Communications Workers of America, Local 1182, 77 OCB 31 (BCB 2006)

[Decision No. B-31-2006] (Arb) (Docket No. BCB-2564-06) (A-11901-06)

Summary of Decision: City challenged the arbitrability of a grievance alleging that City terminated an employee of over twenty years' service in violation of the parties' collective bargaining agreement. The City argued that the Union's request for arbitration must be dismissed because the Union failed to follow the grievance procedure established in the agreement by filing its request for arbitration ten months after the expiration of the time provided for filing, and that the Union was guilty of laches. Because the City has failed to establish that the lapse in time between the prescribed time to file a request for arbitration from the adverse decision and actual filing of the request in any cognizable manner prejudiced the City, the City has not established laches. The question of compliance with contractual provisions setting forth procedural requirements, including time-sensitive deadlines, is one for the arbitrator. The City has not contested, and 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-

THE CITY OF NEW YORK and the NEW YORK CITY POLICE DEPARTMENT,

Petitioners,

-and-

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO Local 1182,

Respondent.

DECISION AND ORDER

On August 4, 2006, the City of New York ("City") and the New York City Police Department ("NYPD") filed a petition challenging the arbitrability of a grievance brought by Communications

Workers of America, AFL-CIO, Local 1182 ("CWA" or "Union") on behalf of Troy Roper, ("Roper" or "Grievant"). The request for arbitration alleges that Grievant, an employee of over twenty years' experience, was terminated in violation of the parties' collective bargaining agreement. The City argues that the request for arbitration should be dismissed for failure to state a claim based upon the Union's failure to follow the grievance procedure as established in Article VI §§ 2 and 5 of the collective bargaining agreement, by not filing the request for arbitration in a timely manner. Acknowledging that ordinarily such questions of timeliness are for the arbitrator to decide, the City here argues that the this Board "has employed the doctrine of laches in cases where unions belatedly prosecuted claims," and should do so here. The Board holds that the City has failed to establish that it has suffered any prejudice resulting from the delay and that the equitable doctrine of laches does not apply. As the City concedes, the Union's allegations establish a reasonable relationship between Grievant's termination and the collective bargaining agreement, and thus this case should be arbitrated. Accordingly, the petition is denied, and the request for arbitration is granted.

BACKGROUND

The operative facts in this matter are not contested; only their legal significance is at issue.

The City of New York and the Union were parties, at the applicable time period, to a collective bargaining agreement dated July 20, 2004 for the period July 1, 2002 through June30, 2005 (the "Agreement"), the terms of which remain currently in force pursuant to the *status quo* provisions of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL").

Pursuant to Article VI of the Agreement, which both the City and the Union attach to their

pleadings (Petition Exhibit 2; Answer Exhibit A), an employee may grieve a "claimed wrongful disciplinary action taken against a permanent employee covered by Section 75(1) of the Civil Service Law . . . upon whom the agency head has served written charges of incompetence or misconduct while the employee is serving in the employee's permanent title or which affects the employee's permanent status." (Agreement, Art. VI §1(e).) The Agreement lays out the familiar three-step grievance process of internal review by the NYPD ("Step I"), appeal of such review within the NYPD ("Step II"), and an appeal to the Commissioner of Labor Relations ("Step III"). Each of these steps contains prescribed time frames in which the Union must file a written grievance, and in which the employer must render a written decision. (Agreement, Art. VI § 2 at 16-17.)[1]

In the event that the "grievant is not satisfied with the determination of the Commissioner of Labor Relations, the union with the consent of the grievant may proceed to arbitration pursuant to the procedures set forth in STEP IV of the Grievance Procedure set forth in this Agreement." (Agreement, Art. VI § 5 at 19.) Pursuant to Article VI § 2, an "appeal from an unsatisfactory determination at STEP III may be brought solely by the Union to the Office of Collective Bargaining within fifteen (15) work days of receipt of the STEP III determination." (*Id.* at 17.) Pursuant to the Agreement, as a condition to the right of the Union to invoke impartial arbitration, "the Union shall be required to file with the Director of the Office of Collective Bargaining a written waiver of the right, if any, of the Employee and the Union to submit the underlying dispute to any other

[1]Neither the City nor the Union asserts any non-compliance, default or other procedural irregularity at Steps I and II that bears upon the arbitrability of the instant dispute, and therefore the specific time frames and procedures of the Agreement with respect to permanent employees who have received written charges of incompetence and/or misconduct as they impact those steps are not germane to the issues presented herein. Such procedures are set forth in Art. VI § 5 of the Agreement.

administrative or judicial tribunal except for the purpose of enforcing the arbitrator's award." (Art. VI § 3.) However, each "of the steps in the Grievance Procedure, as well as time limits prescribed at each step of this Grievance procedure, may be waived by mutual agreement of the parties." (Art. VI § 11.)

