D'Onofrio, 79 OCB 4 (BCB 2007)

[Decision No B-04-2007] (Arb) (Docket No. BCB-2570-06) (A-11999-06).

Summary of Decision: The City challenged a grievance alleging that it wrongfully terminated an employee. The City argued that Grievant could not establish a nexus between the subject of the grievance, the termination of an employee, and a specific contract provision that grants Grievant the right to grieve the termination. The Board found that the City's belated assertion of this defense inexcusably prejudiced Respondent, and that the claim should proceed to arbitration. ***(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-

ROBERT J. D'ONOFRIO,

Respondent.

DECISION AND ORDER

On August 29, 2006, the City of New York and the New York City Police Department ("City" or "NYPD") filed a petition challenging the arbitrability of a grievance brought by Robert J. D'Onofrio ("Respondent" or "Grievant"). Grievant alleges that he was wrongfully terminated. The City argues that Grievant cannot establish a nexus between the subject of the grievance, the termination of an employee, and a specific contract provision that grants Grievant the right to challenge his termination. The Board finds that the City's belated assertion of this defense

inexcusably prejudiced Respondent, and that the claim should proceed to arbitration.

BACKGROUND

Petitioner, first hired in 1997 by NYPD as a General Supervisor of Buildings, has held the civil service title of Steamfitter in the Building Maintenance Section at NYPD since June 30, 1999.[1]

NYPD's First Set of Disciplinary Charges Against Petitioner

In 2002 and 2003, NYPD filed several sets of charges and specifications against Grievant. On November 13, 2003, Grievant, several Enterprise Association of Steamfitters, Local 638 ("Union") representatives, and NYPD's Personnel Officer, Deputy Commissioner, Management and Budget, attended a Step I Informal Conference regarding all of the charges and specifications pending against Grievant. The Union appeared at the Conference to represent Grievant. After the parties attempted to settle the matter, Grievant rejected the proposed settlement.

On December 5, 2003, a second Informal Conference was held, at which time Grievant claimed that he was not guilty of the charges, declined a proposed penalty, and elected to exercise his alleged right to grievance proceedings pursuant to Administrative Guide 319-19.[2] On December

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[1] We note that BCB-2537-06, an improper practice petition also filed by Petitioner, was pending at the time that this matter was filed. For purposes of this decision, we take administrative notice of the facts as elicited from the pleadings in BCB-2537-06.

[2] Administrative Guide 319-19 ("AG 319-19") is titled "Civilian Employee Discipline," and its stated purpose is "to correct violations of department regulations by a civilian employee." (Respondent Exhibit 1.) AG 319-19 sets forth a procedure for processing violations of department regulations by civilian employees. The pertinent part of AG 319-19 states that if a respondent declines a penalty, NYPD should advise respondent that he may contact his union representative and choose between formal charges and specifications or allow the union, with respondent's consent, "to pursue matter in accordance with the Grievance Procedure set forth in Supplementary Agreement." (Id.)

8, 2003, the Personnel Officer, Deputy Commissioner, Management and Budget sent NYPD's Deputy Commissioner, Management and Budget a memorandum regarding the conferences in which she stated that "[Grievant] declined to accept the penalty of 30 days Time on Suspension, and wanted to exercise his right to Grievance Proceedings as per Administrative Guide 319.19." (Respondent Ex. 6.)

A Step II disciplinary hearing was held on the charges and specifications against Grievant and, in a Step II decision on November 1, 2004, the Deputy Commissioner of NYPD's Office of Labor Relations ("NYPD's OLR") found that one of the charges and specifications should be dismissed and two others should be sustained. As a penalty, Grievant was suspended from work for 30 days without pay. On November 23, 2004, Grievant requested a Step III review of the charges against him, and, on January 31, 2005, a Step III hearing was held. On March 7, 2005, a New York City Office of Labor Relations ("OLR") Hearing Officer issued a Step III determination, which found that the charges against Grievant had been substantiated and that the penalty implemented at Step II was appropriate.

After the Union refused to proceed with his grievance, Grievant submitted a request for arbitration on his own, with the approval of the Union, on April 22, 2005. An arbitrator was selected by the City and Grievant on August 12, 2005.

