

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

THE CITY OF NEW YORK,

DECISION NO. B-26-82

DOCKET NO. BCB-546-81
(A-1348-81)

Petitioner,

-and-

NEW YORK STATE NURSES ASSOCIATION,

Respondent.

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DECISION AND ORDER

On November 19, 1981, the City of New York, Human Resources Administration (hereinafter "the City" or "HRA"), appearing by its office of Municipal Labor Relations (hereinafter "OMLR"), filed a petition challenging the arbitrability of a grievance that is the subject of a Request for Arbitration filed by the New York State Nurses Association (hereinafter "the Union" or "NYSNA"). The Union filed a verified answer on December 21, 1981, to which the City replied on January 8, 1982.

REQUEST FOR ARBITRATION

The request for arbitration alleges that the City failed "to pay responsibility differential to staff nurses from 1972-1979" in violation of Article III, Section 11(D) of the 1978-1980 collective bargaining agreement (hereinafter "the Agreement") entered into between the parties.

Article III, Section 11(d) cited above reads as follows:

Effective July 1, 1978, a differential of \$3.00 per tour shall continue to be provided for each Registered Professional Nurse (CETA) or Staff Nurse, who is assigned or exercises responsibility on an evening or night shift for one or more Registered Professional Nurse(s) (CETA) and/or Staff Nurse(s), or for two or more units.

The instant grievance was filed pursuant to Article VI, Section 2 of the Agreement which states in pertinent part:

Step I. - The employee and/or the Association shall present the grievance verbally or 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. The employee may also request an appointment to discuss the grievance. The person designated by the Employer to hear the grievance shall take any steps necessary to a proper disposition of the grievance and shall reply in writing by the end of the third (3rd) work day following the date of submission.

Step II. - An appeal from an unsatisfactory determination at Step I, or Step 1(a) where applicable, shall be presented in writing to the agency head or his designated representative who shall not be the same person designated in Step I. The appeal must be made within five (5) working days of the receipt of the Step I or Step 1(a) determination. The agency head or his designated representative, if any, shall meet with the employee and/or Association for review of the grievance and

shall issue a determination in writing by the end of the tenth (10th) work day following the date on which the appeal was filed.

Step III. - An appeal from an unsatisfactory determination at Step II shall be presented by the employee and/or the Association to the Director of Municipal Labor Relations, in writing within ten (10) working days of the receipt of the Step II determination. Copies of such appeal shall be sent to the agency head. The Director of Municipal Labor Relations or his designee, shall review all appeals from Step II determinations and shall answer such appeals within ten (10) working days following the date on which the appeal was filed.

Step IV. - An appeal from an unsatisfactory determination at Step III may be brought solely by the Association to the Office of Collective Bargaining for impartial arbitration within fifteen (15) working days of receipt of the Step III determination. In addition, the Employer shall have the right to bring directly to arbitration any dispute between the parties concerning any matter defined herein as a "grievance." The Employer shall commence such arbitration by submitting a written request therefore to the Office of Collective Bargaining. A copy of the notice requesting impartial arbitration shall be forwarded to the opposing party. The arbitration shall be conducted in accord with the Consolidated Rules of the Office of Collective Bargaining. The costs and fees of such arbitration shall be borne equally by the Association and the Employer. The determination or award of the arbitrator shall be final and binding in accord with applicable law and

shall not add to, subtract from or modify

any contract, rule, regulation, written policy or order mentioned in Section 1 of this Article.

As a remedy, the Union seeks "payment of all monies due, retroactive to 1973."

BACKGROUND

The City and NYSNA have been parties to four successive collective bargaining agreements since 1972. Each contract contains essentially the same language concerning "responsibility differential" as that quoted above from Article III, Section 11(D) of the 1978-80 Agreement.

In March, 1975 a Step I grievance was filed at HRA's "Camp LaGuardia" location, alleging, inter alia, the City's failure to pay the responsibility differential specified in the 1972 Agreement. In June, 1975 the portion of the grievance relating to the responsibility differential was denied.

According to the City's submissions, a Step II hearing was requested in August, 1976, but there is "no indication that such was granted or held."¹ A new Step I grievance was filed in September, 1977; apparently, it also was denied.

The Union states that communications between NYSNA and HRA concerning the responsibility differential took place

¹ See Step III Decision by OMLR Review Officer, dated October 13, 1981.

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from August, 1976 through February, 1979, at which time HRA reversed itself and agreed to pay the differential. Payment was authorized in an internal memorandum dated September 26, 1979. The memorandum reads, in part:

This is to confirm our conversation today concerning the decision by the office of Labor Relations approving the payment of \$3 differential "to be provided for each Registered Professional Nurse or Staff Nurse who is assigned or exercises responsibility on evening or night shift for one or more Registered Professional Nurses."

As this approval has been received by me today, this factor of responsibility differential payment will become effective immediately.

