

OFFICE OF COLLECTIVE BARGAINING  
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

THE NEW YORK CITY HEALTH AND  
HOSPITALS CORPORATION,

DECISION NO. B-43-87

Petitioner,

DOCKET NO. BCB-923-86  
(A-2429-86)

-and-

LOCAL 1549, DISTRICT COUNCIL 37,  
AFSCME, AFL-CIO,

Respondent.

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DECISION AND ORDER

The New York City Health and Hospitals Corporation (hereinafter referred to as "HHC") has filed a petition challenging the arbitrability of a grievance submitted by Local 1549, District Council 37, AFSCME, AFL-CIO (hereinafter "Local 1549" or "the Union") which alleges that the employer has failed to pay an assignment differential to certain employees, in violation of the collective bargaining agreement. Local 1549 has submitted an answer to the petition; HHC has not submitted a reply thereto.

Nature of the Dispute

The grievants are Office Aides and Office Associates employed at HHC's Morrisania. Neighborhood Family Care Center ("NFCC") Pursuant to the applicable collective bargaining agreement, an assignment differential is to be paid to certain employees who are assigned to ambulatory and inpatient accounts, clinic registration, or to work as clinic clerks who open encounters" (These provisions concerning differentials

are part of what is commonly known as the Model Systems Agreement.) The Union, on behalf of the grievants, filed a grievance on April 23, 1985, alleging that they were entitled to payment of the assignment differential pursuant to the Model Systems Agreement because of their performance of duties involving the completion and filing of "encounter forms 355 in Ambulatory Services". HHC denied the grievance of these ambulatory care workers on the ground that encounter form 355 had not been used in Morrisania NFCC for approximately two years prior to the date of the grievance, and, thus, the grievance was stale. Simultaneously, HHC granted a similar claim for payment of an assignment differential which had been filed by the Union on behalf of clerical employees in Morrisania NFCC's mental health area. These mental health workers were paid the assignment differential retroactively. The Union has filed a request to arbitrate the denial of the ambulatory care workers' grievance, which is the object of HHC's petition challenging arbitrability herein.

#### Positions of the Parties

##### HHC's Position

Initially, it is noted by HHC that the collective bargaining agreement provides that a grievance shall be presented no later than 120 days after the date on which the grievance arose. HHC alleges that the grievance herein was submitted on April 23, 1985, seeking retroactive payment from July 2,

1981 to the date of the grievance. that, However, HHC contends that,

"... contrary to the grievants' assertions, clerical employees in Ambulatory Care have not used Encounter Forms 355 (Visit Requests - Ambulatory Clinics and Emergency Rooms) for approximately two (2) years before the filing of the grievance (April 23, 1985)."

HHC alleges that this delay in filing the grievance has prejudiced its ability to prepare a defense at arbitration. It argues that "it is unreasonable to assume" that HHC could locate the appropriate supervisory staff to provide testimony about the job duties of clerical employees performed more than five years ago. HHC further contends that it is likewise "inequitable" to require HHC to produce documentary evidence regarding job responsibilities performed more than five years ago.

It is asserted by HHC that it "assumed" that the Union had abandoned its claim because of the long and unexplained delay in prosecuting this matter.

For these reasons, HHC submits that Local 1549's grievance should be barred from arbitration based upon the doctrine of laches.

Finally, HHC asserts that to the extent that this grievance involves clerical employees of Morrisania NFCC's department of mental health, it should be held to be moot, since those employees have been paid the assignment differential.

Local 1549's Position

The Union disputes HHC's version of the facts relating to the duties of the grievants as being "false and misleading". The Union asserts that the grievants continuously have used encounter form 355 from 1981 to the present, and that HHC continuously has violated the Model Systems Agreement by failing to pay the assignment differential from 1981 to the present. According to the Union, the issues presented for arbitration are the same now as they were in 1981. Thus, HHC has not been prejudiced by any delay in filing a grievance.

Additionally, Local 1549 alleges that its claim of a violation of the Model Systems Agreement is not based exclusively on use of encounter form 355. The Union contends that the grievants have been performing the qualifying duties specified in the Model Systems Agreement from 1981 to the date of the request for arbitration, either through the use of computer equipment or the use of encounter form 355.

The Union points out that in 1985 and 1986, HHC paid assignment differentials under the Model Systems Agreement to clerical employees represented by Local 1549 at locations other than Morrisania NFCC. In all cases, these payments were retroactive to 1981. The Union submits that it is unfair and inequitable for HHC to pay the assignment differential, retroactive to 1981, for many of its employees and then arbitrarily to deny the identical claim for the grievants herein.

The Union argues that the doctrine of laches is inapplicable to this case because there has been no "loss of evidence" since the grievants are performing the same duties now as they have performed continuously since 1981, and HHC has not "changed its position" in any way in reliance on any delay in filing a grievance.

