DC37 v. City, 10 OCB 41 (BOC 1972) [Decision No. 41-72 (Cert.)]

OFFICE OF COLLECTIVE BARGAINING,
BOARD OF CERTIFICATION
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In the Matter of
DISTRICT COUNCIL 37, AFSCME — DECISION NO. 41-72
AFL-CIO

-and- — DOCKET NO. RU-241-70

THE CITY OF NEW YORK AND
RELATED PUBLIC EMPLOYERS
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A P P E A R A N C E:

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DECISION AND ORDER

On December 11, 1970, District Council 37, AFSCME, AFL-CIO (hereinafter called Petitioner), filed a petition requesting that employees in the title of Hospital Patients' Accounts Manager (hereinafter HPAMs) employed by the New York City Health and Hospitals Corporation (hereinafter the Hospital Corporation), be accreted to a unit of supervisory social service and related titles employed by the City and related employers and currently represented by Petitioner (Decision No, 40-72).

Although Communications Workers of America, AFL-CIO, intervened, during that the HPAMs properly should be accreted to a unit of administrative titles represented by it, its intervention was subsequently withdrawn.

The Office of Labor Relations challenged the petition on the ground that the HPAM title is managerial and/or confidential, hence not eligible for collective bargaining. Extended hearings were held between September 14, 1971 and February 2, 1972 before Ernest Doerfler, Esquire, Trial Examiner, on the question of the alleged managerial status of the title and at the conclusion of the hearing the parties submitted copious briefs.

Upon consideration of the entire record herein, including the briefs, the Board renders the following decision:

I. The Decentralized Structure of the Hospital Corporation and the Role of the HPAMs

The Hospital Corporation, a public benefit corporation, was created to improve the municipal hospital system and to work toward the development of a comprehensive health service for the citizens of the City. According to the statutory declaration of policy, "a system permitting legal, financial and managerial flexibility is required for the provision and delivery of high quality, dignified and comprehensive care and treatment for the ill and infirm, particularly those who can least afford such services."(§2, NYC Health and Hospitals Corporation Act)

The Corporation came into existence in response to widespread criticism of the inadequate funding and inadequate managerial and administrative systems and controls that characterized the Department of Hospitals, and was based upon the need for decentralization, with a two-fold objective: first, the creation of an autonomous hospital system separate from the City administration (i.e., the Bureau of the Budget, the Comptroller the Civil Service Commission, the Department of Personnel, and the Department of Social Services); and, second, the decentralization of operating responsibility within the Corporation from the Central Office to the local institutions comprising the system.

Under the Department of Hospitals, the revenues generated by the hospitals in the system were deposited in the City's general fund to be used to meet any and all fiscal demands of the City, not necessarily for hospital costs or purposes. The Hospital Corporation, however, is an independent entity with its own budget and revenues, and a status outside the City administration. Although it is not financially independent of the City, it is intended to become increasingly so. As Paul Kerz, Senior Vice President for Finance, testified, the Hospital Corporation differs from the old Department of Hospitals "by virtue of its being in a position to benefit from better collections and to be hurt by worse collections." It is the sole beneficiary of its efforts to generate maximum revenues; income derived from patient care in the hospitals accrues to the Corporation and to the individual hospitals for their use, not to other City agencies or to the City as a whole.

The move toward internal decentralization of decision-making to the individual hospitals had already begun in certain areas under the Department of Hospitals in 1966. This earlier decentralization of authority was the basis of the Board of Certification's Decision No. 6-70, Communications Workers of America, Local 1184, AFL-CIO, and the City of New York, wherein the Board found managerial the titles of Hospital Administrator, Assistant Hospital Administrator, and Junior Hospital Administrator. The Board declared in that decision:

> "Under the then existing system, however, little or no authority or discretion was exercised at the hospital level, and the chief function of these titles was to oversee the execution of orders, directives, and policies which originated exclusively at the central office level. The purpose of the reorganization is to replace this rigid and inflexible system with one more capable of dealing promptly and appropriately with the diverse problems of individual hospitals in various parts of the city. The means employed in accomplishing this end has been to shift authority from central office to the individual hospitals and to give the people operating the hospitals the power to make decisions and to formulate policies which will promote maximum effectiveness of the hospital service. Thus, while the three titles here involved are lower in the hierarchy because of the superimposition of the Assistant Commissioner and Deputy Assistant Commissioner titles, the nature and function of the hierarchy has been greatly enhanced. Instead of being at the first (Hospital Administrator), second (Assistant Hospital Administrator), and third (Assistant Hospital Administrator and Junior Hospital Administrator) local levels of what Was, essentially, a centralized city-wide administrative structure, these titles are now all at the third level of a managerial group invested with the responsibility and authority which that term implies. They administer and effectuate policies at the highest level of actual implementation; they make recommendations affecting policy which may be acted upon at two levels above their own and within the same complete self-contained operating entity."

