L. 1759, DC 37 v. City, 11 OCB 1 (BCB 1973) [Decision No. B-1-73 (Scope)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of

LOCAL 1759 and DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

Petitioner,

V.

THE CITY OF NEW YORK,

Respondent.

DECISION NO. B-1-73

DOCKET NO. BCB-128-72

D E T E R M I N A T I O N

I. Preliminary Statement

The Union's petition-requests this Board to make a final determination as to whether the effective date of a renewal agreement, retroactive to January 1, 1971, is within the scope of bargaining, and directing the City to bargain for such an effective date.

This dispute stems from the reorganization of the City's governmental structure which, among others, abolished the former Department of Licenses and the Bureau of Markets of the Department of Markets whose functions were then taken over by the Department of Consumer Affairs and the Department of Ports and Terminals. The reorganization process-included the reclassification by the Civil Service Commission in September 1970, effective March 1, 1970, of employees from their former to their present titles, the transfer of employees from their former to their present departments, and their assignment to duties under their reclassified titles. The result of reorganization was a merger and consolidation of functions and operations affecting existing bargaining units and, therefore,

causing a question concerning representation to arise. The Board of Certification, having found that changed circumstances warranted a new unit, directed an election (Decision No. 79-71) among the employees in the new unit which was won by the Union. The Union was then certified on December 21, 1971 (Decision No. 82-71).[1]

Position of the Parties

It is the Union's contention that by reason of the reclassification of certain employees by the Civil Service Commission in September 1970, effective March 1970, the employees assumed new titles and new duties, and, therefore, were no longer covered by prior certifications or prior collective agreements from and since the time of reclassification. The reclassification of the employees was made mid-term agreements held by the Union for one group of employees, and by Local 237, I.B.T., for another group of employees. Both agreements expired June 30, 1971.

Prior to the reclassification, by resolution of the Commission, in February 1970, the employees were removed from the "Business Inspection Occupational Group" and placed in the "Consumer Affairs Inspection Occupational Group."

In October 1970, the Union filed its representation petition and, being certified in December 1971 to represent the reclassified employees, claims that the effective date of a renewal agreement should be January 1, 1971, the anniversary date nearest in time following the filing of its representation petition.

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[1] Local 237, I.B.T., the other union affected by the reorganization did not intervene and was not placed on the ballot. Local 300, SEIU, AFL-CIO, filed a petition for a supervisory unit and was certified for such unit on December 21, 1971.

The Union's position is that because of the reclassification of the employees its prior certification and agreement were abrogated and, upon being certified anew, it was entitled to negotiate for salary adjustments effective on a cut-off date nearest to the filing of its petition. The Union also argues that the failure of the City to assert the prior agreement as a bar to the Union's petition was indicative of the City's conclusion that the prior agreement was no longer valid. Lastly, the Union cites the City's insistence that a new question of representation had arisen by reason of a change in the employer's operations as proof that the former agreement and certification were no longer in existence.

The City disputes the Union's position, contending that the mere act of reclassifying employees did not serve to terminate either the prior certification or the prior agreements covering the employees but, rather, that the prior certifications were effective until the issuance of the new certification to D.C. 37 on December 21, 1971. The City stated that since the new certification postdated the expiration of the prior agreements, the prior agreements were, therefore, binding on the parties until their expiration June 30, 1971. Consequently, argues the City, while it is willing to negotiate a renewal agreement with a retroactive date, the effective date of the renewal agreement for the adjustment of salaries should be July 1, 1971, the day following the expiration day of the former agreement.

Thus, the dispute between the Union and the City involves an interval of six (6) months concerning the effective date of a renewal agreement, the Union contending for a January 1, 1971 date and the City for July 1, 1971.

II. Discussion

We have reviewed the record in the representation proceeding as well as the papers and materials submitted by the Union concerning the court proceeding. We are bound by the record made in the representation proceeding; the result reached in the court proceeding is not determinative of the issues in the instant proceedings.

We do not agree with the Union's contention that the reclassification of titles, coincidental with the reorganization of the City's governmental structure and consolidation of operations, effectively terminated the prior certification. It is our view that a certification, once issued, retains vitality until the Board of Certification declares otherwise, either by the certification of a new representative, the decertification of an incumbent representative, or the revocation of a certification. The statutory authority of the Civil Service Commission to classify employees is for a civil service purpose while the statutory authority of the Board of Certification is to determine the appropriateness of bargaining units. We follow the rule set forth in Matter of City Employees Union, Local 237, I.B.T., Decision No. 60-69, that:

> "Job classification is the responsibility of the Civil Service Commission. Our task is to establish bargaining units of similar or related titles in a manner that will enhance sound labor relations."

(See also Matter of Local Union No. 3, IBEW, AFL-CIO, etc., Decision No. 62-71.)

Nor do we find tenable the Union's position that the act of reclassifying employees mid-term the agreement effectively terminated prior agreements. The Board of Certification usually issues certifications with the qualifying phrase "subject to existing agreements, if any." Thus, the Board of Certification has adopted the policy of recognizing collective agreements as instruments of union recognition and, therefore, of an established bargaining relationship. The fact that in this case the certification followed the expiration of the agreement in no way diminishes the underlying intent of preserving the force and effect of an agreement to its expiration date.

