

OFFICE OF COLLECTIVE BARGAINING
BOARD OF CERTIFICATION

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In the Matter of the Application of

THE CITY OF NEW YORK,

DECISION NO. 29-81

Petitioner,

DOCKET NO. RE-106-80

For an order declaring employees in the police service titles of CAPTAIN and CAPTAIN DETAILED AS DEPUTY INSPECTOR, INSPECTOR and DEPUTY CHIEF INSPECTOR and SURGEON and SURGEON DETAILED AS DEPUTY CHIEF SURGEON and CHIEF SURGEON, managerial or confidential pursuant to Section 2.20 of the Revised Consolidated Rules of the Office of Collective Bargaining,

-and-

CAPTAINS' ENDOWMENT ASSOCIATION OF THE POLICE DEPARTMENT OF THE CITY OF NEW YORK,

Respondent.

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DECISION AND ORDER

On March 4, 1981, the Captains' Endowment Association of the Police Department of the City of New York (hereinafter "CEA") filed a motion seeking dismissal of a petition previously filed by the City of New York, which petition requested that this Board issue an order determining that persons employed in certain superior officer and medical titles in the New York City Police Department be designated as managerial or confidential employees.

The motion to dismiss is based upon the alternative grounds, asserted by CEA, that:

- "(a) the information heretofore provided by the City of New York as evidence of the allegations of its petition, the timely submission of which information the Board ... made a prerequisite to further proceedings and held (per Decision No. 3-81) to be a condition precedent to the holding of a hearing and further proceedings, was not timely submitted;
- (b) the information hereinabove described in paragraph (a) is insufficient to satisfy the prerequisite and condition precedent set down by the Board to the holding of a hearing and further proceedings; or
- (c) the information hereinabove described in paragraph (a) fails to support a prima facie claim that the titles cited therein are either managerial or confidential;

The City's time to respond to the motion was extended, with the consent of the CEA, and on April 10, 1981, the City filed an Answer in letter form to the motion to dismiss. On May 5, 1981, the CEA by its attorney, submitted an affidavit in reply to the City's answer.

Background

The City of New York filed a petition on January 30, 1980, pursuant to §2.20 of the Revised Consolidated Rules of the Office of Collective Bargaining (hereinafter "OCB Rules"), seeking a determination that:

persons employed in the police service in the titles of Captain and Captain detailed as Deputy Inspector, Inspector and Deputy Chief Inspector (hereinafter referred to collectively as 'Captains') and Surgeon and Surgeon detailed as Deputy Chief Surgeon and Chief Surgeon (hereinafter referred to collectively as 'Surgeons') are managerial or confidential within the meaning of Section 1173-4.1 of the Administrative Code of the City of New York."

The CEA submitted a letter in opposition to the City's petition on April 17, 1980¹. Subsequently, further proceedings were held in abeyance, at the City's request, until, in response to the Trial Examiner's inquiry, the City stated, in a letter dated October 6, 1980, that it was ready to proceed with its petition.

The Prior Motion To Dismiss

An informal conference was held by the Trial Examiner on November 18, 1980, at which time various preliminary matters were discussed, including the CEA's objection to the sufficiency and validity of the City's petition. The failure to resolve this objection, first expressed in CEA's April 17, 1980 letter, and reiterated at the informal conference, resulted in CEA's filing, on November 25, 1980, of a motion to dismiss the City's petition. The City filed a

¹ The Board has previously ruled that CEA's April 17, 1980 letter constituted, inter alia, a motion to intervene, which motion we granted. Decision No. 3-81.

letter, dated November 28, 1980, in opposition to said motion.

CEA's November 25, 1980 motion sought dismissal of the petition on the alternative grounds that:

- "(a) The petition is insufficient as a matter of law pursuant to the requirements of Section 2.20 of the Revised Consolidated Rules of the Office of Collective Bargaining in that it fails' to set forth a statement of the basis for the allegation that the titles affected by the petition are managerial or confidential; or
- (b) the City has failed to satisfy the condition precedent to the commencement of this action as set down in the letter, dated November 13, 1978, from the Board per its Chairman Arvid Anderson, to Anthony C. Russo then Director of the office of Municipal Labor Relations of the City of New York;"

This Board, in an interim decision in this matter,² held that the City's petition was legally sufficient to initiate the Board's investigatory process, and that the Chairman's November 13, 1978 letter did not impose a condition precedent to the mere filing of the City's petition. We declined to rule, at that stage of the proceeding, on the question of what additional evidentiary submission would be required of

the City prior to the holding of any investigatory hearing in this matter.³ On this basis, we denied CEA's November 5, 1980 motion to dismiss.