The titles whose managerial status was affirmed by the Board of Certification in the CWA case no longer exist under the Hospital Corporation, but they occupied the same level - the third - in the local hospital management hierarchy under the Department of Hospital as do the HPAM's in the instant case under the Hospital Corporation. The decentralization

pursued by the Hospital Corporation has had the same effect of greatly enhancing the nature and function of the local hospital hierarchy as the Board noted in the CWA case.

Under decentralization, the Central Office executives and the centralized staff organizations, such as the Office of Management Systems, have no direct authority over the HPAMs. The Executive Director of each hospital reports directly to the President of the Corporation, or his deputy, although he may go to various Senior Vice-Presidents for technical information. In the Corporation hierarchy with its 60,000 employees (direct and affiliation), the only intermediate ranks between the President and the HPAMs are the Executive-Directors and the Controllers.

The evolution of the authority and discretion accorded the HPAM title cannot be understood except in the light of the critical collection problem faced by the Hospital Corporation at its inception and, as abundantly documented by the record, the participation by the HPAMs in the formulation of procedures to resolve that problem. It was recognized by the top Corporation executives that without the technical expertise of the HPAMs and their willing acceptance of proposed procedures the top down directives issued at first by Central office systems specialists would go unimplemented at the hospital level. Therefore, the practice of conferring with the HPAMs and involving them in the preparation of collection procedures was necessarily developed. This practice was nowhere expressly or formally articulated in the Corporation’s operating

procedures or in its table of organization, but management officials testified that since March 1971, all collection procedures issued by the Central Office have been, consensual, involving decisive input by the HPAMs. This development, it is important to note, commenced with the formation of the Hospital Patients' Accounts Manager Committee (hereinafter the HPAM Committee) which is, in effect, integrated into the decision making structure of the Hospital Corporation. Thus, the HPAMs, as a group, through the Committee, have an important role in the formulation of policy in their area of competence and concern.

II. The Duties and Responsibilities of the HPAMs - Their Individual Discretion and Independent Judgment

HPAM is a non-competitive title newly-created by Hospital Corporation when it took over the operation of the municipal hospital system from the Department of Hospitals.

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[1] The HPAM Committee arose as the spontaneous independent reaction of the HPAMs to the confused and desperate collection situation which existed in the Spring of 1971, and the efforts of the Central Office to correct it by the issuance of directives and procedures without prior consultation with the HPAMs. Designed to discuss common professional problems of collection, the Committee meets twice a month and has regular officers, agenda, and minutes. There is no evidence that the Committee was inspired or deliberated prompted by the Hospital Corporation, nor that the Corporation has sought to, or in fact controlled the organization. With the creation of the Committee, the Central Office no longer unilaterally promulgates rules and procedures, but, instead, introduces proposed procedures to the committee for consideration and approval. It does this by requesting permission to have Central Office executives or staff personnel appear before the full Committee to outline the procedures proposed by top management. This permission is generally

Simultaneously, the Hospital Corporation took over from the Department of Social Services the collection function at the hospitals which Social Services and performed for the Department of Hospitals with competitive civil service titles in the Hospital Care Investigator occupational group.

A Patients' Accounts section exists at each of the eighteen municipal hospitals, and is one of the three or four sections comprising the Controller's Department in each hospital. The Controller is the chief financial and budgetary officer at the hospital level, and his responsibility encompasses general accounting, patients' accounts, admissions, and, in some institutions, purchasing. The HPAM reports directly to the Controller, who in turn, reports, to Executive Director, the chief administrative officer at the hospital. Because of the complexity of the collections problem, and the

