Legal Ser. Staff Ass. v. HRA, et. Al, 12 OCB 48 (BOC 1973) [Decision No. 48-73 (Cert.)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF CERTIFICATION
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In the Matter of

LEGAL SERVICES STAFF ASSOCIATION,

Petitioner

DECISION NO. 48-73

- and -

DOCKET NOS. RU-340-72
RE-25-73

COUNCIL AGAINST POVERTY (HUMAN RESOURCES ADMINISTRATION) and COMMUNITY ACTION FOR LEGAL SERVICES, INC., and the DELEGATE CORPORATIONS OF CALS

Respondent

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A P P E A R A N C E S:

CAMMER & SHAPIRO, P.C.
by Ralph Shapiro, Esq.
for the Association

WILLIAM BABISKIN, ESQ.
Office of Labor Relations
for the Employer

DECISION

On October 3, 1972, Legal Services Staff Association (LSSA) filed its petition in RU-340-72 requesting certification as the exclusive bargaining representative of the employees in a unit consisting of all employees of Community Action for Legal Services, Inc. (CALS) and its 9 delegate operating legal services corporations except those employees who are managerial or confi- fidential within the meaning of the NYCCBL.

On November 30, 1972, the New York City Office of Labor Relations, representing the employer herein, stated that with

respect to the petition of LSSA it took the position that
LSSA ""as not demonstrated that it is a bona fide labor organization within the meaning of §1173-3.0 of the NYCCBL"
and that "the requested unit is too small and therefore inappropriate. The only appropriate unit is an industrial
unit of all employees in all Community Corporations."

On December 26, 1972, Deputy Chairman Philip Ruffo
received a letter from LSSA withdrawing the petition in
RU-340-72 and requesting the return of the designation cards filed in support of the petition. At the hearing, Counsel
for LSSA stated that the Association withdrew its no strike affirmation which had been filed pursuant to Rule 2.17.[1]

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[1] Rule 13.7 of the Consolidated Rules of the Office of Collective Bargaining provides that the Board of Certification "may permit withdrawal of a petition." In this case, a withdrawal of the Association's petition would not be dispositive because a question concerning the representation of the employees exists by virtue of the continuing demand for recognition by the LSSA on the employer. In furtherance of its demand for recognition, LSSA has filed a petition for certification with the New York State Labor Relations Board. Also, the employer, contending that jurisdiction lies with the Board of Certification and not with the NYSLRB, has filed its petition before this Board pursuant to Rules 2.2 and 2.4 of the Board. Therefore, we shall not permit withdrawal and the Association's petition and the designation cards filed in support of the petition are not deemed withdrawn.

Although we are aware that in the proceeding before the NYSLRB the LSSA has taken the position that the NYSLRB has jurisdiction over the Employer, we find that the Employer's petition in RE-25-73 is properly before us and we are therefore mandated by the NYCCBL to make a determination of the issues presented herein.

On January 23, 1973, the Council Against Poverty of the Human Resources Administration filed its petition in RE-25-73 alleging that a question concerning representation existed and that the appropriate unit was "an industrial unit of all employees in all Community Corporations."

LSSA filed its answer to the City's petition in RE-25-73 on February 9, 1972 stating that the petition should be dismissed because LSSA had withdrawn its petition in RU-340-72 and therefore there was no question concerning representation for the Board to decide.

On February 28, 1973, the Board of Certification issued an order consolidating RU-340-72 and RE-25-73. Hearings were held on March 22 and 23 and May 16, 1973 before Eleanor L. Sovern,Esq. Trial Examiner. The hearings were adjourned without date to permit the Board to issue a decision on the issues of jurisdiction and the appropriate unit with the understanding that the hearing would resume if the Board deemed it necessary to take testimony on the managerial or confidential status of certain employees.

THE CONTENTIONS OF THE PARTIES

The LSSA brief argues that the Board of Certification does not have jurisdiction over the employees of CALS because "they are not employed by a municipal agency or a public employer and they are not paid by City funds" as required by §1173-3.0(g) of the NYCCBL.