Concerning HHC's allegation of mootness, Local 1549 admits that clerical employees in Morrisania NFCC's mental health unit have been paid an assignment differential, but denies that those employees' grievance has any relationship to the grievance of the ambulatory care workers at issue herein.

For the above reasons, the Union requests that the petition challenging arbitrability be dismissed and that the request for arbitration be granted.

#### Discussion

As we have long held, this Board's function in determining arbitrability is to determine 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 matter in dispute.<sup>1</sup> It is clear in the present case that the parties have agreed to arbitrate grievances, as defined in Article VI, section 1 of their collective bargaining agreement, and that the Union's claim that HHC has failed to pay

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E.g., Decision Nos. B-5-87; B-40-86; B-1-84; B-6-81; B-15-79, and decisions cited therein.

assignment differentials in violation of Appendix C of the contract (the Model Systems Agreement) is a matter which, on its face, falls within the contractual definition of an arbitrable grievance. However, notwithstanding these facts, HHC asks this Board to bar the arbitration of this grievance based upon the equitable doctrine of laches.

We have defined laches as an "unexplained or unexcusable delay in asserting a known right which causes injury or prejudice to the defendant" such as by the loss of evidence, the unavailability of necessary witnesses, or by a party's change of position in reliance upon the claimant's silence.<sup>2</sup> Where the elements of laches are established, the submission of a grievance to arbitration may be barred entirely, or limited in scope to an appropriate time period.<sup>3</sup> Consideration of a claim of laches, which properly is a matter for this Board, is to be distinguished from consideration of allegations of failure to comply with contractual grievance procedure time limitations, which are matters of procedural arbitrability for resolution by an arbitrator.<sup>4</sup>

We find that on the record before us, the applicability of the doctrine of laches has not been established in this

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<sup>2</sup>Decision Nos. B-3-80; B-3-79; B-11-77.

<sup>3</sup>See, e.g., Decision Nos. B-4-80; B-3-80.

<sup>4</sup>Decision No. B-3-80 and decisions cited therein at footnote 10.

case. While HHC asserts that the grievants' duties relating to the use of encounter form 355 ceased more than two years before the grievance was submitted, Local 1549 contends that those very duties continue to the present time. If it can be proven that the grievants continue to perform duties which entitle them to payment of an assignment differential under the Model Systems Agreement, then HHC's failure to pay such differential may be deemed a continuing violation of the Agreement. In this event, even an unexplained delay in filing with respect to an earlier period would not be held to bar arbitration of a claim at least with respect to a block of time prior to the date of filing (usually 120 days) which the parties have agreed, by contract, would not form the basis of a claim of prejudicial, unexplained delay.<sup>5</sup>

Moreover, in the present case, BBC has failed to establish the existence of prejudice resulting from any delay, sufficiently to invoke the doctrine of laches. BBC has not alleged that it has attempted to locate specific witnesses and found them to be unavailable, or that it has searched for specific documentary evidence and found that it has been lost or destroyed. Rather, BBC asserts merely that it is "unreasonable to assume" that it could locate appropriate supervisory witnesses and that it is "inequitable" to require it to produce documentary evidence relating to claims which extend back five years.

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<sup>5</sup>Decision No. B-33-82 and decisions cited therein at footnote 3.

Particularly in light of the Union's allegations that the grievants have been performing the same duties, as they relate to the subject of the grievance, from 1981 to the present, it was incumbent upon HHC to offer specific factual allegations of any prejudice resulting from the Union's delay which rendered it unable to defend against these claims. We find that HHC's conclusory allegations of prejudice are insufficient to meet its burden. Additionally, we note that there is no allegation that HHC changed its position, to its potential detriment, in reliance upon the Union's failure to assert a claim at an earlier time. For all of these reasons, we find that the doctrine of laches may not be applied to bar or limit the Union's request for arbitration herein.

Finally, concerning HHC's contention that any claim relating to clerical employees in Morrisania NFCC's mental health unit is moot, we note the Union's representation that no claim on behalf of that group of employees is included within the instant grievance, which is brought on behalf of clerical employees in Morrisania NFCC's ambulatory care unit. Accordingly, while we accept HHC's contention that the claim of the former group of employees is moot, we find that it has no bearing upon the arbitrability of the claim of the latter group of employees. The grievance which we shall order submitted to arbitration shall not include any employees covered by the mental health unit grievance referred to by HHC.



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 of the New York City Health and Hospitals Corporation be, and the same hereby is, dismissed; and it is further

ORDERED, that the request for arbitration of Local 1549, District Council 37, AFSCME, AFL-CIO be, and the same hereby is, granted.

DATED: New York, N.Y.  
September 22 , 1987

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