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granted, although, on occasion, it has been denied or deferred by the Committee. The HPAM Committee Chairman then names a sub-committee or ad hoc committee consisting of 3-5 interested HPAMs to study the proposed procedure in detail. The minutes of the HPAM Committee record the activities of some 8-10 of these ad hoc committees. The initiative for proposed procedures does not, however, always come from top management; sometimes the HPAMs initiate a proposal, create a sub-committee, and contact management personnel to explore the matter. In either case, the sub-committee and specialists from the Office of Management Systems confer and together work out "tentative compromise agreements" on the matter in hand. These are then brought back to the full HPAM Committee for comment, correction, or approval. Some compromise procedures have been rejected and referred back to the sub-committee for rewriting together with the appropriate systems specialist. However, even when a procedure has been cleared by both an ad hoc committee and the full HPAM Committee, and has been issued by the Central Office, some HPAMs, nevertheless, still reserve the right not to follow or implement it in whole or in part if they consider it unsuitable for their institution.

demands upon their time of other problems, the Controllers and Executive Directors do not involve themselves in the Patients' Accounts operation, generally reposing the fullest reliance in the HPAM who, therefore, has utmost responsibility and authority in the collections area. Memoranda sent by the HPAM to the Central Office of the Corporation are signed by the Controller, and memoranda from the Central Office to the HPAMs are also addressed to the Executive Director and Controller, but this is largely a matter of form or courtesy. Day-to-day contacts between the HPAMs and their Controllers are in fact rare, although they make generalized reports to their immediate superiors weekly.

HFAHs supervise staffs consisting of all levels of Hospital Care Investigator.(except Senior Principal Hospital Care Investigator) and office and clerical employees. This group of subordinates ranges in size from 5 (at Goldwater Hospital, an extended care facility) to 125 (at Kings County Hospital, a general hospital), and includes many professionals with college degrees. HPAMs have the authority to hire (subject to budgetary limitations) and effectively to recommend discharge of subordinates.

When the Hospital Corporation created the non-competitive HPAM title, personnel to fill it were drawn largely, though not entirely, from a pool comprising Supervising Hospital Care Investigators and Principal Hospital Care Investigators (or persons on a then extant PCHI list) employed by the Department of Social Services. The selection was made by Controllers and Directors of the hospitals. The persons appointed to the HPAM title retain the right to revert to their former competitive HCI title from which they are considered to be technically on leave of absence.

The official job description for the HPAM title sets forth the purpose of the title as follows:

> Under general supervision of the Hospital Controller plans, organizes, and directs functions and activities of Accounts Receivable Section relating to financial investigation of patients' payment status, credit and accounts receivable control, billings and collection. Implements policies, practices systems and procedures relating to staffing, supervision of personnel, coordination, control, audit and review of Accounts Receivable activities to attain Corporation's goals and to maximize reimbursement of in-patient and out-patient billings, in concert with policies and procedures promulgated by the Corporate Central Office.

In practice, as appears herein after, the HPAMs' duties and responsibilities depart significantly from the specifications. They do not simply implement policies and procedures made by the Central Office, but have an important input in the-formation of such policies and procedures. They play no part in labor or personnel relations.

HPAMs must possess a baccalaureate degree with a major in accounting, finance, business administration or related field; must have four years of experience in accounting, finance or business administration with at least two years in a supervisory capacity in areas normally related to a hospital, medical center, or health care facility; two years of specialized experience in the management of patients' accounts; or a satisfactory combination of experience, education and training.

At the time D.C. 37 first filed its petition in behalf of the HPAMs, their salary range was $10,400-$15,700. During the course of the hearing, with the consent of the Union, the Hospital Corporation increased the salary range to $14,000-$19,000. None of the HPAMs, however, is formally included in the Managerial Pay Plan.

The collection of revenues for services rendered at the City hospitals - hospitals of the last resort whose open admissions policy requires admission of all comers - is a difficult and complex process, and a crucial one to the survival of hospital services. The sources of these revenues are a number of reimbursement sources whom the Corporation bills: the Sta te and Federal governments under the Medicaid Program for the indigent sick; the Federal Government under the Medicare program for persons 65 and over; Blue Cross; insurance companies; and self-pay patients. To bill effectively the third party providers, requires the collection of a vast amount of critical information and documentation from a number or diverse sources within the hospitals, including physicians, nurses and other medical records personnel, the hospitals' medical boards, and a variety of ward personnel. The third party payors, with the passage of time, have demanded increasingly precise and stringent documentation and paper-work before they will make reimbursement to the Corporation.

