

PBA v. DEA, 24 OCB 29 (BOC 1979) [29-79 (Cert.)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF CERTIFICATION

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In the Matter of

PATROLMEN'S BENEVOLENT ASSOCIATION
OF THE CITY OF NEW YORK,

DECISION NO. 29-79

Petitioner,

DOCKET NO .RU-718-79

-and-

DETECTIVES' ENDOWMENT ASSOCIATION
OF THE CITY NEW YORK,

Respondent.

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DECISION AND ORDER,

This matter concerns a petition filed by the Patrolmen's Benevolent Association (hereinafter "PBA") requesting clarification of its Certification No. 54-68 (as amended) and the objections of the Detectives' Endowment Association (hereinafter "DEA") to the petition.

The PBA's clarification petition seeks to include or confirm the inclusion of police employees working in the titles Field Training Specialist, Technical Skills Specialist, Crime Prevention Specialist, Community Affairs Specialist, and Field Services Specialist (hereinafter collectively referred to as "Specialists") in the bargaining unit certified to PBA. ¹ The DEA contends, inter alia, that employees in the titles listed have been and continue to be

¹ In its Answers to the PBA's petition, the DEA refers to the titles as "Detectives/Specialist," a nomenclature adopted by the PBA in its reply to the answer. However, to avoid confusion, we employ the more neutral "Specialist" term in referring to the titles and police personnel working in the titles.

represented by DEA, and should remain in the bargaining unit certified to it, and that the PBA petition is time barred.

The PBA petition was filed on July 30, 1979 and the DEA filed an answer on September 5, 1979. A reply to the answer was filed by PBA on September 21, 1979 and the DEA submitted a letter in response dated October 9, 1979. The City of New York stated its position in a letter dated August 7, 1979.

BACKGROUND

Decision No. 54-68 certified the PBA as the exclusive bargaining representative "of all employees employed by the City of New York in the titles of Patrolman and Policewoman, excluding those assigned as First, Second and Third Grade Detectives." The Certificate was amended by Decision No. 17-69 to include the title "Police Trainee P.D.)" and by Decision No. 22-77 to include the title "Patrolman/Policewoman (CETA)."

The New York City Department of Labor certified the DEA as the exclusive bargaining representative of employees "assigned as First, Second and Third Grade Detective in the Police Department ..." (5 NYCDL No. 77).

It is undisputed that the Police Department established the five Specialist titles in November 1973 and that neither the PBA nor the DEA sought to list specifically

the titles in its bargaining certificate prior to July 30, 1979. As will be discussed, the unions were joint participants in health and welfare plans and shared the same law firm until July 1979 and no questions concerning the representation of the Specialists occurred prior to that date.

In response to a request from OCB, the Police Department, in a letter dated September 18, 1979, stated that there are 916 police personnel working in the specialist titles. The letter also stated that all "are currently dues paying members of the [DEA].under the [the] Agency Shop Clause." However, a check of the agency shop and voluntary dues checkoff records maintained by the Comptroller's office indicates that a maximum of 38 specialists have agency shop deductions; the remainder have voluntarily requested that the union dues be deducted from their paychecks.

The collective bargaining agreements between the City and each union do not mention any of the Specialist titles nor are the Specialist titles listed in the Appendix attached to each contract which specifies the titles and title code numbers subject to the agency shop clause contained in each contract. Moreover, the Labor Relations Orders (Nos..79/15 and 79/32) which implement the agreements do not mention any of the Specialist titles.

Also as background, we note that the Police Department Career Path Program for Police officers, as detailed in Departmental Interim Order No.49, dated December 20, 1976, differentiates between Investigatory Assignment (which includes the Detective Bureau) and Specialist Assignment. The Police Department-Order states that after a minimum of three years assigned as a "Field Training Officer, Field Services Officer, Crime Prevention Officer, Community Affairs Officer or Technical Skills Officer," and a recommendation from his or her commanding officer, an officer is eligible for a Detective Specialist designation.

