Organization of Staff Analysts, 77 OCB 19 (BCB 2006)

[Decision No. B-19-2006(Arb)] (Docket No. BCB-2510-05) (A-11463-05)

Summary of Decision: NYCHA challenged the arbitrability of a grievance alleging that NYCHA terminated a provisional employee with more than two years of employment in violation of the parties' collective bargaining agreement. NYCHA argued that the Union's request for arbitration must be dismissed because it alleged a violation of an expired contract which was not preserved in status quo. The Board deemed the contract in status quo even though no bargaining notice was filed within the period prescribed by the NYCCBL, and found that the Union established a reasonable relationship between the employee's termination and the cited contractual provision. Therefore, the petition was denied and arbitration granted.
(*Official decision follows.*)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration

-between-

NEW YORK CITY HOUSING AUTHORITY,

Petitioner,

-and-

ORGANIZATION OF STAFF ANALYSTS,

Respondent.

DECISION AND ORDER

On October 31, 2005, the New York City Housing Authority ("NYCHA" or "Authority") filed a petition challenging the arbitrability of a grievance brought by Organization of Staff Analysts ("OSA" or "Union") on behalf of Yocelyn Tarazona-Cornelio ("Grievant"). The request for arbitration alleges that Grievant, a provisional employee with more than two years of employment, was terminated in violation of the parties' collective bargaining agreement ("Agreement"). The

Authority argues that the request for arbitration should be dismissed for failure to state a claim because it alleges a violation of an expired contract which was not preserved in status quo. OSA contends that it could not file a notice to bargain before the Agreement expired because the parties signed the contract almost two years after the Agreement had already expired. The Board holds that it would be inequitable to find that the Agreement was not in status quo because under the unique circumstances of this case it was impossible for the Union to file a bargaining notice before the Agreement expired, the Union did ultimately file a notice to bargain, and the parties were in negotiations for a successor agreement before the instant request for arbitration was filed. The Board also finds that since the Union has established a reasonable relationship between Grievant's termination and Paragraph 7 of the Agreement, this case should be sent to arbitration.

BACKGROUND

Bargaining History

OSA and NYCHA were parties to a collective bargaining agreement dated July 1, 1988, through December 31, 1991.[1] The Union did not file a bargaining notice pursuant to NYCCBL § 12-311(a), between 90 and 150 days prior to the expiration of the Agreement.[2] The Agreement was

[1] NYCHA is not a signatory to the Citywide Agreement negotiated between the City of New York and District Council 37.

[2] NYCCBL § 12-311(a)(1) provides, in pertinent part:
At such time prior to the expiration of a collective bargaining agreement as may be specified therein (or, if no such time is specified, at least ninety but not more than one hundred and fifty days prior to expiration of the agreement) a public employer, or a certified or designated employee organization, which desires to negotiate on matters within the scope of bargaining shall send the other party (with a copy to the director) a notice of the desire to negotiate a new collective bargaining agreement on

signed on October 27, 1993, almost two years after it expired. Following the execution of the Agreement, the parties did not immediately commence negotiations for a successor contract; however, NYCHA continued to pay salaries, make welfare fund contributions, and process grievances.

On December 15, 2004, the Union wrote to NYCHA requesting to commence negotiations for a successor contract. On May 16, 2005, the parties held their first collective bargaining session during which the Union presented its demands and NYCHA asked questions and made preliminary comments. NYCHA's Deputy Director of Labor Relations and Classification in the Human Resources Department, who was present at the session, stated in an affidavit that the issue whether the Agreement should be preserved in status quo was a subject that the parties agreed to discuss at a later time.[3]

On November 3, 2005, the parties met for their second bargaining session. According to the Union, NYCHA's representatives, contrary to the Union's negotiators, took the position that the contract was no longer in status quo. The parties agreed to have another session in December 2005.

Grievant History

According to NYCHA, Grievant began working for the Authority in February 1994 as

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such matters. . . .

[3]NYCCBL § 12-311(d) states, in pertinent part:
During the period of negotiations between a public employer and a public employee organization concerning a collective bargaining agreement, . . . the public employer shall refrain from unilateral changes in wages, hours, or working conditions. . . . For the purpose of this subdivision the term "period of negotiations" shall mean the period commencing on the date on which a bargaining notice is filed and ending on the date on which a collective bargaining agreement is concluded or an impasse panel is appointed.

