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

-between- DECISION NO. B-17-84

THE CITY OF NEW YORK, DOCKET NO. BCB-706-84 (a-1878-84)

Petitioner

-and-

LOCAL UNION NO. 3, I.B.E.W., AFL-CIO,

Respondent.
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## DECISION AND ORDER

Respondent Local Union No. 3, I.B.E.W., AFL-CIO (hereinafter "the Union") has submitted a request for arbitration, in which it seeks to arbitrate the claimed "[r]efusal of Department of Environmental Protection (DEP) to pay night shift differential." On May 9, 1984, petitioner City of New York (hereinafter "the City") , by its Office of Municipal Labor Relations, filed a petition challenging the arbitrability of Local 3's grievance. The Union submitted an answer on May 15, 1984. The City submitted its reply on May 22, 1984.

### Nature of the Grievance

The respondent Union seeks arbitration of its claim on behalf of employees serving in the Department of Environmental Protection in the title of Stationary Engi-

neer(Electric). The wages and supplemental benefits of the employees are established by determinations issued by the Comptroller of the City of New York pursuant to §220 of the Labor Law. The City and the Union are parties to a Comptroller's consent determination for the period from July 1, 1982 through June 30, 1984.

The Comptroller's determination provides for payment of a night shift differential for shifts worked between 4:00 P.M. and 8:00 A.M. The determination also provides for payment at the rate of time and one-half for overtime worked in excess of forty hours. The dispute raised in the grievance concerns situations in which an employee performs overtime work during a night shift. The Union contends that a night shift differential must be paid in addition to the overtime rate. The Department of Environmental Protection's position is that the provision for night shift differential is inapplicable to overtime work.

The grievance at issue in this proceeding was filed on September 6, 1983. The individual grievant cited 30 instances from June 1980 through September 1, 1983 on which he claimed to have been denied night shift differential. The grievance was processed through the first three steps of the "grievance procedure" (the source of which was not

identified) , and was denied on the merits at each step.[1] The grievance was taken to Step IV, where the Review Officer indicated that the source of her authority to hear the grievance was "[p}ursuant to Executive Order No. 83 dated July 26, 1973". The grievance was again denied on the in a Step IV decision dated April 25, 1984. The request for arbitration was submitted the following merits, Union's day.

## Positions of the Parties

### City's Position

The City asserts initially that the request for arbitration, on its face, fails to allege a sufficient basis to bring the instant grievance to arbitration. The City notes that while the Union alleges a violation of a Comptroller's determination, that determination does not contain any provision for arbitration. The City alleges that the Union has failed to cite any other agreement, rule, or submission which would permit this grievance to be brought to arbitration.

[1] There was no Step II determination. The employer deemed its response to the Step II grievance to be a Step III determination, and waived Step II, since a policy question was presented.

Secondly, the City argues that even if the instant grievance were brought under Executive Order No. 83, the grievant's claim should be barred beyond the 120-day period preceding the filing of the grievance. In this regard, the City submits that the Union is guilty of laches as defined by this Board in Decision No. B-3-80. The City alleges that the Union's delay in submitting the grievance has exposed the City to increased liability. It is further alleged that the delay has prejudiced the City in that persons involved in the writing of and the negotiations for the Comptroller's consent determinations for the title Stationary Engineer (Electric) back to the date 1976 [2] are no longer available as witnesses for the City. The City asserts that the Union has failed to allege any "compelling reasons" that would tend to excuse the delay in' filing the grievance.

For these reasons, the City requests that the Union's request for arbitration be denied in its entirety, or, alternatively, that arbitral review be precluded for that

[2] The City notes that the Union has submitted letters dated as far back as 1976 in support of its grievance and its request for arbitration. These letters purport to deal with the interpretation of the provisions of the Comptroller's determination in dispute on the merits of the grievance herein.

part of the grievance beyond the 120-day period preceding the filing of the grievance.

