

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

NEW YORK CITY HEALTH AND
HOSPITALS CORPORATION,

DECISION NO. B-4-85

DOCKET NO. BCB-695-84
(A-1822-84)

Petitioner,

-and-

DISTRICT COUNCIL 37,
AFSCME, AFL-CIO,

Respondent.

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DETERMINATION AND ORDER

This proceeding was commenced on February 9, 1984, when the New York City Health and Hospitals Corporation ("HHC" or "the Corporation") filed a petition challenging the arbitrability of an out-of-title work claim which is the subject of a request for arbitration filed by Local 420 of District Council 37 ("D.C. 37" or "the Union"). The Union filed an answer to the petition on March 2, 1984.¹ The Corporation filed a reply on March 23, 1984.

BACKGROUND

Kryspina Czerwinska ("the grievant") was hired by HHC on July 16, 1974 as a Senior Laboratory Technician and assigned

¹The time in which to file an answer was extended at- the request of the parties.

to the Main Pharmacy at Bellevue Hospital. On or about July 15, 1977, the grievant became a Pharmacy Interne, based upon the attainment of a temporary New York State Pharmacy Interne permit. In August 1981, she was reclassified to the title Institutional Aide, with a salary reduction, because her Pharmacy Interne permit had expired. The grievance herein arises out of this reclassification, as it is alleged that Ms. Czerwinska continues to perform the duties she previously performed as a Pharmacy Interne and, therefore, is being inadequately compensated.²

Shortly after her reclassification to the Institutional Aide title, the grievant sought and obtained a commitment from the Director of Pharmacy at Bellevue Hospital that he would take the necessary steps to effectuate a reclassification and salary upgrade for her. According to D.C. 37, between August 1981 and May 1982, the grievant and/or the Union pursued the above-stated purpose with "various authorized personnel of the petitioner." HHC concedes that an informal remedy was sought through the Office of Labor Relations at Bellevue Hospital "on May 12, 1982 and on one other occasion.'

²In the Step I(A) grievance, it is alleged that the grievant's salary was decreased by \$3600 as a result of the reclassification.

In connection with the pursuit of the above-stated goal, the grievant was directed, in May 1982, to complete a Position Analysis Questionnaire. Based upon this questionnaire, the Director of Pharmacy filed a personnel requisition, in September 1982, seeking to have Ms. Czerwinska promoted to the position of Senior Storekeeper.³ On November 15, 1982, the Corporation determined that the grievant was performing duties appropriate to the Institutional Aide title and denied the Pharmacy Director's request. The instant grievance was filed the next day.

Article VI of the 1980-82 Institutional Services Titles Agreement ("the Agreement"), defines the term "grievance" in relevant part, as:

a claimed assignment of employees
to duties substantially different
from those stated in their job
specifications;... (Section 1(C)).

In denying the claim of out-of-title work at Step III of the contractual grievance procedure, the Review officer noted that,

³The salary range for the position of Pharmacist Interne, effective July 1, 1982, was \$15,447 - \$16,896. The salary range for the Institutional Aide title, effective July 1, 1982, was \$12,466 - \$13,808. The salary range for the position of Senior Storekeeper, effective January 1, 1982, was \$18,062 - \$24,521.

pursuant to another section of the Agreement, the grievant was receiving a \$350 differential,⁴ which is "obvious recognition by the Corporation of the grievant's assignment on a continuing basis' to Pharmacy Service duties"

Positions of the Parties

Health and Hospitals Corporation

HHC's first objection to arbitration in this case is based upon Article VI, Section 2 of the Agreement which, it is argued, bars arbitration of a claim of out-of-titlo work which

⁴Article III, Section 9 of the Agreement provides in relevant part:

F. Institutional Aide/Hospital Aide (CETA)

Effective July 1, 1980, a differential in the pro-rated annual amount of \$350 shall be provided for each Institutional Aide or Hospital Aide (CETA) who is regularly assigned on a continuing basis to perform more difficult tasks in the Pharmacy Service where a significant, major portion of assignment under the direct supervision of a Registered Pharmacist or Pharmacist Interne involves: (a) assisting in filling ward orders, (b) performing par stocking in wards or other dispensing areas, (c) assisting in manufacture of drug solutions or other pharmaceutical preparations, (c) issuing bulk drugs from stores, (e) maintaining and operating mechanical devices and equipment in the manufacture, packaging and labeling operations.

is not filed within thirty days of the assignment to out-of-title duties.⁵

HHC's second objection to arbitration is upon the doctrine of laches. The Corporation asserts that a lapse of fifteen months between the alleged assignment to out-of-title work and the date the grievance was filed constitutes laches because HHC's potential monetary liability has increased and its ability to present a defense at arbitration has been hindered on account of the grievants delay.

The Corporation alleges that violations of contractually prescribed time periods for processing the grievance also contributed to the prejudicial delay. These alleged breaches include:

- (a) a two-month lapse between the decision at Step I(A) and initiation of an appeal to Step II, when the contract provides that an appeal must be made within five days of receipt of the Step I(A) determination; and
- (b) a three-month lapse between the Step III decision and the filing of the request for arbitration, when the contract provides that an appeal must be taken within 15 days of receipt of the Step III determination.