In addition to making important contributions to the formulation of policy during the "rescue" phase of the Corporation's existence, and to sharing continuously in decision-making in the collection area through the HPAM Committee, the weight of evidence discloses that the HPAMs. also have wide latitude for the exercise of individual independent judgment and innovation within their hospitals.

The Central Office executives have no formal, direct authority over the HPAMs. Giglio, Kerz's Deputy for Collections and also Director of the Office of Management Systems, testified:

> "In any area, the governing rule is decentralization. That is the prevalent mood at hospital level. To the best of my knowledge not only in the collections and finance area, nowhere . . . does anyone (in the Central Office) have any formal authority over hospital level activities."

In line with the decentralization goal of the Corporation, top management accords the HPAMs broad discretion and authority within the local hospitals to inaugurate or change collection and billing procedures without approval of the Central Office, or to refuse to put into effect procedures issued by the Central Office. It curtails this authority only when the statutory mandates of the Corporation are not being furthered or fulfilled, or when solvency of the enterprise is threatened. In such cases the Central Office reserves the power to veto the decisions of the HPAMs, presumably, however, through the chain of command: that is, from the President of the Corporation to the Executive Director of the hospitals, to the Controller, to the HPAM.

The Criteria for Determining Managerability

The Union contends that §201.7 of the Taylor Act, the 1971 amendment which exempts managerial and confidential employees (as defined) from the provisions of the Act, is binding on the Board of Certification, and that earlier precedents of the Board of Certification and the managerial definition in the New York City Health and Hospital Corporation Act are not applicable. It further contends that the amendment, which became effective August 16, 1971, and the subsequent interpretations by PERB of the definition of "managerial," have established exclusionary criteria narrower than those adopted by the Board of Certification in its decisions prior to the Taylor Act amendment. The Union declares:

> "While this Board may have adopted its own criteria prior to the legislative amendment of Section 201.7, it appears indisputable that the Board is now bound to apply the definition of the amendment as PERB has interpreted the definition."

In the instant case, the question of the managerial status of the HPAMs hinges entirely on their role in, the formulation of policy, since it is conceded by the Hospital Corporation that they play no part in labor or personnel relations.

The Hospital Corporation maintains that the statutory standard of proof of manageriality is not that in §201.7 of the Taylor Act, but is to be found in §1173-4.1 of the NYCCBL and in §9.5 of the Health and Hospital Corporation Act, which it describes as "codifications of the existing decisions and doctrines of the Board of Certification." Apparently, the Hospital Corporation agrees with the Union that the statutory definition of "managerial" in the amended Taylor Act is narrower than the pre-amendment definitions enunciated by PERB and the Board of Certification.

In point of fact, in its recent decision In-Re State of New York, Case No. E-0081, January 20, 1972, PERB specifically compared the statutory definition in §201.7 CSL with its own pre-amendment decisional definition, and concluded that (with respect to the "formulation of policy" standard) "this legislative criterion is similar in scope and meaning to the earlier one stated by this Board, namely, one who 'formulates or determines State or agency policy.'"

This being so, it follows that the "formulation of policy" criterion set forth in the amended Taylor Act and the amended NYCCBL is the same as the standard developed before the amendments by PERB and the OCB.

In Decision No. 73-71, Association of Deputy Wardens and Deputy Superintendents v. City of New York, decided November 5, 1971, the Board of Certification declared:

> "Since the time we rendered our decisions, the State Legislature, in amending Taylor Law, provided for the exclusion of employees from bargaining rights who may reasonably be designated as 'managerial' (Chapters 503 and 504, Laws of 1971). The amendment pertaining to managerial employees became effective August 16, 1971 and reads as follows:
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> > Employees may be designated as managerial only if there are persons (a) who formulate policy or (b) who may reasonably be required on behalf of the public employer to assist directly in the preparation for and conduct of collective negotiations, or to have a major role in the administration of agreements or in personnel administration, provided that such role is not of a routine or clerical nature and requires the exercise of independent judgment.
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> "It is our view, and we so conclude, that the criteria set forth in our decisions are substantially equivalent to those set forth above, and, further, that the criteria set forth in the Taylor amendment and in our decisions are designed to accomplish the same end."

