

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-26-85

-and- DOCKET NO. BCB-716-84  
(A-1890-84)

DETECTIVE'S ENDOWMENT ASSOCIATION,

Respondent.

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DECISION AND ORDER

On July 6, 1984, the City of New York, by its office of Municipal Labor Relations ("the City" or "OMLR"), filed a petition challenging the arbitrability of a grievance that is the subject of a request for arbitration submitted by the Detective's Endowment Association ("DEA" or "the Union"). The DEA filed an answer to the petition on July 11, 1984 and a supplementary letter on July 16, 1984. OMLR filed a reply on July 26, 1984.

Background

On or about December 21, 1980, Retired Detective Charles Valois ("the grievant") commenced an action against the City in Civil Court, New York County, Special Term, Part 1, claiming that he was entitled to payment for overtime work performed in 1974 and 1977, "pursuant to the collective bargaining agreements in effect at those particular times." The grievant alleged that sometime after he completed the overtime work in question,

he realized that he had not been compensated. In 1975 and 1977, the grievant asked the union delegates representing his unit "whay remedies could be had;" they indicated that "nothing could be done." In July of 1977, while preparing for his retirement, the grievant consulted the Payroll Department regarding his uncompensated overtime hours, and was advised by Captain Ray Hart that he would have to sue for the time owed after his retirement. Subsequent to his retirement, the grievant commenced an action against the City for non-payment of overtime.

The City moved for summary judgment pursuant to CPLR 3212, on the ground that the grievant failed to exhaust his administrative remedies.<sup>1</sup> By decision dated June 14, 1983, Judge Ethel B. Danziz granted the City's motion and dismissed the action.<sup>2</sup>

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CPLR 3212 provides that a motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party."

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Valois v. City of New York, Index No. 91698/80, Civ. Ct., N.Y. Cty., Spec. Term, Pt. 1 (June 14, 1983). The court held that

where a dispute or grievance is governed by the terms of the union's bargaining agreement, as is the situation in this case, the union member must first ex-

(More)

On September 22, 1983, the Union filed a grievance protesting the non-payment of overtime incurred by the grievant from October 22, 1974 through December 23, 1974 and from January 3, 1977 through February 5, 1977. The Union alleged that the grievant "regularly submitted Lost Time Reports," but was not compensated for the overtime work performed in 1974 and was compensated for only two hours of overtime for each date listed in 1977.

The grievance was denied by the Police Department's office of Labor Policy, and subsequently by the Police Commissioner, on the ground that it was not timely submitted. Thereafter, on May 11, 1984, the Union filed a request for arbitration under Article XXI of the 1982-84 collective bargaining agreement between the City and DEA,<sup>3</sup> in which it is alleged that the City violated "[v]arious provisions of (the) contract

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(Footnote 2 continued):

haust the administrative remedies--  
the grievance and arbitration pro-  
cedures provided by the Agreement,  
even if he thinks it will be futile,  
before resorting to the courts.

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Article XXI, Section 1(a) (1) provides:

ARTICLE XXI - GRIEVANCE AND ARBITRATION PROCEDURE  
Section 1 - Definitions  
a. For the purposes of this Agreement, the term  
"grievance" shall mean:

(1) a claimed violation, misinterpretation or  
inequitable application of the provisions of  
this Agreement;. . .

regarding overtime payment." As a remedy, the Union seeks payment for overtime work performed by the grievant for which he was not paid.

### Positions of the Parties

#### City's Position

The City advances three arguments in support of its petition challenging arbitrability. First, the City asserts that arbitration is barred by laches because the delay between the alleged violations and the filing of the grievance caused "serious prejudice" to their case. The City contends that "essential documentary and testimonial evidence is now unavailable, and the passage of time has dimmed available witnesses' memories of events to the point of questionable reliability."

The City further contends that no evidence has been presented which would excuse the Union's delay in initiating the grievance. The City submits that the grievant's use of a court action to pursue his claim does not constitute a "compelling reason" for the delay, in that the Board has held that the use of alternative means of grievance resolution will not preserve contractual rights of grievance and' arbitration. In addition, the City argues that the Union's admission that their own representatives misinformed the grievant about his

rights evidences prior knowledge of the claim. Therefore, the City asserts, the Union cannot claim that Captain Hart's alleged misinformation was the cause of any delay.

Second, the City argues that the Union failed to state an arbitrable claim under the collective bargaining agreement because the alleged violations occurred more than 120 days prior to the filing of the grievance.<sup>4</sup> The City contends that unlike other cases, wherein the Board found a "continuing violation" and, therefore, granted a limited right to arbitration, the alleged violations in the instant case were "discrete" and occurred nine and six years prior to the filing of the grievance.

Finally, the City maintains that the Union's request for arbitration should be denied because it is so vague "as to preclude [the City] from making an informed response at each and every stage of these proceedings." OMLR disputes the

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<sup>4</sup>Article XXI, Section 4 provides:

ARTICLE XXI - GRIEVANCE AND ARBITRATION PROCEDURE  
Section 4.

Under the grievance procedure herein, a grievance must be initiated within 120 days following the date on which the grievance arose or the date on which the grievant should reasonably have learned of the grievance ...