Union's Position

The Union contends that the City should be estopped to challenge arbitrability in this matter. The Union alleges that the City raised the defenses of non-arbitrability and laches only after all steps of the grievance procedure had been exhausted. It is also claimed that the City "sat on this grievance inordinately long until pressured for its decision". And, the Union states that it cannot now go to court to contest this claim because of the waiver filed herein.[3]

Union further asserts that the City's claim of prejudice as a consequence of any delay in filing the grievance is specious. The Union alleges that the author

[3]NYCCBL §1173-8.0(d) provides:

> "As a condition to the right of a municipal employee organization to invoke impartial arbitration under such provisions ' the grievant or grievants and such organization shall be required to file with the director a written waiver of the right, if any, of said grievant or grievants and said organization to submit the underlying dispute to any other administrative or judicial tribunal except for the purpose of enforcing the arbitrator's award."

of the 1976 letter submitted by the Union, State Senator Howard E. Babbush (then Assistant to the Comptroller), would be available to testify if subpoenaed. It is further alleged that any delay in filing the grievance will not have exposed the City to increase liability, because:

> "If the grievance has merit, then the delay merely enabled the City to delay making payments which it should have made sooner, and gave the City the use of the money in the meantime."

Finally, the Union submits that the question of laches should be referred to the arbitrator.

For these reasons, the Union requests that the petition challenging arbitrability be denied and the request forarbitration granted in all respects.

## Discussion

As we have often stated, in determining disputes concerning arbitrability, this Board must decide whether the parties are in any way obligated to arbitrate their controversies and, if so, whether the obligation is broad enough in its scope to include the particular controversy at issue in the matter before the Board.[4] The present case poses one additional question for determination:

[4]See, e.g., Decision Nos. B-5-84; B-1-84; B-6-81; B-15-79-,and decisions cited therein.

if the controversy is found to be within the scope of an obligation to arbitrate, should arbitration nevertheless be barred or limited by application of the equitable doctrine of laches?

We will first consider the source, if any, and scope of the alleged right to arbitrate the grievance herein. The form used for the request for arbitration calls for specification of the "[slection of agreement, rule or submission under which the demand for arbitration is made"; the Union has left this part of the form blank. The request for arbitration alleges a claim that the City has violated "Comptroller's Determination re night shift differential", but it fails to indicate under what provision such an alleged violation is arbitrable. The City alleges, without contradiction, that the Comptroller's determination does not contain any grievance and arbitration procedure. A review of the underlying grievance also fails to disclose any statement of the alleged source of the right to arbitrate.

Ordinarily, the Union's failure to specify any basis for arbitration in the face of a challenge to arbitrability, would compel a finding by this Board that the grievance is not arbitrable. It is well established that this Board

cannot create a duty to arbitrate where none exists.[5] In this regard, we have held:

> "[A] person may be required to submit to arbitration only to the extent that he has previously consented and agreed to do so."[6]

However, the record in this case shows that there does exist a basis for arbitration, although not cited by the Union, and that the City has previously acknowledged this basis and processed the underlying grievance in accordance therewith. The Step IV grievance determination in this case, issued by the City's Office of Municipal Labor Relations, recites the fact that that decision on the merits of the grievance is rendered,

> "Pursuant to Executive Order No.83 dated July 26, 1973, and after having reviewed the record in the case. . . "

Executive Order No.83 provides a grievance and arbitration procedure which may be utilized by employees in a bargaining unit which does not have a written collective bargaining agreement containing a grievance procedure.[7] Such is the case with the unit in question in this proceeding. The procedures under Executive Order No.83 are applicable to

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[5] Decision Nos. B-36-80; B-10-79; B-12-77.

[6] Decision No. B-12-77.

[7] Executive Order No.83, §55a.(l).

grievances as defined in NYCCBL §1173-8.3.0.[8] This statutory definition states, in pertinent part:

> "The term 'grievance' shall mean: (1) a dispute concerning the application or interpretation of the terms of a written collective bargaining agreement or a personnel order of the mayor, or a determination under section two hundred twenty of the labor law affecting terms and conditions of employment;....." (Emphasis added)

The grievance in the present case presents a dispute concerning the application and interpretation of a Comptroller's determination under §220 of the Labor Law.[9] Such a dispute clearly is within the scope of the grievance and arbitration provisions of Executive Order No.83. While we do not condone the Union's failure to cite Executive Order No.83 in the request for arbitration, it is apparent from the Step IV determination that the City considered the grievance to have been brought under the grievance procedures of that Order. Accordingly, the City should not be permitted now to disclaim any knowledge of the basis for arbitration.

[8] Executive Order No.83, §2a.

[9] It has not been argued, and we do not believe, that the fact that the determination in question was arrived at by consent, is of any significance to the applicability of Executive Order No.83.