The Union asserts that CALS is a private non-profit corporation, independent of the City government; that its

employees are not in the civil service and that their salaries are paid by the Federal Office of Economic Opportunity. The brief further argues that the "OCB has denied procedural due process to LSSA by its violations of its rules and its failure to enforce its orders." The Union argues that the Board did not act promptly on the petition in RU-340-72, did not require the City to submit its contentions as to managerial and confidential status promptly, and improperly conditioned access to its processes with the illegal requirement that LSSA file a no-strike affirmation. The Union asserts that if the requirement to file the affirmation with the petition is valid, then OCB has lost jurisdiction because LSSA has withdrawn the affirmation.

The LSSA maintains that if the Board should assert juris- diction over CALS, then the appropriate unit consists of all employees of CALS and its delegates, and that the employees of CALS may not properly be combined with the employees of the various community corporations in a single unit. The brief argues that such a unit meets the criteria of Rule 2.10 in that the employees of CALS have a community of interest, there is no prior history of bargaining contrary to the unit requested by LSSA, such a unit would assure the employees the fullest freedom to exercise their statutory rights, and there has been no showing that the requested

unit would impede the efficient operation of CALS or have adverse effects on sound labor relations. The LSSA argues that CALS is unique and is different from the poverty corporations because it provides legal services whereas the community corporations provide a myriad of poverty services, and that CALS has greater independence in fulfilling its mission than the community corporations.

Finally, the brief argues that the Williamsburgh Community Corporation case (Dec. No. 22-71) is not dispositive because the issue of Board jurisdiction was not litigated and CALS was not discussed in that decision.

The employer's brief argues that the Board has jurisdiction over CALS based on its decision in Williamsburgh, and that CALS is a public employer within the meaning of the NYCCBL because of the control the New York City Council Against Povery (CAP) exercises over CALS in fiscal and personnel matters including labor relations. The brief points out that CALS must meet extensive reporting requirements of CAP and that CAP has complete control over CALS' funding. The employer argues that the employees of CALS need not be public employees for every purpose but that the question presented is "whether there exists a public employer-public employee relationship contemplated by the NYCCBL." The brief states that the funds from which the employees of CALS are paid "does come from the City Treasury"

and that there is "definitely City money in the CALS program because the City contributes its share to the total anti-poverty program. "Alternatively, the employer asks the Board to find that CAP and CALS are joint employers.

The employer's brief argues that "the only appropriate unit is an industrial unit of all employees in the delegate agencies of CAP" including employees of CALS and the community corporations. The brief asserts that the unit requested by the Association "is a throwback to the fragmented and unsatisfactory unit structure of another era". Relying on the unit finding in Williamsburgh that the appropriate unit consists of employees of all 26 community corporations and their delegate agencies, the employer maintains that CALS and its delegates are a species of community corporation and therefore CALS employees should be included in the industrial unit found appropriate in Williamsburgh.

Finally, in a footnote, the brief states: "Under no circumstances should this [the brief on jurisdiction and appropriate unit] be considered a waiver of CAP's position that the LSSA has not demonstrated its bona fide status under the NYCCBL."

STATUS OF THE ASSOCIATION

William Dalsimer, Esq., whose title is Acting Chairperson of Legal Services Staff Association, testified that the

Association came into being at a general membership meeting held on September 25, 1972 following organizational efforts which began in December, 1971. Mr. Dalsimer and other officers were elected to form the leadership, and were authorized to file a petition seeking certification for the Association, collect and disburse funds, engage an attorney and draft a constitution and by-laws. The Association holds regular meetings of which minutes are kept and at which the treasurer's report is read, and it has a bank account. Mr Dalsimer stated that the purpose of LSSA is to represent employees for the purpose of negotiations concerning their wages, hours and working conditions. The City has not presented any evidence to support its contention that the Petitioner is not a labor organization within the NYCCBL.

We find that the Legal Services Staff Association is a "public employee organization" within the meaning of §1173-3.0(j) of the NYCCBL.

