

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-7-82

-and-

Docket No. BCB-531-81

SOCIAL SERVICE EMPLOYEES UNION,
LOCAL 371,

(A-1308-81)

Respondent.

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DECISION AND ORDER

On September 21, 1981, the City of New York, through its Office of Municipal Labor Relations (hereinafter "the City" or "OMLR") commenced this proceeding by filing a petition challenging the arbitrability of a grievance filed by the Social Service Employees Union, Local 371 (hereinafter "SSEU" or "the Union") on January '28, 1981. SSEU answered the petition on November 4, 1981, to which the City replied on December 4, 1981. On January 29, 1982, and February 2, 1982, the City and the Union, respectively, submitted clarifications of position regarding the viability of a rescinded Personnel Policy and Procedure. (hereinafter "PPP") allegedly violated.

BACKGROUND

The Union seeks to arbitrate the grievance of Herbert Robinson. Grievant Robinson began his career in City service in July, 1969 as a provisional Senior Community Liaison Worker in the Department of Housing Preservation and Development (hereinafter "HPD"). In December, 1970 Robinson was named a

provisional Principal Community Liaison Worker. He held this position until November 10, 1972, at which time he was appointed from a civil service list to his present title, that of permanent Senior Community Liaison Worker. SSEU claims that the grievant has not been paid at the correct salary since the time of his permanent appointment.

The Union seeks arbitration pursuant to Article VI, Section 2 of the 1979-80 collective bargaining agreement between SSEU and the City (hereinafter "the Agreement"). That Article states in pertinent part:

The employee 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.

Furthermore, the Agreement includes the following definition of the term "grievance":

A claimed violation, misinterpretation, or misapplication of the rules or regulations, written policy or orders applicable to the agency which employs the grievant affecting the terms and conditions of employment....

As relief, the Union asks, "Compliance, immediate payment of all monies due with interest thereon, and any other just and proper remedy."

The Union claims violations of the Alternative Career and Salary Pay Plan as amended (specifically, Personnel Order 21/67,

which was superceded by Labor Relations Order 81/1),¹ as well as PPP 612-80. Section V, paragraphs 3 and 4 of Personnel Order 21/67 state:

3. An employee, upon demotion as a result of a layoff or reduction in force, shall be treated, insofar as salary in the lower position is concerned, as if the years of service at the higher position had been served at the lower position, in addition to any time actually served at the lower position. An employee, upon voluntary acceptance of demotion, may be treated in the same manner, if the agency head so recommends. In such cases, for service increase purposes only, time served in the higher position shall be deemed to be satisfactory service in the lower position.
4. An employee transferred, reclassified or appointed to another position, without a break in service, shall receive the minimum basic salary rate of the new position or the basic salary rate received by him in his former position at the time of his transfer, reclassification or appointment, whichever is greater. In no case shall the new salary received by the employee exceed the maximum basic salary of the new class of positions, except as otherwise provided in an Implementing Personnel Order.

PPP 612-80 was issued on January 15, 1980. Its purpose was to "clarify paragraph 4 of Section V of the Alternative Career and Salary Pay Plan concerning appointment of provisionals

¹ Labor Relations Order 81/1 incorporated the same language as Personnel Order 21/67.

to permanent positions as a result of certification from an eligible list." It states:

A provisional employee appointed to a permanent position from, an eligible list shall receive the minimum basic salary rate of the new position or the basic salary rate received in the former position at the time of appointment, whichever is greater, only in the following situation:

1. The new position is in the same agency in which the employee was serving provisionally; and
2. The new position is in the same occupational group as the former position and
3. There is no break in service.

PPP 612-80 was unilaterally rescinded by the City's Issuance of PPP 612-81 on may 20, 1981. PPP 612-81 states in full:

Personnel Policy and Procedure No. 612-80, issued on January 15, 1980 is hereby rescinded, as of January 15, 1980.