Secretary to the Chairperson in the Executive Department. In 1999, Grievant was appointed to the title Principal Administrative Associate, and was transferred to the NYCHA Law Department. On August 11, 2002, Grievant was appointed to the title Administrative Staff Analyst, Level I, and was assigned to the position Office Manager in the Law Department.[4]

According to NYCHA, on November 12, 2004, Grievant was transferred to the Law Department's Real Estate and Contracts Division to serve in the position Staff Support Coordinator. Grievant's direct supervisor was David Morris, Assistant General Counsel for Real Estate and Development, who reported to John de Clef Pineiro, the Deputy General Counsel for that division. NYCHA claims that on the day Grievant was transferred, Pineiro told Grievant that one of the reasons she was transferred was because she had violated NYCHA's telecommunication policy by accumulating approximately 35.3 hours of telephone use for September 2004 alone and that most of the calls were not related to NYCHA business. Pineiro advised Grievant that she would not be disciplined but warned her that any further telephone misuse would result in a disciplinary "counseling memo" and could even lead to Grievant's termination.

According to NYCHA, between December 2004 and March 2005, Grievant continued to engage in excessive telephone use of about 30 hours for each month and not related to NYCHA

[4] As of January 2001, the title, Administrative Staff Analyst, Level I, was accreted into OSA's bargaining unit, Cert. No. 3-88, "subject to existing contracts." *See Organization of Staff Analysts,* Decision No. 1-2001 at 4. The decision incorporated a stipulation negotiated by the City, NYCHA, and the Union. The Stipulation states that: "Upon certification of the Union as the collective bargaining agent of the employees . . . , the City of New York shall enter into a Supplemental Agreement to the Staff Analysts 1995-2000 Agreement. . . . The New York City Housing Authority shall be bound by the terms of the Supplemental Agreement to the extent provided in the election letter, dated July 3, 1968, extending application of the New York City Collective Bargaining Law to the New York City Housing Authority and its employees." *Id.* at 2-3.

business, failed to perform her work in a satisfactory manner, repeatedly reported to work late, and failed to have sufficient accrued leave time for her leave requests. On May 17, 2005, Grievant met with her supervisors to discuss her behavior. Grievant stated that she had been using the telephone on behalf of another organization. Pineiro discovered that Grievant was the Executive Director of a non-profit organization, "Don Juan Community Foundation, Inc." On May 19, 2005, Pineiro submitted a memo to the Office of the Inspector General reporting his finding and his suspicion that Grievant may have had a conflict of interest when she used telephone and e-mail on behalf of the non-profit organization. On May 23, 2005, Morris recommended to Pineiro that Grievant be terminated for her telephone misuse and other misconduct. NYCHA terminated Grievant's employment on that day.[5]

On July 18, 2005, the Union, on Grievant's behalf, filed a grievance at Step II alleging: "There has been a violation of Citywide Contract, Article XVI in that grievant with unbroken service of a provisional nature of more than 2 years was terminated without due process." The remedy sought was for Grievant to be restored to her position with back pay. On August 2, 2005, the Union filed a grievance at Step III.

On September 19, 2005, NYCHA responded to both grievances. The letter states:

> Please be advised that it is impossible to accurately respond to the requests because you have failed to articulate a grievable matter. First, you have failed to identify the source of right for Ms. Tarazona-Cornelio to grieve. The forms submitted by [the Union] claim that the Authority violated the Citywide Contract, Article XVI. The

[5] According to NYCHA, after her termination, Grievant applied to the New York State Department of Labor ("Labor") for unemployment benefits, and when Labor disqualified her from receiving such benefits, she appealed. The Unemployment Insurance Appeal Board sustained the decision. NYCHA notes that at her administrative hearing, Grievant acknowledged that she had used her NYCHA telephone for calls unrelated to NYCHA business.