THE EVIDENCE

Community Action for Legal Services, Inc. is a non-profit corporation providing legal services to poor people in New York City. It is funded by the Federal Office of Economic Opportunity as part of the "war on poverty." Federal law requires that OEO funds be granted to local entities established as Community Action Agencies. To meet this requirement, the Council Against Poverty (CAP) was

established by Mayor's Executive Order 87 amending Executive Order 28, on July 1st. 1968. CAP's functions are "(i) to determine overall program plans and priorities for the City's Attack on Poverty ... (ii) to provide for the creation ... of community corporations ... as the primary instruments for citizens participation and community action ... (iii) to adopt each year proposed community development agency estimates ... (iv) to give final approval of all program and budgets for Attack on Poverty funds from community corporations ... (v) to require the (HRA) Administrator ... to submit estimates for the Attack on Poverty and apply for and receive from OEO the necessary Title III (A) funds ... (vi) to allocate among the community corporations ... funds ... and to require the Administrator... to make such funds available ... (vii) to enforce compliance with all conditions of grants from the United States Office of Economic Opportunity..."

The Council Against Poverty is a policy making body composed of 51 members including public officers of the City of New York sitting ex officio, representatives of religious, business and labor groups and representatives of the poor. They are appointed by the Mayor after consultation with CAP. The administrative and staff functions of CAP are performed by the Community Development Agency (CDA) which implements programs initiated by CAP, recommends approval of budgets

for the poverty corporations, and oversees the proper functioning of the poverty programs in New York City according to policies established by CAP. The Commissioner of CDA is appointed by the Mayor on notice to CAP.

Viewed in the context of the City of New York governmental structure, CAP is one of the many agencies under the umbrella of the Human Resources Administration (HRA), a mayoral "super-agency" which coordinates the delivery of all social welfare services in the City of New York. The HRA fiscal department performs audits of poverty corporations and authorizes release of funds pursuant to bills and vouchers submitted by the corporations.

The attack on poverty formulated by CAP is implemented by CDA by means of contracts with poverty corporations which provide anti-poverty services in poor communities throughout the City. These corporations are of two varieties: The most numerous are 26 community corporations which, together with delegate corporations with which they in turn contract, provide a wide variety of poverty services. Mr. Hal Yourman, Director of the Division of Labor Relations of the Human Resources Administration, testified that the community corporations and their delegates have 10,000 employees. The other type of corporation with which CDA contracts is Community Action for Legal Services, Inc. which provides legal services to the poor. CALS has 9 operating legal services corporations which operate law offices in poor communities. Unlike the community corporations, CALS and its

delegates have only one mission, that of providing legal services, and together they have over 300 employees, of whom approximately one-half are attorneys while the rest are supporting staff.

CALS is a non-profit corporation with a Board of Directors consisting of 13 attorneys chosen by local bar associations, 2 law school professors, five attorneys chosen by the Board, and 10 "representatives of the poor." The Board structure and the purposes of CALS were approved by the Appellate Division of the Supreme Court which issued an order authorizing the corporation to practice law. The delegate corporations are similarly authorized to practice law by the Court. The purposes of CALS as stated in its Certificate of Incorporation are to "provide legal services, or to contract with other organizations and agencies for the rendering of legal services, without cost except for a voluntary nominal registration fee, for the indigent in the City of New York...." In addition, CALS provides central administration for the 9 delegate poverty law corporations and funds them pursuant to its CAP grant.[2]

[2] The record shows that the Legal Aid Society receives funds from CALS pursuant to the OEO grant. However, the parties agree that the Legal Aid Society is a private corporation and they have stated on the record that it is not a delegate agency of CALS.

The Federal Office of Economic Opportunity annually grants approximately $70 million for anti-poverty activities in New York City. The City must contribute as matching funds 20% of the total spent for anti-poverty programs in order to qualify for federal aid. The requirement is interpreted to mean that 20% of the total anti-poverty program must be funded by the City, although for simplicity in writing budgets and contracts, not all programs need be funded 80% by OEO and 20% by the City of New York. In the case of CALS, OEO grants CAP $5.1 million to conduct a legal services program for the poor. The City of New York does not contribute 20% in matching funds specifically to CALS, but CALS receives the "benefit of the City share" contributed to the total anti-poverty program. If the City did not contribute 20% of the total anti-poverty program, CALS would not receive the grant or might have to raise an amount equal to the local share from other sources.