The Present Motion

At the November 18, 1980 informal conference, referred to supra, the Trial Examiner indicated to the parties that this Board would require the City to submit certain information as evidence of the basis of its claim that employees in the titles affected by its petition are managerial or confidential. The Trial Examiner stated that this material was necessary to the Board's investigatory process, as well as to the CEA's preparation of its opposition to the City's claim. The Trial Examiner acknowledged that there was some merit to CEA's contention that, as a matter of basic due process, it was entitled to be informed of the specific nature and basis of the City's claim prior to being required to defend the collective bargaining status of members of its unit at a hearing. Therefore, the Trial Examiner informed the City that the furnishing of additional

³ We noted in Decision No. 3-81 that at the request of the Trial Examiner, the City was required to submit certain information and documents as evidence of its claim that the titles affected by its petition are managerial or confidential, and that the required data were to be served and filed subsequent to the date the CEA's earlier motion was filed. Thus, the sufficiency of the City's submission in response to the Trial Examiner's request was not at issue on the earlier motion, and we did not rule thereon.

information was a prerequisite to further proceedings in this matter, and that the failure to submit such information could result in dismissal of the City's petition.

The City agreed that the requested information would be submitted. The only objection raised by the City was directed toward the date by which the information was to be served and filed. The City contended that certain information would have to be assembled and compiled by the Police Department, which would require some time. After some discussion, the City was directed to serve and file the requested information by December 5, 1980. The City stated that it believed that this deadline could be met, although with some difficulty.

The specific nature of the information to be provided by the City was discussed at the informal conference, and was confirmed in a letter from the Trial Examiner to the parties, dated November 21, 1980, in which the City was informed that the information to be submitted should include:

- "1. a current organization chart of the New York City Police Department showing, inter alia, the assignments or details of the titles included within the City's petition, and the number of petitioned employees serving in each of the categories set forth in said chart;

2. as to each category of each title alleged in the petition to be managerial or confidential, a statement of whether the employees in each such category are claimed to be managerial, or are claimed to be confidential;
3. as to each category of each title alleged in the petition to be managerial or confidential, a statement as to whether it is contended that the services rendered or functions performed by the affected employees involve:
 - a. formulation of policy;
 - b. direct assistance in the preparation for and conduct of collective negotiations;
 - c. the exercise of independent judgment in carrying out a major role in the administration of collective bargaining agreements or in personnel administration;
 - d. assistance or action in a confidential capacity to managerial employees whose function is described in b. or c. above.
4. any other indicants of managerial or confidential status which the City believes to be relevant or material."

At the request of the City, its time to submit the requested information, was extended to December 9, 1980. On December 9, 1980, the City submitted (a) an organization chart, and b) written descriptions of duties and responsibilities of certain titles and positions, including excerpts from the Police Department's Patrol Guide. The City filed an "updated version of the Police Department Organization Chart" on January 28, 1981.

The CEA filed the instant motion to dismiss on March 4, 1981, based upon the claimed insufficiency and untimeliness of the City's December 9 and January 28 submissions.

Position of the Parties

CEA's Position

The CEA contends that the City has failed to provided the information requested in the second and third numbered paragraphs of the Trial Examiner's November 21, 1980 letter. Specifically, the CEA asserts that the City has failed to state with particularity which of the approximately 394 employees in the seven job titles in question are claimed to be managerial, and/or which are claimed to be confidential; and has failed to state which, if any, of*the statutory criteria ⁴ of managerial or confidential status are alleged to apply to the services rendered or functions performed by the employees in the seven affected titles serving in the more than 140 categories of positions described by the City. It is submitted by the CEA that the organization chart and general descriptions of duties and responsibilities filed

⁴ The criteria set forth in subdivisions a., b., c., and d. of paragraph 3 of the Trial Examiner's November 21, 1980 letter, are taken from Civil Service Law §201(7)(a).

by the City are not, alone, responsive to the Trial Examiner's request.

Additionally, the CEA alleges that there exist "glaring" inconsistencies between the organization chart and the job summaries provided by the City. The CEA asserts that this serves to "highlight the unresponsive nature" of the information provided by the City.

Finally, the CEA argues that the information submitted by the City fails to support, much less prove, a prima facie claim that any of the positions in question (with the possible exception of the Commanding Officer of the Office of Labor Policy) are either managerial or confidential. The CEA submits that the information submitted fails to indicate whether any of the statutory criteria of managerial or confidential status, as interpreted by the courts and PERB, are applicable to the positions in question in this proceeding.

The CEA observes that over a year has passed since the petition herein was filed, and still the City has failed to submit appropriate supporting material. The CEA characterizes the City's failure as "... part of a long chain of ignored requests for essential evidence made time and time again by this Board to the City in prior related proceedings" dating back to 1973. It is contended by CEA that the City's failure to provide essential evidence, despite its agreement

to do so, has made it impossible for the CEA to prepare a substantive response to the City's position. The CEA concludes that "Due process and justice compel dismissal of the petition without further proceedings."

