L.1199, Drug & Hos. Union v. DC37, City, et. Al**,** 14 OCB 50 (BOC 1974) [(Decision No. 50-74 (Cert.)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF CERTIFICATION
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In the Matter of

LOCAL 1199, DRUG AND HOSPITAL
UNION, RWDSU, AFL-CIO,

DECISION NO. 50 -74

Petitioner,

-and- DOCKET NO. RU-426-74

DISTRICT COUNCIL 37, AFSCME,
AFL-CIO; CITY EMPLOYEES UNION,
LOCAL 237, IBT; and
LOCAL 144, HOTEL, HOSPITAL,
NURSING HOME AND ALLIED SERVICE
EMPLOYEES UNION, SEIU, AFL-CIO,
jointly,

Intervenors,

-and-

THE CITY OF NEW YORK and RELATED
PUBLIC EMPLOYERS
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DECISION AND ORDER

Local 1199, Drug and Hospital Union, RWDSU, AFL-CIO, requests that the Board of Certification reconsider its Decision No. 33-74, issued July 22, 1974, in which it dismissed a petition by Local 1199 for a unit of X-ray, electroencephalograph, electro-cardiograph and radiation technicians. In Decision 98-73, issued December 18, 1973, a little over a month before Local 1199 filed its petition, the Board had combined this medical technician unit with two other technician units consisting of hospital and laboratory technician titles, and had certified the consolidated

unit to Local 237, IBT, Local 144, SEIU, AFL-CIO, and D.C. 37 as joint representatives.

The Union's Motion for Reconsideration calls on the Board to amend its order in Decision No. 33-74 either (1) to find the medical technician component of the consolidated unit to be appropriate, and to direct an election therein; or (2) to direct an election in the medical technician component with a view to affording these employees an opportunity to elect between Local 1199 and Local 237 as their representative in the consolidated unit jointly certified to Local 237, Local 144, and D. C. 37; or (3) to grant Local 1199 a reasonable time to submit sufficient proof of interest in the consolidated unit to justify the Board's directing an election in the consolidated unit.

The City takes no position with respect to the Motion for Reconsideration. Local 237, in a letter, "strongly objects" to Local 1199's request, and Local 144 and D.C. 37, in an Affidavit in Opposition to the Motion for Reconsideration, urge the Board to reaffirm its earlier Decision No. 33-74 and to deny Local 1199's request.

In support of Alternative 1, Local 1199 alleges that in the Spring of 1973 a Board agent, the then General Counsel, Philip Ruffo, informed a union official that filing for the separate medical technician unit which was then certified to Local 237, IBT, would be timely under the Board's rules during

the month of January 1974. Local 1199 accordingly filed its petition on January 28, 1974. It was incumbent on the Board, the Union therefore argues, specifically to notify Local 1199 of the pendency of the consolidation proceeding filed by the three joint petitioners on November 5, 1973, and, failing this, the Board is estopped from denying the appropriateness of the medical technician unit petitioned for by Local 1199 in January 1974. Local 1199 had not intervened in the consolidation proceeding, allegedly for lack of notice thereof.

A full review of the facts and events negates this argument. Mr. Ruffo's advice was valid and accurate when it was solicited, since the medical technicians then constituted a separate unit and were covered by a separate contract expiring June 30, 1974. Of course, at that time Mr. Ruffo had no more advance knowledge or notice than did Local 1199 that in the following November a joint petition for consolidation would be filed by Local 237, Local 144 and D.C. 37. In any event Mr. Ruffo's advice proved correct, for the Board permitted the filing by Local 1199 of its petition for the medical technicians on January 28, 1974 over the protest of the other parties. Moreover, that petition, originally addressed only to the medical technician segment, was permitted by this Board to constitute the basis for an amended petition addressed to the entire consolidated

unit. It was the failure of Local 1199 to produce adequate proof of interest for the consolidated unit that caused the Board, as discussed below, to dismiss Local 1199's request for an election in the overall unit.

Under its general authority to establish appropriate bargaining units, this Board also has authority to consolidate units. Moreover, it is under no obligation to give direct, individual notice to every party that may conceivably have an interest in a pending consolidation proceeding. The New York City Collective Bargaining Law and the Rules of the Office of Collective Bargaining prescribe the form of notice required to be given in representation proceedings. It should be noted here that the form of notice and the procedure for giving notice in representation cases were described to and discussed with representatives of Local 1199 in the course of a conference which the Chairman and other staff members of OCB had with them on May 9, 1973 in connection with another representation matter in which the same union was interested. In the case before us the Board gave the statutory, general notice to all interested parties mandated by Rule 2.8 by publishing a notice in the City Record, posting a notice on the Board's docket, and directing that notices be posted at the employees' places of work.