The Union's request for arbitration follows a March 25, 1981, Step II determination and a Step III decision rendered on July 27, 1981, in which it was found that Section V, paragraphs 3 and 4 of the Alternative Career and Salary Pay Plan were inapplicable to grievant Robinson. It was held that paragraph 3 covers only employees demoted as a result of a layoff or a reduction in force and that paragraph 4 has consistently been applied only to permanent employees. The Step III Review Officer also found that PPP 612-80 had already been

rescinded by the time it was first introduced (at the June 30, 1981 Step III conference) and that the grievant's claim to a money remedy retroactive to November 10, 1972 was precluded by failure to file the grievance within 120 days of the alleged violation.

POSITION OF THE PARTIES

City's Position

The City originally argued that arbitration is barred by laches because the grievant waited nine years from the day the claim arose before filing his grievance. Additionally, the City contended that the grievance is untimely under Article VI, Section 2 of the Agreement in that it was filed more than 120 days after the claim arose. However, OMLR subsequently modified its position in this regard to seek only "dismissal of the Respondent's claim alleging violations beyond the 120 day period of limitations."²

In its pleadings, the City maintained that PPP 612-80, having been retroactively rescinded to its date of issuance by PPP 612-81, could not be the basis for the Union's claim of substantive rights.

² City position letter dated February 2, 1982.

Union's Position

SSEU argues that although the instant grievance is based-on a personnel action which took place in 1972, it is a continuing liability grievance in that grievant Robinson has been receiving an incorrect paycheck every pay period since 1972. Thus, the City is currently perpetuating an ongoing violation of the collective bargaining agreement.

The Union argues that the defense of laches is not available to the City in the present matter, and that our Decision No. B-3-80 states the applicable rule which the Union paraphrases as follows:

... where a continuing violation is alleged, even if the defense of laches is available to part- of the claim, that part of the grievance which alleges violation of the agreement from 120 days prior to the of the grievance to the present is not barred by laches.³

Thus, the Union argues that the claim that the grievant was receiving the wrong salary from 120 days prior to the date that the grievance was first filed to the present cannot be barred by laches.

With regard to the grievability of PPP 612-80 rescission by PPP 612-81, it is SSEU's position that:

...the question of the viability of the new Personnel Policy and Procedure, whether that Personnel Policy and Procedure rescinds or supersedes the previous one, and whether, even if it does, the grievant's claim should be

³ Union Answer, paragraph 15.

_____ decided on the basis of the original Personnel Policy and Procedure or the subsequent one, are all questions for the arbitrator and do not bear on the arbitrability of the grievance.⁴

DISCUSSION

The instant grievance amounts to a "continuing violation"-- one which has taken place, and continues to take place, every time the grievant receives a paycheck. We are cognizant of the fact that the contractual grievance procedure provides for the filing of a grievance within 120 days after the date on which it arose. This 120 day period represents a block of time which the parties, by contract, have agreed would not form the basis of a claim of prejudicial, unexplained delay.

In keeping with our prior decisions,⁵ we find that that part of the instant claim which relates to incorrect salary from October 1, 1980 (120 days prior to the filing of the grievance) to the present is timely asserted and should not be barred from arbitral consideration.

Subsequent to the submission of this matter for adjudication the City withdrew its objections to arbitration relating to the effect of PPP 612-81 and the viability of the Union's claim based upon PPP 612-80. The City thus does not

⁴ Union position letter dated January 28, 1982.

⁵ See Decision Nos. B-6-75; B-29-75; B-3-76, B-4-76; B-9-76; B-3-80; B-15-81; B-4-82.

contest the Union's claim that that issue is for an arbitrator to decide and consents to arbitral determination of that issue. We therefore do not reach the question of the validity of the underlying legal argument of the Union on that issue.

ORDER

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 for the correct salary for work performed by the grievant from and including October 1, 1980 to the present time, and is denied insofar as the Request seeks arbitration of the claim for work performed by the grievant prior to October 1, 1980.

DATED: New York, New York
February 22, 1982

ARVID ANDERSON
CHAIRMAN

DANIEL G. COLLINS
MEMBER

MILTON FRIEDMAN
MEMBER

CAROLYN GENTILE
MEMBER

EDWARD SILVER
MEMBER

JOHN D. FEERICK
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