment of the alleged out-of-title work.
3. Article 4, Section 61, of the Civil Service Law governs the procedure by which a promotion may be made.

Union's Position

In its answer to the petition alleging arbitrability, the Union reasserts its right to request arbitration on the theory that the out-of-title assignments were in the nature of a continuing wrong. Since a separate and distinct violation occurred each day, the grievance, it is alleged, is not barred by the statute of limitations. With respect to the defense of laches, the Union contends that it is unavailable to the City since no prejudice attributable to such delay has been demonstrated.

The Union also asserts that evidence exists in this case of a compelling reason sufficient to excuse the delay in grievant's initiating his claim. The Union contends that, under the rule of Board decision B-3-80, it should be given the opportunity to present such evidence in the.

¹ Matter of City of New York, N.Y. Law Journal, Feb. 28, 1980, pp.11-12.

Decision No. B-17-82
Docket No. BCB-528-81
(A-1311-81)

5.

arbitral forum so that consideration can also be given to allegations of out-of-title work performed beyond the period 120 days prior to the filing of the grievance.

Discussion

The instant matter is typical of a number of 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.

The intent of the parties expressed in Section 2 of Article VI of the Agreement provides, in pertinent part:

Step 1. The employee and/or 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.

In view of the characterization by the Union of a wrong, if any, continuing for the entire period in question, we find, as we did in Decision No. B-3-80, that the part of the grievance relating to out-of-title work performed from May 30, 1980 (which is 120 days prior to the filing of the grievance) to the present is not barred from arbitral consideration.

However, 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 filing of the grievance, which explains why the grievant waited so long to file his grievance. 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 resolution by the Board.² 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 presents evidence intended to explain grievant's delay in filing his claim. A recommendation written by the deputy commissioner of the agency which employs the grievant indicates that as early as March 1977, the agency planned to promote the grievant and to increase his salary. This explanation is not sufficient to excuse the extended delay from March 1977 to September 1980. Accordingly, we limit arbitral consideration of the merits of the claim, to allegations of out-of-title work performed during the 120 day period prior to the filing of the grievance.

² Board Decisions Nos. B-6-75; B-29-75; B-3-76; B-4-76;
B-9-76.

Decision No. B-17-82
Docket No. BCB-528-81
(A-1311-81)

7.

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 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 on and after May 30, 1980, and is denied insofar as the request seeks arbitration of the claim of out-of-title work performed by the grievant prior to May 30, 1980.

DATED: New York, N.Y.
June 17, 1982

ARVID ANDERSON
CHAIRMAN

MILTON FRIEDMAN
MEMBER

EDWARD J. CLEARY
MEMBER

EDWARD SILVER
MEMBER

JOHN D. FEERICK
MEMBER