POSITIONS OF THE PARTIES

The PBA claims that it is the certified bargaining representative of employees in the Specialist titles because police officers working as Specialists are not First, Second or Third Grade Detectives and the PBA is certified to represent all Patrolmen and Policewomen except those detailed as First, Second or Third Grade Detectives. The DEA argues that the Specialists are in fact, and have been treated as, Third Grade Detectives since the titles were established in November 1973 and therefore are covered by the certification issued to it.

Each union cites many factors and disputes the contentions of the other concerning the status of the Specialists.

The PBA maintains that, while a Specialist has a Detective Shield and receives the pay of a Third Grade Detective, a Specialist cannot be promoted to Second or First Grade Detective; a Specialist wears a uniform and a Detective does not; many Specialists perform patrol functions while assigned to training duties and detectives are assigned to investigatory duties; Specialists work for the Borough Field Service Command and are not responsible to the Detective Bureau; a Specialist loses his/her status and shield if transferred because the position is assigned to the Precinct whereas a Detective retains his/her shield if transferred; and Specialists do not receive the training nor have the experience requirements of Detectives. The PBA further claims that the Specialist classification was created "to reward an outstanding Police Officer for excellent performance through monetary incentives rather than through promotion to the Detective Bureau ..." and therefore Specialists were not intended to be part of the Detective detail.

The DEA points out that Specialists are given a Detective's Gold shield, are paid wages and benefits pursuant to the collective bargaining agreement between the DEA and the City, and can be promoted to Second or First Grade Detective by assignment to those positions. The DEA claims that all Detectives receive a uniform allowance, can be ordered to work in uniform at any time and that

whether an employee wears a uniform is not "a matter of substance" on which a unit determination can be based. The DEA maintains that, to a great extent, all Detectives are Specialists and that the strict investigatory/non-investigatory distinction claimed by the PBA "is a gross distortion of the variety of specialized work performed by Detectives." The DEA contends that Specialists can be and are transferred from one Command to another without loss of position and that the assignment of "Specialist positions to a particular command is a matter in dispute between the Union and the Department and, further, is not relevant to the question of representation since the positions, and not the employees, are the subject of this case. The DEA also disputes the PBA's claims concerning the Department's motives in establishing the Specialist classification and contends that the PBA imputes to the City and the unions an illegal circumvention of Civil Service law and rules and budgetary processes and that the Department's motives are not relevant to the question of representation.

The DEA, argues that a PBA petition to represent employees covered by the DEA contract, which will expire June 30, 1980, may not be heard because it violates the contract bar rule set forth in section 2.7 of the OCB Revised Consolidated Rules. The DEA points out that the PBA petition was filed July 30, 1979 and, under the

above-cited rule, the time to file a petition to represent Specialists is during January 1980. In answer to the PBA's claim that its petition concerns clarification of its certification to specify positions it already represents and not representation of employees outside its unit, the DEA notes that the OCB Rules do not provide for such "clarification" petitions and, therefore, there is no authority for the PBA to file or the Board to consider the petition. The DEA also contends that the PBA is barred by the equitable doctrines of laches and estoppel from; asserting its representation claim since the Specialist titles were created six years ago and the PBA did not claim, despite having knowledge of the facts, to represent the employees until July 30, 1979.

The DEA maintains that the criteria set forth in section 2.10 of the OCB Rules concerning unit determination mandate that Specialists continue to be included in the DEA unit because Specialists are Detectives, have received economic benefits as a result of being Detectives, have been represented by the DEA in negotiations since the inception of the titles, have been active members of the DEA and its bargaining committee, have strong community of interests with other Detectives, and because their removal from the DEA unit would disrupt the employer's operations and the Specialist program. The DEA forecasts

that if the Specialists are placed in the PBA unit, they will lose status, shield and contractual benefits.

The DEA characterizes the PBA petition-as an attempt to raid DEA membership and as a reprisal for the recent break in relations between the two unions. The DEA' asserts that the PBA's petition constitutes an improper practice under the New York City Collective Bargaining Law (NYCCBL).

