City v. CEA, et. Al,32 OCB 3 (BOC 1983) [3-83 (Cert.)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF CERTIFICATION
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In the Matter of the Application of

THE CITY OF NEW YORK,

Petitioner,

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,

DECISION NO. 3-83

DOCKET NO. RE-132-82

-and-

CAPTAIN'S ENDOWMENT ASSOCIATION OF THE POLICE DEPARTMENT OF THE CITY OF NEW YORK,

Respondent.
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INTERIM DECISION

On February 1, 1982, the City of New York, by its Office of Municipal Labor Relations ("OMLR" or "the City"), filed a petition pursuant to Section 2.20 of the Revised Consolidated Rules of the Office of Collective Bargaining ("OCB Rules") requesting that:

> an order be entered declaring that employees in the titles of Captain, Captain Detailed as Deputy Inspector, Inspector, and Deputy Chief Inspector, Surgeon, Surgeon Detailed as Deputy Chief Surgeon, and Chief Surgeon are managerial or confidential employees and for such other and further relief as may be just and proper.

On March 16, 1982, the Captains Endowment Association ("CEA"), the certified bargaining representative for these titles,[1] filed a motion, pursuant to Section 13.11 of the OCB Rules, asking the Board of Certification (the "Board") to dismiss the petition upon the following grounds:

> (a) that the petition is untimely and not served within the time limited by New York City Collective Bargaining Law, Section 2.7, 2.8 which requires the filing of a petition not less than five (5) or more than six (6) months before the expiration date of the contract, and
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> (b) the City has failed to satisfy the condition precedent to the commencement of this action.

In opposition to the motion to dismiss, petitioner filed, on May 14, 1982, an affirmation in which it maintained that its petition, as filed, conformed with the requirements of the New York City Collective Bargaining Law ("NYCCBL") and the OCB Rules.

In an interim decision which issued on June 10, 1982, the Board found there to be no basis for a dismissal of the petition. As to the first ground for the motion, the Board, finding there to be a law office error, indicated that:

> We are reluctant to allow law office error to bar the adjudication of serious issues on the merits unless such error is so egregious as to cause detriment to the interest of a party. No such harm has been done here. The filing of the petition was timely and the delay in serving the petition on respondent Union was short. It is within the general discretion of the Board to shorten and extend time limits, invoke expedited procedures and "... prescribe such times and conditions for the service of notices, filing of pleadings and appearances of parties as the circumstances re-

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[1] CEA is the sole and exclusive bargaining representative for the unit consisting of the employees of the New York City Police Department serving in the titles which are the subject of this petition.

> quire and as considerations of due process permit." (Rule 13.6).

Responding to the second ground, the Board held:

> We find that nothing in the law or rules, in the fact that there have been a number of similar petitions filed by the City in the past but not prosecuted,[2] or in our Decision and Order No. 29-81 dated October 21, 1981, dismissing a petition of the City similar to the petition herein, creates a condition precedent to the filing of the instant petition such as is alleged by respondent Union and, accordingly, that on that ground there is no basis for dismissal of the petition.

A conference was, accordingly, held on June 14, 1962, in preparation for the commencement of a hearing on the substantive issues in the proceeding. The motion to dismiss, presently before the Board, was filed following the conference, on June 22, 1982, requesting that "no investigation and hearing be conducted" because of the City's failure to file appropriate evidentiary material essential to the further processing of the matter. An affirmation in opposition to this motion was filed on November 5, 1982.

CEA's Position

CEA maintains that as early as November 13, 1978, Board Chairman Anderson, in a letter of that date, indicated that a manageriality petition must be supported by "appropriate evidentiary material." That is, in the language of Section 2.20(a)(7) of the OCB Rules, a petition must provide "the basis of the allegation that the titles and employees affected by the petition are managerial or confidential. CEA contends, therefore, that

> [p]ursuant to Section 2.20(a)(7), there must he at least some affirmative proof aside from the bare allegations that employees are considered to be managerial or confidential.[3]

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[2] See Docket Nos. RE-26-73; RE-29-74; RE-26-78; RE-106-80.

[3] Paragraph "23" of the affidavit in support of the motion to dismiss, dated March 16, 1982.

CEA concludes that the failure to provide certain indispensable information renders this petition legally insufficient and precludes the further advancement of this case through the Board's investigative processes.

