City v. PBA, 41 OCB 28 (BCB 1988) [Decision No. B-28-88 (Arb)]

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

THE CITY OF NEW YORK,

Petitioner,

-and-

PATROLMEN'S BENEVOLENT ASSOCIATION,

Respondent.

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DECISION NO. B-28-88

DOCKET NO. BCB-988-87
(A-2583-87)

INTERIM DECISION AND ORDER

The City of New York, through its representative, the Office of Municipal Labor Relations (hereinafter "the City"), has filed a petition challenging the arbitrability of a grievance that is the subject of a request for arbitration submitted by the Patrolmen's Benevolent Association (hereinafter "PBA" or "the Union") on April 16, 1987. After two extensions of time, the Union submitted its answer on November 1, 1987 and the City filed a reply on November 13, 1987.

Background

On December 9, 1986, the Union initiated an informal grievance on behalf of Police officer Robert Hothan ("the grievant") regarding his loss of eight unused vacation days accrued in 1984, citing a violation of Article XI, Sections

2 and 3 of the collective bargaining agreement. [1]

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[1] The cited provisions read, in pertinent part, as follows:

> " Section 1. The Department shall continue to provide the following authorized annual vacations:
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> b. During the first 3 years of service: ... twenty (20) work days.
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> Section 2. Employees may select individual vacation days at the time vacations are picked, provided that the maximum number of employee's allowed to take such individual vacation days at any time shall be 2% of the Force....Any employee who fails to select such individual vacation days at the time the employee makes his regular vacation pick may select such individual vacation days at a later time subject to the exigencies of the Department.
>
> Section 3. Accrual of Vacation
> If the Police Department calls upon an employee in writing to forego the employeels vacation or any part thereof that portion up to a maximum of three (3) weeks of vacation shall be carried over until such time as it can be liquidated in the following calendar year subject to the following conditions:
>
> (1) the selection of such vacation days shall be in the discretion of and subject to the exigencies of the Department; and...
> (2) the selection of such days in the following calendar year shall be made after the regular vacation picks; and
> (3) the utilization of this vacation time shall be restricted to the months of January through May and September through November.
> It is the intention of the Police Department to allow an employee to request permission to accrue vacation consistent with this provision and to grant such requests which are reasonable.

The City denied the grievance by letter dated March 2, 1987, claiming there was no violation, misapplication or misinterpretation of either the contract or the rules, regulations, or procedures of the department. The City also asserted that the claim was time-barred for failure to submit the grievance within the contractual time limits of the grievance procedure.

On March 5, 1987 the Union requested a Step IV review of the matter, which the City again denied on the same grounds by letter dated April 10, 1987. On April 16, 1987 the Union filed the instant request for arbitration requesting that Officer Hothan be credited with eight vacation days or be paid for eight days at the rate of time and one half in lieu thereof.

Positions of the Parties

City's Position

The City challenges the arbitrability of this matter wholly on the basis of laches.

The City cites Board Decision No. B-3-80 at page 9 thereof, in defining laches as follows:

> "unexplained or inexcusable delay in asserting a known right which causes injury or prejudice to the defendant such as a loss of evidence....Laches arises from a party's extrinsic delay in not diligently asserting its claim, thereby placing an undue burden on the defendant."

As evidence of the injury suffered, the petitioner claims that the

> " ... delay of at least one year between the claimed violation in 1985 and the filing of the grievance in 1986 ... has caused serious prejudice... in that essential documentary and testimonial evidence is now unavailable, and the passage of time has affected available witnesses' memories of events..."

The City asserts that because the Union is guilty of laches, this Board must find the matter not arbitrable.

The Union's Position

The Union attempts to rebut the City's assertion that the delay was either unexplained or inexcusable, by maintaining that events took place which led the grievant to believe that the dispute involving the carryover and use of the eight vacation days in question would be resolved administratively and, accordingly, would not necessitate his resort to the grievance procedure. The Union contends that, based upon the grievant's account

of events which transpired before the formal grievance was initiated on December 9, 1986, it would be reasonable for an arbitrator to conclude that the delay was neither unexplained or inexcusable. The Union asserts that evidence exists demonstrating that the grievant made informal attempts to correct the problem. Grievant's August 8, 1986 recital of the central events of this matter shows that as early as October of 1985, he tried to use at least five of the eight vacation days in question. When he was informed, at roll call, that this request had been denied, he expressed concern that he might lose the leave time but was told "[d]on't worry about it kid, the department can't do that." Furthermore, the Union asserts that in January 1986, when informed that he had lost the eight days now at issue, the grievant asked his superior officer what his recourse was. The reply, according to the grievant's account of the conversation, was "wait awhile, I'll see what I can do after inspections come; they usually come in February." Officer Hothan states that the awaited inspections did not arrive until July. Only when it thereafter became apparent that the relief sought was not forthcoming did he seek the PBA's assistance in resolving the matter formally. The grievance was initiated at Step I on December 9, 1986.

Moreover, the Union argues that the City has not been injured or prejudiced by the length of time this grievance has been delayed. The Union contends that the City has failed to demonstrate any direct proof of harm, offering only a blanket allegation of prejudice encompassing the possible loss of documentary evidence and the effect that the passage of time may have had on witnesses' memories generally, without offering any specific factual support.

In summary, the Union asserts that because the delay was both explainable and excusable, being due, in part, to certain representations made to the grievant by his superior officer, and further, because of the absence of a showing of prejudice by the City, the defense of laches must fail.

