L.237, IBT, Civil Service Bar Ass. v. City, et. al, 25 OCB 43 (BCB 1980) [Decision No. B-43-80 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of the Improper Practice

-between

LOCAL 237, IBT - CIVIL SERVICE BAR ASSOCIATION
Petitioners,

DECISION NO. B-43-80

CASE NO.: BCB-330-79

-and

EDWARD I. KOCH, Mayor, ALLEN G. SCHWARTZ, Corporation Counsel, and THE CITY OF NEW YORK,

Respondents.
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NATURE OF PROCEEDING

Petitioners, Local 237, IBT - CIVIL SERVICE BAR ASSOCIATION, filed an improper practice petition against EDWARD I. KOCH Mayor, ALLEN G. SCHWARTZ, Corporation Counsel, and THE CITY OF NEW YORK alleging that

> "Allen G. Schwartz is attempting to dominate or interfere with the administration of a public employee organization, viz., Local 237, I. B. T. - Civil Service Bar Association in that he has begun to implement a plan to convert competitive Civil Service titles in the Office of the Corporation Counsel of the CITY OF NEW YORK, which have collective bargaining rights and rights of joining or participating in activities of a public employee organization to exempt titles which do not have such rights. The result of the said action and plan being

> to reduce the number of persons in the union and thereby to lessen, diminish and eliminate the effectiveness of the union, thus interfering and restraining public employees in the exercise of their rights granted in Section 1173-4.1 of the New York City Charter."

The gravamen of the charge as alleged is that respondents violated Section 1173-4.2-a(l) of the New York City Collective Bargaining Law (NYCCBL).[1] Respondents in their amended answer denied each and every of the aforesaid allegations.

STATEMENT OF FACTS

In May, 1978, Allen G. Schwartz, Corporation Counsel, wrote the City Personnel Director to request that the 67 new legal positions authorized for the Law Department be classified in the title of Assistant Corporation Counsel (Exempt) rather than being assigned to a competitive Civil Service Title.

The Corporation Counsel stated as a reason for the request, the difficulty of securing adequate and qualified personnel for these positions through the competitive examination, that it was not practicable to determine by an examination whether the candidate possessed the personal qualities and

[1] Section 1173-4.2. Improper Practices: good faith bargaining.

a. Improper public employer practices. It shall be an improper practice for a public employer or its agents:

(1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in Section 1173-4.1 of this chapter.

capabilities considered necessary. The qualities sought included dedication, responsibility, judgment, resourcefulness and an ability to interact with people. He stated that it was his experience and that of other public law officers, such as the United States Attorney and the District Attorneys, that "top students and outstanding practitioners" can be best recruited when the position is offered without an examination.

The Personnel Director granted the request and assigned these 67 positions to a temporary exempt title. In the FY 1979 budget, 50 more positions were added to the Law Department under the same temporary exempt title.

In March, 1979, the Corporation Counsel requested that 62 positions, then classified in competitive Civil Service Titles, be reclassified in the exempt class. All of these 62 competitive titles were at the time of the request either vacant or provisionally filled.

At the time of the hearing, there were approximately 420 attorneys in the Corporation Counsel's office of which 260 were exempt or provisionals and 160 held Civil Service competitive titles.[2]

Adam Klein, counsel for petitioners, testified that in June, 1979, he had a conversation with Irwin Herzog, then Managing Attorney in the Corporation Counsel's office, concerning the above conversion of competitive Civil Service positions into exempt titles. According to Klein, Herzog

[2] In 1970 there were 383 lawyers in the office of which 278 were in the competitive class and 105 were exempt employees.

said "we intend" to convert all the attorneys in the Office of the Corporation Counsel to exempt positions which would practically eliminate the bargaining unit in that office.

Bert Rose, an organizer for petitioners, testified that about ten attorneys from the Corporation Counsel's office told him they were being offered exempt positions on condition that they would resign from their competitive Civil Service line and were told that failure to accept the offer would result in the end of their career at the Corporation Counsel's office.[3] Of the ten attorneys, seven or eight already were in exempt positions and on a leave of absence from their competitive Civil Service line. Two or three according to Rose were serving in a competitive title. When the names of the representatives of the Corporation Counsel who spoke to the ten attorneys, Rose said Herzog spoke to two or three and supervisors or division chiefs spoke to the remainder. He could not recall the names of the supervisors or division chiefs. When asked if he knew the names of the ten attorneys who spoke to him, Rose testified he knew the names of two or three but declined to state the name of any such attorney.