In support of its position, the PBA allege's that there was no question concerning representation of Specialists from November 1973 until July 1979 because the two unions, during that time, were joint participants in health and welfare plans and were represented by the same law firm in labor matters. During a significant portion of this period, the PBA points out, it collected dues for both organizations and distributed to DEA its apportioned share. Thus, there was no question concerning representation of Specialists until the two labor organizations completely severed their relationship in July 1979. For this reason, laches and estoppel do not apply to :bar its request for clarification of its certification, the PBA argues. Also, because this is a clarification petition, and not a representation petition, contract bar rules do not apply. In any event , the PBA argues, there is no contract bar because Specialists are not covered by or even mentioned in the DEA contract or certification. The PBA also disputes, the

DEA's application of the Rule 2.10 criteria, maintaining that after a police officer is designated a Specialist, he or she continues to have primarily patrol functions and duties, continues to ride in patrol cars and continues under the supervision of the patrol force. The PBA also claims that there is no evidence that any Specialist has been promoted to Second or First Grade Detective.

The City of New York was served with the petition for clarification by the PBA and, in a letter dated August 7, 1979 from its Office of Municipal Labor Relations (OMLR), advised that it did not consider itself a party to this matter and would take no position regarding the PBA petition, although questioning the timeliness of its filing.

The PBA requests that the Board issue an order "classifying [sic] the bargaining unit of the [PBA] and specifically include within the certification of the [PBA] [Specialist classifications]." The DEA requests that the Board dismiss the PBA petition as untimely or, in the alternative, deny the petition on the merits. The DEA adds, "In the event that the Board should reach the merits, the DEA respectfully requests that the Board, consistent with the principles of self-determination and Board decisional law, conduct an election to determine the issue." The DEA also asks that the Board conduct an investigation of the PBA's conduct in this matter in connection with the DEA's charge of improper practice.

DISCUSSION

Before considering the substance of the petition and the objections thereto, we first address the timeliness issues raised by the DEA. Section 2.7 of the Revised Consolidated Rules of the OCB provides that a valid contract between a public employer and a public employee organization shall bar the filing of "a petition for certification, designation, decertification or revocation of designation" during a contract term-not exceeding three years and that such petitions shall be filed not less than five or more than six months before the expiration of the contract. In Decision No. 11-71, the Board stated that the purpose of the contract bar rule "is to accommodate two sometimes conflicting objectives: first, the freedom of employees to select or change bargaining representatives; and, second, to give continuity and stability to an established bargaining relationship." The PBA's "petition for clarification" in effect seeks amendment of its certification to add the Specialist classifications created more than six years ago. The OCB rules, section 2.19, provide for amendment of certification by motion made by a certified representative to include a change in name of titles in the unit or specialty designations added to the unit. While the Board has indicated that it will not grant an amendment of certification where a question of representation exists,² as

will be discussed, consideration of the merits of the PBA's petition is not barred by the section 2.7 contract bar rule because the PBA's papers, at least on their face, are not a "petition for certification, designation, decertification or revocation of certification."

In addition, it is our opinion that neither the policies of the NYCCBL nor the purposes of the contract bar rule would be served by dismissing the instant petition on grounds of untimeliness. The pleadings of the parties indicate that there exists some confusion concerning the two bargaining units which only recently came to light as a result of the break in the historical relationship between the two unions. Neither union has conclusively established that the Specialists are covered by its certification or by its contract. Moreover, the "contract open period" will start in less than one month, i.e., January 1980. Dismissal of the instant petition on contract bar grounds would appear to accomplish nothing more than a short delay in examining this dispute. Furthermore, we believe that by addressing, the merits of the petition now, a primary function of the Board -- to insure harmonious and sound labor relations between the City and municipal unions--will be served because an unstable condition between two municipal police unions, involving close to 1000 police employees, will be resolved in advance of the

start of the 1980 round of collective bargaining. Thus, under the special and unique circumstances of this case and for the reasons discussed we hold that consideration of the PBA petition is not time barred.

