

City v.L.371, SSEU, 29 OCB 4 (BCB 1982) [Decision No. B-4-82 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Arbitration

-between-

THE CITY OF NEW YORK,

DECISION NO. B-4-82

DOCKET NO. BCB-529-82
(A-1305-82)

Petitioner,

-and-

SOCIAL SERVICE EMPLOYEES UNION,
LOCAL 371,

Respondent

-----X

DECISION AND ORDER

On September 11, 1981, the City of New York, by its Office of Municipal Labor Relations (the "City"), filed a petition challenging the arbitrability of a grievance that is the subject of a request for arbitration filed by the Social Services Employees Union, Local 371 ("SSEU"). On November 10, 1981, SSEU filed its answer to the petition, and on December 4, 1981, the City submitted its reply.

Request for Arbitration

The grievance alleged by SSEU, in its request for arbitration, is that:

[g]rievants who are Supervisors I have been working out-of-title as Supervisors II, Fair Hearing Representatives, for the Department of General Social Services of HRA/DSS.

The grievants, Theodore Zabb, Fred Maier, and Laura Blakely, initiated the grievance on May 11, 1979, based on their belief that they have been performing duties since 1976 substantially different from those contained in their job specifications and duties which had previously been performed by incumbents in the title "Supervisor II."

We the above have been employed as Fair Hearing Representatives for GSS. In the past, Mr. Bill Tambeau, MI, and Steffany Liveau, Supv. II, have been employed by GSS has [sic] Fair Hearing Representatives ...¹

SSEU cites violations of "SSEU Local 371 Contract Article VI Section 1, Pers. Policy 510-78, 510-79, Mayor's Directive 79-3, HRA Inf. 58-37,² HRA Dir. of 1/22/80," and seeks, as a remedy, "compliance, appropriate compensation for all out-of-title work, promotion to Supervisor II and any other just and proper remedy."

Positions of the Parties

City's Position

The City stipulates that the grievance as to Theodore Zabb is timely, but maintains, in its petition, that the grievance as to Fred Maier and Laura Blakely,

¹ Grievance Form, dated May 11, 1979.

² In its petition, the City notes an error in this cite which should read "HRA Informational No. 78-57."

relating to out-of-title work commencing in 1976, is time-barred.

If this claim is deemed to be in the nature of a "continuous grievance," then it is timely only for the 120 day period preceding the date of filing or as of January 11, 1979.

* * *

Notwithstanding the contractual 120 day limitation, the instant grievance cannot be maintained by Maier and Blakely since respondent is guilty of laches ...

The City urges that the failure of Maier and Blakely to institute a claim prior to 1979 is "inexcusable" and, therefore, tantamount to a relinquishment of the protections and remedies which would otherwise be afforded these grievants by the 1978-80 Social Services Agreement ("Agreement"), or the 1978 amendment to the Civil Service Law³ permitting monetary awards for employees assigned to out-of-title work in violation of a collective bargaining agreement. The City argues in the alternative that if the matter is found to be arbitrable, the period prior to January 11, 1979 (beyond the 120-day period) should be barred from arbitral consideration.

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

³ Civil Service Law §100 (1) (d) (1978) L.1978, Ch. 255
§1 eff. June 5, 1978.

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,"⁴, 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, SSEU 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 limitation. With respect to the defense of laches, SSEU 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 Decision No. B-3-80, the part

⁴ Matter of City of New York, N.Y. Law Journal,
February 28, 1980, pp. 11-12.

of the grievance relating to the 120-day period immediately prior to the date it was filed is arbitrable.

Discussion

The parties to this proceeding do not question their obligation under the Agreement to submit to arbitration a grievance pertaining to "a claimed assignment of employees to duties substantially different from those stated in their job specification." Instead, the City is contesting arbitrability on the ground that it was untimely filed and also is barred by the doctrine of laches.

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

Step 1. The employer and/or the 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 grievants 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 January 11, 1979 (which is 120 days prior to the filing of the grievance) to the present is not barred

from arbitral consideration.⁵ Since SSEU's submissions in this proceeding are devoid of any explanation to excuse the delay, the Board finds that the arbitration of the grievance which relates to a period beyond the 120 days proceeding the filing of the grievance is barred.⁶

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 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 grievants on and after January 11, 1979, and

⁵ We note, in connection with the second of the three numbered items allegedly limiting remedies, set forth herein in the Statement of City is position at page 2, supra, that the effects, if any, of Section 2, Article VI of the contract between the parties upon this matter is subject to be dealt with by the arbitrator.

⁶ B-6-75; B-29-75; B-3-76; B-4-76; B-9-76; B-15-81.

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7.

is denied insofar as the request seeks arbitration of the claim of out-of-title work performed by the grievants prior to January 11, 1979.

DATED: New York, N.Y.
January 29, 1982

ARVID ANDERSON
CHAIRMAN

MILTON FRIEDMAN
MEMBER

DANIEL G. COLLINS
MEMBER

CAROLYN GENTILE
MEMBER

MARK J. CHERNOFF
MEMBER

FRANKLIN J. HAVELICK
MEMBER