City & HPD v. CSBA & IBT, 67 OCB 43 (BCB 2001) [Decision No. B-43-2001 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Arbitration

-between-

THE CITY OF NEW YORK AND DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT,

Petitioners,

Decision No. B-43-2001
Docket No. BCB-2189-01
(A-8412-00)

-and-

CIVIL SERVICE BAR ASSOCIATION AND THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS (IBT),

Respondent.

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DECISION AND ORDER

The City of New York and the Department of Housing Preservation and Development ("City" or "HPD") filed a petition on February 9, 2001, challenging the arbitrability of a grievance brought by the Civil Service Bar Association ("Union") on behalf of its members. The grievance asserts that HPD violated the 1995 Municipal Coalition Memorandum of Economic Agreement ("MCMEA") and the parties' collective bargaining agreement ("CBA") when it hired outside contractors to perform bargaining unit work without notifying the Union and when it assigned unit attorneys to supervise, train, and assist outside contractors. The City, challenging only the arbitrability of the MCMEA allegation, not that of the CBA violation, argues that the alleged MCMEA violation is not arbitrable because the claim is untimely as a result of the Union's failure to follow the procedure for dispute resolution prescribed in MCMEA. Based

upon our review of the parties' submissions, the Board finds the grievance arbitrable under the provisions of MCMEA. Accordingly, we deny the petition and direct that the grievance proceed to arbitration.

BACKGROUND

HPD hired four non-bargaining unit attorneys to work *per diem* in its Housing Litigation Division from January 4, 1998, through April 30, 1999. HPD also hired two non-bargaining unit attorneys to work *per diem* in its Landlord/Tenant Litigation Bureau from January 18 through June 30, 1999.

On February 11, 1999, the Union filed a Step II grievance alleging that by assigning HPD attorneys to supervise, train, and assist outside contractors, HPD violated the Civil Service Law, Article VI, Section 1c – the out-of-title provision – of the CBA, and "Municipal Labor Coalition Agreements." The Director of Labor Relations denied the grievance focusing only on the out-of-title claim under the CBA. The Union then submitted the grievance at Step III, which was denied by a Review Officer on August 11, 2000. In his description of the grievance in the Step III decision, the Review Officer noted the alleged MCMEA violation, but in the determination, he addressed only the alleged CBA violation.

On August 30, 2000, the Union filed its request for arbitration. In the request, the Union alleges that using outside contractors to perform bargaining unit work and assigning unit attorneys to supervise, train, and assist these contractors violate both Article VI of the CBA and Section 11 – Privatization/ Contracting-Out/ Contracting-In – of the 1995 MCMEA.

Section 11 of MCMEA provides in relevant part:

* * *

> b. It is the Employer's policy to have advance discussions with the Union to review its plans for letting a particular contract which may adversely affect employees covered by this 1995 MCMEA. The Union shall be advised as early as possible, but in no case later that 90 days in advance of the contract being let, of the nature, scope, and approximate dates of the contract and the reasons therefor.
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> c. The Employer will provide the Union as soon as practicable with information, in sufficient detail, so that the Union may prepare a proposal designed to demonstrate the cost effectiveness of keeping the work in-house. Such information, consistent with the applicable provisions of Section 312(a) of the New York City Charter, shall include but not be limited to, applicable solicitations to vendors, winning bids, descriptions of services to be provided by vendors, cost comparison analyses, and the agency's estimated direct operating and administrative costs of contracting out the work.

As a remedy, the Union asks that the arbitrator order HPD to cease and desist from its actions and asks that the arbitrator order HPD to compensate unit employees with backpay.

POSITIONS OF THE PARTIES

Petitioner's Position

The City argues that the request for arbitration should be dismissed because the Union did not follow the procedure for resolving disputes under MCMEA. According to the City, a claim of an alleged MCMEA violation should be submitted directly to an arbitration panel consisting of the three impartial members of the Board of Collective Bargaining. By submitting the alleged MCMEA violation to the grievance process, the Union seeks to place a MCMEA issue before arbitrators other than the three neutrals contemplated by MCMEA and thereby "amend" MCMEA. Furthermore, the City argues that the request for arbitration, filed in August 2000, more than a year after the contract for attorney services expired, should be dismissed as untimely.

The City further contends that the arbitration of the alleged MCMEA violation is barred by the doctrine of laches. Because, according to the City, the Union filed the alleged violation

pursuant to the wrong procedure, the Union has allowed almost two years to elapse after it obtained knowledge of the claim, and the City has been prejudiced by the Union's failure to follow proper procedure. The City contends that witnesses may no longer be available to testify and the gathering of evidence may be difficult. The lapse of time renders arbitration unjust on equitable principles. Further, the Director of Labor Relations notified the Union in the Step II decision that the alleged MCMEA violation is beyond the scope of the Step II hearing, and, therefore, addressed only the CBA violation.[1] The City contends that because of the delay, the contracts with the outside attorneys were already performed and an arbitration decision would simply amount to an advisory opinion. However, the City does not challenge the arbitrability of the CBA violation.

Respondent's Position

The Union contends that HPD violated MCMEA by contracting out bargaining unit work without prior notice to the Union and violated the CBA out-of-title provision when it assigned bargaining unit members to train and supervise the contract personnel. Under MCMEA, the City must notify the Union at least 90 days before contracting out work when such contract may adversely affect employees because the Union must have an opportunity to offer a counter-proposal demonstrating that it is in the best interest of the agency to perform the work in-house. The City never provided such advance notice.

