

L.188, DC37 v. Dep't of Personnel, et. Al, 2 OCB 70 (BOC 1968)
[Decision No. 70-68 (Cert.)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF CERTIFICATION

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In the Matter of

DECISION NO. 70-68

LOCAL 188, DISTRICT COUNCIL 37,
A.F.S.C.M.E., AFL-CIO

-and-

DOCKET NO. R-13-67

DEPARTMENT OF PERSONNEL OF THE
CITY OF NEW YORK

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In the Matter of

LOCAL 188, DISTRICT COUNCIL 37,
A.F.S.C.M.E., AFL-CIO

-and-

DOCKET NO. R-14-67

DEPARTMENT OF WATER SUPPLY, GAS
AND ELECTRICITY OF THE CITY OF
NEW YORK

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In the Matter of

LOCAL 188, DISTRICT COUNCIL 37,
A.F.S.C.M.E., AFL-CIO

-and-

DOCKET NO. R-15-67

DEPARTMENT OF PERSONNEL OF THE
CITY OF NEW YORK

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DECISION AND ORDER

The above-entitled petitions were filed by Local 188, District Council 37, A.F.S.C.M.E., AFL-CIO, herein called Petitioner, with the New York City Department of Labor, and subsequently were transferred to the Board of Certification pursuant to Rule 13.13 of the Consolidated Rules of the Office of Collective Bargaining.

In these petitions, Petitioner requested certification as the collective bargaining representative of:

1. all Rule XI titles in the Personnel Examiner Occupational Group from Trainee to Principal (including specialties except Railroad and Engineering) in the Department of Personnel (Case No. R-13-67);
2. the Senior Personnel Examiner in the Depart-

ment of Water Supply, Gas and Electricity
(Case No. R-14-67); and

3. the Rule X titles of Civil Service Examiner, Grade 2 (including specialties except Architecture, Railroad and Engineering) and Classification Analyst, Grade 2, in the Department of Personnel (Case No. R-15-67).

The three proceedings were consolidated for purposes of hearing, and a hearing thereon was duly held before Richard J. Horrigan, Esquire, Trial Examiner, on July 30 and 31, 1968.

At the hearing, Petitioner requested permission to withdraw its petition in Case No. R-14-67 because there is no Senior Personnel Examiner in the Department of Water Supply, Gas and Electricity. The request is granted.

It was stipulated that the Rule X titles petitioned for in Case No. R-15-67, are equated to the Rule XI titles involved in the Personnel Examiner Occupational Group. Since all the titles are so equated, and the units petitioned for are in the Department of Personnel, all titles concerned herein, regardless of grade, will be referred to as "Personnel Examiners."

Upon consideration of the entire record, and Petitioner's brief, the Board of Certification makes the following findings and conclusions, and renders the following decision.

I. "Confidential" Status of
Personnel Examiners in
Department of Personnel

The City contends that all Personnel Examiners in the Department of Personnel are managerial and/or confidential employees, and, hence, are not entitled to collective bargaining rights.

The City's position is based upon the testimony of Solomon Hoberman, Director of Personnel of the City of New York and Chairman of the New York City Civil Service Commission.

Petitioner contends that Personnel Examiners are neither managerial employees nor, with one possible exception, confidential employees. It argues that the labor relations of the City are handled primarily by the Office of Labor Relations; and although managerial personnel in the Department of Personnel may be involved in the field of labor relations, only one Personnel Examiner assists these management personnel in that field to any appreciable extent.

The Personnel Department is the central personnel agency of the City. It is responsible for recruitment of personnel, the preparation and holding of civil service examinations, certification of eligible lists, the classification of positions, participation in the determination of wage and salary ranges, including salary studies, investigation of out-of-title work, providing consultative services to other City agencies in personnel matters, and advisory services in collective bargaining negotiations and in salary and classification appeals.

Mr. Hoberman testified that the Department no longer uses specialty titles in connection with Personnel Examiners; e.g., Personnel Examiner (Research); that all Personnel Examiners are interchangeable, and may be, and are, assigned to any type of work in the Department. In the course of their duties, they visit all City agencies and have access to all personnel records and information therein. Practically all of them render services in connection with labor relations matters, including representation of the Department in collective bargaining matters and in arbitration proceedings.

Mr. Hoberman further testified concerning the role played by Personnel Examiners in connection with the City's Labor Policy Committee and the Personnel Council.