DISCUSSION

The parties' pleadings present only one issue for resolution in determining the arbitrability of the grievance: whether laches (extrinsic delay) applies to bar arbitrability.

We have defined laches as "unexplainable or inexcusable delay in asserting a known right which causes injury or prejudice to the defendant,"[2] such as by the loss of evidence, the

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[2] Decision Nos. B-26-85; B-36-82; B-20-79.

unavailability of necessary witnesses, or by a party's change in position in reliance upon the grievant's silence.[3] Inasmuch as laches is an equitable doctrine, we must balance various factors in determining whether laches, will serve as a bar to arbitrability of a grievance on a case-by-case basis, guided by the long standing policy of the New York City Collective Bargaining Law to favor and encourage the impartial resolution of disputes through arbitration.[4]

In striking this balance, the questions to be answered are whether there existed an arguable excuse for the delay in bringing the grievance and whether allowing arbitration of the matter despite the delay would unfairly prejudice the defendant. These questions are to be evaluated in light of the peculiar equitable circumstances of each case.

In this case, we find that the City's allegations of prejudice resulting from the delay in submitting this grievance are insufficient to demonstrate the existence of actual harm. The City has not offered evidence of injury or prejudice other than its conclusory statement that "the passage of time nas affected available witnesses' memories of events" and that

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[3] Decision Nos. B-43-87; B-3-79; B-11-77.

[4] NYCCBL Section 12-302.

unspecified "documentary and testimonial evidence is now unavailable." In prior Board decisions in which there was a claim of prejudice as a result of delay, we have held the party asserting this defense to a higher standard of evidentiary proof of harm when the delay in initiating the grievance was relatively short, particularly when the City's potential liability remained fixed.[5] Heretofore, we have attempted to draw a distinction between these cases and others where we held that the City was implicitly prejudiced by an extended delay because the passage of time itself, where sufficiently prolonged, placed an undue burden on the defense and/or introduced the element of increasing liability.[6]

We now determine that such distinctions are a potential source of confusion rather than elucidation and that, in any case, reliance on a mere presumption of prejudice as a basis for foreclosure of possibly substantial and significant claims through the grant of the extraordinary remedy of laches is inappropriate. We will, therefore, require that regardless of the particular circumstances of individual cases, the defense of laches be supported by allegations of fact rather than conclusory statements and that such factual submissions shall provide

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[5] See Decision Nos. B-7-88 (10 month delay); B-4-85 (15 month delay); B-23-80 (16 month delay); B-20-79 (12 month delay).

[6] See Decision Nos. B-26-85 (6 and 9 year delays); B-17-84 (3 year delay); B-15-81 (9 year delay); B-4-80 (2 year delay).

support for findings as to each of the constituent elements of the defense, i.e., (1) that the claimant was guilty of significant delay after obtaining knowledge of the claim; (2) that such delay was unexplained and/or inexcusable; and (3) that such delay caused injury and/or prejudice to the defendant's ability to prepare and present a defense against the claim.

Consideration may also be given, in appropriate cases, to evidence that the defendant's liability has been enlarged as a result of the claimant's delay. Since this element does not arise in the instant matter, we need give no further consideration here, to the particular circumstances in which weight is to be given to evidence of this specific form of prejudice nor to the matter of appropriate forms of remediation.

In the instant case, the delay attributable to the Union is less than one year. In addition, we note that the City's potential liability remains fixed, regardless of the extent of the delay. We also find the City's allegations of prejudice and injury in the instant matter to be unsupported by any allegations of probative fact and, therefore, insufficient to warrant a grant of the extraordinary remedy of laches.

On the other hand, we find that the Union has alleged facts and submitted evidence to support its assertion that timely, albeit informal, efforts were made to resolve this matter. As mentioned above, there is uncontroverted evidence that the grievant made an attempt, within the contractually mandated

time-limits for instituting a grievance, to resolve the matter with his superior officer. There is also evidence that the grievant was persuaded to delay pressing his claim, based on the representations of his superior officer that the matter would be resolved administratively. Moreover, these inquiries constituted notice to the City of the grievant's claim and preclude any claim by the City that it had reason to believe that the grievant had abandoned his claim. We have previously held[7] and will continue to recognize that a claimant's preliminary efforts to pursue his claim may constitute notice of the claim to the employer such as would preclude a finding that the employer was caused to believe, to its detriment, that the claim had been abandoned.

In light of the foregoing, we cannot conclude that the grievant acted in a manner which was either inexcusable or unexplained. However, in view of the fact that our prior holdings relating to the element of prejudice may have been a source of confusion to the parties as to the evidentiary standard to be applied when the defense of laches is asserted, this decision shall not become final if, within 15 days after issuance, the City submits a written statement alleging any specific factual support for its claims of prejudice. If the City files such a submission, the Union shall have five days

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[7] Decision No. B-23-80.

thereafter to file its response. The parties' submissions will be considered by this Board before we render a final determination of the arbitrability of this matter. However, in the event that the City fails to submit the requested statement, and based upon the present record as a whole, we shall find this dispute arbitrable.

ORDER

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 City's petition challenging arbitrability be denied, unless the City submits to the Board within 15 days a submission addressed to the element of prejudice; and it is further

ORDERED, that in the event the City does file such submission, that the Union file its response, if any, within five days; or in the alternative, it is hereby

ORDERED, that in the event the City does not file a further submission, that the Union's request for arbitration be granted.

DATED: New York, N.Y.
June 30, 1988

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