In support of Alternative 2, Local 1199 reiterates an argument it had earlier made at the hearing and in its brief, that if the Board declines to find a separate medical technician unit appropriate and reaffirms its finding of a consolidated unit, Petitioner is willing to Participate in joint bargaining with Local 144 and D.C. 37, and that the Board should, therefore, conduct an election among the medical technicians to ascertain whether or not Local 1199 should replace Local 237 in the joint bargaining triad. However, as the Board said in Decision No. 33-74, to accept this "substitution" theory is, in effect, to dismember the consolidated unit, and "would imply that the Board can compel joint certificate holders to accept another union representative as a substitute for one of their joint coalition." This Board his authority to determine that groups of employees must bargain together as one unit, but it cannot dictate to employee organizations the coalitions in which they must participate.

In seeking additional time to solicit proof of interest in order to contest an election for the consolidated unit at this time (Alternative 3), Local 1199 contends that it "was barred by well-established rules from filing for the overall unit before the Board issued Decision No. 33-74, and that, therefore, it could not be expected to demonstrate a sufficient showing

of interest in the overall unit at the time of the hearing." This is not so. When, on January 28, 1974, Local 1199 filed its original petition herein, it knew that Decision No. 98-73, issued on December 18, 1973, had already created a consolidated unit including the medical technicians sought by Local 1199 in its petition; thus, Local 1199 evidenced a belief that there was no "well-established rule" protecting the newly-created unit from challenge, at least as to a segment thereof, in January 1974. That belief was correct; in Decision No. 16-74 issued March 20, 1974, in an analogous case, and prior to the hearing in this matter, we held that that portion of Rule 2.18 which protects newly-created units from challenges for a period of one year following certification, does not apply to existing units which enjoy the protection of the contract bar rule set forth in Rule 2.7. Our ruling, over the objections of the Intervenors, that Local 1199's original petition was timely, sustained the above-mentioned belief of Local 1199 and was consistent with Decision No. 16-74.

Local 1199's filing in January 1974 also demonstrates that the union was aware of the requirement that a petition be supported by a showing of interest equal to 30% of the unit sought and that such showing of interest must be filed simultaneously with the filing of the petition; in filing its original

petition Local 1199 complied with this requirement by showing that it represented 30% of the medical technicians sought in the original petition. A union is not permitted to file its petition, await a determination of the Board as to whether the unit sought is appropriate and then file proof of interest in order to obtain an election in that unit; and Local 1199's original filing in January 1974 indicates that the union was aware that this was not the prescribed procedure. Yet that is precisely what Local 1199 now seeks. For, when Local 1199, in the course of the hearing herein on March 27, 1974, requested an election in the entire consolidated unit as an alternative to its original request for an election in a unit of medical technicians, it offered no proof of interest in the overall unit nor did it file or seek to file any such proof of interest at any time prior to issuance of the Board's Decision No. 33-74.

Having obtained the Board's decision confirming that the consolidated unit created by Decision 98-73 is the appropriate unit - a decision which Local 1199 clearly anticipated as a possibility and which it provided against by its alternative request - the union now seeks a further indefinite extension of the time during which the representation of the unit may be subject to challenge and during which the union would seek to obtain and file sufficient proof of interest to warrant an election.

Decision No. 16-74 clearly indicates that Rules 2.7 and 2.18 must be harmonized so as to promote stability in labor relations without unduly suspending the right of public employees to express their preferences in the matter of choice of representatives. It is, in part, for this reason that proof of interest is required where a challenge to representation is offered. The proof of interest is a demonstration that at the time a petition is filed, a substantial number of interested employees support the proposed change in representation. No such support having been demonstrated here, there can be no basis or justification for the continued suspension of the bargaining authority of the incumbent representatives of the unit which has been without a contract since June 30,1974.

