City, HHC v. Doctors Council, 29 OCB 36 (BCB 1982) [Decision No. B-36-82 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of

THE CITY OF NEW YORK and the HEALTH AND HOSPITALS CORPORATION,

DECISION NO. B-36-82

DOCKET NO. BCB-552-81 (A-1355-81)

Petitioners,

-and-

DOCTORS COUNCIL,

Respondent.
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DECISION AND ORDER

On December 11, 1981, the New York City Office of municipal Labor Relations ("OMLR") on behalf of the City of New York and the New York City Health and Hospitals Corporation ("petitioners"), filed a petition challenging the arbitrability of a grievance that is the subject of a request for arbitration filed by Doctors Council ("respondent") on November 18, 1981. on April 28, 1982, following several extensions of time, Doctors Council submitted its answer. A reply was filed on May 10, 1982, in response to which a sur-reply was submitted on May 28, 1982.

Background

Under the 1978-1980 collective bargaining agreement between the City of New York and Doctors Council ("Agreement"), the parties agreed, at Article III, Section

2, Note CC, to the payment of supervisory differential as follows:

> (CC) The payment of $6.00 per session to each hourly paid incumbent for employment and chief of a clinic or service, effective July 1, 1979. It is the understanding of the parties that the supervisory differential provided in this Note CC (and those reductions in rates provided in Article III, Section 2(b) required to fund said supervisory differential) shall expire on June 29, 1980. The supervisory differential shall not survive the exDiration of the agreement nor shall it continue in any status quo period that may arise.

The request for arbitration, brought pursuant to Article VII, Section 2, states the grievance to be

> [t]he failure and refusal of the employer to pay the supervisory differential to per session chiefs of clinics and services employed from July 1, 1979 through June 29, 1980, as provided and required by Article III, Section 2, Note CC, of the then effective Doctors Council contract [1978-80].

The provision on supervisory differential, as apparent on its face and conceded by the parties, had a fixed term beginning on July 1, 1979 and ending on June 29, 1980. It is stipulated, therefore, that upon the expiration of the Agreement on June 30, 1982, the status quo provision of the New York City Collective Bargaining

Law,[1] otherwise applicable to the Agreement, did not operate to extend the term of this particular provision. Accordingly, supervisory differential has only been claimed for the 12-month period covered by that provision

Positions of the Parties

Petitioner's Position

Petitioners oppose arbitrability on the following grounds:

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[1] Section 1173-7.0 of the NYCCBL provides, in relevant part:

> d. Preservation of status quo. During the period of negotiations between a public employer and a public employee organization concerning a collective bargaining agreement, and, if an impasse panel is appointed during the period commencing on the date on which such panel is appointed and ending thirty days after it submits its report, the public employee organization party to the negotiations, and the public employees it represents, shall not induce or engage in any strikes, slowdowns, work stoppages, or mass absenteeism, nor shall such public employee organization induce any mass resignations, and the public employer shall refrain from unilateral changes in wages, hours, or working conditions. This subdivision shall not be construed to limit the rights of public employers other than their right to make such unilateral changes, or the rights and duties of public employees and employee organizations under state law. For purpose of this subdivision the term "period of negotiations" shall mean the period commencing on the date on which a bargaining notice is filed and ending on the date on which a collective bargaining agreement is concluded or an impasse panel is appointed.

(A-1355-81)

1. The grievance, initiated on April 25, 1981 is time-barred by the terms of the Agreement pursuant to which it is brought in that more than 120 days have elapsed from the date on which the grievance arose. Furthermore, the prejudice engendered by the delay warrants the dismissal of the request for arbitration based on the doctrine of laches.

2. There has been, it is argued, a historic recognition by the Board of the unique and personal nature of claims concerning additional work, to which the claim for supervisory differential is analogized. Hence, where as here the claim does not concern the work of the bargaining unit as a whole, a waiver executed by the union, on behalf of the claimants, is ineffective to fulfill the waiver requirement of Section 6.3 of the Revised Consolidated Rules of the office of Collective Bargaining.

3. The grievants, by initiating the grievance at Step III, have failed to follow the multi-level grievance procedure set forth in the Agreement.

4. The request for arbitration fails to specify the dates on which grievants allegedly performed in a capacity entitling them to supervisory differential.

5. The issue herein is the entitlement of these particular claimants to the supervisory differential, not the refusal, altogether, to implement Article III, Section 2, Note CC of the Agreement, as suggested by respondent.

Respondent's Position

Respondent maintains that the filing of the grievance on April 25,

1981 was, under these circumstances, timely.