We further find that the equitable doctrines of estoppel and laches do not apply in this case because the question concerning representation appears to have arisen during the first six months of this year when the break in relations between the two unions started the dual dues check off to PBA/DEA was terminated, and dues of affected employees were checked off either to PBA or to DEA. On July 1, 1979, the PBA and DEA stopped using the same law firm in labor matters and, shortly thereafter, on July 30, 1979, the PBA petition was filed. The one month that elapsed does not appear to have resulted in harm or prejudice suffered by the DEA and, therefore, laches and/or estoppel do not apply. It should be noted here that the present controversy arises out of the failure of either party to seek or obtain certification to represent Specialists when the titles were originally created in 1973. Instead of following the law, rules and procedures applicable in such circumstances, the parties, acting in concert as they did in various matters at that time, simply treated Specialists as being within the amorphous area of joint interest of the two unions. This condition, undefined

by appropriate proceedings pursuant to the NYCCBL and without proper sanction of this Board, continued until June 1979.

We turn to the merits of the PBA's request for clarification and the DEA's objections. Each union has cited many factors in support of its position that the Specialists have been, and should remain, in its unit. The essence of the case is a dispute over the unit placement of the Specialists. Our authority to determine appropriate units of City employees is provided in NYCBBL section 1173-5.0b(1), which states:

[The Board of Certification shall have the power and duty] to make final determinations of the units appropriate for purposes of collective bargaining between public employers and public employee organizations, which units shall be such as shall assure to public employees the fullest freedom of exercising the rights granted hereunder and under executive orders, consistent with the efficient operation of the public service, and sound labor relations

In the exercise of this authority, we are guided, in large measure, by the criteria stated in section 2.10 of the Revised Rules of the OCB. The criteria are:

- a. which-unit will assure public employees the fullest freedom in the exercise of the rights granted under the statute and the applicable executive order;
- b. The community of interest of the employees;
- c. The history of collective bargaining in the unit, among other employees of the public employer, and in similar public employment;

d. The effect of the unit on the efficient operation of the public service and sound labor relations;

e. Whether the officials of government at the level of the unit have the power to agree or make effective recommendations to other administrative authority of the legislative body with respect to the terms and conditions of employment which are the subject of collective bargaining;

f. Whether the unit is consistent with the decisions and policies of the Board.³

Placement of the Specialists in either the PBA unit or the DEA unit would be consistent with our decisions and policies on unit placement and, in whichever unit the Spec-

³ The analogous provisions of section 201, subdivision 1 of the Taylor Law set forth similar criteria for application by the New York State Public Employment Relations Board; the statute reads, in pertinent part, as follows:

(a) the definition of the unit shall correspond to a community of interest among the employees to be included in the unit;

(b) the officials of government at the level of the unit shall have the power to agree, or to make effective recommendations to other administrative authority or the legislative body with respect to, the terms and conditions of employment upon which the employees desire to negotiate; and

(c) the unit shall be compatible with the joint responsibilities of the public employer and public employees to serve the public.

Examination of the two sets of standards demonstrates the substantial equivalence of the Taylor Law and the NYCCBL on the criteria to be considered in deciding unit determination questions.

ialists are placed, the same officials would be responsible for negotiating with the employee representative. Thus, criteria "e" and "f" would be satisfied in either case.

As noted, the unions each presented lengthy arguments and cited conflicting evidence concerning criteria "b," "c," and "d." The record herein indicates that although Specialists receive a Detective's Shield and the pay of a Third Grade Detective, their experience, duties, assignment and placement within the Department relate to the patrol force. Based on the affidavits, documents and arguments submitted, we have not been able to establish conclusively which union has represented the Specialists in bargaining. None of the contracts negotiated with the DEA and PBA since 1973 mention Specialists nor do any applicable Labor Relations, Orders. We note, in passing, that the employer has declined to take a position on the merits of the case.

