

CWA v. City, et. Al, 10 OCB 63 (BOC 1972) [Decision No. 63-72
(Cert.)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF CERTIFICATION

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In the Matter of
COMMUNICATIONS WORKERS OF
AMERICA, AFL-CIO,

Petitioner

DECISION NO. 63-72

- and -

DOCKET NO. RU-251-71

THE CITY OF NEW YORK AND THE
NEW YORK CITY HEALTH AND
HOSPITALS CORPORATION AND
OTHER RELATED PUBLIC EMPLOYERS,
Respondent

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APPEARANCES:

MR. TED J. WATKINS
for Communications Workers of America, AFL-CIO

JOHN E. SANDS, ESQ.
by MARK GROSSMAN, ESQ. for the City of New York

STEVEN J. GOLDSMITH, ESQ.
for the New York City Health and Hospitals Corporation

DECISION AND ORDER

Communications Workers of America, AFL-CIO, Petitioner herein, requests that employees in the titles of Personnel Representative (including specialties) and Senior Personnel Representative (including specialties) be accreted to Petitioner's existing certification (see Decision No. 48-69). The foregoing certification merged and consolidated earlier certifications covering Personnel Assistants, Personnel Associates, Administrative Assistants (including specialties), Senior Administrative Assistants, and Rule X equivalents (see Decision No. 8-69 and Certifications Nos. CWA-4-67 and MR-1-67).

The petitioned titles, herein jointly referred to as Personnel Representatives, were established by the New York City Health and Hospitals Corporation (herein called the Corporation) subsequent to issuance of the certification under Board Decision No. 48-69.

The City opposes accretion on the ground that the employees in the petitioned titles are confidential employees.

A hearing was had before Oscar Geltman, Esquire, Trial Examiner, on August 25, September 1, 8, and 15, October 7, and November 3, 1971 and January 25, 1972.

Upon consideration of the entire record and the briefs submitted, the Board of Certification makes the following determination:

I

The Hospital Corporation

The Corporation was created by special legislation to operate and maintain eighteen hospitals and a central office formerly operated and maintained by the New York City Department of Hospitals (The New York City Health and Hospitals Corporation Act, L. 19699 c. 1016). The Act expresses a legislative intent to create "a system permitting legal, financial and managerial flexibility." (§2). In furtherance of this intent, the Act authorizes the Corporation to employ employees "who assist and act in a confidential capacity" to "management personnel" and to promulgate its own rules and regulations, consistent with civil service law, for the conduct of its personnel matters (§§ 5.11, 5.12 and 9.1).

Shortly before the creation of the Corporation, a substantial shift in authority from the Department of Hospitals' central office to the local hospital level had already taken place as a policy measure in order "to give to the people operating the hospitals the power to make decisions and to formulate policies which will promote maximum

effectiveness of the hospital service." (See Communications Workers of America, Local 1184, AFL-CIO, Decision No. 6-70.) Since the creation of the Corporation authority over hospital personnel has been statutorily shifted to the Corporation. Control over hospital personnel is no longer exercised by the City's Department of Personnel. Nor do other agencies, such as the Department of Investigations and the Bureau of the Budget, exercise control over the conduct of hospital personnel or the fiscal and budgetary policies of the Corporation.

II

Personnel Representatives and Senior Personnel Representatives

There are approximately thirty-three Personnel Representatives employed in fourteen of the Corporation's hospitals and in the central office. Their job descriptions include performance of a variety of administrative functions connected with the employment and placement of personnel, Personnel procedures, training activities, job and job training analysis, and related matters. The job description for Senior Personnel Representative includes the requirement that he "Investigates and processes employee grievances and works toward successful resolution."

Witnesses called by the City testified as to the duties and functions performed by the Personnel Representatives at central office and at the following hospitals: Bellevue, Coney Island, Fordham, Goldwater and Sydenham. Petitioner called no witnesses.

III

Functions at the local hospital level

At each of the hospitals named above personnel matters are handled by a staff headed by a Personnel Director who is subordinate only to the hospitals's Executive Director. The Personnel Director directs the

handling of personnel matters at the hospital, including such matters as hiring, training, grievance handling, and the initiation and handling of disciplinary action. Each Personnel Director has one or more Personnel Representatives on his staff. Working relationships between the Personnel Directors and the Personnel Representatives on their staffs are close. Typical of the testimony descriptive of that relationship is testimony given by two Personnel Directors, as follows:

"They are privy to my thinking
They give me the input that is needed to
make a proper and intelligent decision."¹

and

"They are interchangeable in representing me and the hospital at various meetings, and in terms of special projects and emergency situations, they all have to fill in on whatever is needed at that particular moment, although each of them has more specifically designated responsibilities."²

At most or all of the hospitals named above, the Personnel Representatives have been called upon to substitute for the Personnel Director at meetings, including meetings with other Personnel Directors, and meetings with hospital Executive Directors. At two of the hospitals, Personnel Representatives were called upon to assist Personnel Directors in reviewing union contract demands forwarded for comment by the Corporation's central office. It appears from the testimony, explicitly in some instances and inferentially in others, that the Personnel Representatives at all the hospitals named have access to personnel records of hospital employees.

Testimony of John Cusack, Coney Island Hospital.

