L.32B-32J, L.144, SSEU v. City, 25 OCB 24 (BCB 1980) [Decision No. B-24-80 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of

LOCAL 32B-32J and LOCAL 144, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO

DECISION NO. B-24-80

DOCKET NO. BCB-390-79

Petitioner,

-and-

THE CITY OF NEW YORK

Respondent.

DECISION AND ORDER

On January 8, 1980, Local 32B-32J Service Employees International Union, AFL-CIO (hereinafter "SEIU") filed a Verified Improper Practice Petition alleging:

> On or about January 1, 1980, during the pendency of a representation proceeding before the Office of Collective Bargaining (RU-695-79), [the City of New York] unilaterally terminated its payment of carfare and meal allowances to employees commonly referred to as "Home Attendants" for the purpose of interfering with rights granted in Section 1173-4.1 of Chapter 54 of the New York City Charter in violation of Section 1173-4.2(a)(1).

The Union requests that the Board order the City of New York "to restore the benefits which were unilaterally eliminated."

The City of New York, appearing by its office of Municipal Labor Relations (hereinafter "the City"), filed on January 21, 1980 a motion to dismiss the improper practice petition. On February 8, 1980, the Union filed an affidavit in opposition to the motion to dismiss.

BACKGROUND

The instant proceeding is related to a representation case which was decided by the Board of Certification on July 17, 1980.[1]

Home Attendant care is one of three programs of home-care service administered by the Human Resources Administration (hereinafter "HRA"). The Home Attendant program provides comprehensive personal care, such as assisting with bathing, grooming, ambulation and dressing needs, and performance of basic household tasks, to medically disabled and/or physically handicapped clients who might otherwise require institutionalization. The service is usually more than part time and can be authorized up to 24 hours a day, 7 days a week. Approximately 16,000 clients are served by approximately 15,500 Home Attendants and the program has been in existence since 1970. The other forms of home-care service administered by HRA are Housekeeper service, a part-time chore service provided to elderly or handicapped persons who are unable, for medical reasons, to perform basic household tasks, and Homemaker service, which provides assistance with housekeeping tasks, personal aids and house management to physically frail or emotionally dependent clients and to families with an incapacitated head of household. Funding for the programs is provided under the Social Security Act,[2] Title XIX, which covers medical needs, and Title XX, which covers social service needs, and is divided 50% federal monies, 25% state funds and 25% city funds.

[1] Decision No. 20-80.

[2] 42 USC §1901 et. seq. See also New York Social Service Law §365-a.

SEIU petitioned in December 1979 to represent persons working as Home Attendants.[3] D.C. 37, AFSCME, AFL-CIO, intervened in the proceeding, also seeking to represent the Home Attendants. The City opposed the petitions on the grounds that Home Attendants are not employees of the City and therefore not entitled to representation rights under the New York City Collective Bargaining Law (NYCCBL). After a lengthy proceeding regarding the proof of interest filed by SEIU, numerous hearings concerning the representation claims and objections were held.

During the course of the hearings, the Board of Estimate, on November 15, 1979, approved the award of 42 purchase-of-service contracts by HRA to private not-for-profit corporate-contractors, commonly known as "vendors." Under the contracts, the vendors will be responsible for delivery of Home Attendant service to the clients, which includes hiring and maintaining a work force to provide the service. The transition from the former system of delivery of service to the purchase-of-service arrangement has been deemed "vendorization."

In December 1979, the City moved that the Board of Certification dismiss the representation petition on the grounds that whatever relationship, if any, that had existed between the Home Attendants and the City, the relationship was ended by the vendorization of the program. The City claimed that persons providing Home Attendant service would become employees of the vendors and that the employment

[3] This was the second petition SEIU had filed to represent Home Attendants. An earlier petition, filed in June 1978, was dismissed by the Board of Certification in Decision No. 61-78 for failure to satisfy the 30% proof of interest requirement stated in §2.3 of the Rules of the OCB.

relationship would be subject to the jurisdiction of the National Labor Relations Board ("NLRB") and not within the jurisdiction of OCB. SEIU and D.C. 37 opposed the City's motion, arguing inter alia, that under vendorization control over the terms and conditions of a Home Attendant's employment would remain in the City.