Respondent claims that as soon as it became evident that petitioners were not implementing Section 2 of Article III, a letter dated September 29, 1980, was sent to William Boyce, Director of Personnel at Kings County Hospital Center ("KCHC") requesting the enforcement of said provision. Further,

> [s]ubsequent to that date, throughout the latter part of 1980 and the first months of 1981, it appeared that petitioners were attempting to comply with the provisions in dispute, but were encountering difficulties in determining which doctors were entitled to the supervisory differential provided therein.[2]

Doctors council notes that a memorandum, dated December 4, 1980, from Mr. Boyce to Pedro Hernandez, Associate Executive Director, KCHC, stated that "associate medical directors" were not entitled to the supervisory differential but that "chiefs of clinics or services" were entitled to the differential. Thus, it is argued, the grievance was properly instituted only when, as of April 1981, supervisory differential had still not been paid to any of the allegedly entitled individuals.

Doctors Council maintains that at issue is the refusal of the employer to implement the supervisory differential provision of the Agreement, and that as in mandamus proceedings, the time within which to bring such a claim should run "from the denial of the demand to comply."

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[2] Paragraph 11 of respondent's answer.

otherwise, respondent maintains,

> ... unions must grieve every provision of of the collective bargaining agreement which has not been fully implemented 120 days from the effective date of the agreement.

With respect to the second ground for opposing arbitration-i.e., the waiver requirement, respondent urges that Doctors Council, as agent for "all union members in the arbitration of a union grievance" properly executed, in that capacity, the waiver herein. Doctors Council argues that petitioners' insistence on individual waivers, based on principles borrowed from out-of-title cases, is misplaced since

> ... unlike an out-of-title claim, neither the respondent nor the individual employees affected by the claim have the statutory cause of action provided by Civil Service Law §61(2) and 10.0(1)(d).

Since, it is argued, the contractual remedy is the only one available to claimants herein, there is no basis for requiring individually executed waivers. In response to the challenge to arbitration based on the initiation of the grievance at Step III, respondent draws our attention to Article VIII, Section 5 which provides for the filing of a group grievance directly at Step III.

Section 5.

> A grievance concerning a large number of employees which concerns the claimed misinterpretation, inequitable application, violation or failure to comply with the provisions of this Agreement may be filed directly at Step III of the grievance procedure. All other individual grievances in process concerning the same issue shall be consolidated with the "group" grievance.

Discussion

This Board has repeatedly held that questions concerning the parties' adherence to contractual time limitations relate to the procedural arbitrability of a grievance and are thus properly determined in the arbitral forum.[3] Accordingly, we decline to pass on the issue of timeliness.

It is also claimed, however, that the petition herein should be dismissed on grounds of laches. Laches is defined as "unexplained or inexcusable delay in asserting a known right which causes injury or prejudice to the defendant".[4] We have held, in a number of cases, that such a delay may form the basis for a denial of the request for arbitration and that the question of laches, or extrinsic

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[3] B-11-77; B-6-78; B-3-79; B-15-81.

[4] Board Decision No. B-11-77, citing Tobacco Lorillard Corp., 78 LRMM 2293, 2280 (4th Cir. 1971).

delay, is to be decided by the Board.[5] In Decision No. B-15-81, we discussed, at length, our role with respect to the issue of laches and held that it is proper for the Board to make a threshold determination concerning "the probable sufficiency of the Union's excuse for delay in filing", while leaving the actual evaluation of the excuse for the arbitral forum where both parties can be heard. We indicated that where a respondent offers nothing in the way of explanation beyond the bare allegation that there are compelling reasons to excuse the delay in initiating a formal grievance, there is no warrant for allowing an arbitrator to consider the sufficiency of the excuse for the delay.

In the instant matter, respondent has alleged facts and submitted evidence to support its assertions that timely efforts were made by the parties to resolve this matter. In light of this, we cannot say that respondent acted in a manner which is either inexcusable or could fairly be interpreted by the Department, to its prejudice, as an abandonment of the claim for supervisory differential. It must be stressed that this finding does not constitute a determination of the underlying issues. Our finding goes no further than to say that a substantial question as to whether the delay herein was justified or excusable has

[5] B-6-75; B-9-76; B-15-81; B-4-82.

been raised and should be submitted to an arbitrator. In considering the challenge to arbitrability based on respondent's failure to process the grievance through Steps I and II of the contractual grievance-arbitration procedure, we note that the Agreement expressly provides for the filing of a group grievance at Step III.[6] We further note that as early as September 29, 1980, respondent, in a letter of that date, characterized its claim as the demand for the implementation of the contractual provision on supervisory differential with respect to all persons serving as "Chiefs of Services and/or Clinics". Hence, from the very beginning, respondent advanced this claim as a group claim. Accordingly, since there is no dispute in the pleadings that the grievance herein was initiated as a group grievance, we find there to be no basis for this objection to arbitrability.