City's Position

The City contends that the motion to dismiss is without basis and is "... yet another attempt by the CEA to prevent the Board of Certification from investigating this matter fully and reaching a decision on the merits of the City's claim...."

The City explains that inconsistencies in the information which it submitted, to the extent that they exist, result from the fact that each of the documents submitted by the City was prepared at a different time. The City states that "The Police Department is a dynamic structure and changes in personnel occur nearly every day."

The City, in its reply, submitted on April 10, 1981, alleges that:

"The City, in its haste to comply with the Board's directive, failed to state in writing which positions it is claiming are managerial and which it is claiming are confidential.... The City is claiming that employees in the title Surgeon are confidential, that the Surgeon detailed as the Deputy Chief Surgeon is managerial and confidential and that Captains and above are managerial and confidential."

The City further disputes the claims that it has failed to provide the information requested in paragraph 3 of the Trial Examiner's November 21, 1980 letter, concerning the applicability of each of the statutory criteria of managerial or confidential status. The City asserts that from the document entitled "General Duties of Commanders and Executive Officers of Precinct and Non-Precinct Commands", it is "clear" that the employees in the Captain positions render services or perform functions which involve:

- "a) formulation of policy;
- b) assistance and preparation for, or conduct of collective bargaining negotiations;
- c) administration or interpretation of collective bargaining agreements including grievance handling;
- d) exercise of independent judgment; and
- e) assisting or acting in a confidential capacity to managerial employees."⁵

The City also alleges that the salaries of these employees, the size of the commands for which they are responsible, and their interaction with community groups, the media, and governmental bodies serve to demonstrate that they "are management."

⁵ It should be noted that the City's formulation of the relevant criteria, quoted above, differs from that presented by the Trial Examiner and from the statutory terms found in Civil Service Law §201(7)(a).

The City submits that it has presented a sufficient basis for the Board's investigatory process to move forward to a hearing. Accordingly, it requests that the CEA's motion to dismiss be denied.

Discussion

The petition filed by the City herein is only the latest of several applications filed seeking to have this Board declare as managerial or confidential all or certain members of the bargaining unit for which the CEA is the certified collective bargaining representative. Three earlier proceedings⁶ relating to employees in this unit were closed administratively by the office of Collective Bargaining because of the City's failure to prosecute its claim in those matters over extended periods of time. It is within the context of this prior history that we must consider the CEA's instant claim that the City has again failed to provide sufficient evidence in support of its petition to warrant the holding of a hearing on the merits of the petition.

The Trial Examiner's November 21, 1980 letter to the parties requested the City to submit, by December 5, 1980, information in three specific categories in support of its claim of managerial or confidential status, together with any other indicants of managerial or confidential status which

⁶ Docket Nos. RE-26-73, RE-29-74, and, RE-96-78.

the City believed to be relevant or material. The City had agreed, at the November 18, 1980 informal conference, that the requested information would be provided. After an extension of time was granted, the City submitted, on December 9, 1980, only (a) a detailed but partly illegible organization chart, indicating the assignments or "details" of the various Captain and Inspector⁷ positions within the Police Department, and (b) written descriptions of duties and responsibilities of Captains and Inspectors in various assignments or "details". The City submitted an "updated version" of the organization chart on January 28, 1981. Additionally, the letter filed by the City on April 10, 1981, in opposition to the instant motion, contained a statement, in belated response to the Trial Examiner's November 21, 1980 letter, to the effect that:

"The City is claiming that employees in the title Surgeon are confidential, that the Surgeon detailed as the Deputy Chief Surgeon is managerial and confidential and that Captains and Above are managerial and confidential."

The City's April 10, 1981 submission also alleged that the salaries of the Captains and Inspectors, the size of the commands for which they are responsible, and their interaction with community groups, the media, and governmental bodies demonstrates that they "are management".

⁷ As used hereinafter, the term Inspector refers to Captains detailed to serve in assignments as Deputy Inspectors, Inspectors, and Deputy Chief Inspectors.

The question presented for determination on this motion to dismiss is whether the City's submissions are responsive to and satisfy the Trial Examiner's November 21, 1980 written request for necessary information, and, if not, whether the City's petition should be dismissed for failure timely to submit information essential to the prosecution of its claim that persons in the positions in question are managerial and/or confidential employees.

Clearly, the City has satisfied requests "1" and "4" contained in the Trial Examiner's request⁸. However, the question of compliance with requests "2" and "3" is of greater significance, for in view of the statutory policy favoring collective bargaining⁹, we must be concerned with the applicability of the Taylor Law's criteria of managerial and/or confidential status¹⁰ to the facts of this case if we are to be able to evaluate the merits of the City's claim in this proceeding. The Trial Examiner's requests "2" and "3" were designed and intended to elicit from the City, particularized allegations of the applicability of the statutory criteria to each category or assignment claimed by the City to be managerial and/or confidential.