CALS submits a yearly request for a grant to conduct a poverty law program, including the cost of funding its delegate agencies, to CAP which must approve the proposed budgets and forward them to OEO as part of its annual request for poverty funds. The total federal anti-poverty grant to the City is deposited with the Comptroller of the City of New York and is thereafter paid out to the delegate agencies of CAP, including CALS, pursuant to the contracts. CAP and its operating legal services corporations submit monthly financial reports to the HRA Fiscal Department which determines whether

the monthly expenditures of the agency are in accord with the approved budget, and then authorizes release to the agency of its funds for the next 30 day period.

A CAP Standing Committee on Legal Services makes recommendations to the entire CAP Board concerning CALS programs and the budgets which have been proposed by CDA. Mr. Marttie Thompson, Chief Counsel of CALS testified that any major policy changes contemplated by CALS would have to be brought before the Committee on Legal Services which would in turn report its recommendations to CAP for final action.

The contract between CDA and CALS provides, in Part I, that CALS "agrees to render professional legal services to indigent residents of the City of New York ... within the authority granted to the Contractor (CALS] by the Appellate Division of the Supreme Court ... and in accordance with the provisions of the proposal and within the limitations of the budget and subject to the conditions of the grant made by the Office of Economic Opportunity of the United States for the rendition of those services. The proposal, budget and conditions of the grant are hereby made a part of this agreement. The contract sets forth conditions for agreements with the 9 operating legal services corporations of CALS, providing for CDA approval of the contracts with delegate agencies and CDA evaluation and auditing of the programs conducted by the

delegate, corporations. The contract provides that CDA and CAP shall refrain from asserting "any power over the operation and conduct of the legal services program .... which would involve control, directly or indirectly, over the practice of law by lawyers ... nor shall either of them interfere with lawyers in their rendition of legal services or decide professional matters." In compliance with the order of the Appellate Division, CDA agrees to furnish CALS with copies of its audits and evaluation of the legal services program in order to assist CALS "in its function of supervision and enforcement" of CALS' agreements with its delegate agencies.

Part II of the contract between CALS and CDA contains general provisions relating to budgets, fiscal procedures, hiring and promotion of personnel in accordance with CDA, CAP and OEO regulations, and monthly reporting requirements. These provisions call for a high degree of fiscal supervision of CALS and its delegate corporations by CDA and require close adherence by CALS to the auditing requirements which are administered by the Fiscal Department of HRA. CDA has the right to terminate the contract for nonperformance.

Article III AM of the contract-provides that the appointment of the Chief Fiscal Officer of CALS shall be effective only upon certification by CDA "that the appointment is consistent with applicable regulations, policy and procedures."

Of considerable importance herein is Article III B of the contract which provides that CALS "shall not negotiate or enter into any agreement concerning the collective bargaining rights of its employees under this agreement. All negotiations shall be conducted by the Council Against Poverty or its authorized representatives."

Mr. Yourman of HRA testified that he advises the corporations funded by CAP on labor relations and personnel matters. A CAP Resolution dated October 10, 1968, provides that it is the policy of the Council Against Poverty "to utilize the services and procedures of the Office of Collective Bargaining" and that "an employee organization shall not be certified as an exclusive bargaining representative unless and until it files with the OCB an affirmation that, during the life of the collective bargaining agreement, it does not assert the right to strike ..." The Resolution constitutes CAP as "the sole negotiating agent for collective bargaining purposes for all community corporations and delegate agencies funded in whole or in part by CAP" and establishes a CAP committee on negotiations. Mr. Yourman testified that if employees of a corporation funded by CAP were represented for the purposes of collective bargaining, he would be an integral part of the employer's negotiating team and would replace the Chairman of CAP as chief negotiator when the Chairman was absent. Between 1968 and 1970,

employees of several of the community corporations were represented by unions and negotiated collective agreements.
Mr. Yourman was "actively involved in and represented the Council Against Poverty in those actual negotiations where [he] was many times a chief spokesman, and also preparing the research documents and data on budgets and costs, and also advising industrial corporations and delegate agencies on grievance procedure, application of the law and their role and responsibility under the rules and regulations of CAP in personnel matters and due process matters." (Transcript, p.78) Mr. Yourman also testified that there have been two efforts by unions to represent employees of CALS prior to the instant case, and "hat in those instances he engaged in informal discussions with the two unions involved and with the directors of the CALS delegate agencies involved.[3]