At the close of the first hearing day, Mr. Klein asked for the opportunity to present additional witnesses to "buttress Mr. Rose's testimony."

At the second hearing, the only witness called by petitioners was the Corporation Counsel, Allen Schwartz.

[3] At one point Rose testified that only "a few" (two or three) said such a threat was made--later he said the threat occurred in "every case".

Schwartz testified that the need of his office for attorneys could not be met through the means of competitive examination; that the skills or abilities required did not lend themselves to testing in competitive examinations. It was for this reason that he requested that the 67 new positions created in 1978 and the 50 new positions created in FY 1979 be classified as exempt positions. He described the hiring process for filling these exempt positions. All resumes filed by applicants were reviewed and evaluated by a committee of lawyers on his staff. The criteria used in such evaluations were scholastic records and experience. The applicants selected in such evaluations were then interviewed by three senior lawyers and evaluated. Those who passed these three interviews were then interviewed by a Division Chief and finally by the Corporation Counsel. Writing samples were also required. He stated his goal was to attract the best and the brightest in a non-political merit program.[4]

In 1979, the Corporation Counsel was informed that his office could not fill all its budgeted lines because a number of people were of "sitting on two lines", that is a person was serving in an exempt title and on a leave of absence from a competitive title.

Schwartz testified that he met with the people who were on two lines and said he would like them to choose either to retain their exempt position and resign from the competitive position or to return to the

[4] Of the 75 attorneys hired pursuant to this process in 1979, 29 had served on the staff of a Law Journal and 33 were graduated cum laude or above either from Law School or undergraduate school.

Civil Services position. He promised to try to keep them in the same dollar line and to maintain their rate of progress in the office. Many opted to keep their exempt position--some opted to move back to their Civil Service title. A few, requested to keep both lines and they were permitted to do so. Schwartz testified that these meetings with the employees holding two lines were not to reduce the number of competitive titles or to affect the union, but rather it was for the purpose of freeing up lines.

Schwartz denied that any threats were made by him or anyone on his behalf to any person making the above choice. Schwartz stated that he never that he intended "to eliminate the competitive titles of the are in the department holding those competitive titles." Schwartz testified that he mentioned to representatives of petitioners the possibility of exempt employees being represented by a union and that he had no objection to all of his employees having collective bargaining rights.

DISCUSSION

The thrust of the charge is that the Corporation Counsel has a plan to convert competitive Civil Service titles to exempt titles and since the competitive Civil Service titles are represented by petitioners while exempt titles are presently not organized, the petitioners claim that this results in the reduction of persons in the union and the lessening of the effectiveness of the union. The union charges that this constitutes interference with and restraint of the exercise of Section 1173-4.1 rights and thus is in violation of Section 1173-4.2a(1) of the NYCCBL.[5]

[5] See Fn. 1, supra.

The record discloses that in May 1978 and in January 1979 the Corporation Counsel did obtain approval to have the newly-authorized positions in the Law Department classified as exempt titles, albeit on a temporary basis, pending a final determination. These two instances did not involve any conversion of Civil Service' competitive titles to exempt titles, but, of course, it did increase the number of exempt positions.

In March 1979, the Corporation Counsel did request the reclassification of 62 positions from the competitive class to the exempt class, but not one of these 62 positions were then filled by a permanent competitive employee.

This March 1979 request would appear to be the only matter within petitioners' charge for it was the only instance of conversion of competitive titles to exempt titles.

This was brought to the attention of petitioners' counsel during the course of the hearing and he responded "In that case I will request an amendment of the petition because we are talking about . . . an objective . . .to ultimately eliminate the influence and control of those competitive titles insofar as they belong to unions, to eliminate the power structure of the Union. . ." Counsel, however, did not thereafter move to amend the petition or actually state what the amendment would be, but it is assumed that he would be seeking to amend the petition to include May 1978 and January 1979 requests for exempt classification for the 67 and 50 newly-authorized Positions'. Since he did not actually move to amend, respondents were not able to assert the four-month statute of limitations.[6] However,

[6] Section 7.4 Revised Consolidated Rules of the Office of Collective Bargaining.

as counsel stated the purpose of considering the May 1978 and January 1979 actions of the Corporation Counsel was to show motivation, I will consider these actions on the question of motivation.

