City v. DC37, 37 OCB 46 (BCB 1986) [Decision No. B-46-86 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration	
-between-	DECISION NO. B-46-86
THE CITY OF NEW YORK, Petitioner,	DOCKET NO. BCB-869-86 (A-2230-86)
-and-	DOCKET NO. BCB-896-86 (A-2379-86)
DISTRICT COUNCIL 37, AFSCME, AFL-CIO Respondent.	

DETERMINATION AND ORDER

On April 16, 1986, the City of New York ("City"), by its Office of Municipal Labor Relations ("OMLR") filed a petition in BCB-869-86 challenging the arbitrability of a grievance which is the subject of a request for arbitration filed by District Council 37, AFSCME, AFL-CIO ("D.C. 37" or "Union"). On June 4, 1986, D.C. 37 submitted its answer to the petition. The City filed a reply on August 20, 1986. On November 5, 1986, the Union submitted a sur-reply.[1] This request for arbitration was submitted on behalf of all Police Administrative Aides and Senior Police Administrative Aides (herein referred to collectively as "PAA's"). The underlying grievance alleges that "the use of unearned sick leave and extension of sick leave is being denied in an arbitrary and capricious manner."

[1] The OCB Rules and Regulations do not provide for the filing of a sur-reply; permission to file is discretionary with the Board. Although no application was made to the Board in this case, as the sur-reply responds to new matter raised in the reply, and as the City does not object, we accept it.

On August 22, 1986, the City filed a petition in BCB-896-86, challenging the arbitrability of a second grievance which is the subject of a request for arbitration filed by D.C. 37. On September 22, 1986, D.C. 37 submitted its answer to the petition. The City filed a reply on October 17, 1986. This request for arbitration was submitted on behalf of PAA Lois Henderson. The underlying grievance alleges that "extension of sick leave without pay is being denied in an arbitrary and capricious manner."

The Union alleges that the denial of unearned sick leave in both cases violates Sections 3.4 and 3.5 of "Leave Regulations for Employees who are under the Career and Salary Plan" and Article V(1) of the 1980-82 City-wide Contract.

Because the two petitions raise common issues of law, Docket Nos. BCB-869-86 and BCB-896-86 are hereby consolidated for decision in the instant Determination and Order.

The provisions which D.C. 37 alleges to have been violated read as follows:

> 3.4 In the discretion of the agency head, employees, except provisional and temporary employees, who have exhausted all earned sick leave and annual leave balances due to personal illness may be permitted to use unearned sick leave allowance up to the amount earnable in one year of service, chargeable against future earned sick leave.

3.5 In the discretion of the agency head, permanent employees may also be granted sick leave with pay for three months after ten years of City service, after all credits have been used. In special instances, sick leave with pay may be further extended, with the approval of the agency head. The agency head shall be guided in this matter by the nature and extent of illness and the length and character of service.

Art.V(i) All provisions of the ... "Leave Regulations for Employees who are under the Career and Salary Plan" and amendments, and official interpretations relating thereto ... shall apply to all employees covered by the Agreement.

This section shall not circumscribe the authority of the City Personnel Director to issue new interpretations subsequent to the effective date of this Agreement. Such new interpretations shall be subject to the grievance and arbitration provisions of this Agreement.

The Union further alleges that the violations of the above sections are grievable under Article XV of the City-wide Contract, which sets forth a grievance-arbitration procedure and defines a grievance as "a dispute concerning the application or interpretation of the terms of this agreement."

BACKGROUND

BCB-869-86

Appendix A of the Union's sur-reply indicates that Senior PAA Phyllis Reden requested sick leave with pay under Sec. 3.5 on February 15, 1984. In her request, Reden stated that she had suffered gastrointestinal problems, had been advised by her doctor to "abstain" from work, and had been employed by the Police Department almost 11 years with excellent working record.[2]

The Union's sur-reply alleges that Reden's request was denied on September 19, 1984, and that Reden was not informed of the denial until on or about September 29, 1984. The Union further alleges that on November 23, 1984, a Union representative wrote to the Commanding Officer, Personnel Bureau of the Police Department, requesting reconsideration of Reden's request, and that no response was received.

The Step I grievance in this matter is undated; the Union alleges that it was filed within the first two weeks on January, 1985, on behalf of all PAA's. No individual grievants were named. The Step II grievance was filed April 29,1985 and denied May 8, 1985. A request for Step III hearing was filed May 16, 1985.