Interestingly, other than several conclusory allegations, neither party presented evidence of the wishes of the employees as to the unit or union they would prefer to represent them. While extent of organization is not

4

⁴We have no submission from either party, nor any other information, which would indicate a clear designation by Specialists of their choice of representative based on checkoff. Although checkoff information is available, as noted above, the PBA collected and administered the dues checkoff for both the PBA and DEA and, in fact, there existed a joint PBA/DEA checkoff designation. The unorthodox treatment of dues checkoff by the parties throughout most of the six year period since creation of the Specialist titles rendersthe checkoff information available to us inconclusive as to choice of employee representative.

determinative of unit placement issues, evidence of employees' desires in the exercise of rights, granted under the NYCCBL, to be represented in collective bargaining negotiations by an employee organization of their own choosing is relevant under criterion "a" stated in Rule 2.10.

We find that there does exist a question concerning representation of the Specialists and therefore at this time cannot grant the PBA's request for clarification or amendment of its certification to include the Specialists.⁵ In resolving representation questions, we "may conduct informal conferences or hearings, may direct an election or elections, or use any suitable method to ascertain the wishes of the employees."⁶ We would expect that an informal conference or hearings would produce more-conflicting arguments., evidence and testimony of selected Specialists. On the other hand, an election would provide all Specialists an opportunity to express their desires concerning choice of bargaining representative and unit placement and, under the circumstances of this case, would be the fairest determinant of the dispute.

Therefore, as part of our investigation of the controversy concerning unit placement and representation of police employees working in the Specialist titles, we

⁵ See Decision No. 13-72

⁶ Section 2.9, OCB Revised Consolidated Rules.

direct an election among the Specialists and that both PBA and DEA be named on the ballot. If a majority of the specialists in the Police Department vote for representation by the PBA, we shall add them to the unit of Patrolmen and Policewomen (excluding those assigned as First, Second and Third Grade Detectives) covered by Certification No. 54-68 (as amended). If a majority of the Specialists vote for representation by the DEA, we shall add them to the unit of First, Second and Third Grade Detectives covered by Certification 5 NYCDL No. 77. If either the PBA or the DEA does not desire to participate in the election, it may have its name removed from the ballot upon written request filed with the Board within ten days after service of this Decision and Order

ORDER AND DIRECTION OF ELECTION

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 of the Patrolmen's Benevolent Association for clarification of its Certification No. 54-68 (as amended) be, and the same hereby is, denied; and it is further

7

⁷ We do not address the improper practice allegations raised by the DEA because we do not have jurisdiction to consider or rule upon improper practice charges. Under the NYCCBL, the Board of Collective Bargaining decides improper practice charges petitioned to it in accordance with section 7.4 of the OCB Rules.

DIRECTED, that as part of the investigation authorized by the Board, an election by secret ballot be conducted under the supervision of the Board, or its agents, at a time, place, and during hours to be fixed by the Board, among police officers employed by the Police Department of the City of New York in the titles Field Training Specialist, Technical Skills Specialist, Crime Prevention Specialist, Community Affairs Specialist, and Field Services Specialist during the payroll period immediately preceding this Direction of Election, other than those employees who have voluntarily quit, retired, or who have been discharged for cause before the date of the election, to determine whether they desire to be represented for the purposes of collective bargaining by the Patrolmen's Benevolent Association, and thereby be added to the unit covered by Certification No.. 54-68 (as amended), or by the Detectives' Endowment Association, and thereby be added to the unit covered by Certification 5 NYCDL No. 77, or by neither;.and it is further

DIRECTED, that either of the employee organizations may have its name removed from the ballot in the aforementioned election by filing with the Board, within ten (10) days after service of this Direction of Election, a written

Decision No. 29-79
Docket No. RU-718-79

19.

request that its name be removed from said ballot.

DATED: New York, New York
December 13, 1979

ARVID ANDERSON
CHAIRMAN

WALTER L. EISENBERG
MEMBER

ERIC J. SCHMERTZ
MEMBER