> Authority is not a signatory to that agreement, and it confers no rights upon Ms. Tarazona-Cornelio. Even if the Citywide Contract applied to the Authority, which it does not, these appeal claims would have to be dismissed as premature because you failed to present a grievance at the Step 1 level. On the forms you wrote "omitted" next to the Step 1 box. A Step 1 would not be at the option of a grievant and could not be bypassed. Second, you have failed to identify what rule, regulation or contract provision the Authority purportedly violated when it terminated Ms. Tarazona-Cornelio's services. Such omission puts the Authority in the unenviable position of speculating what provision it may or may not have violated. The Authority will not participate in such an exercise.

On September 21, 2005, the Union sent a letter to Morris stating that Grievant was terminated without being accorded disciplinary rights in violation of ¶ 7(b) of the Agreement and that the letter should be considered as a Step I grievance. On September 23, 2005, NYCHA denied the grievance for the following reasons:

> The collective bargaining agreement cited in the grievance expired almost 14 years ago, on December 31, 1991. The Union had not demanded bargaining at that time, causing the contract to expire rather than continue in status quo. Even if the collective bargaining agreement was valid, the agreement applied only to those titles listed in its "Attachment A."[6] The agreement does not list the title held by Ms. Tarazona-Cornelio, Administrative Staff Analyst. As you know, this title was not represented by the Union during the period of the expired collective bargaining agreement and no agreement has been negotiated by the Union with the Housing Authority to grant disciplinary or any other rights to provisional employees in this title. Even if Ms. Tarazona-Cornelio had rights under the expired agreement, the relief she seeks is not available under the terms of the expired agreement. The expired agreement merely entitles certain provisional employees to the due process provision of Civil Service Law Section 75. Finally, if this agreement were valid, it would have required that the grievance be filed "not later than 90 days after the grievance arose." Because it was filed well beyond the permissible 90 days, this grievance would be time barred.

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[6] Attachment A of the Agreement provides:
Titles Covered Under the Agreement
Associate Staff Analyst
Staff Analyst
Staff Analyst Trainee
Training Development Specialist

On October 3, 2005, the Union filed a request for arbitration of the following grievance: "Whether Grievant, a provisional with more than two years of unbroken service, was terminated without due process." The Union alleged that NYCHA violated ¶ 7(a) and ¶ 7(b) of its Agreement, and attached the grievance filed on July 18, 2005.[7] The remedy sought by the Union is for Grievant to be restored to her position with back pay.

POSITIONS OF THE PARTIES

NYCHA's Position

NYCHA argues that the request for arbitration must be dismissed for failure to state a claim because it alleges a violation of an expired contract. The Union did not file a notice of bargaining as required by NYCCBL § 12-311 at least 90 days but not more than 150 days prior to the expiration of the Agreement, thereby precluding the preservation of the Agreement in status quo. As to the Union's claim that it was not required to file a notice before the expiration of the Agreement because it was not signed until October 27, 1993, NYCHA notes that the Union filed a notice to bargain over 11 years after the Agreement was signed, and the instant request for arbitration was filed almost 14 years after the Agreement expired. Thus, it would be unreasonable to allow the Union to file a notice to bargain such a long period of time after the Agreement has expired, and the Board should find that

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[7] Paragraph 7 of the parties' Agreement provides, in relevant part:
DISCIPLINARY PROCEDURES
(a) All Authority disciplinary procedures, which include the Local Hearing process and the General Trial Hearing process, shall be in full force and effect, except as herein set forth.(b) A full-time provisional employee who has been in continuous Authority service for a period not less than two (2) years, shall be accorded the same disciplinary rights afforded permanent, competitive employees.

the Agreement was not preserved in status quo.

NYCHA asserts that it processed grievances after the expiration of the Agreement because the Board requires management to continue to process grievances under an expired collective bargaining agreement, but the processing of grievances does not preclude management from challenging the arbitrability of a grievance. Furthermore, unlike the right to arbitrate a grievance, which is wholly contractual, the right to grieve is afforded to employees through statutory as well as administrative procedures, requiring management to process grievances despite the Agreement's expiration.

NYCHA contends that even if the Agreement had been preserved in status quo, the Agreement was not applicable to Grievant's title, and when it became the representative of the title, the Union took no actions to have the title covered by the Agreement. Therefore, the Agreement cannot be relied upon as a source of Grievant's right to grieve.

