

City v. SBA, 31 OCB 23 (BCB 1983) [Decision No. B-23-83 (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-23-83

Petitioner,

DOCKET NO. BCB-534-81  
(A-1227-81)

-and-

SERGEANTS' BENEVOLENT ASSOCIATION,

Respondent.

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### **DECISION AND ORDER**

On October 6, 1981, the City of New York, through its Office of Municipal Labor Relations (hereinafter "the City") commenced this proceeding by filing a petition challenging the arbitrability of a grievance filed by the Sergeants' Benevolent Association (hereinafter "SBA") on behalf of seven (7) Sergeants. On December 10, 1981, the SBA filed its answer to the petition, and on January 22, 1982, the City submitted its reply.

### **Background**

In 1975 the grievants were employed by the Police Department and were assigned to the Legal Division. From January 1, 1975 through October 6, 1980 the grievants were assigned to a reserve schedule which required working hours

in excess of the regular duty chart. Additionally, from September 1, 1977 to the present the grievants were rescheduled from time to time to work tours other than those assigned as per their required duty chart. The grievants requested additional compensation for the performance of the reserve duty schedule from January 21, 1975 to October 6, 1980 and additional compensation for the rescheduling of tours of duty from September 1, 1977 to the present. On February 13, 1981 the grievance containing both claims was denied at Step IV. The SBA seeks arbitration of its claims pursuant to a collective bargaining agreement which contains a grievance and arbitration procedure.

### **Positions of the Parties**

#### **The City's Position**

The City challenges the arbitrability of the instant grievance on the ground that arbitration is barred by the doctrine of laches, as the grievants waited for five years and three years, respectively, before presenting their claims in the form of a grievance. Accordingly, the City asserts that the claimed violations of Article III, Section 1(a) and Article III, Section 1(b) are barred by laches for the following reasons:

- a) The Union-is guilty of a long delay in commencing the grievance procedure;
- b) The City's potential monetary liability has significantly increased;
- c) The City will have great difficulty obtaining relevant evidence and witnesses.

In addition, the City raises as an issue in its petition the omission by the SBA (in its request for arbitration) of the claim related to the reserve duty schedule from January 1975 to October 1980. The City concedes, however, that both claims were identified in the waiver executed by the grievants, which was annexed to the request for arbitration.

Alternatively, the City requests that this Board limit the scope of the submission to the arbitrator to those claims occurring within the 120 day contractual statute of limitations.

### **The Union's Position**

In its first claim the SBA alleges a violation of Article III, Section 1 (a) of the collective bargaining agreement, which states:

All ordered and/or authorized overtime in excess of the hours required of an employee by reason of the employees regular duty chart, whether of an emergency nature, shall be compensated for either by cash payment or compensatory time off at the rate of time and one half ...

In its second claim, the SBA alleges a violation of Article III, Section 1(b), which states:

In order to preserve the intent and spirit of this section on overtime compensation, there shall be no rescheduling of days off and/or tours of duty. This restriction shall apply both to the retroactive crediting of time off against hours already worked and to anticipatory reassignment of personnel to different days off and/or tours of duty.

The SBA asserts that this rescheduling of work tours is, by its nature, a continuing violation.

The SBA also maintains that the doctrine of laches should not bar arbitration of the present dispute. It is the SBA's contention that the defense of laches has been overcome by the following excuses and explanations:

1. The arrangement of working hours as to both claims was one imposed by the "stronger of the two parties" - i.e., because of unequal bargaining power;
2. The arrangement was imposed by coercive tactics;
3. The City was aware at all times that this arrangement violated the collective bargaining agreement;
4. To permit a defense of laches would result in permitting the City to profit by its misconduct;
5. The excuse for the delay is two-fold;
  - a) the delay is excusable because it resulted from a lack of awareness of the grievants

that violations of the collective bargaining agreement existed; and

- b) the grievants failed to initiate their grievance claims because of intimidation and duress by the City as a consequence of the grievants fears that a transfer or loss of detail to their assignment to the Legal Division would result.

6. The City should have no problem obtaining evidence because all of the evidence for the work periods in dispute is in the possession of the Police Department and the witnesses associated with the Legal Division are still members of the Police Department.

