

CITY OF NEW YORK
OFFICE OF COLLECTIVE BARGAINING
BOARD OF CERTIFICATION

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In the Matter of the Application of

THE CITY OF NEW YORK,

Petitioner,

DECISION NO. 3-81
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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INTERIM DECISION AND ORDER

On January 30, 1980, the City of New York filed a petition, 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 Captains' Endowment Association (hereinafter "CEA"), while technically not a party to this proceeding,¹ submitted a letter by its attorney, dated April 17, 1980, in response to the City's petition. We deem the CEA's letter to constitute, inter alia, a motion to intervene, which we hereby grant because of the CEA's obvious substantial interest in this matter, and we will further consider the CEA's letter as an answer in opposition to the City's petition.

Further proceedings in this matter 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.

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 the April 17, 1980 letter of CEA's attorney, and reiterated at the informal conference, resulted in

¹ The City's petition erroneously named the CEA as a respondent. This proceeding, as all proceedings before this Board, is of an investigatory, rather than an adversary, nature and thus, there is properly no respondent. Pursuant to §2.20a(9) of the OCB Rules, the City was required to give notice of the filing of its petition to the certified union representing persons employed in the titles in question, in this case, the CEA. The union's appropriate response should have been to file a motion to intervene under §13.9 of the OCB Rules. This was not done by the CEA in this case.

the CEA's filing, on November 25, 1980, of a motion to dismiss the City's petition. The City filed a letter, dated November 28, 1980, in opposition to said motion. It is this motion which is the subject of this interim decision and order in this proceeding.

This Board believes that the written submissions of the parties have clearly and thoroughly stated the issue which must be determined on this motion. We do not feel that oral argument, which we rarely permit, is warranted in this matter, nor do we believe that it would assist us in determining this motion. Accordingly, we deny the CEA's request for oral argument, and we will decide this matter based upon the written record in this case.

NATURE OF THE MOTION

The CEA's motion to dismiss is based on two alternative grounds. The CEA alleges that the City's petition should be dismissed because:

"(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;"

The "condition precedent" asserted by the CEA is allegedly contained in the following clause from the November 13, 1978 letter of Chairman Anderson, referred to above:

"... I am hereby directing that RE-96-78 shall be marked closed without prejudice to the filing of a lawful petition at a future time, which petition shall be supported by appropriate evidentiary material."

POSITIONS OF THE PARTIES

Union's Position

The CEA argues initially that the City's petition is defective because it fails to allege any basis for the City's claim of managerial or confidential status, other than to allege that the employees in the positions in question perform certain of the functions included in the statutory definition of managerial employees.² The CEA alleges that S2.20 of the OCB Rules does,

"... distinguish between a pure declaration of managerial status and the basis for such a declaration. Under Section 2.20(7) there has to be at least some basis affirmatively stated in the petition beyond bare allegations that employees are considered to be managerial or confidential."

(The CEA concedes,, however that the statement of the basis of a claim under §2.20M, "... does not require as detailed information as a bill of particulars might....") The CEA submits that the City has failed to adequately frame a basis for its petition, and

² Civil Service Law §201(7)(a).

that its petition is therefore legally insufficient and should be dismissed.

The CEA further contends that the City was required, as a condition precedent to filing the petition herein, to simultaneously file "appropriate evidentiary material" in support of the petition. The CEA recites the history of several prior proceedings in which the City petitioned to have all or certain members of the CEA's bargaining unit declared managerial or confidential,³ and alleges that a condition precedent to the filing of any further petition in this matter was established by the Board as a consequence of the City's alleged consistently unbroken record in failing to meet its burden... of going forward in the prior proceedings. The CEA argues that since the City's current petition, filed on January 30, 1980, was not supported by "appropriate evidentiary material" as required by Chairman Anderson's November 13, 1978 letter, it failed to satisfy the condition precedent, and is thus "irreparably defective". Accordingly, the CEA asks that the petition be dismissed.

³ Docket Nos. RE-26-73, RE-29-74, and RE-96-78. These proceedings were all closed administratively by the Office of Collective Bargaining because of the City's failure prosecute its claims in these matters over extended periods of time. An additional proceeding, RE-24-72, pertained in part to certain employees in the CEA's bargaining unit. The part of the City's petition pertaining to said employees was withdrawn by the City, without prejudice, after the parties reached an understanding concerning treatment of certain employees in "sensitive positions in the Police Department's Office of Labor Policy.