Union's contention that the grievant's civil complaint is proof of the City's knowledge of the allegedly violated contractual provisions. The City contends that it is "incumbent upon [the Union), as the proponent of the materials, to produce them and indicate how they substantiate its allegations."

Union's Position

The Union asserts that the City failed to allege sufficient facts in its petition challenging arbitrability upon which to base a cause of action. In support of its position, the Union argues that the City failed to satisfy the requirements for the application of the defense of laches. The Union contends that since most, if not all, relevant material can be obtained from the judicial action commenced by the grievant, the City's allegation that evidence is now unavailable is "conclusory at best and insufficient as a matter of law" to establish prejudice to their case. The Union also argues that the City's misinformation was a "contributing if not controlling factor" in the delay of the processing of the grievance. Therefore, the Union maintains, "the grievant has put forth sufficient evidence to excuse his delay in filing a contract grievance."

In addition, the Union argues that the City's allegation that the grievance is vague and precluded an informed

response is "simply not true." The Union contends that the civil complaint filed by the grievant is proof of the City's knowledge of the specific contractual provisions allegedly violated, and notes that the City never requested particularization or classification of the violation claimed.

#### Discussion

The City asserts that the request for arbitration should be denied because the Union failed to comply with the 120-day contractual statute of limitations and is guilty of laches. This Board has held in numerous decisions that while questions of procedural arbitrability, including the timeliness of a request for arbitration under a contract, are for an arbitrator to decide, the question of laches is to be resolved by the Board.<sup>5</sup>

Laches is defined as:

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 grievances gives an advantage to the petitioner because of his own inaction, while at the same time

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See, e.g., Decision Nos. B-38-80; B-3-82; B-33-82; B-36-82; B-9-23-83; B-17-84.

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)." <sup>6</sup>

In prior decisions, this Board has held that arbitration may be barred by laches only when it has been demonstrated that (1) the claimant's long delay in asserting a known right is unexplained or inexcusable, and (2) the delay has caused injury or prejudice to the defendant.<sup>7</sup> We have also recognized that in some cases there may be "compelling reasons" sufficient to excuse the delay; and that it is proper for this Board to make a threshold determination concerning the prima facie sufficiency of the excuse.<sup>8</sup>

We find that in the present case the first element of laches has been established. It is clear from the record that there was a long delay in filing the grievance. Although the Union argues that the delay is excusable because the grievant sought relief in court as a result of the misinformation he

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<sup>6</sup>Decision No. B-6-75.

<sup>7</sup>Decision Nos. B-11-77; B-3-79; B-3-80; B-12-81; B-17-84.

<sup>8</sup>Decision Nos. B-15-81; B-17-82; B-23-83.



received from his DEA representatives and Captain Hart, we find that explanation insufficient to excuse the delay of nine and six years between the alleged violations in 1974 and 1977 and the filing of the grievance in 1983. We note that the grievant did not commence the court action until December 1980; which was three years after he received the advice of Captain Hart and six and three years after the alleged violations occurred. Therefore, even if the grievant initiated a grievance under the collective bargaining agreement in December 1980, instead of an action in court, the grievance would have been untimely filed and barred by laches.

We further find that the City sufficiently has demonstrated the existence of the second element of laches, prejudice resulting from the delay. The City asserts that documentary and testimonial evidence is now unavailable or unreliable; a factor which this Board has recognized as a form of injury or prejudice resulting from the delayed assertion of a claim.<sup>9</sup> We are not persuaded by the Union's contention that the City's allegation of prejudice is "conclusory at best and insufficient as a matter of law to establish that any prejudice will result." We note that the delay of nine and six years between the alleged

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<sup>9</sup>Decision Nos. B-11-77; B-3-79; B-12-81.

violations and the filing of the grievance was unreasonable and that, other than a statement that "relevant material can be obtained through references to the judicial action commenced in this matter," the Union presented no evidence to refute the City's allegation of prejudice. We find that it is incumbent upon a party after a long period of delay to present such evidence.

Having found that the Union failed to satisfactorily excuse its delay, and that the City has been prejudiced thereby, we hold arbitration of the claim herein to be barred by laches. The City contends that unlike other laches cases, wherein we granted a limited right of arbitration for a period not exceeding the contractually specified 120-day statute of limitations because the grievance involved a continuing violation, the alleged violations in the instant case were "discrete". We agree, and find that in the instant case there can be no limited right of arbitration.

In view of our finding that the Union's claim of alleged contract violations is barred by laches, we need not determine whether the request for arbitration is vague. Accordingly, we shall grant the City's petition challenging arbitrability, and deny the Union's request for arbitration.

ORDER

Pursuant to the power vested in the Board of Collective

Bargaining by the New York City Collective Bargaining Law, it is hereby

ORDERED, that the City's petition challenging arbitrariness be, and the same hereby is granted and it is further

ORDERED, that the Union's request for arbitration be, and the same hereby is denied.

Dated: New York, N.Y.  
August 15, 1985

ARVID ANDERSON  
CHAIRMAN

DANIEL G. COLLINS  
MEMBER

MILTON FRIEDMAN.  
MEMBER

EDWARD SILVER  
MEMBER

JOHN D. FEERICK  
MEMBER

EDWARD F. GRAY  
MEMBER

CAROLYN GENTILE  
MEMBER