NYCHA also argues that the first grievance filed by the Union and attached to its request for arbitration does not give rise to an arbitrable matter because it relies on the Citywide Agreement to which NYCHA is not a signatory.

Union's Position

The Union argues that NYCHA was required to maintain the Agreement in status quo especially because the parties were negotiating in May 2005, when Grievant was terminated. Thus, NYCHA was required to provide Grievant, a full-time provisional employee with more than two years of service, with the same disciplinary rights as permanent employees have under ¶ 7(b) of the Agreement.

The Union contends that the title Administrative Staff Analyst, Level I, was covered under existing contracts from the date that it was included in the Union's bargaining certificate. Moreover, NYCHA recognized that it was a covered title because it participated in the agreement which gave the Union representation rights over the title and because it applied sections of the contract to that title, such as welfare fund contributions, dues checkoff, and grievance processing. NYCHA cannot pick and choose which provisions of the contract will apply to a represented title.

In addition, the Union asserts that it is customary for a "working conditions" contract to continue for significant periods of time beyond its purported expiration date whether or not a bargaining notice has been filed.[8] Indeed, the Union claims that until September 2005, the parties operated under the assumption that the provisions of the Agreement were in status quo. The Union cites to several grievances filed and processed and to disciplinary proceedings conducted in accordance with the Agreement after it had expired.

The Union argues that it was not required to file a bargaining notice under the NYCCBL and that it could not have filed prior to December 31, 1991, because the Agreement was not signed until October 27, 1993.

The Union claims that NYCHA relies on a technical error the Union made in its original grievance. The Union mistakenly cited to the Citywide contract instead of the Agreement regarding the provision for due process hearing rights for provisional employees with at least two years of service. The request for arbitration should not be dismissed based on that error.

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[8] The Union asserts that the 1988-1991 contract is a "working conditions" contract because the economic or fiscal provisions are contained in OSA's unit contract and the Citywide contract. According to the Union, these contracts apply to unit members employed by NYCHA because NYCHA elected to be covered by such agreements for non-unique titles.

DISCUSSION

In this case, the Union seeks arbitration on the question whether NYCHA violated the parties' Agreement when it terminated Grievant, a provisional employee with more than two years of employment, without contractual due process. This Board finds that the Agreement was in status quo and that the Union has established a reasonable relationship between Grievant's termination and ¶ 7 of the Agreement.

Under the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter3) ("NYCCBL") § 12-302, the policy of New York City is to favor and encourage arbitration to resolve grievances. Doubtful issues of arbitrability are resolved in favor of arbitration. *Civil Service Bar Ass'n,* Decision No. B-5-2005 at 7. To determine arbitrability, this Board decides first whether the parties are contractually obligated to arbitrate a controversy, absent court-enunciated public policy, statutory or constitutional restrictions, and, if so, whether "the obligation is broad enough in its scope to include the particular controversy presented," *Social Service Employment Union,* Decision No. B-2-69; *see also District Council 37, AFSCME,* Decision No. B-47-99, or, in other words, "whether there is a reasonable relationship between the subject matter of the dispute and the general subject matter" of the agreement. *New York State Nurses Ass'n,* Decision No. B-21-2002 at 8.

Here, the first prong of the test has been met. There is no dispute that the parties' Agreement provides for grievance and arbitration procedures and there is no claim that arbitration would violate public policy or that it is restricted by statute. Thus, the issue is whether a reasonable relationship exists between Grievant's termination and ¶ 7 of the Agreement.

Paragraph 6(a) of the parties' Agreement defines grievance to mean:

> (i) A dispute concerning the application and interpretation of the terms of written collective bargaining agreements and written rules and regulations.
> (ii) A claimed violation, misinterpretation or misapplication of the rules and regulations of the Authority affecting the terms and conditions of employment.

First, we address the issue whether the Agreement was preserved in status quo after it expired. The status quo provision of § 12-311(d) of the NYCCBL states, in pertinent part:

> During the period of negotiations between a public employer and a public employee organization concerning a collective bargaining agreement . . . , the public employer shall refrain from unilateral changes in wages, hours, or working conditions. . . . For the purpose of this subdivision the term "period of negotiations" shall mean the period commencing on the date on which a bargaining notice is filed and ending on the date on which a collective bargaining agreement is concluded or an impasse panel is appointed.