The Labor Policy Committee, in addition to Mr. Hoberman as Director of Personnel, includes the two Deputy Mayors, the Director of Labor Relations, the Corporation Counsel and the Director of the Budget. It formulates the City's labor relations policies and determines the City's position in collective bargaining matters.

The Personnel Council consists of the Director of Personnel and the Chief Personnel officer of every City agency. Its meetings are almost entirely devoted to personnel matters, including the collective bargaining process, relations with unions, and discussion of the City's position with regard thereto.

Personnel Examiners assist the Director with his work on the Labor Policy Committee and act as the secretariat of the Personnel Council.

The New York City Collective Bargaining Law, herein called the Act, does not contain or define the term "confidential employee." Its meaning, however, has become well-established in the field of labor relations. Under decisions

of the National Labor Relations Board,¹ confidential employees are those who regularly assist and act in a confidential capacity to persons who formulate, determine and effectuate management policies in the field of labor relations.² (The B. F. Goodrich Co., 115 N.L.R.B. 722, 724, 37 LRRM 1383; American Radiator and Standard Corp., 119 N.L.R.B. 1715; Westinghouse Electric Corp. v. N.L.R.B., _____ F.2d _____, 68 LRRM 2850; N.L.R.B. v. Quaker City Life Ins. Co., 319 F.2d 690, 694, 53 LRRM. 2519) This same definition was applied by the New York City Department of Labor (Matter of Personnel Examiners Council and Department of Personnel, Case No. R-19-63).

The responsibilities and duties of Personnel Examiners, as set forth in their job specifications, directly concern terms and conditions of employment of employees in all City departments and agencies, including recruitment, classification, promotion and wage and salary ranges. Mr. Hoberman's testimony establishes a nexus between the Personnel Examiners and the work of the Labor Policy Committee and the Personnel Council; two bodies directly involved in the formulation of City policy on labor relations and personnel practices. Petitioner's witnesses concede that they regularly have access to confidential information in labor relations and personnel matters.

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.

II. Status of Confidential Employees Under the Act

Having determined that the Personnel Examiners in the Department of Personnel are confidential employees, the question remains as to the effect of that finding.

As previously noted, neither the Act nor the National Labor Relations Act expressly refers to or excludes confidential

¹ The National Act does not refer to or define "confidential employees."

² Petitioner's brief cites this definition of confidential employees.

employees. The National Board, however, long has excluded confidential employees from bargaining units, and has been upheld by the Federal courts. The exclusion is based upon potential or inherent conflicts of interests and "the right of the employer to formulate, determine and effectuate its labor policies with the assistance of employees not represented by the union with which it deals" (Westinghouse Electric Corp. v. N.L.R.B. (1968), _____ F.2d _____, 68 LRRM at 2850-2851. See also, to same effect, N.L.R.B. v. Quaker City Life Insurance Co., 319 F.2d 690, 53 LRRM 2519.

This principle takes on special significance in view of §1173-5.0b(1) of the Act, which requires that bargaining units shall be "consistent with the efficient operation of the public service and sound labor relations."

Establishment of a bargaining unit of Personnel Examiners in the Department of Personnel manifestly would deprive the City of its "right to formulate, determine and effectuate labor policies with the assistance of employees not represented by the union with which it deals." It would disrupt established managerial procedures, interfere with "the efficient operation of the City in personnel matters," and impede the very processes of collective bargaining throughout the City which it is the Purpose and policy of the Act to encourage and promote.

We find and conclude, therefore, that Personnel Examiners in the Department of Personnel do not constitute a unit appropriate for the purposes of collective bargaining, in fact or within the meaning of the Act.

In view of our determination herein, and since the record is limited, almost entirely, to evidence concerning Personnel Examiners in the Department of Personnel, we do not pass upon Petitioner's motion to amend its petitions to encompass a City-wide unit.

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 request to withdraw the petition in Case No. R-14-67 be, and the same hereby is, granted; and it is further

O R D E R E D , that the petitions in Cases Nos. R-13-67 and R-15-67, be, and the same hereby are, dismissed.

DATED: New York, N.Y.

November 18, 1968

ARVID ANDERSON
C h a i r m a n

ERIC J. SCHMERTZ
M e m b e r

SAUL WALLEN
M e m b e r