⁸ The full text of the Trial Examiner's four categories of requested information is set forth at pages 6-7 supra.

⁹ NYCCBL §1173-2.0; Civil Service Law §200.

¹⁰ Civil Service Law §201(7)(a).

This Board expected that the City's response to the Trial Examiner's requests would serve to frame the issues to be considered at any hearing to be held in this matter, and would place the CEA on notice of the specific nature of the City's claim so that it could adequately prepare its case in opposition to that claim. We anticipated that compliance with the Trial Examiner's requests would be conducive to the orderly, thorough, and expeditious completion of the Board's investigatory process.

The City's indication, in its April 10, 1981 submission, of which positions it claims to be managerial and which it claims to be confidential, satisfies the Trial Examiner's request number "2". We would not consider the untimeliness of this response, alone, to be sufficient reason to dismiss the City's petition.

We find, however, that the City has failed to provide the information specified in the Trial Examiner's request number "3". This request, which tracks the language of the Taylor Law ¹¹ in calling for the enumeration of which criteria of managerial and/or confidential status are alleged by the City to be applicable to each category of each title

¹¹ Civil Service Law §201(7)(a).

covered by the City's petition, seeks to obtain what is perhaps the most essential information required as a prerequisite to further proceedings in this case. The City has never disputed the need for this information, and agreed at the November 18, 1980 informal conference to submit this information by December 5, 1980, a date later extended, at the City's request, to December 9, 1980. We find that the City's submissions are not responsive to this request and have not provided the specific information requested by the Trial Examiner. We hold that the City's continued failure to submit this information, more than a year after the filing of its petition herein, precludes further consideration by this Board and warrants dismissal of the City's petition for failure timely to prosecute its claim.

The City's contention that its submission of a document referred to by the City as the "General Duties of Commanders and Executive Officers of Precinct and Non-Precinct Commands" satisfies the Trial Examiner's request number "3" is without merit, The Trial Examiner's request was specific and clear; the City was asked to submit:

"3. as to each category of each title alleged in the petition to be managerial or confidential, a statement as to whether it is contended that the services rendered or functions performed by the affected employees involve:

a. formulation of policy;

- b. direct assistance in the preparation for and conduct of collective negotiations;
- c. the exercise of independent judgment in carrying out a major role in the administration of collective bargaining agreements or in personnel administration;
- d. assistance or action in a confidential capacity to managerial employees whose function is described in b. or c. above."

The City's submission of a general description of duties is not responsive to the above request. It fails to correlate the described duties with the four criteria, derived from the Taylor Law, which are contained in the above request. It attempts to shift to this Board and to the intervenor union the burden of sorting out which criteria, if any, might apply to which of the positions and described functions. We are presented in this case with the City's claim that employees in the titles in question are managerial and/or confidential, and the burden clearly rests on the City, not this Board, to specify under which of the statutory criteria each of the positions involved is alleged to be managerial and/or confidential.

It is this Board's function to determine the merit of the City's claim, not the very nature of that claim. The Board, and the intervenor union, are entitled to be informed by the City of the specific nature of its claim of

managerial and/or confidential status, within the context of the applicable Taylor Law criteria, before proceeding to an evidentiary hearing on the merits of that claim. The City has failed to define and express adequately the specific nature of its claim with respect to employees in the titles which are the subject of the City's petition herein.

The City has been given every opportunity, over a period of more than a year and a half to clarify the basis of its claim in this proceeding. To the present time, the City has failed to establish the basis of its claim sufficiently to warrant a hearing. Its failure to provide the necessary information requested by the Trial Examiner in this matter, and its inability to provide this information even in response to the instant motion to dismiss, can only be construed as a failure by the City to prosecute its case. We are mindful that in three earlier cases¹² involving employees in the unit in question, the proceedings were closed administratively, after notice to the parties, because of the City's failure. to prosecute its claims of manageriality over extended periods of time. Under these circumstances and in view of the record in this case and the passage of more than a year and a half since the filing of the City's petition, we will order that the

¹² Docket Nos. RE-26-73, RE-29-74 and RE-96-78.

City's petition be dismissed. However, such dismissal is not on the merits and is without prejudice to the City's right, pursuant to §2.20 of the OCB Rules, to file another petition at the time provided in §2.20 if it so desires and if it is prepared to prosecute its claim.

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

ORDERED, that the Captains' Endowment Association's motion to dismiss be, and the same hereby is, granted; and it is further

ORDERED, that the City of New York's petition herein be, and the same hereby is, dismissed.

DATED: New York, N.Y.
October 21, 1981

ARVID ANDERSON
CHAIRMAN

WALTER L. EISENBERG
MEMBER

DANIEL G. COLLINS
MEMBER