The petition alleges, and the Union agrees, that Grievant Troy Roper was employed by the City as a Traffic Enforcement Agent ("TEA") from 1984 through his receipt of a letter dated March 21, 2005 (the "March 21 Letter"), which purported to terminate his employment effective that day. A series of disciplinary charges had been served on Grievant prior to the March 21 Letter, and those allegations had been the subject of Step II Hearings on August 12, 2004 and March 1, 2005. By letter dated March 23, 2005, the Union requested a Step III hearing regarding the charges underlying the instant grievance. A Step III hearing was duly held on June 29, 2005 at the New York City Office of Labor Relations. On July 8, 2005, OLR issued a Step III determination upholding Grievant's termination.[2]

The Union's Request for Arbitration was filed on June 8, 2006. The requisite waiver of rights under Section 75 of the Civil Service Law, however, was not filed until July 25, 2006.

POSITIONS OF THE PARTIES

City's Position

The City acknowledges in its petition that the Board has held that compliance with each of the procedural steps necessary to invoke the right to impartial arbitration, including timeliness, is

[2]The Union, based upon dates alleged in the petition, and admitted in the answer, notes that the Step III decision was issued nearly three (3) months after the contractual time frame required. (Union Memorandum of Law at 3.)

"ordinarily for the arbitrator." (Petition ¶ 17.) It argues that the Board has also "employed the doctrine of laches in an equitable defense, not a contractual one, which arises from the recognition that the belated prosecution of a claim imposes upon the defense an additional, extraneous doctrine." (*Id.*) From this, the City argues that the Board has distinguished between "intrinsic delays," which it defines as "the failure to follow contractual limitations," and "extrinsic delays" which it defines as occurring "when a union's lack of diligently following procedures places an undue burden on the City." (Petition ¶ 18.)

The City contends that the Board should find an undue burden on the City, and thus apply the doctrine of laches and deny arbitration, for two reasons. First, the City claims that "some of the witnesses the City intends to rely on are members of the public," and that the Union's delay "makes it far less likely that these witnesses can be located and essentially frustrates that arbitration process." (Petition at ¶19.) The City's second ground for asserting an undue burden is that "Because the Grievant did not file a Request for Arbitration within fifteen working days or a reasonable time thereafter, the City deemed the termination final. The City did not secure witnesses, nor did it seek to secure documents." (Petition ¶ 20.)

Union's Position

The Union asserts that the City itself has failed to comply with the time frames set forth in the Agreement in processing the very grievance at issue. According to the Union, the contractual time frames set forth in the Agreement required the rendering of a Step III decision by the Commissioner of Labor Relations on or about April 14, 2005, but that the Decision did not issue until July 8, 2005. Thus, the Union claims, the City should not be "permitted to ease out of its obligation to arbitrate a grievance by" claiming rigid adherence to the time frames it failed to comply

with itself." (Union Memorandum of law at 2.)

Additionally, the Union asserts, the City cannot establish, as it must to prove the defense of laches, that the Union's delay has prejudiced the City's position. The Union notes that the prejudice claimed by the City is couched in conclusory and speculative terms–an alleged complaint that witnesses are less likely to be found, not an allegation that attempts to find such witnesses have failed, and a statement that the City has not "secure[d] documents" relating to the Grievant in a Petition that annexes such documents concerning the Grievant dating back to 2001. (Union Memorandum of Law at 5.) The Union argues that the NYPD would have secured information regarding the witnesses and documents dating back several years through the grievance process, and that record-keeping is "intrinsic to its mission." (*Id.*) Thus, the Union argues, it "defies belief" that the NYPD would have disposed of the records so soon after the Step III decision. (*Id.*)

DISCUSSION

As a general matter, in deciding if a claim is subject to arbitration, this Board determines first whether the parties have entered into a legally enforceable agreement to arbitrate, and, if so, whether "the obligation is broad enough in its scope to include the particular controversy presented." *Organization of Staff Analysts*, Decision No. B-19-2006 at 10 (*quoting Social Service Employment Union,* Decision No. B-2-69); *see also District Council 37, AFSCME,* Decision No. B-47-99. This standard requires us to decide "whether there is a reasonable relationship between the subject matter of the dispute and the general subject matter"of the agreement. *Id.; quoting New York State Nurses Ass'n,* Decision No. B-21-2002 at 8. In this case, however, the City has not disputed the Union's claims that the Grievant's termination bears a reasonable relationship to the Agreement's provisions,

and that, but for the alleged delay, the request for arbitration would otherwise be proper. Therefore, the application of the doctrine of laches to the delay at issue in this case is the only question properly before this Board. Because the City has failed to allege facts that, if proven, would establish the elements of the equitable defense of laches, the Board finds that defense inapplicable. Accordingly, the petition is dismissed, and the matter referred to arbitration.