Having found that the Union's grievance is within the scope of the City's obligation to' arbitrate, we direct our attention to the City's assertion that arbitration should be limited by application of the equitable doctrine of laches. While questions of procedural arbitrability, including the timeliness of a request for arbitration under a contract are for the arbitrator to decide, the question of the applicability of the doctrine of laches is to be resolved by this Board.[10]

We have accepted a definition of laches which states:

> "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 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)."[11]

This defense of laches is founded on the lapse of time and the intervention of circumstances which render it unjust, on equitable principles, for a plaintiff to be permitted to maintain a claim.

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[10] Decision No. B-23-83 and cases cited therein at footnote 3.

[11] Decision No. B-6-75.

It is well established that a plaintiff's claim may be barred by laches only when it has been demonstrated that (a) the plaintiff is guilty of a long and unexcused delay in asserting his claim, and (b) the defendant has been prejudiced by the plaintiff's delay.[12] In the present case, the record shows that the grievance filed on September 6, 1983, complained of denials of payment for night shift differential dating back as far as June, 1980. The City argues that this delay in filing has prejudiced the City due to increased potential liability and the non-availiablity of witnesses to the negotiation and writing of past consent determinations. The Union has disputed these allegations of prejudice, but has failed to offer any excuse or explanation for the delay in filing the grievance.

We find that the first element of laches has been established - it is clear that there was a long (up to three years) and unexcused delay in filing the instant grievance. We further find that the City sufficiently has demonstrated the existence of the second element, prejudice resulting from the delay. The City asserts increased

[12] Gardner v. Panama Railroad Company, 342 U.S. 29 F1951).

potential monetary liability, a factor which this Board often has recognized as a form of prejudice implicitly resulting from the delayed assertion of a wage claim.[13] We are not persuaded by the Union's contention that ".... the delay merely enabled the City to delay making payments it should have made sooner for it is equally likely that if a meritorious claim had been asserted sooner, the City would have adjusted the assignment of work to eliminate or reduce the assignment of overtime during night shifts. Therefore, it cannot be said, as alleged by the Union, that "[aIny delay cannot cost the City a single dollar." For these reasons, and consistent with our prior rulings, we find that the City has been prejudiced in the present case.

We note, however, that we are not convinced by the City's allegation that it has been further prejudiced because parties to the negotiation and writing of past consent determinations presently are not available as witnesses. The Union properly observes that the position and location of the one witness referred to by the City[14] are known.

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[13] Decision Nos. B-3-80; B-4-80; B-38-80; B-15-81; B-23-83.

[14] State Senator Howard E. Babbush, former Assistant to the Comptroller, and the author of two letters submitted by the Union in support of its grievance.

There is no reason to believe that this individual would not appear and testify if subpoenaed. The City has failed to identify any other individual who is unavailable. Accordingly, our finding of prejudice is based solely on the City's increased potential liability, and not on the alleged non-availability of witnesses.

The grievance herein involves a claimed continuing violation of the provisions of the Comptroller's determination. In other cases in which there was a claimed continuing violation, and in which the elements of laches were established, this Board nevertheless has ordered submission to arbitration, but only for a period not exceeding 120 days prior to the filing of the grievance. This limited grant of arbitration has been 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 prejudical unexplained delay.[15]

In the present case, there is no applicable contractual grievance procedure. However, Executive Order No.83, which we have found to be applicable herein, contains its own time limitation for the filing of grievances.[16] This limitation is the same as the contractually-specified one we

[15] Decision Nos. B-3-80; B-4-80; B-23-83.

[16] Executive Order No.83, §5a.(2), Step 1.

have previously recognized, i.e., 120 days. Accordinuly, we will limit the scope of the submission to the arbitrator to so much of the grievance as arose within 120 days prior to the filing of the grievance on September 6, 1983.

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 Union's request for arbitration be, and the same hereby is, granted insofar as it concerns claims arising during the period from and including 120 days prior to the filing of the grievance on September 6, 1983; and it is denied in all other respects.

DATED: New York, N.Y.
September 17, 1984

ARVID ANDERSON
CHAIRMAN

MILTON FRIEDMAN
MEMBER

DANIEL G. COLLINS
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EDWARD SILVER
MEMBER

CAROLYN GENTILE
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