City's Position

The City seeks a determination that employees serving in the titles Captain, Captain Detailed as Deputy Inspector, Inspector, and Deputy Chief Inspector (collectively referred to as the "Captains"), and Surgeon, Surgeon Detailed as Deputy Chief Surgeon and Chief Surgeon collectively referred to as the "Surgeons"), are managerial or confidential within the meaning of Section 1173-4.1 of the Administrative Code of the City of New York.[4]

[4] §1173-4.1 Rights of public employees and certified employee organizations. Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities. However, neither managerial nor confidential employees shall constitute or be included in any bargaining unit, nor shall they have the right to bargain collectively; provided, however, that nothing in this Chapter shall be construed to: (i) deny to any managerial or confidential employee his rights under section 15 of the New York Civil Rights Law or any other rights; or (ii) prohibit any appropriate official or officials of a public employer as defined in this Chapter to hear and consider grievances and complaints of managerial and confidential employees concerning the terms and conditions of their employment, and to make recommendations thereon to the Chief Executive Officer of the public employer for such action as he shall deem appropriate. A certified or designated employee organization shall be recognized as the exclusive bargaining representative of the public employees in the appropriate bargaining unit.

In opposition to the objections raised by CEA in its motion to dismiss, the City maintains that since it has supplied all the information required by Section 2.20 of the OCB Rules, it has fulfilled any condition precedent to the advancement of its petition to a hearing.[5]

In addressing CEA's numerous references to earlier petitions filed in connection with the Captains and the Surgeons, the City sets out the background of the immediately preceding petition, Docket No. RE-106-80, and gives special emphasis to the precise factors which led to its dismissal in Decision No. 29-81. In particular, there is reference to a letter dated November 20, 1980, by which the parties were advised by the Trial Examiner that certain additional information was to be provided by the City and would constitute a condition precedent to further proceeding with the matter. The requirements were as follows:

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[5] §2.20(a) requires that the petition contain:

1. The name and address of petitioner;
2. A general description of petitioner's function;
3. The titles of employees covered by the petition and the number of employees in each;
4. A statement as to whether any of the titles affected by the petition has ever been included in a collective bargaining unit for purposes of negotiation with petitioner; whether any of them has been represented at any time by a certified employee organization; and the current collective bargaining status of each such title;
5. The expiration date of any current collective bargaining agreement covering employees affected by the petition;
6. The name and address of any certified employee organization which represents persons affected by the petition;
7. A statement of the basis of the allegation that the titles and employees affected by the petition are managerial or confidential;
8. A request that the titles and employees affected by the petition be designated managerial or confidential, as the case may be;
9. A statement that notice of the filing of the petition has been mailed to any certified employee organization which represents employees in such titles.

1. Current organization chart of the New York City Police Department showing, inter alia, the assignment 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.

The City's failure to satisfy the requirement set out in item "3" resulted in the dismissal of the prior petition.

The City maintains that is present petition is devoid of any of the deficiences which were attributable to its earlier petitions. Specifically, it contends that the information requested at item "3" has been supplied at paragraphs "5" and "61" of the petition, which identify the criteria for determining manageriality applicable to these titles, and at paragraphs "8"-"14", which correlate specific duties to the stated criteria. Thus, the City insists that it has met all the prerequisites for Board consideration.

The City notes that some uncertainty over determinations of manageriality, engendered by the successive

appeals in Civil Service Technical Guild v. Anderson, ("Administrative Engineers"), might have triggered the establishment of the additional requirements contained in the November 20, 1980 letter in RE-106-80. The Court of Appeals' ultimate reversal of the lower courts,[6] it is argued, by upholding the Board's determination, has thereby eliminated the need to continue to "superimpose an additional condition precedent."[7]

Discussion

The instant petition, as correctly noted by the City, must be viewed against the multi-faceted background which preceded it. The City's prior effort to obtain a determination as to the manageriality of the Captains and the Surgeons, in RE-106-80, coincided with a serious examination by the courts of the validity of the standards applied by us in manageriality proceedings. our present consideration must, therefore, of necessity, take into account the following developments:

1. The City has, in the instant matter furnished us with more evidentiary material than it had in any of the earlier petitions concerning the Captains and Surgeons.

2. The Court of Appeals decision, upholding as it did our determination in Administrative Engineers, reconfirmed the soundness of the basis for our manageriality determinations.

In Decision No. 45-78, this Board was asked to consider the claimed managerial/confidential status of employees in, among others, the title of Administrative We indicated there that a determination by us would, of course, be made with direct reference to Section 201.7(a) of the Taylor Law, which section enumerates the criteria to be used by the New York State Public Employment Relations Board ("PERB") in determining manageriality. Section 201.7(a) provides, in relevant part, as follows:

> Employees may be designated as managerial only if they are persons (i) who formulate policy or (ii) who may reasonably be required

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[6] The Supreme Court's ruling that the Board had applied improper standards was affirmed by the Appellate Division.