CALS Personnel policies are set forth in the "Uniform Personnel Manual for Community Action for Legal Services, Inc. and Delegate Corporations" which contains provisions regulating salaries, employee benefits, provisional status, and disciplinary and appeals procedures. The personnel policies set forth

[3] One petition was filed with the Board. It was dismissed when the Union failed to submit proof required for the Board's investigation. District 65 and City of N.Y., Dec. 72-71.

therein must conform to general OEO and CAP policies, and the manual was submitted to both OEO and CAP for approval. Each separate corporation is responsible for hiring employees, but the manual provides that no attorney may be employed or promoted by CALS or its delegate corporations without having been accepted for the CALS roster. The roster system requires each applicant to be interviewed by a committee of attorneys who evaluate the applicant's written work and contact his references. The Chief Counsel of CALS, acting upon the recommendation of the roster committee, makes the final decision whether to place the applicant on the CALS roster. His decision is subject to appeal by the applicant or a delegate agency which is seeking to hire a rejected applicant.

THE JURISDICTION OF THE BOARD

Section 1173-4.0(a) of the NYCCBL makes the provisions of the Collective Bargaining Law applicable to "all municipal agencies and to the public employees and public employee organizations thereof." In §1173-3.0(d) a municipal agency is defined as "an administration, department, division, bureau, office, board or commission, or other agency of the City established under the charter or any other law, the head of which has appointive powers, and whose employees are paid in whole or in part from the City treasury ...."

In Williamsburgh Community Corporation, the Board raised the question of jurisdiction and after a lengthy consideration of our jurisdiction in that decision, we found that the community corporations administered by CAP and CDA, which agencies in turn are a part of the Human Resources Administration, were so closely controlled and intertwined with HRA that they in fact were a part of that mayoral agency.[4] We said:

> "[s]ufficient facts exist to warrant the conclusion that the employees involved are employees of ... CAP, which is an arm of HRA, a mayoral agency. The question with which we are concerned is not whether the employees involved are employees of the City government for every conceivable purpose but, whether there exists a public employer-public employee relationship such as is contemplated by the NYCCBL. The record supports the finding that the employees involved may be deemed employees of a mayoral agency within the meaning of the NYCCBL and we so find and determine."[5]

There is no dispute that HRA is a mayoral agency.

See also New York Public Library, et al. and Brower, 5 PERB 3045 (1972), to the effect that "an entity ... may be an employer for some purposes but not for others."

* * *

The definitions of "municipal employees" and "municipal agency" in §1173-3.0 of the NYCCBL do not include a requirement that employees within the meaning of the statute be classified in the civil service, and the Board has in fact certified a unit including non-civil service employees. See DC-37 and the City of New York, Dec. Nos. 23-71 and 47-71.

We find that a similar conclusion is justified with respect to the employees of CALS and its delegate agencies. CAP and its administrative arm, CDA, are agencies operating within the structure of HRA. Policies for the delivery of legal services to the poor are determined by CAP. CALS receives all of its operating funds pursuant to a contract with CDA which obligates the legal services corporations to provide services in a prescribed manner, subject to substantial financial control from CAP and CDA. The amount of funding for legal services is a matter of negotiation between CALS and CDA and the goals for various legal services projects are formulated during these discussions as well as the manpower required to execute these goals. CDA reviews and approves the line item budgets for CALS and its delegate agencies. The Fiscal Department of HRA carries out the fiscal procedures necessary to verify adherence to CDA approved budgets and to release of funds for monthly operations.