Local 1199 maintains that to deny its request for additional time to obtain proof of interest in the overall unit would be "to impose retroactively a rule which would deprive Local 1199 and the employees of fundamental rights of representation." But the Board is not applying retroactively the new rules regarding timely filing and intervention which it enunciates in Decision No. 33-74. That decision specifically finds Local 1199's petition timely both for the segment of medical technicians and the consolidated technician unit, but calls attention to the fact that pursuant to Rule 2.3.b.1 proof of interest must be submitted simultaneously with the filing of a petition, and that Local 1199 did not do so.

This case differs materially from the situation presented in Decision No. 38-74, wherein the Board "in the interests of equity and fairness" afforded a union additional time to submit proof of interest in a consolidated unit. In the latter case the Union timely filed for a segment before the Board found that segment

to be inappropriate and to be part of a larger, consolidated unit. In the instant case Local 1199 filed its petition for a segment after the Board had found the consolidated unit to be appropriate.

Local 1199's Motion for Reconsideration also raises certain evidentiary questions. It contends that Decision 33-74 relies on evidence which was not received at the hearing and hence was not subject to cross-examination by it. In making the point that the employees and Local 1199 had constructive notice of the proposed consolidation, the Board alluded to the fact that it had been informed by the Health and Hospitals Corporation that a notice of the pendency of the consolidation sent by the Board to the Corporation for posting had in fact been posted at the City's nineteen hospitals. However, this was not the sole or even the principal basis for the Board's finding that the Union and the employees had, adequate notice of the proceeding. The Decision recites that a notice was published in the City Record, was posted on the Board's docket, and was routinely sent by the Board to agencies employing unit employees with instructions to post copies on employee bulletin boards for ten days. These facts are not only such as the Board can properly take judicial notice of, but were in fact included in the record by the Trial Examiner. The decision merely adds that the Board's record discloses that the Health and Hospitals Corporation confirmed in writing the posting of the notice.

Two employees, one an employee of the Health and Hospitals Corporation, the other an employee of the Department Of Health, testified in behalf of Local 1199 that they had received no notice of the proposed consolidation from their union, Local 237, and that they learned of the consolidation decision from other sources only after the case was closed. This clearly does not gainsay the fact that notice was given by the Board to all the affected employees pursuant to the rules of the OCB.

In short, we find no reason to alter the opinions expressed in Decision 33-74 or for granting any of the alternative requests made by Local 1199 in its Motion for Reconsideration.

The persistent and widespread references by Local 1199 to a "conspiracy" to keep it from representing City employees requires comment. But for the fact that this charge has been made at the hearing, in the pleadings, and in a letter to the Mayor, we would not dignify it by our consideration. This agency is not party to a "conspiracy" nor is there any evidence before us that any other parties are conspiring to bar Local 1199 from representing City employees. This agency does not oppose representation of City employees by Local 1199. In point of fact, we have

certified Local 1199 to represent a unit of Pharmacist titles (Decision 35-69). The reason that Local 1199 does not prevail in this case is that it did not submit an appropriate showing of interest in the consolidated bargaining unit. The consolidation of units has been a well-established and widely-publicized Board policy almost from the very first days of the Board's existence, and is aimed at rationalizing the New York City collective bargaining structure by reducing the excessively large number of existing appropriate bargaining units. As a result of that policy, the number of bargaining units in New York City has been reduced from 385 in 1967 to 198 by the end of 1973* (see 6th Annual Report). It cannot fairly be charged that the application of this policy has been inequitable or discriminatory.

0 R D E R

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

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* Certifications were consolidated by the Board:

On stipulation: 48-69, 62-69, 76-70, 38-71,40-71
59-71, 60-71, 10-72, 22-72,61-72
41-73, 44-73, 98-73, 22-74

On motion: 16-70, 46-70, 69-70, 83-70, 10-73,
19-73, 44-73, 41-73, 1-74, 2-74,
8-74, 9-74, 31-74, 38-74

On its own motion: 33-72, 34-72, 35-72, 36-72, 37-72, 39-72, 67-72
68-72, 69-72, 75-72, 77-72, 15-73, 16-73, 24-73
25-73, 27-73, 28-73, 29-73, 32-73, 33-73, 37-73
39-73, 66-73, 71-73, 72-73, 73-73, 77-73, 78-73
79-73, 80-73, 92-73, 93-73, 94-73, 96-73, 23-74

ORDERED, that the Decision rendered by the Board in Decision 33-74 is reaffirmed, and that the petition filed by Local 1199, RWDSU, AFL-CIO, bee and the same hereby is, dismissed.

DATED: New York, N. Y.
September 16, 1974.

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