[7] Paragraph "31" of the affirmation in opposition to the motion to dismiss.

> on behalf of the public employer to assist directly in the preparation for and conduct of collective negotiations or to have a major role in the administration of agreements or in personnel administration provided that such role is not of a routine of clerical nature and requires the exercise of independent judgment. Employees may be designated as confidential only if they are persons who assist and act in a confidential capacity to managerial employees described in clause (ii).

In addition to the above, we also indicated that the Board would consider the following factors, found by it through the course of its experience to be reliable indicia of manageriality:

(a) position in table of organization;

(b) number of subordinate employees;

(c) area of authority;

(d) power to assign and transfer personnel;

(e) preparation of budget/allocation of funds;

(f) inclusion in managerial pay plan;

(g) history of collective bargaining;

(h) personnel involvement;

(i) job specifications.

We stressed there that these additional factors were: (1) substantially equivalent to the criteria set forth at Section 201.7(a) of the Taylor Law,[8] and (2) developed

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[8] Section 212 of the Taylor Law requires this.

> §212. Local government procedures.
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> 1. This article, except sections two hundred one, two hundred two, two hundred three, two hundred four, paragraph (b) of subdivision four and paragraph (d) of subdivision five of section two hundred five, paragraph (b) of subdivision three of section two hundred seven, section two hundred eight, section two hundred nine-a, subdivisions one and two of section two hundred ten, section two hundred eleven, two hundred

thirteen and two hundred fourteen, shall be inapplicable to any government (other than the state or a state public authority) which, acting through its legislative body, has adopted by local law, ordinance or resolution, its own provisions and procedures which have been submitted to the board by such government and as to which there is in effect a determination by the board that such provisions and procedures and the continuing implementation thereof are substantially equivalent to the provisions and procedures set forth in this Article with respect to the state. [Emphasis supplied].

and designed to achieve the same end contemplated by the Taylor Law - i.e., "to exclude from collective bargaining those employees whose participation in collective bargaining would create conflicts with the employer's right to formulate, determine and effectuate its labor policy with assistance from employees not represented by a union with which it deals."

The Union, in Administrative Engineers, maintained before the Board, and subsequently before the Supreme Court, the Appellate Division, and the Court of Appeals, that:

> [a]ny criterion used by OCB that is not directly interrelated to the four statutory criteria is improper, invalid and illegal.

In addition, the Union objected to the utilization of a presumption which had been developed by the Board as a procedural tool to facilitate the City's establishment of a prima facie case.

As we stressed throughout the litigation of Administrative Engineers, and as Justice Kupferman recognized in his penetrating dissent in the Appellate Division, the language of Section 201.7(a) of the Taylor Law is very broad and general. Thus, the indicia enumerated above have both the purpose and effect of reducing those broad generalities to implementing specifics. We emphasize that

the aforementioned indicia, (a) through (i), have no greater nor lesser purpose, nor, we believe, any different effect than this.

On November 17, 1981, the Court of Appeals upheld the 1978 Board determination in Administrative Engineers. This unanimous decision was based on the dissenting opinion of Justice Kupferman, of the Appellate Division, who wrote in relevant part as follows:

> The Board in its certifying process resorted to the guidelines, but not slavishly, nor without reviewing the evidence as a whole nor without constant reference to the statutory criteria and its goals. The Board contends, and I agree, that the factors used as indicia of manageriality, when considered together, are appropriate aids in determining either who formulates policy (Civil Service Law §201.7(a)(1)) or who may reasonably be required to assist in collective bargaining (Civil Service Law §201.7(a.)(ii)) and therefore theirs is a reasonable construction of the statute.

Commenting on the challenge to the use of a rebuttable Justice Kupferman observed that

> [b]oth the language of the elements of the presumption and the manner in which the presumption was applied, give ample indication that the burden is and was at all times on the City clearly to establish the status of a title to exempt it from certification. The Board's decision was not based upon the presumption per se, but upon all the evidence, both the evidence which satisfied the elements of the presumption, and all other proferred evidence.

The reinstatement of our decision in Administrative Engineers reinforced the legitimacy and soundness of our manageriality determinations. Based on these developments, and the satisfaction of the Board that "appropriate evidentiary material" does in fact support the petition herein, we will order that CEA's motion to dismiss be denied and that hearings in the matter be commenced forthwith.

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, denied; and it is further

ORDERED that the instant matter be referred back to the designated Trial Examiner for the purpose of conducting a hearing and establishing a record upon which this Board may determine manageriality.

DATED: New York, N.Y.
January 18, 1983

ARVID ANDERSON
CHAIRMAN

MILTON FRIEDMAN
MEMBER

DANIEL G. COLLINS
MEMBER