City v. UFA, 31 OCB 1 (BCB 1984) [Decision No. B-1-84 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of

THE CITY OF NEW YORK, DECISION NO. B-1-84

Petitioner, DOCKET NO. BCB-652-83
(A-1694-83)

-and-

UNIFORMED FIREFIGHTERS' ASSOCIATION
OF GREATER NEW YORK,

Respondent.

DECISION AND ORDER

On June 3, 1983, the New York City office of Municipal Labor Relations ("OMLR"), on behalf of the City of New York, filed a petition challenging arbitrability of a grievance that is the subject of a request for arbitration filed by the Uniformed Firefighters' Association of Greater New York ("UFA") on May 25, 1983. The UFA filed its answer on July 28, 1983. No reply was submitted.

Background

On July 31, 1981, Sections B3-30.1 and B3-30.2 of the Administrative Code of the City of New York were amended by Chapter 941, to allow the transfer to the fire and police pension funds of credit for prior service in the uniformed transit police service, uniformed correction force, housing police service, and the uniformed force of the Department of Sanitation (collectively known as "NYCERS").

Following the enactment, a discrepancy allegedly developed in the parity between fire and police department employees. The Fire Department has recognized the transfer of such credit for pension purposes only; the Police Department has recognized such credit for determining entitlement to compensation and promotion, as well as for pension purposes.

On March 29, 1983, the UFA initiated a Step III grievance in which it charged that

> [t]he City of New York and the Fire Department of the City of New York has failed and refused to credit prior City-service in the Department of Correction, Transit Police Department, Housing Police Department and the Sanitation Department (The "NYCERS Uniformed Forces") for purposes of salary and longevity increments, thereby denying Firefighters possessing such prior City-service of their proper increments, in violation of Article VI of the Collective Bargaining Agreement between the UFA and the City of New York.

For its remedy, the UFA requested "immediate and retroactive salary adjustments for all concerned firefighters."

On April 28, 1983, Deputy Fire Commissioner James E. Kohler responded to the grievance in a letter addressed to UFA President Nicholas Mancuso. Conceding that Chapter 941 has not been applied in the same manner by the police and fire departments, he nevertheless denied that there was anything in the collective bargaining agreement or in the past practice of the Fire Department which related

to this matter. He concluded, therefore, that this was not a proper subject for a grievance.

Positions of the Parties

City's Position

OMLR, on behalf of the Fire Department, maintains that the contractual language, at Article VI, has remained substantially unchanged since 1968, and that "the Fire Department has never 'credited' service in anything other than the appropriate title for salary or longevity purposes." Since Article VI makes no provision for "crediting" prior City service, the UFA has failed to establish the requisite nexus between the act complained of and the source of the alleged right.

Furthermore, to the extent that any portion of the request for arbitration is predicated on a claimed violation or misapplication of law, it does not, it is argued, constitute a grievable matter as defined by the parties in their collective bargaining agreement.

The City further opposes arbitrability on the basis of the untimeliness of the request for arbitration. Specifically, the City maintains that the Fire Department has been determining salary rates for employees represented by the UFA in the same manner for many decades and never

before have its determinations been challenged.

> Since the Department has utilized the same method of salary calculation for so long, it is impossible to determine who was originally responsible for this method or the basis upon which such determination was made. The City strongly asserts that in this circumstance, the Board should bar the entire claim of the UFA.

UFA's Position

The UFA maintains that the City of New York, through its agent the Fire Department, has failed to credit prior City service in the New York City Uniformed Forces for purposes of salary and longevity increments pursuant to the aforementioned Article VI "despite the fact that the petitioners [NYC], through its agent the Police Department, has granted such credit pursuant to a similar salary clause of it collective bargaining agreement with the PBA." The UFA contends that the failure to credit prior service violates the collective bargaining agreement because "... it causes firefighters with such prior city service to receive salary and longevity increments below those called for in Article VI of the Agreement."

The UFA regards the laches defense as one which runs only to the UFA's claim for retroactive underpayments - i.e. damages for the alleged contract breach - and not to the exercise of any such breach itself.

> Since the UFA seeks relief in the form of cessation of a continuing alleged violation of the contract, the existence of which can only be determined by an arbitrator, the mere assertion of a defense of laches to a claim for back payments cannot affect the clear arbitrability of the question regarding whether or not the contract was and is being breached to date. Upon information and belief, while an arbitrator may decide that some part of the UFA's claim for retroactive payments may be barred by laches, the question of whether a continuing contractual violation exists and whether damages should be awarded retroactively as a result of such violation are clearly for the arbitrator, so that there exists no legal bar to arbitral consideration of this matter.

Discussion

It is well settled that the question before the Board on a petition challenging arbitrability is one of substantive arbitrability -- i.e. is there an agreement between the parties to subject their disputes to arbitration, and, if so, is the obligation broad enough in its scope to include the particular controversy presented.

Petitioner does not dispute the existence of an agreement with the UFA whereby contract grievances are resolved through arbitration, nor does it disagree that Article VI deals with salary rates and longevity increments. Instead, OMLR argues that because the crediting of prior service is not expressly provided for in Article VI, that

provision cannot be relied upon as the source of the alleged right with respect to which arbitration is being sought.

In determining arbitrability, we have consistently declined to comment on the merits of a claim and have deliberately confined the scope of our inquiry to the narrow question of whether it has been established, prima facie, that there is a nexus between the claim or complaint underlying the grievance and the contract provision which has allegedly been violated or not fully and/or properly implemented. In the instant proceeding, the UFA claims that prior service in other agencies has not been factored into the formula for determining entitlements to longevity increments pursuant to Article VI of the collective bargaining agreement. The City's argument -- that Article VI does not provide for the crediting of prior service in another agency -- goes to the merit of the dispute and is, therefore, a question of contract interpretation.

We find that where the union cites a contract provision which arguably deals with the subject matter at issue, it has presented all of the elements appropriate to the limited scope of the Board's inquiry in matters of substantive arbitrability. Arguments advanced by the parties herein, relating to the past practice of the Fire Department, present practice of the Police Department, and

the relevance of Chapter 941 of the Administrative Code to Article VI, are matters for the arbitrator.

With respect to the laches defense raised by the City as a further basis for precluding the submission of this matter to arbitration, the Board has followed a policy in cases involving "continuous violations" of recognizing the 120-day contractual time limitation for the filing of claims as representing a block of time which the parties themselves have agreed would not form the basis of a claim of prejudicial, unexplained delay. [1]Our application of both the equitable doctrine of laches and the parties' contract to the circumstances of continuing violations achieves, we believe, a balance among competing policy considerations relating to the arbitrability of grievances. Thus, where the delay in filing appears unwarranted, we have barred arbitration of the grievant's claim except for that part of the grievance alleging the continuous commission of a wrong for a period 120 days prior to the filing of the grievance.

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

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[1] B-3-80; B-12-82; B-4-82; B-24-82.

O R D E R

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 City's petition challenging arbitrability be, and the same hereby is, denied; and it is further

ORDERED, that the Uniformed Firefighters' Association request for arbitration be, and the same hereby is, granted provided, however, that claims arising more than 120 days prior to the filing of the grievance shall be precluded from consideration by the arbitrator.

DATED: New York, N.Y.
February 2, 1984

ARVID ANDERSON
CHAIRMAN

MILTON FRIEDMAN
MEMBER

DANIEL G. COLLINS
MEMBER

JOHN D. FEERICK
MEMBER

EDWARD SILVER
MEMBER

EDWARD F. GRAY
MEMBER