City v. DEA, 41 OCB 73 (BCB 1988) [Decision No. B-73-88 (Arb)]

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

THE CITY OF NEW YORK,

Petitioner,

-and-

DETECTIVES' ENDOWMENT ASSOCIATION,

Respondent.
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DECISION NO. B-73-88
DOCKET NO. BCB-1095-88
(A-2886-88)

DECISION AND ORDER

On September 29, 1988, the City of New York ("the City"), through its Office of Municipal Labor Relations ("OMLR"), filed a petition challenging the arbitrability of a grievance filed by the Detectives' Endowment Association ("DEA" or "the Union") on behalf of Detectives assigned to the Joint Terrorist Task Force ("JTF"). On October 12, 1988, the DEA filed its answer to the petition, and the City submitted a reply on October 21, 1988. The Union's counsel filed an additional written submission on October 28, 1988, concerning the alleged relevance of a recent arbitrator's award in another matter, which was attached thereto.[1]

[1] While the Revised Consolidated Rules of the Office of Collective Bargaining ("OCB Rules") do not provide for the filing of pleadings subsequent to the reply, and while we discourage such additional pleadings, no objection is raised in this proceeding to the Union's filing of this material. For the additional reason that the appended Arbitration Award was not issued until October 17, 1988, and has relevance to the issue now before us, we shall consider the contents thereof. This is also consistent with our policy of eschewing an overly technical application of rules of pleading. Decision Nos. B-20-85; B-15-83. See also, Board of Certification Decision No. 21-82.

Background

On July 8, 1987, the DEA submitted an informal grievance on behalf of Detectives assigned to the JTF of the Arson Explosion Division of the New York City Police Department ("Department") concerning "Reserve Tours," requesting payment of the contractual overtime rate pursuant to Article III[2] of the July 1, 1984 - June 30, 1987 Collective Bargaining Agreement ("Agreement"), for all reserve duty performed. Attached thereto, the Union submitted several Department memoranda, issued by various named supervisory personnel, which established the schedules of two-man teams of

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[2] **Article III - Hours and Overtime**

> **Section 1(a).** Ordered overtime of an emergency nature, authorized by the Police Commissioner or Chief of Operations... shall be compensated for by cash payment or compensatory time off at the rate of time and one-half at the sole option of the employee. Such cash payments or compensatory time off shall be computed on the basis of completed fifteen (15) minute segments.
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> **Section 1(b).** Effective July 1, 1976, an employee shall be compensated either by cash or compensatory time off, at the rate of time and one-half, at such employee's sole option, for hours worked by such employee in each calendar year of authorized overtime (other than ordered overtime of an emergency nature referred to in subsection (a) of this Section 1) in excess of 40 hours in any week or in excess of the hours required of an employee by reason of the employee's regular duty chart, if a week's measurement is not appropriate.

Agents and Detectives assigned to Emergency Standby Duty ("ESD"). These memoranda cover a period of time commencing June 22, 1984 through August 14, 1987. The stated purpose of these emergency teams, as indicated in the memorandum dated January 28, 1986, is

> to respond to questionable situations or incidences [sic] [during non-work hours] which need immediate on the scene efforts to resolve. (emphasis in original)

Several of the memoranda state

> [i]n the event an Agent or Detective will not be available for ESD during the time he is scheduled, no matter what the reason, it is his responsibility to secure a replacement and notify JTF-2 desk, the Night Supervisor, and the Switchboard. (emphasis in original)

The memorandum dated April 7, 1987, further states

> Standby Agents/Detectives are reminded of [the] mandatory nature of this assignment and the absolute need for availability. JTF-2 members should insure that their beepers are in operating order and that CBR's are left with the switchboard/Operations Center during non-duty hours so that they can be reached in a moment's notice.

The DEA maintains that ESD is Reserve Tour Duty by another name, an assignment which has previously been found by several arbitrators to constitute ordered and/or authorized overtime.

The informal grievance was denied on July 22, 1988.[3] The DEA's request for consideration of this matter in accordance with Article XXI, Section 4, Step IV of the Agreement, was denied on August 24, 1988. No satisfactory resolution of the matter having

[3] No explanation is offered for the Police Department's delay of over one year in first responding to the DEA's grievance.

been reached, on September 8, 1988, the Union filed a request for arbitration. As its remedy, the DEA seeks

> [p]ayment for all members involved and a directive to the Police Department to make appropriate payments in the future without the need to arbitrate each case. Provide a penalty for non compliance. [sic]

Positions of the Parties

The City's Position

The City challenges the arbitrability of this matter in its entirety on the sole ground that arbitration is barred by the doctrine of laches. The City cites the recent Board of Collective Bargaining ("Board") Decision No. B-28-88, in defining the constituent elements of the defense of laches as follows:

> (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 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.