As is made explicit by § 12-302 of the NYCCBL, the policy underlying the NYCCBL is to favor and encourage arbitration to resolve grievances. *Organization of Staff Analysts*, Decision B-19-2006 at 10. Thus, the presumption is that disputes are arbitrable, and that “doubtful issues of arbitrability are resolved in favor of arbitration.” *Id.* (*citing Civil Service Bar Ass’n,* Decision No. B-5-2005 at 7). As this Board’s prior holdings make clear, questions of compliance with procedural requirements, including the time limits of the procedural steps of the contract, require construction of the agreement at issue, and are therefore a matter left to the arbitrator. *Civil Service Bar Ass’n*, Decision No. B-43-2001 at 6; *Social Service Employees Union*, Decision No. B-6-68 at 2-3. Indeed, the City explicitly acknowledges that this Board “has held that questions of timeliness are ordinarily for the arbitrator,” and goes on to then assert that its predicate for the claim that this case is not arbitrable, 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 an additional, extraneous burden.” (Petition at ¶17 (*quoting Social Service Employees Union*, Decision No. B-6-75.))

This Board has recently characterized laches as an “affirmative defense”– that is, one which the proponent bears the burden of proving. *Organization of Staff Analysts*, Decision No. B-19-2006 at 14; *see also Hufnagel v. Martin*, 23 A.D.3d 186, 189-190 (1st Dep’t 2005) (“laches must be pleaded and proved by the party asserting it”). In this case, the City has signally failed to plead

operative facts which, if credited, would establish the elements of the equitable defense of laches.

It is well established that "the mere lapse of time, without a showing of prejudice, will not sustain a defense of laches." *Organization of Staff Analysts*, Decision No. B-19-2006, at 14, *quoting Saratoga County Chamber of Commerce, Inc. v. Pataki,* 100 N.Y.2d 801, 816 (2003)(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); *see also Hufnagel*, 23 A.D.3d at 189-190. A party asserting laches must make a concrete factual showing 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. *Organization of Staff Analysts*, Decision No. B-19-2006 at 14 (*citing 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)); *see also Hufnagel, supra; Skrodelis v. Norberg,* 272 A.D.2d 316, 317 (2nd Dep't 2000).

We have consistently held 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." *Organization of Staff Analysts*, Decision No. B-19-2006 at 14; *citing Civil Service Bar Ass'n,* Decision No. B-43-2001 at 6; *Social Service Employees Union,* Decision No. B-33-96 at 9-10; *see generally 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). Failure to establish actual, concrete prejudice has been deemed sufficient grounds, when standing alone, to deny the applicability of the doctrine of laches, even in the case of a lengthy, unexcused delay. *Id.*

In particular, defenses predicated on laches have been routinely rejected where the prejudice asserted has been, as here, a conditional claim that witnesses and documents "may" be more difficult to locate because of the delay caused by the Union's failure to punctually file. Thus, in *District Council 37, Local 1549,* Decision No. B-43-87 at 7-8, the employer argued that a four year delay between the grieved conduct and the filing of the grievance 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. Stating that "conclusory allegations of prejudice are insufficient to meet its burden," this Board found the defense of laches inapplicable because "it was incumbent upon [the employer] to offer specific factual allegations of any prejudice resulting from the Union's delay which rendered it unable to defend against these claims," *Id.* at 8.

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 did not support a finding of laches because "the City has not demonstrated that its ability to defend itself at arbitration has been prejudiced by such delay." *Id.* at 7. In particular, we based our decision that laches was inapplicable on the fact that the City had "not indicated that any particular witness is no longer available, nor has it indicated that any specific evidence [was] unavailable because of the lapse of time." *Id.*

Most recently, in *Organization of Staff Analysts*, we reaffirmed that in the absence of a demonstration that the employer had somehow changed its position to its detriment, or that its ability to defend the claim had in fact been impeded or impaired, the defense of laches had not been established. Decision No. B-19-2006 at 15 (delay of 11 years), *citing Saratoga*, 100 N.Y.2d at 816

(no laches despite delay of "nearly six years").