We next consider the challenge to arbitrability based on the failure to submit individual waivers as allegedly required by Section 6.3 of the Rules. In Decision No. B-12-71 we referred to the stat~tory canon dealt with in McKinney's Sections 145 and 147 - "A sensible construction of a statute is preferred to one which is absurd" and "statutes must be so construed that mischief may be avoided." We found significant support for the application of this principle to our interpretation of the NYCCBL

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[6] Article VIII, Section 5 provides:

> A grievance concerning a large number of employees and which concerns a claimed misinterpretation, inequitable application, violation or failure to comply with the provision of this Agreement may be filed directly at STEP III of the grievance procedure. All other individual grievances in process concerning the same issue shall be consolidated with the "group" grievance.

in Wirtz v. Local 153, Glass Bottle Blowers, 67 LRRM 2129 (1968) where the Supreme Court especially cautioned against a "literal reading of Congressional labor legislation." In light of the stated policy of the NYCCBL--to encourage the arbitration of grievances, the waiver provision should be read and applied in a manner consistent with the protections sought to be afforded.

In Decision No. B-20-74, and earlier in Decision No. B-12-71, we distinguished between the three types of grievances:

1. Union grievances, in which the Union is clearly the only identifiable grievant. This type of grievance involves a contract interpretation or application, and generally applies to all employees in the bargaining unit and probably to future employees as well.

2. Group grievances, which do not necessarily apply to all employees in the bargainable unit, but rather to a number of employees in the unit who are similarly affected by an alleged violation.

3. Individual grievances, in which one or more identifiable individuals claim a violation of contractual rights.

In Decision No. B-12-71, we drew yet another distinction -- between a group grievance involving a right possessed by the bargaining unit as a whole and a group grievance involving rights uniquely personal to the individuals involved. The Board expressed the view that:

> [U]nder the NYCCBL:, if a-factual situation demonstrates that the issue involves an alleged violation of a right possessed by the bargaining unit as a whole, or by the union's exclusive representative, the union waiver is sufficient to warrant proceeding to arbitration of the dispute.

There, on the other hand, the grievance sought to be arbitrated is uniquely personal to the individuals involved, the Board may require that the individuals and the Union sign the written waiver before the matter may be further processed. In B-12-71, we further held:

> The Board will consider each case on its own merits, and clearly will want such waivers as will avoid the possibility of recourse to other remedies concurrently with or subsequent to arbitration.

Respondent maintains that the gravamen of the dispute herein is the total failure to implement the contractual provision on supervisory differential. The City maintains this is merely a dispute over the entitlement of certain individuals to supervisory differential. Under either characterization, we find that the waiver requirement has been met. That is to say, we are not persuaded that the City's characterization of the underlying dispute, even if accepted, makes it a group grievance involving uniquely personal rights and requiring individual waivers. The fact that a relatively small and ascertain-

able number of employees are involved does not, ipso facto, make it uniquely personal to the individuals involved. "We do not think the statute intended that the execution of waivers as a pre-condition to arbitration should turn solely on the numbers of employees who could be involved in the grievance."[7]

In Decision No. B-12-72, the employer refused to pay cash benefits to the beneficiaries or the estates of deceased employees for accrued annual leave and compensatory time. Even though the survivors were ascertainable, the claim was found to be union related - not one which was uniquely personal to the grievants. Similarly, in Decision No. B-12-71, nine individuals were found to be affected by the out-of-title performance by a Foreman of Mechanics of duties properly assignable only to Machinists, Auto Machinists or Auto Mechanics in a bargaining unit represented by the Union. The Board found this to be a union grievance since it impacted on the work of the bargaining unit. In the instant proceeding, the grievance was initiated on behalf of employees who had performed in the capacity of per session chiefs of clinics and services from July 1, 1979 through June 29, 1980. There are no remarkable facts distinguishing these individuals from each other. Each

[7] B-12-71.

will benefit from the arbitration, if at all, by virtue of having performed in the aforementioned capacity. Accordingly, we reject, as well, this basis for the challenge to arbitrability.

Lastly, we consider the challenge to arbitrability based on the failure to specify dates on which grievants allegedly performed in a capacity entitling them to supervisory differential. In view of the allegation that there was a complete failure to implement this provision, and the fact that the provision was intended to cover only work performed in the 12-month period between July 1, 1979 and June 29, 1980, we find the challenge to arbitrability on this ground to be without basis as well.

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 Doctors Council's request for arbitrability be, and the same hereby is, granted; and it is further

ORDERED, that the petition challenging arbitrability be, and the same hereby is, denied.

DATED: New York, N.Y.
September 23, 1982

ARVID ANDERSON
CHAIRMAN

DANIEL G. COLLINS
MEMBER

MILTON FRIEDMAN
MEMBER

EDWARD SILVER
MEMBER

JOHN D. FEERICK
MEMBER

CAROLYN GENTILE
MEMBER