[2] These facts are contained in the Union's sur-reply, Exhibit A. While the sur-reply is addressed only to the issue of laches and these facts are not alleged by the Union, inasmuch as they are now before us, we take notice thereof.

The Step III decision indicates that, at the Step III conference, the City requested the names of employees who had been denied unearned sick leave and particulars of the requests and denials. The Union submitted the name of PAA Reden and the date on which her request was denied, September 19, 1984. The Union did not specify either the names of other PAA's affected or the circumstances of their requests or denials. On August 29, 1985 the Step III decision issued dismissing the grievance in its entirety because the Union had declined to identify affected individuals other than Reden, whose grievance was found to be untimely. The Union then filed a request for arbitration of this matter on October 2, 1985.

BCB-896-86

The Step I grievance in this matter was filed December 10, 1985 on behalf of PAA Lois Henderson. The Step II grievance was filed January 14, 1986 and denied on January 28, 1986. A request for Step III hearing was filed on February 11, 1986 and the Step III decision denying the grievance was issued on March 31, 1986. The Union's request for arbitration was filed on May 14, 1986.

The Step III Decision indicates that Henderson was injured in August 1985, requested sick leave with pay in October 1985, and the request was denied on November 12, 1985. This decision also indicates that at the Step III conference the Union argued that the grievant had been employed by the department 12-13 years, had maintained a good evaluation record, and had never been subjected to any disciplinary penalties.

The City's Position

The City takes the position, in both cases, that the Union has not established a sufficient nexus between the provisions upon which it relies and the alleged denials of unearned sick leave. The City argues that in view of the fact that the grant of unearned leave is clearly discretionary, in order to substantiate a claim of arbitrariness a union must provide "factual assertions regarding the treatment of an individual or individuals and how these regulations have been violated, misinterpreted, or misapplied."

With respect to Docket No. BCB-869-86 (filed on behalf of all PAA's), the City contends that the Union has failed to satisfy the waiver requirement under the New York City Collective Bargaining Law ("NYCCBL"). Although D.C. 37 alleges that the denial of unearned sick leave has affected many members, these members have neither been identi-

fied nor their waivers submitted with the exception of Reden.[3] Thus, argues the City, all claims except Reden's must be dismissed on this basis. Finally, with respect to Reden's claim, the City asserts that the Union is guilty of laches, as Reden's request was denied September 19, 1984 and the Step III review officer -- calculating that the undated grievance was filed at least seven months thereafter-- found the grievance untimely.

The Union's Position

The Union recognizes that under Sections 3.4 and 3.5 of the Leave Regulations, the granting of unearned sick leave is discretionary, but argues that the City does not have the right to interpret these sections in an arbitrary or capricious manner. In essence, the Union asserts that these sections grant employees a right to have their unearned leave requests considered in a nonarbitrary fashion, that the City has violated the spirit of the regulations, and that the issue is thus arbitrable pursuant to Article XV of the collective bargaining agreement. In BCB-869-86, the group grievance case, the Union does not elaborate on this argument.

[3] The City, in its petition in BCB-869-86, challenged the request for arbitration on the basis that only the Union had submitted a waiver. The Union's answer was accompanied by a waiver signed by Reden.

In BCB-896-86, however, which concerns only Henderson, the Union points out that Section 3.5 directs the agency head to consider the individual's illness and employment history, and asserts that the denial of Henderson's request was either arbitrary or capricious. The inference is that the agency must not have taken into account the fact, alleged at the Step III conference, that Henderson had worked 12-13 years with an unblemished record. In this same case, D.C. 37 also argues that the City is estopped from asserting that the matter is not arbitrable because the Step III review officer found that "disputes concerning the regulations in question are grievable under the contractual grievable [sic] procedure."

In both cases D.C. 37 alleges that the City has adopted a new policy of denying requests by PAA's for use of unearned sick leave and extension of sick leave time. In BCB-869-86, the Union further asserts that "this policy resulted in a denial of most if not all such requests .... The adoption of this policy affects many members ... and thus, appropriately constitutes a union [rather than individual] grievance." -The Union states that the case of Reden is merely an example of the impact of the alleged new policy, and that it is not necessary to submit waivers from other individual grievants.[4]

[4] In the event that the Board should not agree that this is a union grievance, or that the Union waiver should be found insufficient, the Union submitted a waiver signed by Reden with its answer in BCB-869-86.