The Director of Labor Relations for HRA is the officer who coordinates the conduct of labor relations and personnel matters for the employees of CALS and its delegate agencies. CAP, by contract, is the sole and exclusive bargaining agent authorized to negotiate with the representative of the employees of CALS and its delegate agencies.

With respect to the Association's argument that the employees of the legal services corporations are not paid

"in whole or in part from City treasury" we find that these employees are paid from the City treasury within the meaning of 91173-3.0(d) NYCCBL. All funds received from OEO are deposited by the City with the Comptroller and are paid to CALS pursuant to authorization from the Fiscal Department of HRA. Two witnesses testified that the City contributes a 20% share of the CALS annual budget indirectly; that is, the City contribution is made to the total anti-poverty effort and for simplicity in bookkeeping the City payment is not indicated on the budget of each separate anti-poverty grant made by CDA. Whatever technical method may be used to simplify the task of allocating the millions of dollars spent on anti-poverty programs, it is clear to this Board that the City of New York has a financial interest in the compensation of the employees of the poverty law corporations. We believe that the intent of 51173-3.0(d) is met because the employees of CALS receive their salaries in part due to City payment of funds to the total anti-poverty effort in the City of New York. The record is undisputed that if the City did not contribute its 20% share to the war on poverty, the CALS program would not have been funded and constituted in its actual form.

We find, therefore, that there is abundant support in the record for the conclusion that for the purposes of the NYCCBL the employees of CALS and its delegate agencies are employees of a municipal agency.

OTHER CONTENTIONS

We have considered the Association's contentions regarding delay and the required filing of the no-strike affirmation, and find them to be without merit. We find that there was no unreasonable delay in the processing of the petitions herein. Pursuant to the New York State Public Employees Fair Employment Act, Rule 2.17 of the Board of Certification requires the filing of a no-strike affirmation as a condition to certification by the Board. The Board has adopted the practice of requiring the filing of the affirmation at the commencement of the proceedings as a condition to processing a petition for certification, and this procedure was upheld by the Court of Appeals in Rogoff v. Anderson, 28NY2d880 (1971). The Supreme Court of the United States dismissed an appeal for want of a substantial federal question at 78 LRRM 2463 (1971). Inthe instant case, Petitioner filed the affirmation and its petition was processed; at the hearing, counsel for the Association stated that the affirmation was withdrawn In light of the fact that the Association's petition was processed, that the employer subsequently filed its petition and both cases were consolidated, and that hearings were held and a complete record on the issue of jurisdiction was made, we find that public policy and sound labor relations0 would best be served by a resolution at this time of the issue of this Board's jurisdiction over the employer.

We shall, therefore, continue to process the case solely on the issue of jurisdiction. We shall reserve consideration of the effect of the withdrawal until such time as it becomes necessary to a final decision on issues to which it is relevant.

THE APPROPRIATE UNIT

We have considered the record and the briefs herein, and we find that further argument would be helpful to a resolution of the question of appropriate unit. Therefore, we shall request the parties to submit briefs discussing the scope and content of the appropriate unit in light of the structure and functioning of HRA as it relates to the various agencies and commissions under its aegis, and developing further the argument whether any community of interest exists among the employees of CALS, the employees of the community corporations and the employees of the other agencies of HRA. Such evidence as is already in the record on the unit issue remains before this Board. If the parties have further evidence that they wish to present to this Board in addition to their briefs, they may request that a hearing date be set for that purpose.

DETERMINATION AND ORDER

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

DETERMINED, that the Board of Certification has jurisdiction over the employer herein, and it is

ORDERED, that the Association's request for permission to withdraw its petition in RU-340-72 be, and the same hereby is, denied, and it is further

ORDERED, that the Association's request that the Employer's petition in RE-25-73 be dismissed be, and the same hereby is, denied, and it is further

ORDERED, that the parties shall file briefs with this Board on the issue of the appropriate unit, or request the setting of a date for a hearing on that subject, within ten (10) days of the date of this Decision.

Dated: New York, New York

June 25, 1973

ARVID ANDERSON
CHAIRMAN

WALTER L. EISENBERG
MEMBER

ERIC J. SCHMERTZ
MEMBER