In a separate matter, on April 10, 2003, NYPD served Grievant with an additional charge and specification. Although this charge and specification was initially considered with the other charges and specifications during the previous Informal Conferences, it was considered separately at Step II. The charge was substantiated and NYPD imposed a 30-day annual leave penalty upon Grievant. Grievant appealed the Step II decision for this particular charge on February 15, 2005. In a Step III

reply, issued on June 15, 2005, an OLR Review Officer found that NYPD substantiated the charge, that the penalty imposed was appropriate, and denied the grievance. A note to the Union in the letter stated, "Failure by the Union to proceed to arbitration within fifteen days shall be deemed a waiver and abandonment by the union of its right to proceed to arbitration." (Respondent Ex. 8.)

Grievant again sought arbitration on his own on July 8, 2005, with the Union's approval. With the consent of the City and Grievant, Grievant's two arbitration cases were consolidated on August 2, 2006. On August 12, 2005, the Office of Collective Bargaining designated a single arbitrator to hear and decide both matters, and an arbitration hearing is scheduled for February 2, 2007.

Events Leading Up To Grievant's Termination

During 2004 and 2005, 24 new charges and specifications were filed against Grievant and on July 22, 2005, a Step I Informal Conference was held regarding those charges. At the Informal Conference, a NYPD representative offered Grievant the option of resignation or termination as a penalty, but Grievant declined to accept the penalty and signed a document, provided to him by NYPD, titled "Grievance Hearing", which stated, "I decline the decision and penalty set forth at the conclusion of my Informal Conference and elect to exercise my right to Grievance Proceedings as per Administrative Guide 319-19." (Emphasis in original.) A NYPD representative and a Union representative also signed the document.

A Step II hearing regarding the charges was held on September 26, 2005, and, on November 2, 2005, the Deputy Commissioner of NYPD's OLR found that all of the charges and specifications against Petitioner were substantiated, and terminated Petitioner's employment. On November 7, 2005, the Director of NYPD's Employee Management Division sent Petitioner a letter making the

termination effective.

On November 9, 2005, Petitioner requested a Step III hearing to challenge his termination and the charges filed against him, and on December 5, 2005, a Step III hearing was held. In a Step III decision on January 4, 2006, an OLR Review Officer found that NYPD had substantiated the charges against Petitioner and that termination was appropriate.

The Union refused to take the claim to arbitration and on January 18, 2006, Grievant again submitted a request for arbitration on his own, with the Union's approval. The request contained the language, presumably drafted by the Union, which stated, "The employee . . . asked Local 638 to file for arbitration: Mr. D'Onofrio will provide his own attorney and Local 638 has no responsibility for this arbitration." Similar language appears on the page that contains the waiver. The request claims that Respondent was wrongfully terminated in violation of Civil Service Law § 75. As a remedy, he seeks to be restored to full duty.

POSITIONS OF THE PARTIES

City's Position

The City argues that the January 18, 2006, request for arbitration must be dismissed because there is no nexus between Respondent's termination and a specific contract provision that grants him the right to grieve his termination. The City contends that, since Respondent is employed pursuant to New York State Labor Law § 220, there is no collective bargaining agreement between the Union and the City that provides Respondent the right to challenge discipline. In the absence of a contractual provision, employees holding titles covered by New York State Labor Law § 220 are provided grievance rights through Executive Order 83 ("EO 83"). EO 83 provides the right to

arbitrate:

> (a) a dispute concerning the application or interpretation of the (1) written, executed, collective bargaining agreement; or (ii) a determination under Section two hundred twenty of the Labor Law affecting terms and conditions of employment; (b) claimed violation, misinterpretation or misapplication of the written rules or regulations of the mayoral agency by who the grievant is employed affecting the terms and conditions of his or her employment; and (c) a claimed assignment of a grievant to duties substantially different from those stated in his or her job classification.

However, EO 83 does not provide grievants with the right to challenge disciplinary action through the grievance procedure. Respondent, therefore, is only entitled to disciplinary procedures established by Civil Service Law § 75. Accordingly, since Respondent cannot form a nexus between his termination and a valid collective bargaining agreement, the petition should be dismissed in its entirety.

Respondent's Position

Respondent argues that he has actively been misled by OLR and NYPD because he was offered the four-step grievance procedure at all times, and for all specifications and charges against him over 3-1/2 years, and only now does the City claim he has no right to arbitration. Respondent contends that he has worked through the grievance procedure three separate times, has twice filed a request for arbitration, has selected arbitrators and received an arbitration hearing date, with nary an objection from the City, and now OLR and NYPD wish to argue that he has no rights to the grievance procedure. He argues that he has appeared at multiple Step hearings and Conferences, which were presided over by an OLR or NYPD representative, and they never objected to the application of the grievance procedure to Respondent. Respondent therefore argues that if there is any fault in this matter, the onus is upon the City, NYPD, and the Union because they actively participated in the grievance procedure, leading Respondent to fail to exercise his rights under § 75

of the Civil Service Law in a timely fashion.