Noting that the memoranda attached to the Union's grievance request cover a period of time commencing in June of 1984, the City argues that over four years elapsed before the DEA filed its grievance, constituting "significant delay."[4] The City further

[4] We take administrative notice that the City overstates the alleged delay by one year inasmuch as the grievance was initiated on July 8, 1987.

maintains that this delay is inexcusable, as evidenced by the fact that the DEA filed a similar grievance in December, 1984 and a subsequent request for arbitration of the matter in 1985 (Case No. A-2261-85) on behalf of only certain of its members.[5] The City maintains this demonstrates that the Union had knowledge of an available legal remedy for the instant grievance but failed to include the instant grievants in the previous request for arbitration. Therefore, the City argues that the DEA should be precluded from now asserting that the delay was excusable or explainable.

The City contends that it has suffered prejudice because of the delay for the following reasons:

(1) In order to present its defense, the City must establish that certain reserve duty tours were never "ordered and/or authorized overtime" within the meaning of Article III of the parties' Agreement. The City submits that it will have to present testimony of the grievants' supervisors who were allegedly responsible for assigning the tours of duty at issue.

[5] We take administrative notice that several grievances associated with Arbitration Case No. A-2261-85 were consolidated (although none were filed specifically on behalf of Detectives assigned to the JTF), and the request for arbitration initiated as a "Class Action" grievance. However, for reasons unexplained, the arbitrator received evidence limited to 43 Detectives assigned to the Field Internal Affairs Unit, restricting applicability of his award, dated October 9, 1986, to these 43 alone. We further note that the parties later stipulated and agreed, on July 2, 1987, to withdraw the grievance docketed as Case No. A-2261-85 on behalf of 42 of the grievants.

The City argues that this testimony "will surely be inhibited by the faded memories of [those supervisors]." The City further submits that some witnesses are no longer available to make appearances in this matter, i.e., "Lieutenant Kevin Hallinan [under whose name many of the aforementioned memoranda were issued], the Commanding officer of the [JTF] and a critical witness to this proceeding, retired... in July of 1986."

(2) Operations Order No. 68 promulgated on June 18, 1988, authorized the City to destroy all documents issued through 1984. The City asserts that "much of the documentary evidence the City would have produced to make its defense (to demonstrate that certain reserve tours were not, in fact, ordered and/or authorized overtime] could have been destroyed pursuant to [this Order]."

(3) Finally, the City argues that the Union's delay in filing the instant grievance has caused the City's potential liability to balloon to more than $250,000.00.

Accordingly, the City submits that inasmuch as the Union is guilty of laches, the Board must find this matter not arbitrable.

The Union's Position

Prior to filing its answer to the City's petition, counsel for the DEA, in a letter dated October 4, 1988, objected to the timeliness of the City's petition challenging the arbitrability

of this matter. The Union asserts that service of the request for arbitration was made on September 8, 1988, and, thus, the City's petition challenging arbitrability, submitted on September 29, 1988,[6] was not filed within the time period required by Section 6.4 of the Revised Consolidated Rules of the Office of Collective Bargaining ("OCB Rules").[7]

In its answer, the DEA responds to the substantive issue raised by the City's petition, arguing that the doctrine of laches is inapplicable to the instant matter. In reliance upon a statement that was allegedly made by the City during the proceedings in Case No. A-2261-85, and memorialized at page 4 of the Award,[8] the DEA contends that both it and the Arbitrator were

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[6] On September 22, 1988, the City requested an extension of time within which to file its petition challenging arbitrability.

[7] **OCB Rule 6.4** provides, in relevant part:

> **Ten Day Notice - Preclusion of Objection.** A request for arbitration may contain a notice that a petition for final determination by the Board, as to whether the grievance is a proper subject for arbitration, must be served and filed within ten (10) days or the party served with the notice shall be precluded thereafter from contesting in any forum the arbitrability of the grievance.

[8] Arbitrator Walter Gellhorn, in his Opinion and Award in Case No. A-2261-85 states, in relevant part:

> I understand that reserve tour duty is no longer required in any of the units involved in this case. My award therefore has only retrospective significance as to the pending forty-three grievances. Plainly, however, the award governs the issue of overtime if

(continued...)

led to believe that "'Reserve Tours' would no longer be used in the department....” Reasoning that the grievance in Case No. A-2261-85 was initiated as a "Class Action," the Union contends that it "had expected the City to treat all cases of a same nature in the same way." Arguing that it was not until it later became apparent that the City refused to apply equal treatment "to other members of the class, for reserve duty worked when such fact became known" (emphasis in original), that the Union found it necessary to pursue this separate grievance. The DEA also maintains that but for the arbitrator's decision not to conclude the previous arbitration as a "Class Action," the instant grievants would have been covered by the prior proceeding.