In the instant case, the City's sole allegations of prejudice are that "[t]he Union's delay in appealing the Step III determination makes it far less likely that these [members of the public] witnesses can be located" and that "[t]he City did not secure witnesses, nor did it seek to secure documents." (Petition at ¶¶ 19, 20.) As was the case in *District Council 37, Local 1549,* Decision No. B-43-87, and *Civil Service Bar Ass'n,* Decision No. B-43-2001, the City has asserted only conclusory and conditional grounds for the claim that it has been prejudiced by the approximately ten month delay at issue in this case.[3] No record evidence – affidavits, policies or other – has been proffered to substantiate the claim that any specific document or documents needed by the City at

---

[3]Although the parties agree on the dates of the salient events, the City calls the period between the issuance of the Step III decision on July 8, 2005 and the filing of the Request for Arbitration on June 8, 2006 a "year," a figure that also omits the fifteen work day period from receipt of the Step II decision in which the Union had to file the Request. (Petition ¶ 13.) Depending on when the decision was received, the period is closer to ten months. The City's apparent claim in the petition that the filing of the Request for Arbitration was not effective for laches purposes until the subsequent filing of the contractual waiver on July 25, 2006 (petition ¶¶ 13, 20 (the "Union waited a year [sic]...") conflates compliance with the procedures, an issue for the arbitrator, with providing effective notice to the City, all that is required to avoid a finding of laches. *Resolution Trust Corp. v. Two B Holdings, Inc.*, 4 Misc.3d 1030A, 798 N.Y.S.2d 348 (Sup. Ct. N.Y. Co. 2004). The City elsewhere appears to acknowledge that some "reasonable time thereafter" must lapse between the filing date and the applicability of a laches defense. (Petition at ¶ 20.) These time frame issues, and the City's own alleged delay at earlier stages in the grievance process are asserted by the Union as depriving the City of standing to assert laches.

Because we deny the petition based upon the failure of the City to plead or prove the prejudice element of laches, we do not reach the Union's contention that the City's own alleged failure to comply with the contractual time frames constitutes "unclean hands" and deprives it of the ability to assert the equitable defense of laches. *Compare, Karan v. Hoskins,* 22 A.D.3d 638, 639 (2nd Dep't 2005) (unclean hands constitutes bar to laches, *following Ta Chun Wang v. Chun Wong*, 162 A.D.2d 300 (2d Dep't 1990) (unclean hands strips party of right to equitable remedy)); *with Matter of Peters v. Sotheby's*, 2006 N.Y. App. Div. LEXIS 10693 (1st Dep't September 14, 2006) (unclean hands claim did not bar laches claim where no prejudice caused by inequitable conduct). Accordingly, the City's computation of the time at issue need not be addressed by us.

the arbitration has been lost or discarded. Nor has any evidence been tendered to suggest that witnesses, whether in the employ of the City or not, have in fact become more difficult to locate. We are presented, instead, with the sort of "common sense" allegations of prejudice deemed insufficient in *District Council 37, Local 1549,* Decision No. B-43-87 at 7, and by the judicial decisions defining laches. *Compare, Matter of Hubsher v. DeBuono*, 232 A.D.2d 764 (3d Dep't 1996), *app. den*., 89 N.Y.2d 810 (1997) (five year delay did not constitute laches where only "conclusory allegations" of prejudice; allegations did not identify evidence allegedly lost, or impact of "lost" witness) and *In re Application of Silverstein*, 271 A.D.2d 340 (1st Dep't 2000); with *Hufnagel,* 23 A.D.3d at 189-190 (specific allegations of documents which had been destroyed, and death of key witness, contributed to finding of laches).

Notably, the Union pointed out in its memorandum of law in support of its answer the lack of any concrete allegations supporting the allegations of prejudice, which gave the City an opportunity to submit further specifics in its reply. The City failed to do so, leaving this Board solely with the conclusory allegations in the Petition. These allegations are insufficient to establish prejudice, as required to find laches. Accordingly, we find that the City has failed to carry its burden of proving the applicability of the equitable defense of laches, and that the Petition should be dismissed, and the matter scheduled for 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-2564-06 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-11901-06, be, and the same hereby is, granted.

Dated: October 25, 2006
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

CHARLES G. MOERDLER
MEMBER

BRUCE H. SIMON
MEMBER

M. DAVID ZURNDORFER
MEMBER

ERNEST F. HART
MEMBER

-