IV. The Evidence

The two HPAMs called by the Union testified that they merely implemented procedures issued to their hospitals by the Central Office, that they had no discretion to reject or modify these procedures, and that they never initiated any new procedure in their institutions. These witnesses made little or no reference to the part played by the HPAM Committee in the development of policy and procedure, although they were part of the Committee and one of them was its Chairman. The impression left by the Union's witnesses was that they were allowed little scope for independent judgment by their Controllers or the Central Office.

The City's witnesses, especially the four HPAMs, testified that individual HPAMs possess broad discretion and in fact exercise independent judgment and innovative authority at their hospitals. These witnesses asserted that their controllers have little or no involvement in the collection area, partly because of the complexity of the field and partly because of the pressure of other duties, thus leaving the HPAMs free to run their sections without restriction. As examples of direct, personal innovation or policy formulation at their hospitals, Corporation witnesses cited specific programs to maximize income or to capture revenues formerly lost under the Department of Hospitals regime, which they had initiated or which they had undertaken on their own without prior consultation with or approval of their controllers.

The fact that some HPAMs (the Union's witnesses) did not exercise the discretion which Corporation executives testified is inherent in the position, and did not take the initiatives on new programs which other HPAMs (the Corporation's witnesses) in fact took, cannot be regarded as a refutation of the Corporation's claim that the position entails managerial authority.

Although the mechanics of the collection function are essentially the same under the Hospitals Corporation as under the Department of Hospitals, the enhanced importance of collections to the autonomous Corporation and the enlarged discretion granted to local hospital personnel under decentralization, make the HPAM a substantially different position, in point of motivation and initiative, identification with the employer's interests, and authority, from the HCI titles who formerly performed the function.

We find and conclude, therefore, that the HPAMs employed by the Hospital Corporation because of their direct, personal policy formulation at the individual hospital, and their joint or collective participation in system wide collection policy formulation through the agency of the HPAM Committee, are managerial-executive employees, and do not, collectively or severally, constitute a unit appropriate for purposes of collective bargaining in fact or within the meaning of the New York City Collective Bargaining-Law. Accordingly, we shall dismiss the petition in Case No. RU-242-70.

V. Union Objections to the Trial Examiner's Rulings

During the course of the hearing the Union objected to the propriety of the Trial Examiner's ruling in regard to two items of testimony.

The first was testimony by Giglio, Deputy for Collections and Director of the Office of Management Systems, who had been qualified as an expert, that in his view "the role of the HPAM involved the art of management." The Trial Examiner permitted the testimony. The Union objected, demanding that the testimony be struck on the ground that the determination of manageriality was for the Board of Certification, that the Employer's position was not material or relevant, that the ruling opened the door to unlimited expert testimony by both sides, and was a departure from prior OCB practice.

We find and conclude that the Trial Examiner's ruling was proper. In Re State of New York, Case No. E-0081, January 20, 1972, The New York State Public Employment Relations Board, rejecting the State's contention that the amended statute expressed a legislative intent that PERB should adopt the employer's judgment that a particular position is managerial unless it is arbitrary and unsupported by substantial evidence, declared:

> "We do not read the quoted language of the statute as creating a presumption in favor of an employer's judgment concerning the employees whom it may reasonably require to conduct its labor relations responsibilities; we understand it as providing a criterion which PERB must observe in making its determination. While an employer's opinion as to the designation of employees as management or confidential is entitled to serious consideration, nevertheless this Board's determination is not limited simply to a review of the opinion of the employer and the reasons supporting such opinion. Rather, the determination is based upon the application of the statutory criteria to all the evidence offered by the parties."

The second objection of the Union related to testimony concerning a vote taken by the HPAM Committee as to whether the HPAMs chose to be considered managerial. The Union maintained that this was "like asking people whether the majority wanted to be represented by the Union." Upon the Trial Examiner's direction, the witness answered a question as to the outcome of the vote, testifying that the HPAM Committee had voted to consider the title managerial. We are persuaded by the overwhelming weight of other evidence in the record that the position of HPAM is in fact managerial. Accordingly, we deem it unnecessary to pass on the propriety of the Trial Examiner's ruling, since in our view the testimony objected to is of insufficient weight to affect our judgment.

O R D E R

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

ORDERED, that the petition filed by District Council 37, AFSCME, AFL-CIO, in Case No. RU-241-70 for certification as the collective bargaining representative of Hospital Patients' Accounts Managers be, and the same hereby is dismissed.

DATED: New York, N.Y.
August 31 1972.

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