In support of their petition, petitioners first argue that the increase of the number of exempt positions the concomitant reduction proportionately in the number of competitive titles, even absent any improper motivation, is an improper practice because it results in a reduction in the number of positions within the bargaining unit and thus reduces the effectiveness of the bargaining representative. In advancing this contention, petitioners rely upon Textile Workers v. Darlington Manufacturing Company, 380 U.S. 263 (1965) . It is true that the Court there did state that a violation of [Section 8(a)(1)] [Here Section 1173-4.2a(l)] presupposes an act which is unlawful even absent a discriminatory motived. Under Section 1173-4.3b of the NYCCBL, the determination of the personnel by which the operation of the Corporation Counsel's office is to be conducted are matters of managerial pejorative and are not matters within the scope of collective bargaining. Thus, it would seem to follow that in order for the petitioners to prevail on the charge herein they must establish an improper motivation.[7]

[7] Local 1407, District Council 37 AFSCME and New York City Health and Hospital Corporation B-4-79.

Petitioners next argue that it was the intention of the Corporation Counsel to eliminate all competitive titles in his office and as the present bargaining unit is comprised only of persons holding competitive titles, the bargaining unit would thereby cease to exist. Petitioners contend that this constitutes improper motivation.

The statement attributed to Herzog that it was the intention of the Corporation Counsel to eliminate the bargaining unit is not credible. The testimony of the Corporation Counsel, which I credit, was that he never intended to erase or eliminate the bargaining unit. There is no credible evidence that the Corporation Counsel or his agents ever threatened emp1oyee to induce them to leave competitive titles and to accept exempt positions. In fact on the record here, not one of the titles converted from the competitive class to the exempt class was, at the time of such conversion, filled by a permanent employee.

Admittedly, it is the intention of the Corporation Counsel to continue to increase the number of the exempt positions and obviously the number of competitive titles will, as a result, decrease. However, the motivation of the employer in this regard is clearly based on sound managerial reasons. The Corporation Counsel acted to recruit talented and qualified attorneys. For as the court said in Grossman v. Rankin, N.Y.L.J., Dec. 13, 1979, p. 11 (Sup. Ct. N.Y. Co.) in considering the actions of the Corporation Counsel herein complained of:

> "The overwhelming testimony . . . has convinced the court that the professional equipment and the capacity to efficiently perform the duties of

> Assistant Corporation Counsel as demanded by the City's Law Department cannot be determined and evaluated by competitive examination, and the court can only come to the conclusion that it would be impracticable to submit candidates for appointment as Assistant Corporation Counsel to competitive examination."

Based on the evidence in this record, I conclude that the increase in exempt titles and indeed the conversion of unfilled competitive positions to exempt ones was not motivated by any anti-union animus but rather as previously stated was based on a desire to attract qualified attorneys.

Further in response to the contention of petitioners that the ultimate goal of the Corporation Counsel was to remove all of his employees from the bargaining unit and thus preclude their participation in Section 1173-4.1 rights, the Corporation Counsel sua sponte raised with representatives of petitioners the question of the organization of exempt employees. He also testified that he would have no objection to all of his employees including exempts exercising their organizational or collective bargaining rights.

I therefore, find that, absent improper motivation, the acts complained of do not constitute a violation; that the record not only fails to establish any improper or anti-union motivation, rather it does establish that the motivation for the acts under scrutiny here was based on sound professional reasoning.

I, therefore, recommend that the petition be dismissed in its entirely.[8]

DATED: New York, N.Y.
December 17, 1980

JOSEPH R. CROWLEY

[8] The charge does speak of domination of and interference with the administration of petitioners. However, domination of a labor organization generally takes place where an employer controls the formation or administration of the organization by controlling its affairs. Modern Plastic Corp. v. NLRB, 379 F.2d 201, 204. Interference would require a showing of substantial intermeddling by an employer with the administration of the organization. Petitioners did not submit any evidence of any such control or intermeddling by respondents.

The time in which to file written exceptions to the Intermediate Report of the Trial Examiner having expired on January 8, 1981, and no exceptions having been filed by any party, this report became the final decision of the Board of Collective Bargaining by operation of law.

Marjorie A. London
Executive Assistant to the
Chairman of the Board of
Collective Bargaining