The statutory purpose of this provision, in accordance with the policy of the NYCCBL to encourage collective bargaining, "is to preserve the balance between the parties during their negotiations by preventing unilateral changes by either party." *Patrolmen's Benevolent Ass'n,* Decision No. B-9-77 at 16; *see also District Council 37,* Decision No. B-14-77 at 8-9.

The procedures for submitting a request for commencement of negotiations, a "bargaining notice," are prescribed in NYCCBL § 12-311(a)(1), which provides:

> At such time prior to the expiration of a collective bargaining agreement as may be specified therein (or, if no such time is specified, at least ninety but not more than one hundred fifty days prior to expiration of the agreement) a public employer, or a certified or designated employee organization, which desires to negotiate on matters within the scope of bargaining shall send the other party (with a copy to the director) a notice of the desire to negotiate a new collective bargaining agreement on such matters. . . .

See also Section 1-03(b) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1). This Board has held that a request for the commencement of

negotiations for a successor labor agreement is a condition precedent to the invocation of the status quo provision of the law. *District Council 37,* Decision No. B-14-77 at 8. In that case, the Union filed a request for arbitration six years after the parties' collective bargaining agreement had expired. The Board found that there was no evidence that a bargaining notice had been filed or that the Union had ever attempted to negotiate a contract. On the basis of that record, the Board held that the Union was not "entitled to the protection that the preservation of the status quo . . . affords," and it denied the request for arbitration. *Id.* at 9.

In *District Council 37*, the union had an opportunity to comply with the statutory window period but failed to act. In contrast, here, the Union had no window of time in which to file a bargaining notice before the Agreement expired. The parties' Agreement was for the period July 1, 1988, through December 31, 1991, but was not executed until October 27, 1993 – almost two years *after* its expiration date. Therefore, it was impossible for the Union to file a bargaining notice because no window period existed. Further distinguishing *District Council 37,* the Union in this case did submit a request to bargain, and the parties had in fact commenced and were continuing negotiations for a successor contract at the time the Union's grievance was filed.

Instructive to our discussion is a representation case, *Emergency Medical Benevolent Ass'n,* Decision No. 7-90. There, three unions representing a single jointly-certified bargaining unit, and initially parties to one contract, had negotiated separate contract extensions with differing expiration dates so that there existed no "window period" under the contract bar rule that would simultaneously be applicable to all three unions' contracts.[9] The Board of Certification held that this circumstance

[9] Section 1-02(g) of the OCB Rules provides:
A valid contract between a public employer and a public employee organization will

would not be permitted to frustrate the right of the petitioner to file a petition challenging the representation of certain unit titles. A filing that was within the window period applicable to any of the contracts was deemed timely as to all three contracts. *Id.* at 5-7.

Courts in New York have consistently held that the words of a statute will not be applied blindly to arrive at an unreasonable or absurd result. *People v. Corines,* 3 N.Y.3d 234 (2004)*; Williams v. Williams*, 23 N.Y.2d 592, 599 (1969). In *Wilson v. Board of Education*, 39 A.D.2d 965, 967 (2nd Dep't 1972), the court found that "the literal meaning of a statute must give way where necessary to give effect to the intention of the Legislature or where a result is produced which the Legislature plainly did not intend." *Id.* at 967; *see also Statewide Roofing v. Eastern Suffolk Bd. of Coop. Educ. Serv.,* 173 Misc. 2d 514, 518 (Sup. Ct. N.Y. Co. 1997) ("words of a statute . . . may be subjected to exceptions through implication."). A statute shall not be literally interpreted or applied when circumstances make it impossible to comply with its terms. *Wilson,* 39 A.D.2d at 966-967. This doctrine has been applied to grant relief from time limitations for the imposition of penalties under N.Y. Civil Service Law Article 14, § 210, when the court found that it was impossible for the public employer to have complied with the terms of the statute. *Id*.; *see also Statewide Roofing,*

> bar the processing of any petition filed outside of the window periods described below. The time period for filing a petition for certification, designation, decertification or revocation of designation pursuant to § 1-02(c),(d),or (e) of these rules shall be: for a contract of no more than three years' duration, a petition can be filled not less than 150 or more than 180 calendar days before the contract's expiration date, or not less than 150 or more than 180 calendar days before the end of the third year of that contract. No petition for certification, decertification or investigation of a question or controversy concerning representation may be filed after the expiration of a contract. . . . Moreover, if the Board finds that unusual or extraordinary circumstances exist, . . . the Board may process a petition otherwise barred by this rule.

supra (granting relief from the statutory time frame where legislative intent would be subverted by literal application).