City's Position

The City contends that its petition was timely filed, under §2.20(b) of the OCB Rules, and that the basis of its claim of managerial or confidential status was sufficiently stated, as required by §2.20(a)(7). The City refers to paragraphs "5" and "6" of its petition, in which it alleges the basis of its petition as follows:

"5. Employees of Petitioner in the aforementioned titles participate in the formulation and effectuation of policy and operating procedures, as well as labor relations and personnel administration matters, on a regular basis. Copies of the job specifications for these titles are annexed hereto as Exhibit A. Salaries of these titles are annexed hereto as Exhibit B.

6. Employees of Petitioner in these titles are obliged to regularly exercise significant independent judgment and discretion and such employees are 'chargeable with and responsible for the discipline and efficiency of the force under . . . [their] command.'"

The City further alleges that "... it is the usual and customary practice of the parties under the jurisdiction of the Board of Certification... " to file the type of concise petition submitted herein, and to provide "...additional and more detailed evidence and information..." subsequent to the time of filing the petition.

The City also argues that Chairman Anderson's November 13, 1978 letter was not meant to serve as a bar to any further proceedings, nor did the City deem it to have established a condition precedent to the maintenance of a later petition. The City notes

that under §2.20(b) of the OCB Rules, the City possesses the express legal right to file a managerial/confidential petition at specified recurring times, notwithstanding the failure of any prior petitions, even on the merits. Therefore, the City contends, the dismissal, without prejudice, of an earlier petition, for failure to prosecute its claim, cannot serve as a basis to preclude the City from exercising its right to maintain a new and timely-filed petition. Thus, the City asserts that the prior history of similar proceedings commenced by the City is irrelevant to the determination of this matter. For these reasons, the City requests that the CEA's motion to dismiss be denied.

DISCUSSION

Section 1173-4.1 of the New York City Collective Bargaining Law (hereinafter "NYCCBL") provides, inter alia, that:

" ...neither managerial nor confidential employees shall constitute or be included in any bargaining unit, nor shall they have the right to bargain collectively."

This exclusion from the right to bargain collectively is in conformity with the requirements of §201(7)(a) of the Taylor Law.

A proceeding to determine whether designated employees are managerial or confidential, and therefore statutorily excluded from collective bargaining, is commenced by the filing of a petition by the public employer. The required contents of such a petition, and the only limitations upon its filing, are contained in §2.20 of the OCB Rules. It is not disputed that, with one possible

exception, the City's Petition in the instant matter satisfied the terms of §2.20 of the OCB Rules. The one disputed issue of compliance with the OCB Rules concerns the requirement, in §2.20 (a) (7), that the petition contain:

"A statement of the basis of the allegation that the titles affected by the petition are managerial or confidential;"

The CEA contends that the City's petition fails to satisfactorily state the basis of its claim, and is thus irreparably defective. This Board does not agree.

The City's statement of the basis of its claim, contained in paragraphs "5" and "6" of the petition, quoted supra, sufficiently identifies which of the criteria of manageriality⁴ are alleged to be applicable to the duties performed by the employees in question. For purposes of filing a petition, it is unnecessary that greater factual detail be alleged. The primary purpose of the petition is to put all parties and this Board on notice as to which employees are alleged to be managerial and/or confidential, and which of the statutory criteria are claimed to be relevant to the functions of the designated employees so as to render them managerial and/or confidential. This is this Board's understanding of the requirement of a statement of the "basis" of a petitioner's claim, and we find that such basis has been adequately alleged in the petition herein.

⁴ Taylor Law §201(7) (a).

That is not to say that such an abbreviated statement of a petitioner's claim is, in all cases, sufficient to warrant the holding of a hearing upon such claim. To the contrary, in many cases, as in the present one, further clarification and substantiation of the petitioner's claim will be required, as part of the Board's investigatory process, before a determination can be made that a hearing is necessary. Moreover, a petitioner's failure timely to submit such clarification and substantiation, when requested by the Board, may result in dismissal of the petition. Thus, we hold only that the City's petition is sufficient, under §2.20 of the OCB Rules, to initiate the Board's investigatory process. We do not, at this time, rule on the question of what additional submission may be required of the City prior to the holding of any investigatory hearing in this matter. ⁵

The CEA further argues that the City has failed to satisfy a condition precedent to the commencement of this proceeding, inasmuch as it failed to file, simultaneously with its petition,

⁵ We note that at the request of the Trial Examiner, made at a conference on November 18, 1980, and confirmed in a letter to the parties, dated November 21, 1980, the City was required to submit certain information and documents as evidence of the basis of its claim that the titles affected by its petition are managerial or confidential. At least part of the required information and documents were served and filed by the City on December 9, 1980, subsequent to the date the instant motion was filed. Therefore, the sufficiency of the City's December 9 submission is not at issue on this motion.