The Union argues that its submission of the MCMEA violation is not untimely because

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[1] The Step II decision dated May 6, 1999, states:
The Union, in the Step II conference, has also asked the agency to consider other related concerns in support of their cease and desist request. While those issues have been brought to the attention of senior agency management, they are not contractual and do not involve issues of agency policy or procedure.

MCMEA does not provide any time limit for submitting alleged violations of the agreement to arbitration. Further, MCMEA does not preclude a union from submitting claimed violations to the grievance process. If the Board determines that the MCMEA procedures are exclusive, the Union requests that the Board send the grievance to the three person arbitration panel described in MCMEA.

The Union contends, finally, that laches is an equitable doctrine founded on the lapse of time and the intervention of circumstances which render a party's maintaining a claim unjust on equitable principles. The grievance was submitted at Step II within 120 days of the initial contract. The City waited close to three months to respond to the initial grievance and over a year to respond to the next step. The Union argues that it raised the MCMEA issue in both its initial grievance and at Step III, making the City aware of its claim, but the City never addressed the issue in either of its determinations. Moreover, the City's contention that it has been prejudiced by the lapse of time is unsupported; it does not identify any witnesses or evidence that are no longer available because of the delay. The Board should not consider the City's request to bar arbitration where the City was responsible for the delay in processing the case.

DISCUSSION

The issue before the Board is whether the alleged MCMEA violation is arbitrable.[2] Section 16 of MCMEA – Resolution of Disputes – provides in relevant part:

> a. Subject to the subsequent provisions of this Section 16(b), any dispute, controversy, or claim concerning or arising out of the execution, application, interpretation or performance of any of the terms or conditions of this 1995 MCMEA shall be submitted to arbitration upon written notice therefor by any of the parties to this

[2] Because the City challenges only the MCMEA claim, we will examine only that issue.

> 1995 MCMEA to the party with whom such dispute or controversy exists. The matter submitted for arbitration shall be submitted to an arbitration panel consisting of the three impartial members of the Board of Collective Bargaining pursuant to Title 61 of the Rules of the City of New York. Any award in such arbitration proceeding shall be final and binding and shall be enforceable pursuant to Article 75 of the CPLR.

The parties do not dispute that they are both signatories to MCMEA and have agreed to arbitrate controversies arising under the agreement.

As to the City's untimeliness argument, we have held that "whether a union has complied with the requisite steps of a grievance procedure or whether those steps exist and are applicable to a given situation, are issues of procedural arbitrability for an arbitrator to determine."[3] Therefore, we find that the question of timeliness, which is an issue of procedural arbitrability, must be determined by an arbitrator and not by this Board. We also note that Section 16 of MCMEA does not set any time limitation for submitting disputes to arbitration.

The City's equitable claim under the theory of laches is equally unavailing. The equitable doctrine of laches applies when a party would be unjustly prejudiced by a lapse between the time of the alleged act and the time a claim was filed.[4] We have held that the submission of an otherwise arbitrable claim may be barred by laches when the claimant was guilty of significant delay after obtaining knowledge of the claim; such delay was unexplained or inexcusable; and

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[3] *Detectives Endowment Ass'n*, Decision No. B-71-89 at 9. *See also District Council 37*, Decision No. B-31-85 at 17; *Soc. Serv. Employees Union*, Decision No. B-6-68 at 2-4.

[4] *See Soc. Serv. Employees Union, Local 371*, Decision No. B-33-96 at 12; *Local 1549, District Council 37,* Decision No. B-43-87 at 6; *Probation and Parole Officers Ass'n, Local 599,* Decision No. B-29-75 at 3-4.

the delay caused injury or prejudice to the City's ability to present a defense.[5]

In *Communication Workers of Am., Local 1180*, Decision No. B-7-88, the Board found that the laches argument failed because the City did not demonstrate any direct proof of harm or undue burden caused by the grievant's delay in filing the Step I grievance. The City offered no evidence that necessary witnesses were unavailable or that evidence had been lost because of the delay. Finally, the City had not established that its potential liability had increased because of the grievant's delay.

In the present case, the reason for the delay in submitting the MCMEA issue to arbitration was that the Union submitted the issue to the contractual grievance process, which took more than a year. The grievance was promptly filed, and the City was on notice from the beginning that the grievance included the MCMEA claim. Furthermore, the City has not demonstrated that its ability to defend itself at arbitration has been prejudiced by such delay. The City has not indicated that any particular witness is no longer available, nor has it indicated that any specific evidence is unavailable because of the lapse of time. The City has also failed to establish that any potential liability has increased because of the delay.

Accordingly, we deny the City's challenge to arbitrability. We order the question of a MCMEA violation to proceed to arbitration as prescribed in Section 16 of MCMEA, and we order that the Union's out-of-title claim under the CBA, which the City has not challenged, proceed to arbitration.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York

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[5] *Soc. Serv. Employees Union, Local 371,* Decision No. B-33-96 at 12.

City Collective Bargaining Law, it is hereby

ORDERED, that the New York City Department of Housing Preservation and Development's petition challenging arbitrability be, and the same is hereby denied; and it is further

ORDERED, that the Civil Service Bar Association's request for arbitration on the issue whether there was a violation of the 1995 Municipal Coalition Memorandum of Economic Agreement be, and the same hereby is granted; and it is further

ORDERED, that the Civil Service Bar Association's request for arbitration on the issue whether there was a violation of the parties' collective bargaining agreement be, and the same hereby is granted.

Dated: November 19, 2001
New York, New York

MARLENE A. GOLD
CHAIR

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

CHARLES G. MOERDLER
MEMBER

RICHARD A.WILSKER
MEMBER