In the present case, we will not permit the Union's right to file a request for negotiations, and thereby to invoke the status quo protections of the NYCCBL, to be frustrated by the fact that the 1988-1991 Agreement expired before it was executed, because under these circumstances, it was impossible for the Union to file a bargaining notice within the time period required by the NYCCBL. There is no evidence that NYCHA ever disavowed the Agreement or disputed the Union's representational status prior to the time the Union, on December 15, 2004, requested bargaining for a successor contract. The parties did commence negotiations on May 16, 2005. Thereafter, on July 18, 2005, the grievance in this matter was filed. Under these unique circumstances, we find that when the grievance was filed, the status quo provision of the NYCCBL was applicable, and, therefore, the terms of the parties' Agreement, including the grievance and arbitration provisions, remained in effect.

We now turn to NYCHA's claim that the Union's 11 year delay in filing a notice to bargain should preclude the granting of its request for arbitration. Although NYCHA did not characterize its claim as an affirmative defense of laches, this Board will discuss the applicability of that defense because it most nearly comports with the nature of NYCHA's objection.

In *Saratoga County Chamber of Commerce, Inc. v. Pataki,* 100 N.Y.2d 801, 816 (2003), the New York Court of Appeals determined that "the mere lapse of time, without a showing of prejudice, will not sustain a defense of laches." (finding the laches defense unavailing because there was no indication that the six year delay caused any harm in defendant's ability to defend against a suit or its economic interests). A party asserting laches must show that it had changed its position

in the time period in question, or establish other harm to its ability to defend against a suit, such as the loss of records or unavailability of witnesses. *Transport Workers Union of America, Local 100, v. New York City Transit Authority,* 341 F. Supp. 2d 432, 452-3 (S.D.N.Y. 2004).

The Board's treatment of laches is consistent with that in New York courts. We have stated in prior cases that the submission of an otherwise arbitrable claim may be barred by laches if the following elements are established by the party claiming a bar: (1) the claimant was guilty of significant delay after obtaining knowledge of the claim; (2) such delay was unexplained and/or inexcusable; and (3) the delay caused injury and/or prejudice to the defendant's ability to present a defense against the claim. *Civil Service Bar Ass'n,* Decision No. B-43-2001 at 6; *Social Service Employees Union,* Decision No. B-33-96 at 9-10; *Transport Workers Union of America,* 341 F. Supp. 2d at 452-3 (enunciating same standard for a party to prevail on a defense of laches).

In *District Council 37, Local 1549,* Decision No. B-43-87, the union filed a grievance in 1985 seeking retroactive payment from 1981 for duties the grievants performed. The employer argued that the delay prejudiced its ability to prepare a defense because it was "unreasonable to assume" that it could locate witnesses and that it was "inequitable" to require production of documentary evidence extending back five years. The Board found the defense of laches inapplicable because the delay in filing the grievance was not unreasonable and because the public employer failed to establish prejudice. Similarly, in *Civil Service Bar Ass'n,* Decision No. B-43-2001, the Board found the two year delay in filing a second grievance under the parties' economic agreement after the union had previously submitted a claim was not unreasonable because the public employer was on notice that the first grievance included the economic claim, and because the public employer failed to establish prejudice, including increased potential liability.

In the present case, we find inapplicable the defense of laches. The parties do not dispute that the grievance was timely filed under the provisions of the Agreement were the Agreement in effect; rather, the parties dispute whether the Agreement was maintained in status quo and whether the grievance can proceed to arbitration. Even though the Union inexplicably delayed in filing a request to bargain, NYCHA has not alleged that it changed its position because of that delay or that it has suffered any prejudice in its ability to defend itself or that any potential liability has increased on account of the Union's delay. To the contrary, the record shows only that the Union requested bargaining in December 2004, bargaining commenced on May 16, 2005, Grievant was terminated on May 23, 2005, and the Union filed the instant grievance on July 18, 2005. On this record, we find no evidence of prejudice to NYCHA as a result of the delay. Therefore, while we do not condone the Union's 11 year delay in seeking bargaining, we are constrained to find that the defense of laches, even if it had been asserted, would be unavailing. *See Saratoga,* 100 N.Y.2d at 816.