Adhering to this policy, we find that there was an agreement and that its vitality was not vitiated by the reorganization of the employer's operation. There was, even after the Union filed its representation petition in October 1970, a continuing duty on the part of the City to recognize the Union as the representative of the employees under the agreement until its expiration, June 30, 1971, and until the issuance of the new certification. While the certification was issued after the contract expiration date, the phrase "subject to existing contracts, if any" was intended to preserve and protect contractual rights and obligations for their duration, in this case until June 30, 1971.

We are not persuaded by the Union's argument that the failure of the City to assert the agreement as a bar to the Union's representation petition is indicative of the City’s view that the agreement was a nullity. The fact is, as conceded by the Union, that the City did continue to apply the terms of the agreement to the reclassified employees until its expiration, June 30, 1971.

We perceive, instead, sound reasons why neither the City nor the Union would assert the agreement as a bar to a representation election. The City was desirous of resolving conflicting rival representation claims for a unit of employees it deemed appropriate for future bargaining purposes, The Union acknowledged the existence of a possible competing claim by another union (Local 237, I.B.T.) for the same group of employees and, therefore, filed a representation petition to resolve the controversy. Both the Union and the City were, therefore, desirous of achieving the same objective of resolving the question of representation caused by the reorganization.

The new election and subsequent certification of the Union authorized the Union to represent the employees in the new unit for future bargaining. In this case, such future bargaining means negotiating a renewal agreement for all of the employees in the new unit with an effective date of July 1, 1971.

MAJORITY COMMENT ON DISSENT

Our dissenting colleagues question the relevancy of whether any prior agreement or prior certification remained in effect or was abrogated, stating that, "The facts conclusively show that both the City and the Board of Certification consistently acted as if the prior agreement and prior certification in no way applied to the employees in question." Based upon the foregoing views, our colleagues then conclude that any continuing existence of an earlier agreement or certification does not touch on the basic issue in dispute. We must state that at no time did the Board of Certification act as if the prior agreements and prior certifications did not apply to the employees involved.

In our opinion we stated:

> "a certification, once issued, retains vitality until the Board of Certification declares otherwise, either by the certification of a new representative, the decertification of an incumbent representative or the revocation of certification."

Our opinion also referred to the policy of the Board of Certification of issuing certifications "subject to existing agreements, if any" and, adhering to this policy, we found if that there was an agreement and that its vitality was not vitiated by the reorganization of the employer's operation." Our opinion left no doubt that:

> "There was, even after the Union filed its representation petition in October, 1970, a continuing duty on the part of the City to recognize the Union as the representative of the employees under the agreement until its expiration, June 30, 1971, and until the issuance of the new certification."

As for the City's observance of the prior agreement, our opinion stated "The fact is, as conceded by the Union, that the City did continue to apply the terms of the agreement to the reclassified employees until its expiration, June 30, 1971."

With respect to our colleagues' characterization of the prospective agreement between the City and the Union as a "brand-new agreement," rather than a "renewal agreement," and their view that the distinction compels different conclusions, we do not agree. We have labeled the prospective agreement as a renewal agreement because, essentially, there is no break in the continuity of bargaining between the same parties covering essentially the same employees.

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

DETERMINED, that the Union's petition be, and the same hereby is, denied.

DATED: New York, N.Y.
January 18, 1973.

ARVID ANDERSON
C h a i r m a n

WALTER L. EISENBERG
M e m b e r

ERIC J. SCHMERTZ
M e m b e r

EDWARD SILVER
M e m b e r

JOHN H. MORTIMER
H e m b e r

DISSENTING OPINION

In our view the majority decision fails to set forth clearly the disputed issue, and ignores many of the key facts surrounding the dispute.

In our opinion, the majority decision incorrectly analyzes the Union's request. In effect, the Union says that a brand-new agreement for a brand-new, previously-unrepresented group of employees is being negotiated and that, therefore, the effective date of the contract is negotiable. The Union does not consider the agreement being negotiated to be a "renewal agreement," but by so describing the Union's position, the majority decision in effect refutes it,

The evidence, in our opinion, is that the City consistently treated the employees in question as a group without union representation, and unilaterally decided all questions involving wages and fringe benefits, until the Board of Certification decided the representation question. Thereafter, the City reversed itself completely and in effect is now saying that the employees had union representation all along b ut were unable to derive any benefit therefrom. The City has adopted at any given time the posture which was most detrimental to the employees, and the majority decision would sanction such a course of action.

It is not really relevant whether any prior agreement or prior certification remained in effect or was abrogated. The facts show conclusively that both the City and the Board of Certification consistently acted as if the prior agreement and prior certification in no way applied to the employees in question. Accordingly, any continuing existence of an earlier agreement or certification does not touch on the basic issue in dispute.

Since this is a newly-created bargaining unit, negotiating its first collective bargaining agreement, the effective date of the agreement is within the scope of bargaining.

DATED: New York, N.Y.
January 18, 1973.

MORRIS IUSHEWITZ
Alternate Member

HARRY FRUMERMAN
Alternate Member