⁵Article VI, Section 2 provides, in relevant part:

For all grievances as defined in Section 1(C), no monetary award shall in any event cover any period prior to the date of the filing of the Step I grievance unless such grievance has been filed within thirty (30) days of the assignment to alleged out-of title work.

It is asserted further that these violations should be deemed admitted, as D.C. 37 has conceded the underlying facts and dates from which HHC draws its conclusion.

The Corporation also contends that, contrary to the Union's assertion, the claim of prejudicial delay is not defeated by the fact that Article VI, Section 2 of the Agreement may be a bar to a monetary remedy in this case because the enumerated breaches of contractual time limitations commencing with the filing of the grievance, have increased HHC's potential monetary liability by \$6882.⁶

HHC maintains further that, in accordance with established Board precedent,⁷ informal attempts to resolve a claim, such as were engaged in by the grievant and Union in this matter prior to filing the grievance, are not a basis for tolling contractual time limitations. Moreover, since the evidence relating to the grievant's efforts to resolve her claim deal with the merits of that claim, it is argued, this evidence must not be considered by the Board in its inquiry into the question of arbitrability.

⁶HHC asserts that \$6882 represents the difference between the salary of a Senior Storekeeper and the grievant's present salary as an Institutional Aide plus the "pharmacy differential" over a period of 17~ months, the alleged total of the delays in excess of contractual time limitations.

⁷HHC cites our Decision Nos. B-3-76, B-4-76, and B-26-82.

District Council 37

D.C. 37 maintains that HHC's reliance upon a laches defense is misplaced in this case. It is alleged that the lapse of time between the grievant's reclassification and the filing of her claim was attributable not to lack of diligence on the part of the grievant or the Union, but rather to the Corporation's dilatoriness in initiating the procedure which would result in a further reclassification and a salary upgrade. Although Bellevue Hospital's Pharmacy Director promised to take this action in August 1981, no action was taken until May 1982.

The Union contends that HHC's claims of prejudice arising from the alleged delay in initiating the grievance are unsupported in the record; the Corporation has provided no evidence of increased potential liability or of hindered ability to defend, according to D.C. 37. Moreover, the fact that the thirty-day contractual condition precedent for a monetary remedy for out-of-title work was not met here militates against a finding of prejudice. Furthermore, it is asserted, HHC could not reasonably believe that the grievant had abandoned her claim because her efforts to obtain a reclassification and salary upgrade afforded the Corporation timely notice of the continuing violation.

Insofar as HHC's allegations concerning delay involve time limitations prescribed in the Agreement, the Union

asserts that they raise questions of procedural arbitrability which are for determination by an arbitrator. In any event, the Union argues, even if we reject the Union's position on the applicability of laches, we should not bar entirely consideration of the instant grievance because the assignment to out-of-title work continues to this day.

As a remedy for the alleged out-of-title assignment, D.C. 37 requests that the grievant be awarded back pay plus interest from August 1981 forward, payable at the salary rate for the position of Senior Storekeeper.

Discussion

In determining arbitrability, it is the function of this Board to determine whether the parties to a dispute are obligated to arbitrate their controversies and, if so, whether the particular controversy presented is within the scope of that obligation.⁸ The parties to the instant matter concede that they have agreed to submit to arbitration disputes involving alleged assignments to out-of-title work. Nevertheless, the petitioner contends that Article VI, Section 2 of the Agreement precludes arbitration of the out-of-title claim in this case.

We note, however, that Article VI, Section 2, on its face, does not restrict the scope of arbitration; in fact

⁸E.g., Decision Nos. B-15-79; B-6-81; B-1-84; B-17-84.

it relates only to the question of remedy, and deals with the availability of monetary awards for meritorious out-of-title claims not grieved "within thirty (30) days of the assignment to alleged out-of-title work." Since questions of remedy are separate and distinct from questions of arbitrability, the latter being for determination by this Board, while the former are reserved exclusively for determination by an arbitrability, and since we find no other limitation on the arbitrability of this out-of-title claim, we conclude that the instant grievance is within the scope of the parties obligation to arbitrate under the Agreement.

The remaining objections to arbitration in this case involve questions of timeliness. HHC relies principally upon the equitable doctrine of laches, which has been defined as "an unexplained or inexcusable delay in asserting a known right which causes injury or prejudice to the defendant."⁹ "In past decisions, we have also accepted the following definition of laches:

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 (Prouty v. Drake, 182 N.Y.S. 2d 271).¹⁰

⁹Tobacco Workers v. Lorillard Corporation, 78 LRRM 2273, 2280 (1971).

¹⁰See, e.g., Decision Nos. B-6-75; B-23-83; B-17-84.

The defense of laches is based upon the fact that:

[1]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 the petitioner's apparent abandonment of the claim (Id.).