The basis of the Union's grievance is that NYCHA's termination of Grievant without contractual due process may have violated ¶ 7 of the Agreement, which provides disciplinary rights to, among others, full-time provisional employees with over two years of Authority service. The parties do not dispute that Grievant was a provisional employee with over two years of service. Thus, we find that the Union has established a reasonable relationship between Grievant's termination and ¶ 7 of the Agreement. We make no judgment on the merits of the issues whether NYCHA's termination violated ¶ 7 of the Agreement or whether Grievant had rights under the Agreement, issues which involve contract interpretation and are properly before an arbitrator.

Accordingly, this Board denies the petition challenging arbitrability and sends this grievance to arbitration.

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 petition challenging arbitrability in Docket No. BCB-2510-05 filed by the City of New York be, and the same hereby is, denied; and it is further

ORDERED, that the request for arbitration filed by the Organization of Staff Analysts, docketed as A-11463-05, be, and the same hereby is, granted.

Dated: May 30, 2006
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

CHARLES G. MOERDLER
MEMBER

I dissent. M. DAVID ZURNDORFER
MEMBER

I dissent. ERNEST F. HART
MEMBER

DISSENTING OPINION OF
CITY MEMBERS ZURNDORFER AND HART

We dissent. The Board's decision in this case, which requires the New York City Housing Authority to comply with the terms of a collective bargaining agreement that expired in 1991, is contrary to Board precedent and defies common sense.

In *District Council 37,* Decision No. B-14-77, the Board addressed the issue of whether the City had a status quo obligation when six years had passed since the contract's expiration and the union had hade no attempt to bargain a new contract. The Board, in a unanimous decision, ruled that it did not. The Board's opinion concluded as follows:

> A union cannot stand pat for six years on an expired collective bargaining contract and expect the terms thereof to be binding on the City in perpetuity. A labor contract is a 'living' document only if it is attended to and revised on a regular basis. If a union wants the protection which a valid contract provides, it must see to it that the contract remains current and ongoing. (pp. 12-13)

There are only two significant differences between this case and the *District Council 37* case. The first is that in this case, the union "stood pat" for eleven years rather than six. The other is that in this case it was not possible for the union to file a timely bargaining notice before the contract expired in December 1991 because the contract was not executed until October 1993. There is no suggestion that the union's inability to do so in 1991 was in any way responsible for its waiting until December 15, 2004 to file such a notice and commence negotiations on a new contract. Thus, it is inescapable that if the union could have filed a timely

notice in 1993 (when it executed the agreement), it would not have done so in 1993 or at any other time during the subsequent eleven years.

In sum, the majority's decision obligating the employer to reinstate the terms of a contract that expired thirteen years before rests entirely on the happenstance that it would have been impossible for the union to file a timely notice in 1991. The majority opinion states that "courts in New York have consistently held that the words of a statute will not be applied blindly to arrive at an unreasonable or absurd result." (P. 13). Yet in this case, the majority does precisely that – it applies the statute blindly to arrive at a result that is truly absurd.

Finally, the majority attempts to distinguish the *District Council 37* decision on the ground that when the grievance at issue in this case was filed, the union had commenced negotiation of an agreement to succeed the one that expired thirteen years before. But surely the mere commencement of negotiations in December 2004 cannot be the basis for obligating an employer to restore the status quo as it existed when the previous contract expired in December 1991. If the union's request to bargain in December 2004 gave rise to any status quo obligation, it was to thereafter maintain the status quo that existed at the time of its request – *viz.* in December 2004.

Accordingly, we would grant the petition challenging arbitrability and deny the union's request for arbitration.

Dated: June 8, 2006
New York, New York

M. DAVID ZURNDORFER
MEMBER

ERNEST F. HART
MEMBER