DISCUSSION

The Board's function in determining arbitrability is to decide whether the parties are in any way obligated to arbitrate their controversies and, if so, whether the obligation is broad enough to include the particular controversy.[5] In the instant case, there is no dispute that an alleged violation of the Leave Regulations falls within the parties, contractual definition of a grievance. Rather, the City challenges arbitration on the basis that there is no nexus between the City's denial of unearned sick leave and the alleged violation of a regulation setting forth a grant of discretionary authority.

Although the City states its argument in terms of "nexus," the gravamen of the argument is that where management is given discretionary authority, there can be no arbitrable issue unless the Union alleges facts which would tend to show that the discretion has been improperly exercised.

[5] Decision Nos. B-4-86, B-2-69.

The regulation sections upon which the Union relies do not grant employees a general right to unearned sick leave; these sections specify that it is within the discretion of the agency head to grant such requests. In the case of requests for sick leave with pay, Section 3.5 also sets forth factors to be considered, including "the nature and extent of the illness, and the length and character of service." Thus, the agency head is directed to exercise discretion, i.e., to use his own judgment rather than fixed rules, which may include consideration of subjective factors and, in cases falling within Section 3.5, should also include the factors listed therein. In sum, the agency head must weigh the circumstances of each individual case when a request is made for unearned sick leave.

Sections 3.4 and 3.5 constitute a grant of authority which, although not statutory, is comparable to the management rights granted by Section 1173-4.3b of the NYCCBL. In the past, where the City has asserted a claim that the disputed action is within the scope of a management right, the Board has observed that the mere assertion of such a right does not end Board inquiry, for:

> [t]he protected area is not intended to be so insulated as to preclude an examination of actions claimed to have been taken within its limits. In short, it is intended as a means to enable management to do that which it should do but not as a license to do that which it should not ....[6]

The fact that it is within the agency's discretion to grant unearned sick leave does not mean that discretion may be exercised in an arbitrary or capricious manner, particularly where, as here, there is no express provision that the agency's decision in this matter is final and not subject to review.[7]

We are concerned here to formulate a rule that will strike a balance between the City's right to exercise discretion and the employee's right to fair and reasonable treatment.

We will require, in cases such as this, that a union allege more than the mere conclusion that discretion has been exercised in an arbitrary manner. In any case in which the City's discretionary action is challenged on the basis that the discretion has been exercised in an improper manner, the

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[6] Decision No. B-8-81.

[7] If the parties had intended such a result, they could have expressly so provided. See, e.,g., Decision No. B-10-79, in which we found that the City had no obligation to arbitrate a dispute where the contract provision alleged to have been violated provided that "the Department's decision is final."

burden will be on the union to establish initially, to the satisfaction of the Board, that a substantial issue exists in this regard.[8] This is not to say, as the Union suggests, that the Board will examine or determine the merits of this case. Rather, the Union must specify facts and circumstances which establish a relationship between denial of unearned leave and an arbitrary exercise of discretion. In other words, it must specify facts which, if proven, would tend to substantiate allegations of arbitrariness.

In BCB-869-86, Reden alleges that she has been advised by her doctor to "abstain" from work on account of gastrointestinal problems, and that she has been employed 11 years and has a good work record.

In BCB-896-86, it is alleged that Henderson has been employed by the department for 12-13 years, during which time she has received good evaluations and no disciplinary penalties.

Thus, both grievants have alleged facts concerning the "nature and extent of illness and the length and character of service," the factors which must be considered under Sec. 3.5. The Union's position, that these facts demonstrate that the City did not consider the factors set forth in

[8] See Decision No. B-8-81, which sets forth a comparable test for establishing arbitrability of an action which is a management right.

Sec. 3.5, if proved, could establish that in this particular case the City did exercise its discretion in an arbitrary manner. Under these circumstances, we find that the burden of demonstrating that a substantial issue exists in this regard has been met with respect to Reden and Henderson. Our finding herein is not to be construed as a finding on the merits of the case. The question whether the actions taken by the agency were arbitrary goes to the merits of the dispute and thus is a question to be determined by an arbitrator.

Accordingly, we deny the petitions challenging arbitrability filed in BCB-8169-86 with respect to Reden, and in BCB-896-86 in its entirety, insofar as they allege that the petitioner has failed to raise a substantial issue.[9]

We turn now to the City's claim that arbitration of Reden's grievance is barred by laches. This board has held in numerous decisions that questions of procedural arbitrability, including timeliness of a request for arbitration under a contractual time limitation, are for an arbitrator to resolve, while the question whether arbitration should be barred by the equitable doctrine of laches is properly before the Board.[10]

[9] Inasmuch as we deny the petition in BCB-896-86 on these grounds, we find it unnecessary to address the Union's stoppel argument.