In the instant matter, HHC asserts that, because of the grievant's long delay in initiating a claim, the Corporation has been subjected to (1) an increased potential liability and (2) a hindered ability to defend. We have previously held in cases involving claims for back pay on account of out-of-title work that the City is "implicitly prejudiced" by an extended delay in filing because its liability, if any, increases every day that the grievant works out-of-title.¹¹ 37 asserts, however, that the restriction on monetary relief set forth at Article VI, Section 2 of the Agreement militates against a finding of prejudice in this case. We agree.

It is the well-settled rule in matters of disputed arbitrability that any issue which draws the inquiry within the four walls of the contract is within the domain of the arbitrator. Thus, while we must occasionally examine contract language in order to resolve issues of arbitrability,

¹¹E.g., Decision Nos. B-3-80; B-4-80; B-38-80; B-15-81; B-23-83.

we subscribe fully to the rule that matters of contract interpretation should be left to resolution in arbitration, the process the parties themselves have selected for determining such questions.

In the instant matter, however, the City maintains that Article VI, Section 2 constitutes a total bar to arbitration herein, a contention which we have rejected on the basis that the clause in question, on its face, does not so provide. The Union relies upon Article VII Section 2 for its argument that there can be no prejudicial increase in the employer's potential liability herein such as to support the employer's claim of laches because that provision clearly limits the potential amount of any award of back pay for out-of-title work where, as is conceded here, the grievance was not filed within thirty days of the commencement of out-of-title work. This argument, which appears at Paragraph Twenty-Fourth of the Union's Answer, constitutes an amendment of the Union's position regarding remedy as originally set forth in the Request for Arbitration, and unequivocally and squarely negates the management assertion of laches. Paragraph Twenty-Fourth reads as follows:

Moreover, the 30 day time limitation set forth in Article VI, Section 2 of the applicable contract, if not complied with, militates against Petitioner's expansion of potential liability contention since a monetary award is barred for any period prior to the filing of the grievance. Petitioner's assertion of and reliance upon the equitable doctrine of laches, therefore, is both misplaced and inapplicable.

Therefore, we reject the City's argument that it will be subjected to increased potential liability due to the grievant's delay. We add, however, that all of this spells out a waiver by the Union of any claim for a remedy that might constitute basis for an assertion by the City that its potential liability has increased as a result of the delay in grieving.

We note that the Corporation has offered no evidence tending to show that necessary witnesses would be unavailable or that evidence has been lost as a result of the grievant's delay; to the contrary, it appears that there is at least one representative of HHC who not only had knowledge of the circumstances surrounding the grievant's claim when it arose, but also was actively involved in efforts to resolve the claim. There is no reason to believe that the Director of Pharmacy would not appear and testify if called by the petitioner. Therefore, we reject the contention that HHC's ability to defend at arbitration has been hindered by delay. Based upon the foregoing, we conclude that the lapse of time in this case, in excess of one year, while constituting an extended delay, was not prejudicial to the employer and therefore cannot be found to constitute laches.

We have considered HHC's assertion that the Union's breach of contractual time limits for the processing of a grievance contributed to the alleged prejudicial delay in this case. We note, however, that allegations concerning

the failure to comply with time limitations prescribed by a contractual grievance procedure are not subject to the equitable defense of laches.¹² Rather, such allegations present questions of procedural arbitrability which, we have long held, are for an arbitrator to resolve.¹³

We have also considered HHC's assertion that we should rely upon our statement in prior decisions that informal attempts to resolve a grievance do not toll contractual time limitations as a basis for denying the Union's request for arbitration in this case. However, in none of the cases cited by HHC¹⁴ did we bar arbitration for the reason that the respective grievances were not timely filed under relevant collective bargaining agreements. Compliance with the contractual 120-day limitation for the filing of a grievance, which is common to most municipal labor contracts in the City of New York and was applicable in the cited cases, is a question of procedural arbitrability for resolution by an arbitrator. In fact, in the cases cited by HHC, the delays in initiating the claims were in flagrant violation

¹²See, Flair Builders, Inc. v. I.U.O.E., 80 LRRM 2441 (1972).

¹³E.g., Decision Nos. B-6-68; B-6-75; B-3-79; B-20-80; B-33-82.

¹⁴Decision Nos. B-3-76; B-4-76; B-26-82.

of applicable contractual time limitations. However, our decision in each case was based upon a finding that the extended delay in filing was unexplained and sufficiently prejudicial to the employer to constitute laches.

For all of the aforementioned reasons, we find no limitation on the substantive arbitrability of the grievance presented herein and, accordingly, shall grant the Union's request for arbitration.

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 petition challenging arbitrability be, and the same hereby is, denied; and it is further

ORDERED, that the request for arbitration be, and the same hereby is, granted.

DATED: New York, N.Y.
February 19, 1985

ARVID ANDERSON
CHAIRMAN

DANIEL G. COLLINS
MEMBER

MILTON FRIEDMAN
MEMBER

CAROLYN GENTILE
MEMBER

EDWARD F. GRAY
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EDWARD SILVER
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