Testimony of Doris Lesser, Bellevue Hospital.

IV

Functions at the
central office level

Seven of the Personnel Representatives are employed at the Corporation's central office. One assists the Corporation's Acting Director of Labor Relations, another makes comparisons and recommendations regarding pay rates, and five are involved in training programs. Most of the training is federally funded and presented under the joint auspices of the Corporation and District Council 37, AFSCME, AFL-CIO. One of the Personnel Representatives is responsible for the day-to-day administration of the federally funded training program and makes recommendations and arrangements for the release of employees to receive full time schooling while remaining on the Corporation's payroll,

V

Discussion

Petitioner asserts that there are "striking similarities" in the duties and responsibilities of Personnel Representatives with those of Personnel Assistants and Personnel Associates who are represented by Petitioner. In this respect, Petitioner contends that its current representative status on behalf of Personnel Assistants and Personnel Associates constitutes a basis for a determination that Personnel Representatives are not confidential employees. We do not agree with this contention. Petitioner overlooks the fact that its status as collective bargaining representative of Personnel Assistants and Personnel Associates excludes confidential employees since the certification issued to it specifically excluded all employees in the titles "directly engaged in handling and/or assisting those who are directly responsible for personnel management and labor relations activities in their agency." (Matter of Local 1180, CWA, AFL-CIO, Decision No. 8-69)

The City and the Corporation contend that the facts in this case are governed by the same considerations which prompted our determination in Matter of Local 188, D.C. 37, (Decision No. 70-68). That decision involved the status of Personnel Examiners in the Personnel Department.. and in denying the union's petition we held:

"The record clearly establishes that Personnel Examiners in the Department of Personnel regularly assist and act in a confidential capacity to persons who formulate, determine and effectuate policy in labor relations and personnel management and regularly have access to confidential information pertaining thereto. Accordingly, we find and conclude that they are confidential employees."

In the Local 188 case we also held that the exclusion of Personnel Examiners from a bargaining unit was warranted "based upon potential or and 'the right of the employer to formulate, inherent conflicts of interest determine and effectuate its labor policies with the assistance of employees not represented by the unions with which it deals.'" In this connection we referred to §1173-5.0b (1) of the New York City Collective Bargaining Law (NYCCBL), "which requires that bargaining units shall be 'consistent with the efficient operation of the public service and sound labor relations.'" "

A fortiori, the exclusion of managerial and confidential employees from collective bargaining is now statutorily based and our determination finds authority in express statutory authorization (§1173-4.1 NYCCBL).

The facts in this case persuade us that the activities of Personnel Representatives, whether performed at the Corporation's central office or at its various hospitals³ are such as to constitute them confidential

In our evaluation of the testimony concerning the duties, task, and responsibilities of the Personnel Representatives at the central office and the five-named hospitals, it is our judgment that such testimony is, from an evidentiary aspect, substantial so as to warrant the inference that the duties, tasks and responsibilities are similar for all Personnel Representatives throughout the Hospital complex in the absence of contrary evidence.

employees within the purview of the NYCCBL and as articulated in our rulings and decisions in Matter of Local 188, D.C. 37, supra, and Matter of Local 1180, Communications Workers of America, AFL-CIO, supra.

We note that the Hospital Act defines confidential employees in language similar to that in our decision in Matter of Local 188, D.C. 37, supra, and that such employees are excluded from collective bargaining.⁴ In this connection, the Corporation is free to classify its employees in the same manner as a civil service commission for civil service purposes while the statutory function of this Board is to determine units appropriate for collective bargaining purposes (see Matter of Local Union No. 3, IBEW, AFL-CIO, etc., Decision No. 62-71).

We have also noted that the Public Employment Relations Board rendered an "Interim Decision" on January 20, 1972 (Matter of State of New York, Case No. E-0081) which, in part, excluded from collective bargaining all employees in the State's Personnel Administration series. That decision, though not determinative of the instant case, does, nevertheless, indicate the factors which are considered in arriving at the conclusion that the duties, tasks and responsibilities of certain employees constitute them confidential in nature.

Section 5.11 of the Hospitals Act provides, for the exclusion from collective bargaining representation of:
"officers, executives, management personnel, and such other employees who formulate or participate in the formulation of the plans, policies, aims, standards, or who administer, manage or operate the corporation and its hospital or health facilities, or who assist and act in a confidential capacity to persons who are responsible for the formulation, determination and effectuation of management policies concerning personnel or labor relations, or who determine the number of, and appointment and removal of, employees of the corporation, fix their qualifications and prescribe their duties and other terms of employment."

Based upon the facts in this case we find and conclude that all Personnel Representatives and Senior Personnel Representatives employed by the New York City Health and Hospitals Corporation are confidential employees and that they do not constitute a unit appropriate for purposes of collective bargaining. Accordingly, we shall dismiss the petition herein.

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

O R D E R E D, that the petition filed by Communications Workers of America, AFL-CIO, for accretion of Personnel Representatives and Senior Personnel Representatives to its certification under Board Decision No. 48-69, be and the same hereby is dismissed.

DATED: New York, New York
September 15 , 1972

/s/ Arvid Anderson
C h a i r m a n

/s/ Eric J. Schmertz
M e m b e r

/s/ Walter L. Eisenberg
M e m b e r