On November 29, 1979 an OMLR official called for a meeting with NYSNA representatives to discuss a number of topics, including responsibility differential payments. A dispute had arisen as to the cutoff date for the commencement of the retroactive payments. The meeting took place on March 17, 1980. On September 5, 1980, HRA denied retroactive payment of the responsibility differential prior to January 1, 1979.

On November 18, 1980, the Union filed a third grievance concerning the responsibility differential, seeking payment from 1972 - 1979. The grievance was denied at Steps I, II and III. The Step IV Request for Arbitration, which underlies the present petition, was filed on November 5, 1981.

POSITIONS OF THE PARTIES

The City's Position

The City argues that the instant petition should be dismissed because the grievance was not filed in a timely manner and is barred by laches.

OMLR maintains that each Agreement since 1972 gives the Union the right to proceed to the next step of the grievance procedure if an unsatisfactory response to the grievance is received and/or if the City exceeds the prescribed time limits. The original Step I grievance concerning payment of the responsibility differential was filed in March, 1975; an unsatisfactory determination was rendered in June, 1975. Nonetheless, the City argues, the Union declined to seek arbitration until 1980, in obvious violation of the prescribed time limits specified in Article VI of the Agreement.

The City further contends that the "written communications" between the parties from 1975 through 1980 do not constitute "grievances" filed pursuant to the formal grievance procedure. Assuming arguendo, however, that these communications are construed as grievances, they were not "filed" until three years after the grievance allegedly first arose. Thus, even in 1975, arbitration in the instant matter was barred by laches.

OMLR urges that as a result of the Union's inexcusable delay in filing and pursuing the instant matter,

the City's potential monetary liability has significantly increased. Additionally, as a result of the long delay, it has become impossible for HRA to obtain relevant evidence and witnesses in order to adequately defend the alleged contractual Violation.

The Union's Position

NYSNA argues that in 1975, Camp LaGuardia nurses asserted a timely claim concerning payment of the responsibility differential. For 5 years thereafter, the parties attempted to resolve the matter. The City, however, procrastinated, took inconsistent positions, refused to properly implement their own grievance settlements and failed to render a final determination until 1980. Thus, the doctrine of laches is inapplicable in the present situation, for any delay that may have occurred resulted solely from the City's failure to issue a final determination as to the grievants' entitlement to the responsibility differential. Similarly, any increased monetary liability the City must now bear was brought upon it by itself. To bar arbitration at this time would be to "reward" the City for continued procrastination and dilatory behavior.

The Union also maintains that the issue herein is clearly a matter of contract interpretation and application. In that the Board need only resolve "whether a matter is a

proper subject for the grievance and arbitration procedure",² an Order directing the parties to arbitrate the instant matter is warranted.

DISCUSSION

The parties to this proceeding do not question their obligation under the Agreement to submit to arbitration a grievance pertaining to payment of the responsibility differential. Rather, the City is contesting arbitrability on the grounds that the present grievance was untimely filed and also is barred by the doctrine of laches, issues which are to be resolved by this Board.³

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."⁴ Essentially, the City claims that the Union failed to diligently assert its claim, thereby increasing the City's monetary liability and making it impossible to properly defend the alleged wrong. NYSNA, on the other hand, attributes all delay incurred to the City's alleged procrastination and refusal to make a final determination as to entitlement to payment of the responsibility

² Section 7.3 of the Revised Consolidated Rules of the Office of Collective Bargaining.

³ Decision Nos. B-6-75, B-4-76, B-15-81, B-4-82.

⁴ Decision Nos. B-3-80, B-4-80, B-38-80, B-15-81.

differential until September, 1980, five years after the original Step I grievance was filed.

The facts show that communications between the parties concerning the dispute took place from 1975 through 1980. Throughout and prior to this period, the Union had access to a grievance procedure culminating in binding arbitration. The Union fails to explain why it did not invoke Steps III and IV of the grievance-arbitration machinery when its original grievance was first denied in 1975. By failing to request arbitration promptly and in accordance with the Agreement's formal procedures, the Union was, in effect, telling the City that it was abandoning its claim to arbitrate the dispute. The City, under no contractual obligation to resolve the matter through informal discussion, continued to interpret the responsibility differential provision as it saw fit.

Unsuccessful, informal attempts to resolve a claimed contract violation will not preserve rights to the grievance arbitration procedure.⁵ Nor do such settlement efforts toll the contractual time requirements of a formal grievance procedure.⁶

NYSNA has failed to present any probative evidence of meritorious, extenuating circumstances that might militate

⁵ Decision No. B-4-76.

⁶ Decision No. B-3-76.

against a finding of unwarranted delay. Thus, we find that the City's laches and timeliness arguments have validity and we shall deny the request for arbitration.

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 City's petition challenging arbitrability be, and the same hereby is, granted; and it is further

ORDERED, that the Union's request for arbitration be, and the same hereby is, denied.

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

ARVID ANDERSON
CHAIRMAN

MILTON FRIEDMAN
MEMBER

EDWARD J. CLEARY
MEMBER

EDWARD SILVER
MEMBER

JOHN D. FEERICK
MEMBER