In Decision No. 20-80, the Board of Certification dismissed the representation petitions on the grounds, among others, that the Home Attendants would be employees of the vendors and that the vendors possessed a sufficient ability to engage in meaningful collective negotiations with a union of Home Attendants to meet the NLRB's "right-of-control" test, thus indicating that the Home Attendants would be subject to the jurisdiction of the National Board.[4] The Board of Certification stated:

> Therefore, under circumstances where the City and the vendors have expressly agreed that the vendors will be the sole employers and the NLRB has taken jurisdiction in similar cases involving purchase of service contracts with established reimbursement rates, despite the claims of 'exempt political subdivision' by the vendor involved, we feel constrained to find that the employment relationship herein is subject to the jurisdiction of the NLRB.

POSITIONS OF THE PARTIES

In the present case before the Board of Collective Bargaining (hereinafter "BCB"), the City argues, as it did in the representation case, that Home Attendants are not employees of the City or of any

[4] The Board in particular relied on the NLRB decision in Ankh Services, Inc., 101 LRRM 1419 (1979).

other public employer covered by the NYCCBL, and therefore the Home Attendants are not public employees as defined Dy the NYCCBL section 1173-3.0(h). The City claims that it has never possessed the necessary degree of control over the employment conditions of Home Attendants to give rise to an employment relationship. The City contends that in any event, as of January 1, 1980, when the vendor contracts were executed, the Home Attendants were in the process of becoming employees of the vendors, severing any relationship that may have existed with the City, and would be subject to the jurisdiction of the NLRB which would preempt any jurisdiction the OCB may have over the individuals. The City refers to its memorandum of law filed in the representation case for the substance of its argument on this point. The City concludes that because Home Attendants are not employees as defined by the NYCCBL and are in the process of entering into an employment relationship that is subject to the jurisdiction of the NLRB, the BCB is without jurisdiction to adjudicate the improper practice petition.

The Union also relies on its memorandum of law filed with the Board of Certification to support its claim that Home Attendants are employees of the City and covered by the provisions of the NYCCBL. SEIU contends that the fact that the City was able to terminate the Home Attendants' meal and carfare allowances indicates that the City does control the conditions of a Home Attendant's employment, and that the Home Attendants are employees of the City. SEIU concludes

that the City's motion must be dismissed and requests that the BCB consider the improper practice.

DISCUSSION

The issue raised by the City's motion to dismiss and SEIU's response has been answered by the Board of Certification's decision that it does not have jurisdiction to decide the representation claims made by SEIU and D.C. 37 because the Home Attendants are in the process of becoming employees of the vendors and that employer-employee relationship will be subject to NLRB jurisdiction. The Certification Board's decision on its authority and power to hear and decide the claims of the Unions to represent Home Attendants under the NYCCBL is, in our opinion, binding on the Board of Collective Bargaining. The BCB also derives from the
NYCCBL authority and power to hear and decide claims of statutory rights of public employers, public employees and their certified representatives.[5] Based upon our review of the facts and circumstances of the Home Attendants' employment relationship with the vendors under the Home Attendant contract and in light of the decisions of the NLRB to assert jurisdiction over private vendors and their employees under purchase of service agreements similar to the arrangement in the instant case, we find that we are preempted from hearing and deciding SEIU's improper practice petition because of the presence of NLRB jurisdiction over the Home Attendants' claims of rights with regard to their employment.

[5] The powers and duties of the BCB are stated in NYCCBL §1173-5.0 a.

ORDER

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

ORDERED, that the motion to dismiss filed herein by the City of New York be, and the same hereby is, granted; and it is further

ORDERED, that the improper practice petition filed herein by Local 32B-32J, Service Employees International Union, AFL-CIO be, and the same hereby is, dismissed.

DATED: July 23, 1980
New York, N.Y.

ARVID ANDERSON
Chairman

WALTER L. EISENBERG
Member

DANIEL G. COLLINS
Member

EDWARD SILVER
Member

JOHN D. FERRICK
Member

EDWARD F. GRAY
Member

CAROLYN GENTILE
Member