We emphasize that the question of the legal sufficiency of a petition is separate and distinct from the question of the nature and quantum of evidence required to be produced in support of a petition as a prerequisite to the holding of an investigatory hearing.

"appropriate evidentiary material" in support of the petition. The CEA states that the City's failure to submit this "indispensable information" with its petition, renders said petition defective and requires its dismissal. The CEA contends that this condition precedent was established by Chairman Anderson in his letter to the City, dated November 13, 1978, in which he stated, with respect to an earlier manageriality proceeding brought by the City, that:

"...I am hereby directing that RE-96-78 shall be marked closed without prejudice to the filing of a lawful petition at a future time, which petition shall be supported by appropriate evidentiary material."

This Board has reviewed the prior history of the City's various attempts to have the employees involved herein declared managerial and/or confidential,⁶ including the proceeding in RE-96-78, in the course of which Chairman Anderson's November 13, 1978 letter was written. We find that, in the context of the prior proceedings, the November 13, 1978 letter did establish a condition precedent. However, we hold that such condition is precedent not to the mere filing of a petition by the City, but to the holding of a hearing and the further processing of any proceeding commenced by the City.

This conclusion is supported by the background of the prior proceedings, as well as by the provisions of the OCB Rules. The

⁶ See footnote 3, supra.

letter of November 13, 1978 made clear reference to an earlier letter by Chairman Anderson, dated September 27, 1978; in this regard, it stated:

"On September 27, 1978, I wrote to you concerning the above noted case reviewing the failure of the City to proceed and stating that unless the City met its burden of going forward in support of the petition, the case would be marked closed without prejudice"

Chairman Anderson's September 27, 1978 letter observed that had become,

"... clear that the City was not in possession of certain information indispensable to the processing of the case...."

The letter further stated that the City had continued, over an extended period of time, to be unable to gather the necessary information, and consequently,

"It is clear that there can be no hearing in case RE-96 unless the City has the information required to meet its burden of going forward in support of its petition."

Therefore, Chairman Anderson directed that the City notify the Trial Examiner by a given date that it was in possession of the necessary facts and was ready to proceed to a hearing promptly, or else suffer a dismissal of its case without prejudice. It was the City's subsequent further failure to obtain the necessary information which prompted Chairman Anderson to write his November 13, 1978 letter, which directed that that proceeding be marked closed.

It is clear to this Board that the requirement that the City obtain certain "indispensable information" was at all times viewed as a necessary prerequisite to further movement of the case through the Board's investigatory process, including the holding of an investigatory hearing. However, while the City's failure to come forward with this information proved to be an insurmountable impediment to the processing of the case, it was never claimed to have vitiated the legal sufficiency and validity of the petition filed by the City.

Furthermore, both the September 27, 1978 and November 13, 1978 letters from Chairman Anderson indicated that the City had been warned that the proceeding (RE-96-78) would be marked closed without prejudice if the City did not obtain the necessary information required to meet its burden of going forward. The closing of that case, which was in fact directed in the November 13 letter, would hardly have been without prejudice if the submission of evidentiary material were made a condition precedent to the filing of any future petition by the City. Therefore, we conclude that Chairman Anderson's statement,

"... which petition shall be supported
by appropriate evidentiary material",

was intended only to put the City on notice that, as in RE-26-73, RE-29-74, and RE-96-78, no future petition would be processed, and no hearing upon such petition would be held, unless the petition were supported by appropriate evidentiary material. It was not

intended to require submission of such evidentiary material simultaneously with and as a condition precedent to the filing of such a petition.

Our finding on this issue is consistent with the provisions of §2.20 of the OCB Rules. Section 2.20 prescribes inter alia, the contents of petitions for the designation of persons as managerial or confidential employees, and the times during which such petitions may be filed. Under this section, there is no requirement that supporting evidentiary material be submitted as a condition precedent to the filing of a petition. And, significantly, this section would permit the City to file a new petition as often as, every two years, even though prior petitions were denied by this Board after adjudication on the merits.⁷ If the City possesses this right to file a new petition following a dismissal on the merits, then clearly this Board would not place restrictions on the City's right to file a new petition following a dismissal without prejudice, which did not reach the merits.

We find that the City's petition herein was properly filed and is legally sufficient to initiate the Board's investigatory process in this matter. Accordingly, we will deny the CEA's motion.

⁷ OCB Rules, §2.20 (g).

ORDER

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, denied.

DATED: New York, N.Y.
January 5, 1981

ARVID ANDERSON
CHAIRMAN

DANIEL G. COLLINS
MEMBER

WALTER L. EISENBERG
MEMBER