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

It is well established that a claim may be barred by laches only when it has been demonstrated that (a) the claimant is guilty of a long and unexcused delay in asserting a claim, and (b) the party asserting the defense has been prejudiced by the claimant's delay.[11] The City has failed to show harm or prejudice resulting from any delay in initiating Reden's grievance, other than stating the conclusion that "This delay has caused serious prejudice to the Petitioner's case." Inasmuch as it is not entirely clear when the grievance arose or when some steps of the grievance procedure were undertaken, we conclude that the real issue herein is the timeliness of the grievance under the contractual grievance procedure and that, as we have stated, is a matter for an arbitrator.

Accordingly, we deny the petition challenging arbitrability on the basis of laches filed in BCB-896-86 with respect to Reden.

We turn next to the Union's assertion, in BCB-869-86, that the City has adopted a policy of denying unearned sick leave that affects many members, and to the City's contention that the waiver requirement imposed by the NYCCBL has not been satisfied with respect to grievants other than Reden.

[11] See, e.g.,Decision No. B-23-83, B-20-79.

In Decision No. B-12-71, which dealt with the filing of waivers as a condition precedent to arbitration, the Board distinguished three categories of grievance:

1. Union grievances, in which the union is clearly the only identifiable grievant. This type of grievance involves a contract interpretation or application, and generally applies to all employees in the bargaining unit and probably to future employees as well.

2. Group grievances, which do not necessarily apply to all employees in the bargaining unit, but rather to a number of employees in the unit who are similarly affected by an alleged violation.

3. Individual grievances, in which one or more identifiable individuals claim a violation of contractual rights.

The Board held in Decision No. B-12-71 that the processing of a union grievance does not require the filing of waivers by individual employees, but only by the union. As to group grievances, some, by their very nature, might require individual waivers signed by individual employees as well as a waiver signed by the union, while in other situations only a union waiver might be required. The Board stated that it would make this determination on a case-by-case basis. With respect to individual grievances, both the individual(s) and union must sign waivers as a condition precedent to arbitration.[12]

[12] Accord, Decision No. B-20-74.

We have observed supra at 10 that the grant of discretionary authority in Secs. 3.4 and 3.5 of the leave regulations requires that the agency head weigh the factors of each individual case, including in some circumstances the nature of the illness and the individual's work record. Because these decisions must be made on a case-by-case basis, in our opinion a grievance concerning the denial of unearned sick leave is the quintessential individual grievance. A request for arbitration of such a grievance requires the waiver of both the union and the individual grievant(s).

In these cases, the Union has alleged the adoption of a new policy which affects many members of the unit. However, the Union has alleged no facts concerning the previous policy, and it has named only one individual in BCB-869-86 and a second individual in BCB-896-86 affected by the alleged new policy. The fact that two individuals in a unit have been denied unearned sick leave does not, under the circumstances herein, establish either a change of policy or a union grievance.

We find that in BCB-869-86 the Union has neither alleged sufficient facts to establish that a substantial issue exists nor satisfied the statutory waiver requirement with respect to individuals other than Reden. Accordingly, the petition challenging arbitrability

is also granted insofar as it concerns the allegations of the instant petition relating to all PAA's as a group.

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 in BCB-869-86 be, and the same hereby is, granted insofar as it relates to PAA's other than Phyllis Reden; and it is further

ORDERED, that District Council 37's request for arbitration in BCB-869-86 (A-2230-86) be, and the same hereby is denied insofar as it relates to PAA's other than Phyllis Reden; and it is further

ORDERED, that the petitions challenging arbitrability in BCB-869-86 insofar as it relates to Phyllis Reden, and in BCB-896-86 be, and the same hereby are, denied; and it is further

ORDERED, that District Council 37's requests for arbitrationin BCB-869-86 (A-2230-86) insofar as it relates to Phyllis Reden, and in BCB-896-86 (A-2379-86) be, and the same hereby are, granted.

DATED: New York, N.Y.
November 25, 1986

ARVID ANDERSON
CHAIRMAN

MILTON FRIEDMAN
MEMBER

DANIEL G. COLLINS
MEMBER

JOHN D. FEERICK
MEMBER

DEAN L. SILVERBERG
MEMBER

EDWARD F. GRAY
MEMBER

CAROLYN GENTILE
MEMBER