The SBA attempts to refute the position taken by the City regarding the Union's omission of the claimed violation of Article III, Section 1 (a) on the Request for Arbitration form. The SBA states that it seeks to arbitrate both claims and that this is indicated on the waivers signed by the grievants. Due to limitations of space on the Request for Arbitration form, counsel for the Union was unable to type in each claimed violation, but the City was nevertheless placed on notice of both claims because both were raised at the lower steps of the grievance procedure and both were indicated on the waiver which was annexed to the request for arbitration.

The SBA denies that either the Union or the grievants abandoned their rights or acquiesced in the City's

actions with respect to each of the two claimed contractual violations.

The remedy sought by the SBA is compensation for the rescheduling of overtime at the rate of time and one half for the period January 1975 through October 1980 and for the rescheduling of tours of duty from September 1977 to the present.

### **Discussion**

The parties in this matter do not contest that the subjects of the grievants' claims are covered by the grievance-arbitration clause of their collective bargaining agreement. The issues raised relate solely to the timeliness of the grievance. The City's objection to arbitration is based upon its assertion of the Union's laches as well as upon the SBA's failure to comply with the 120-day contractual statute of limitation. This Board has held in numerous decisions that questions of procedural arbitrability, including the timeliness of a request for arbitration, under a contractual time limitation, are for an arbitrator to resolve.<sup>1</sup> However, a question properly before this Board for determination in this case is whether arbitration should be barred by the equitable doctrine of laches because of the grievants' delay in initiating the grievance.

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<sup>1</sup> Decision Nos. B-15-81, B-3-82, B-4-82.

An analogy may be drawn between the facts presented in the instant case and Board decisions concerning out-of-title work grievances in which the issue of laches was addressed. The grievants herein were performing their duties pursuant to the direction of their supervisors, and although not working out-of-title, they were working at times other than those regularly scheduled, and allegedly without appropriate compensation. In those out-of-title work cases in which the claim was an alleged continuing violation of the contract, and in which the elements of laches were established, this Board nevertheless has ordered arbitration, but only for a period not exceeding 120 days prior to the filing of the grievance. This limited grant of arbitration is based upon our recognition of the contractually-specified 120-day period for filing grievances as constituting a period which the parties, by contract, have agreed would not form the basis of a claim of prejudicial, unexplained delay.<sup>2</sup>

Decision No. B-6-75 sets forth a definition of laches accepted by this Board:

"Laches is an equitable defense, not a contractual one, which arises from the recognition that the belated prosecution of a claim imposes upon the defense efforts an additional, extraneous burden. Long delay in bringing a suit or grievance gives an advantage to the petitioner

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<sup>2</sup> Decision Nos. B-3-80, B-4-80.

because of his own inaction, while at the same time subjecting the defense to a greater risk of liability because of actions taken, or not taken, in reliance on petitioner's apparent abandonment of the claim. (Prouty v. Drake, 182 NYS 271)."

While questions of procedural arbitrability, including timeliness of a request for arbitration under a contract are for the arbitrator to decide, the question of laches is to be resolved by this Board.<sup>3</sup> Thus, it is proper that a threshold determination concerning the prima facie sufficiency of the SBA's excuse for delay be made by the Board. In Decision No. B-15-81, we held a statement by the union that "evidence exists of a compelling reason sufficient to excuse the delay...." to be a "bare allegation", affording no basis for permitting an arbitrator to consider the evidence. While the excuses for delay offered by the SBA amount to more than bare allegations, they fail to allege the basis of a meritorious excuse. Inconsistent allegations are submitted by Respondent to the effect that it was "unaware" of any contractual violations and, at the same time, that the failure to assert rights was due to "duress and coercion". In addition, it is doubtful whether an employee's subjective apprehension of being transferred to another assignment as a consequence of exercising contractual rights constitutes

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<sup>3</sup> Decision Nos. B-38-80, B-3-82, B-33-82, B-36-82.



duress, in the absence of any overt threat or other affirmative act by the employer.

