

City v. UFA, 29 OCB 19 (BCB 1982) [Decision No. B-19-82 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

THE CITY OF NEW YORK,

Petitioner,

DECISION NO. B-19-82

DOCKET NO. BCB-543-81
(A-1347-81)

-and-

THE UNIFORMED FIREFIGHTERS
ASSOCIATION OF GREATER NEW YORK,

Respondent.

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DECISION AND ORDER

This matter concerns the arbitrability of a grievance stated in a request for arbitration filed by The Uniformed Firefighters Association of Greater New York (hereinafter "the Union") on November 4, 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 November 12, 1981. The Union answered the petition on November 30, 1981. The City did not file a reply.

Request for Arbitration

The grievance herein involves two individuals, one of whom claims that he has been performing the duties entitling him to a payment differential since 1973, and the other since 1976. The grievants, Lts. Joseph Vassallo and Arthur Carr,

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initiated the grievance on August 31, 1981, based on their belief that they have been performing duties substantially different from those contained in their job specifications, since 1973 and 1976 respectively. The Union claims a violation of Article VII of the collective bargaining agreement which reads as follows

"Article VII - Temporary Assignments

Whenever a Fireman is assigned to the duties of a higher rank (i.e., Officer, Marine Engineer or Pilot) for more than two hours in any tour, he shall be paid in cash for the entire tour at the rate of pay for the higher rank in which he served, even though the Department may replace him at any time with an appropriate Officer, provided that if the Fireman is replacing a Fire Officer who is attending an authorized meeting of a certified labor organization as a delegate, the Fireman shall be paid in cash at the rate of pay for the higher rank in which he served only for the actual number of hours served. The intent is that the Department shall have two hours to obtain an Officer, Marine Engineer or Pilot qualified in the higher rank. Payment shall be made within a reasonable time."

The remedy sought in both cases is that they be given "an increase in pay to the lieutenant's salary, and that it be retro active to the time of their appointments" as acting lieutenants.

Positions of the Parties

City's Position

The City opposes arbitration on the ground that the grievance was filed "more than 120 days from the date on which it arose" in violation of time limits provided by the contractual

grievance procedure. The City argues that the grievance is also barred by laches in that the grievants waited well beyond the 120 day limit to file their grievance. 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 the agreement 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 April 30, 1981.

Union's Position

In its answer to the petition challenging 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. It further contends that even assuming, arguendo, that prejudice could be established under this Board's holding in B-3-80 and B-12-81, the part of the grievance relating to the 120-day period immediately prior to the date it was filed is arbitrable.

The Union does not affirmatively assert that evidence

exists in this case of a compelling reason sufficient to excuse the grievants' delay in initiating their claim. However, it is noted in the Step III Hearing Officer's Report, that the grievants' claim that, when they assumed the alleged out-of-title assignments, "they were promised they would receive added compensation to reimburse them for taking on these new responsibilities."

Discussion

The instant grievance asserts a continuing violation one which arose every day of the period during which the out-of-title duties were performed. The grievance procedure of the 1978-1980 contract between the City and the UFA, provides that a grievance may be filed within 120 days after the date on which it arose (Article XXII, Section 1, Step I). Under this provision, therefore, the grievants' claim of out-of-title work performed from April 30, 1981 (which is 120 days prior to the filing of the grievance) to the present is not barred from arbitral consideration.

We decided in B-15-81 that it is proper for the Board to make a threshold determination concerning the probable

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sufficiency of the union's excuse for delay in filing beyond 120 days prior to the time the grievance arose. We note, in this regard, the reference made in the Step III Hearing Officer's Report of a promise concerning "compensation to reimburse [the grievants] for taking on these new responsibilities." The Union does not, however, speak of such a promise, and even if it did, the Board would not necessarily find this explanation sufficient to excuse the extended delay from 1973 and 1976 to August 1981, respectively. Thus, the Board finds that the arbitration of the grievance, which relates to a period beyond the 120 days preceding the filing of the grievance, is barred.

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 United Firefighters Association of Greater New York 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

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and after April 30, 1981, and is denied insofar as the request seeks arbitration of the claim of out-of-title work performed by the grievants prior to April 30, 1981.

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