Respondent also argues that the petition is untimely because he filed his request for arbitration on January 18, 2006, and the petition was not filed until August 29, 2006, which is well beyond the 10 days allowed by the Rules of the City of New York.

DISCUSSION

Assuming this matter is timely,[3] 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. Here, the City argues that Respondent is covered by § 220 of the Civil Service Law and, as such, has no contractual right to challenge his discipline. It contends that Respondent's only recourse to challenge his termination is pursuant to the provisions of § 75 of the Civil Service Law. However, Respondent argues that the City has processed his grievances, including the present grievance, throughout the years as if he had these grievance rights. In fact, the City has permitted two of Respondent's prior disciplinary grievances to proceed to arbitration. Only now is the City asserting that he does not

[3] Although the request for arbitration was filed with this office on January 18, 2006, it is unclear when the City was placed on notice of Respondent's request.

have these rights, which greatly prejudices him. We construe Respondent's contentions as raising the equitable defense of laches before the Board.

This Board has 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, we find that the uncontroverted facts establish the elements of the equitable defense of laches.

We have held that a 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, Local 100 v. New York City Transit Authority,* 341 F. Supp. 2d 432 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 prior cases before this Board, claims have failed because the proponent failed to show prejudice. 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." Most recently, in

Communications Workers of America, Local 1182, 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-31-2006 at 10-11.

However, in the instant matter, and in contrast to the above cases, we find that Respondent has pleaded facts which would satisfy the three-pronged test to determine if laches has been established. First, the City was guilty of significant delay after obtaining knowledge of Respondent's assertion of the claim that the disciplinary action taken against him was grievable. In the instant matter, the City was aware that Respondent had claimed that he was wrongfully disciplined as of July 22, 2005, at the latest. That date marks the date on which an Informal Conference was held on the charges that led to his termination, the date on which he declined to accept the proposed penalty for the charges against him, and the date on which the City offered, and Respondent elected, to exercise his "right" to "Grievance Proceedings as per Administrative Guide 319-19." (Respondent Exhibit 8.) We also note that as early as 2003, the City was aware that Respondent challenged multiple other charges proffered against him and that the City still offered him the full grievance procedure to challenge those charges. Respondent is correct when he contends that the City had processed each step of his three grievances for over 3-1/2 years and had permitted his two grievances to proceed to arbitration before asserting, with respect to the instant grievance – at the penultimate moment in the grievance and arbitration process – that he had no grievance rights. Since the City did not act to dispute Respondent's rights to the grievance procedure until long after he had submitted his grievance to the process, we find that the City was guilty of a significant delay.

Second, the delay is unexplained and unexcusable. The City gives no reason for why it

processed Respondent's grievances as if he had grievance rights to challenge his discipline for years, only to challenge the third request for arbitration because he purportedly has no grievance rights. We are unable to discern a valid excuse for the City's actions from the pleadings.

Finally, we find that the delay has severely prejudiced Respondent's ability to present a defense against the claim. The City belatedly contends that Respondent is only entitled to disciplinary procedures established by Civil Service Law § 75. However, this provision provides that an eligible employee seeking to appeal his or her dismissal, "shall file such appeal in writing within twenty days after service of written notice of the determination to be reviewed . . .". In the instant matter, Respondent's employment was terminated in 2005, and the City, in 2006, is only now claiming that Respondent should have filed a claim pursuant to § 75. This belated assertion by the City, after it actively participated in and processed this particular grievance and two others through each step of the procedure over three years, could leave Respondent without any remedy, as the time to contest his termination pursuant to Civil Service Law § 75 has passed. We also note that under Article 78 of the Civil Practice Law and Rules, Respondent only has four months to challenge the actions of NYPD in court, and that time has passed as well. Because the City's failure to assert its claim that no grievance remedy was available to Respondent led him to forego other available remedies, we find that he has been injured and prejudiced by the City's actions and that he has fulfilled the third prong of the test.

The uncontroverted facts are sufficient to establish the equitable defense of laches, we find that the City's petition should be dismissed, and the matter should be 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, the petition challenging arbitrability filed by the City of New York and the New York City Police Department, docketed as No. BCB-2570-06, hereby is denied; and it is further

ORDERED, that the request for arbitration filed by Robert J. D'Onofrio, docketed as A-11999-06, hereby is granted.

Dated: February 26, 2007
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

GABRIELLE SEMEL
MEMBER