In addition to an unexcused delay in initiating a claim, the other element necessary for finding of laches is a burden on or prejudice to the defendant resulting from the other party's unjustifiable delay. We believe that the SBS has negated the City's claims of difficulty in obtaining evidence and witnesses. However, the City asserts increased monetary liability as an additional element of prejudice. In cases where employees have sought back-pay for out-of-title work, this Board has ruled that the City is "implicitly prejudiced" by an extended delay in filing because the mere passage of time may increase its liability.<sup>4</sup> Consistent with our prior rulings, we find that the City has been prejudiced in the present case.

Having found that the SBA has failed satisfactorily to excuse its delay, and that the City has been implicitly prejudiced thereby, we hold the SBA's claims are barred by laches, except to the extent that they allege continuing violations occurring within 120 days of the filing of the grievance. Applying these considerations to the facts of this case, we find that the first claim alleged by the SBA, for overtime on the reserve schedule from January 1975 to October 1980, alleges a continuing contractual violation

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<sup>4</sup> Decision Nos. B-3-80, B-4-80, B-38-80, B-15-81.

during that time period, and therefore, a grievance filed within 120 days of any date that this practice was in existence would be timely under the collective bargaining agreement. Since the grievance was filed in November, 1980 and the practice ended October, 1980, the claim is arbitrable insofar as it involves matters occurring within the period from 120 days prior to the date of filing until the termination of the practice in October 1980.

We further find that the SBA's second claim alleges a continuing contractual violation and, therefore, arbitration should be granted as to this claim insofar as it involves matters occurring within the period of 120 days prior to the filing of the grievance until the present time.

The Union's allegation of "duress and coercion" is insufficient to justify permitting the arbitrator to consider these claims for any period prior to the contractual 120-day time limit. It is doubtful whether an employee's subjective apprehension of being transferred to another assignment as a consequence of exercising contractual rights constitutes duress, in the absence of the allegation of any overt threat or other affirmative act by the employer. Moreover, the allegation of failure to grieve due to duress is inconsistent with the SBA's allegation that the delay in filing the grievance was due to the Union's

lack of awareness of any contractual violations. In any even, we find that the explanation for delay offered by the SBA fails to establish extraordinary circumstances such as would excuse compliance with the contractual time limitations.

The further issue raised by the City regarding the SBA's omission of one of its claims on the Request for Arbitration form is not deemed by this Board to constitute a fatal defect. In Decision No. B-9-76, a claim was raised by the City that the union did not file a timely Request for Arbitration. The union contended the request was timely, but was not contained on the proper Request for Arbitration form because of unfamiliarity with OCB procedures. We did not find this irregularity in form to be a fatal defect. We stated that the City was in no way prejudiced by the irregularity, and that the union's letter requesting arbitration satisfied both OCB procedure and policy. In the instant case, we find that the City was on notice of both claims throughout the lower steps of the grievance procedure, and, as the City admits, both claims appear on the waiver signed by the grievants which was annexed to the request for arbitration. Therefore, we find no basis to hold that the SBA abandoned or waived one of its claim.

For the above reasons, we find that both of the SBA's claims are arbitrable to the limited extent indicated above.

**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 Sergeants' Benevolent Associations' request for arbitration be, and the same hereby is granted insofar as the request seeks arbitration of the claim for overtime on the reserve schedule for the period from and including 120 days prior to the filing of the grievance in November, 1980 until the termination of the practice in October, 1980; and it is denied insofar as the request seeks arbitration of the claim prior to that period; and it is further

ORDERED, that the Sergeants' Benevolent Associations' request for arbitration be, and the same hereby is, granted insofar as the request seeks arbitration of the claim of rescheduled work tours performed by the grievants for the period from and including 120 days prior to the

filing of the grievance in November 1980; and it is denied insofar as the request seeks arbitration of the claim for rescheduled work tours performed by grievants prior to this period.

DATED: New York, N.Y.  
August 24, 1983

ARVID ANDERSON  
CHAIRMAN

DANIEL G. COLLINS  
MEMBER

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MILTON FRIEDMAN  
MEMBER

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EDWARD SILVER  
MEMBER

PATRICK F.X. MULHEARN  
MEMBER

EDWARD F. GRAY  
MEMBER

CAROLYN GENTILE  
MEMBER