The DEA attempts to rebut the City's assertion of prejudice, arguing that the City was on constant notice of claims arising from the assignment of uniformed personnel within the Department to Reserve Tour Duty. Referring to a request for arbitration filed in 1981 on behalf of members of the Sergeants' Benevolent Association (Case No. A-1227-81), involving overtime compensation for Sergeants assigned to a reserve schedule which required working hours in excess of the regular duty chart, the DEA contends that "the issue there was exactly the same as here[in],

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(...continued)

> reserve tour duty (or a variant) is reintroduced during the life of the applicable contract, unless the parties otherwise agree. (emphasis added)

i.e., the required payment for Reserve Tours."[9] Therefore, the Union argues that the City has imputed knowledge of the nature of the instant dispute, dating back to at least 1981.

As to the purported prejudice arising from the destruction of documentary evidence, the DEA contends that the City had actual knowledge of this dispute on July 8, 1987, almost one year prior to the promulgation of Operations Order No. 68 on June 18, 1988. The Union asserts that inasmuch as the City had the instant grievance under active consideration well before issuance of this order, any claims of prejudice suffered pursuant to it must fail.

Finally, in response to the City's claim of increased liability, the DEA asserts that questions concerning remedy are not relevant to the arbitrability of a grievance. Moreover, the Union submits that "an arbitrator should determine if the damages should go [further back in time] than the 120 day period prior to July 8, 1987." The Union contends that the resolution of such questions are matters of procedural arbitrability and, thus, for the arbitrator.

[9] We take administrative notice that the City challenged the arbitrability of Case No. A-1227-81 on the basis of laches. In Decision No. B-23-83, we found the grievance arbitrable to the extent that the Union alleged a continuing violation and granted the Union's request for arbitration for the period from and including 120 days prior to the filing of the grievance in November 1980; and denied the request for arbitration of the claims prior to that period.

In support of this position, the DEA, in its additional pleading of October 26, 1988, claims that a recent Arbitrator's Award (Case No. A-2580-87) between the City and the Lieutenants' Benevolent Association ("LBA"), is directly on point. Therein, the LBA filed a grievance on November 30, 1986, concerning "recall duty" (a variation of the reserve duty system), after it learned for the first time that its contentions concerning "recall duty" would not be heard by the arbitrator considering its then current "reserve duty" grievance.[10] The Union contends that the decision of Arbitrator Sands, in finding the grievance concerning "recall duty" timely filed and granting relief back to November 15, 1984, should be reviewed by the Board in its determination of whether to allow arbitral consideration of claims arising prior to the 120 day statute of limitations period prescribed by the contract.

Discussion

As a preliminary matter, we will address the DEA's objection

[10] In 1986, Arbitrator Margaret (Sipser) Leibowitz heard a "reserve duty" grievance filed by the LBA. During those hearings, it was learned through a Lieutenant's testimony that since November 15, 1984, "the reserve system's abuses had continued under a new name," i.e., recall duty. However, Arbitrator Leibowitz denied the Union's demand to include recall duty claims in the proceeding and, consequently, on November 30, 1986, the LBA had to file an independent grievance for recall duty overtime beginning November 15, 1984. That grievance was the subject of a request for arbitration (Case No. A-2580-87) and was heard by Arbitrator John E. Sands.

to the City's petition challenging arbitrability of this matter on the ground that it is untimely under OCB Rule 6.4.

We recognize that there is some confusion in the record concerning whether the City's request for an extension of the time within which to file a petition challenging arbitrability was made in a timely manner, or was made one day late. We need not resolve this question. Even assuming that the City's request was one day late, we would be reluctant to allow such a short delay to bar the adjudication of serious issues on the merits unless such delay were so egregious as to cause prejudice to the interests of a party. No such harm has been demonstrated here. We believe that our approach to this issue is consistent with our policy, with due regard for due process considerations, to apply our rules liberally and in such a fashion as will promote the resolution of real issues rather than the application of technical rules of procedure.[11] Therefore, we decline to dismiss the petition for untimeliness.

In our consideration of the merits of the instant challenge to arbitrability, we note that there is no dispute that the subject of the grievants' claims is covered by the grievance and arbitration clause of the Agreement. The issue raised by the City relates solely to whether the doctrine of laches applies to

[11] See, Board of Certification Decision No. 21-82; see also footnote 1, supra.

bar arbitrability.

The City contends that it has alleged facts which satisfy our test, as set forth on page 4 supra, of whether a claim is sufficiently supported by allegations of probative fact so as to warrant a grant of the extraordinary remedy of laches.[12] The DEA denies that laches applies to the circumstances of this particular dispute but rather argues that any timeliness questions raised by the City are matters of procedural arbitrability. As such, the Union asserts, they are matters appropriate for resolution by an arbitrator. Alternatively, however, recognizing that we have jurisdiction over questions of the applicability of the laches doctrine, the DEA attempts to rebut the City's allegations of prejudice, and affirmatively states

> there has been no delay by the union in the exercise of a known right and [that] any delays were caused by the City's long delay in addressing the grievance and considering all in a class to be treated equally. (emphasis in original)

In prior consideration of claims of this nature, we have long accepted the following definition of laches:

> Laches is 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 subjecting the defense to a greater risk of

[12] Decision No. B-28-88.

> liability because of actions taken, or not taken, in reliance on petitioner's apparent abandonment of the claim. (Prouty v. Drake, 182 NYS 271).[13]

This defense of laches is founded on the lapse of time and the intervention of circumstances which render it unjust, on equitable principles, for a plaintiff to be permitted to maintain a claim.[14]

We have previously held that 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.[15] For the following reasons, we are not persuaded to apply an absolute equitable bar to arbitration of the grievance herein.

We have previously drawn an analogy between the facts presented in cases similar to the instant one and Board decisions concerning out-of-title work grievances in which the issue of laches was addressed. In Decision No. B-23-83, we stated:

> the grievants were performing their duties pursuant to the direction of their supervisors, and although not working out of title, they were working at times other than those regularly scheduled, and allegedly without appropriate compensation. In those out-of-title work cases in which the claim was an alleged continuing violation of the contract, and in which the elements of laches were established, this Board nevertheless has ordered arbitration, but only for a period not exceeding 120 days prior to the filing of the grievance.

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[13] Decision Nos. B-26-85; B-17-84; B-23-83; B-6-75.

[14] Decision No. B-17-84.

[15] Decision No. B-43-87.

We found that this limited grant of arbitration strikes a balance between our application of the equitable doctrine of laches and the contractually agreed upon intentions of the parties when applied to circumstances of allegedly continuing violations.[16] Thus, where the delay in filing a grievance appears unwarranted, we have barred arbitration of the grievant's claim except for that part of the grievance alleging the continuous commission of a wrong for a period of 120 days prior to the filing of the grievance, which constitutes the period which the parties, by contract, have agreed would not form the basis of a claim of prejudicial, unexplained delay.[17]

In the instant matter, we find that the DEA has alleged sufficient facts to demonstrate that the action complained of was "ongoing and continuous" at the time the grievance was filed. Therefore, we shall grant the request for arbitration limited to that part of the grievance alleging the continuous commission of a wrong for a period 120 days prior to July 8, 1987. This, we believe, achieves a balance among competing policy considerations relating to the arbitrability of grievances.

With respect to the claim for relief covering a period of more than 120 days prior to July 8, 1987, we find that the

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[16] See, Decision Nos. B-1-84; B-33-82; B-3-80. Cf., Decision No. B-43-87.

[17] Decision Nos. B-23-83; B-4-80; B-3-80.

Union's delay in filing is unwarranted. We are not persuaded by the DEA's argument that the instant grievants were included in the "Class" of original grievants in Case No. A-2261-85. We take administrative notice that the record in that case does not reflect any such intention, nor has the Union produced any evidence now that would explain why the instant grievants were not a part of its previous request for arbitration.[18] We find that it is incumbent upon a party after a long period of delay to present such evidence.

We further find that the City sufficiently has demonstrated prejudice resulting from the delay. The City alleges that documentary and testimonial evidence is now unavailable and/or unreliable, constituting an unjustifiable burden on its defense against this claim. The City also asserts that it has been exposed to increased potential monetary liability. We have previously recognized each of these forms of injury, if established by the proponent of the defense, to constitute prejudice arising from the delayed assertion of a claim.[19] We find that the City has submitted sufficient factual support for its claim of prejudice, without the need to comment on the merits

[18] In this regard, we distinguish our finding from that of Arbitrator Sands in Case No. A-2580-87, discussed supra at page 10, inasmuch as the grievants in that matter were parties to the original "reserve duty" grievance.

[19] See, Decision Nos. B-26-85; B-17-84; B-4-76. Cf., B-11-77.

of each allegation, except to note that the City need not submit irrefutable evidence to substantiate each allegation. Nor do we require that the City sufficiently demonstrate more than one form of prejudice.

Therefore, having found that the DEA has failed satisfactorily to excuse its delay, and that the City has been prejudiced, we hold that any claims for relief as to the period prior to 120 days before July 8, 1987 is barred by laches.

Based upon these considerations, we find that the grievance should be submitted to arbitration with the limitations indicated above.

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 request for arbitration herein, by the Union be, and the same hereby is, granted insofar as the request seeks arbitration of claims arising during the period from and

including 120 days prior to the filing of the grievance on July 8, 1987; and it is denied in all other respects.

DATED: New York, N.Y.
December 20, 1988

MALCOLM D. MacDONALD
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

DEAN L. SILVERBERG
MEMBER

CAROLYN GENTILE
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EDWARD F. GRAY
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