

L.444, SEIU v. City, 4 OCB 43 (BOC 1969) [Decision No. 43-69 (Cert.)]

OFFICE OF COLLECTIVE BARGAINING

BOARD OF CERTIFICATION

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SERVICE EMPLOYEES INTERNATIONAL UNION,
LOCAL 444, AFL-CIO

-and-

THE CITY OF NEW YORK

DECISION NO. 43-69

DOCKET NO. RU-26-68

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A P P E A R A N C E S

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DECISION AND ORDER

On April 1, 1968, City Employees Union Local 237, I.B.T. (herein referred to as Local 237) filed a petition with the Office of collective Bargaining requesting certification as the collective bargaining representative for the eight titles comprising the Uniformed Officers Force of the Department of Sanitation, namely: Director of Operations, City Superintendent, Principal Superintendent, Supervising Superintendent, Senior Superintendent, District Superintendent, Foreman and Assistant Foreman. The petition cited Building Service Employees International Union, Local, 444, AFL-CIO (herein referred to as Local 444) as a public employee organization claiming to represent employees in the appropriate unit.

Local 444 was the certified representative of five of the eight titles in the proposed unit.

1. The three titles not covered by the certification are Principal Superintendent, City Superintendent and Director of Operations.

A conference of the interested parties, including the City of New York, represented by the Office of Labor Relations, was called by the Office of Collective Bargaining. At that meeting, which took place on May 6, 1968, the parties entered into an Agreement for Consent Election in which it was stipulated that the appropriate unit was one consisting of the titles Assistant Foreman, Foreman, District Superintendent, and Senior Superintendent, but further stipulated:

that employees in the titles of Supervising Superintendent, Principal Superintendent, City Superintendent. and Director of Operations may cast challenged ballots in the election pending determination by the Board of Certification as to whether or not they should be included in the unit described in paragraph 141 above, or whether such employees should be included in any unit for bargaining purposes by reason of their managerial or confidential status as alleged by the City."

At the election, held on May 24, 1968, 1,115 ballots were cast of which 69 were challenged ballots. Of the 1,046 unchallenged ballots, 588 were in favor of Local 444 which thus had a majority not only of the valid ballots, but of the ballots cast by all employees in the proposed unit, including employees in the allegedly managerial title. The Board of Certification thereafter certified Local 444 as the collective bargaining representative of all Assistant Foremen, Foremen, District Superintendents and Senior Superintendents in the Sanitation Service, employed by the City of New York. (Decision No. 21-68).

Hearings on the question of the alleged managerial status of the titles Supervising Superintendent, Principal Superintendent, City Superintendent and Director of Operations were held on October 29 and 30, and December 2 and 16, 1968 before Malcolm D. MacDonald, Esq., Trial Examiner.

Upon consideration of the entire record herein, the Board renders the following decision:

I. Managerial Status"of the Employees

A. The Facts

The Department of Sanitation is One of several New York City agencies which are grouped under the general authority of the Environmental Protection Administration (EPA). EPA provides certain consolidated services, including the assistance of hearing officers and a labor relations representative. It covers such administrative functions as payroll and budget services for its component agencies, and exercises over-all policy-making and coordinating authority over these components. In general, it can be said, however, that the authority exercised over the Sanitation Department by EPA is indirect; that the Department's mission as prescribed by law remains substantially the same as it was before establishment of EPA; and that the authority and discretion exercised by the, Commissioner of Sanitation continues basically undiminished.

The Department of Sanitation, itself, recently has undergone various changes which have redirected some lines of authority. The Department was formerly organized in three main branches: Staff, Administration and Operations. The operations branch included virtually the entire Uniformed Force including, the Uniformed Officers and, thus, all of the titles here involved. This branch encompassed the Bureaus of Cleaning and Collection, Waste Disposal, Safety and Training, all, of which are manned in whole or in large part by uniformed personnel, and the Bureaus of Motor Equipment, Plant Maintenance, and Engineering.

Under the present organization of the Department, there no longer is an operations branch as a single entity. The Director of

Operations formerly exercised control over the Operations branch and reported directly to the Commissioner on behalf of that branch and its component bureaus. He now exercises only the staff functions of an advisor to the Commissioner in the organizational title of Operations Advisor. His only participation in operations is in connection with the snow removal program. The role of this title in the Department has been so completely changed that the job specification for the title was not offered in evidence [although the specifications for the other three titles involved here were introduced as Joint Exhibits.]

Each of the heads of the bureaus which formerly comprised the Operations branch now reports directly to the Commissioner.

The City Superintendent, whose organizational title is, Chief of Staff, formerly acted as Chief of Staff to the Director of Operations. He now serves as Chief of Staff to the Department and as head of the largest bureau in the Department, that of Cleaning and Collection, which employs 10,000 of the Department's total of approximately 14,000 employees most of whom are uniformed personnel.

Next below the Director of Operations and the City Superintendent, in terms of Civil Service titles, is that of Principal Superintendent. There are no incumbents in this title but there are four officers who are assigned to various duties which formerly would have been performed by Principal Superintendents, and who are paid at the Principal Superintendent wage rate. Three of them are Assistant Chiefs of Staff in the Bureau of Cleaning and Collection. The fourth is assigned as head of the Bureau of Waste Disposal, which is the second largest bureau in the Department, employing between 1,800 and 1,900

persons, most of them uniformed personnel. He now reports directly to the Commissioner.

The next Civil Service title is that of Supervising Superintendent. The heads of the Bureau of Safety and the Bureau of Training are Supervising Superintendents; the former reports directly to the Commissioner, the latter to the Deputy Commissioner (Administration). The officer second in command of the Bureau of Waste Disposal, who is also in full command of the Department's Marine Land-fill program, is a Supervising Superintendent, as is the officer in charge of the Bureau Operations office of the Bureau of Cleaning and Collection. The latter officer and several other Supervising Superintendents hold the organizational title of Deputy Assistant Chief of Staff and serve on the central staff of the Department.

The majority of the Supervising Superintendents are assigned as Borough Superintendents in the Bureau of Cleaning and Collection. They report directly to the Chief of Staff (City Superintendent). There are ten Borough Commands: Manhattan, Bronx and Queens each have two, Brooklyn has three and Richmond one. Each Borough Superintendent has a staff consisting of Senior Superintendents (2 to each Borough Command except Richmond which has one) and District Superintendents. Each Borough Command is divided, operationally, into districts (generally 6 to 8 districts to a command) headed by District Superintendents; the districts are divided into Section Areas (generally 3 to 5 per district) headed by Foremen. The Borough Commands vary in the numbers

of personnel and equipment employed from the single Richmond County Borough Command, which employs 379 Sanitationmen, to the Queens East Command; which has 1,166 Sanitationmen. The average Command has approximately 8 District Superintendents, 35 Foremen, 63 Assistant Foremen, 900 Sanitationmen and 350 vehicles.

The four titles involved here include 20 officers: 1 Director of Operations, 1 City Superintendent, 4 Principal Superintendents and 14 Supervising Superintendents. They direct a uniformed force of approximately 12,000 men. All Sanitation officers wear the same uniforms with insignia of rank similar to those used in the military service; the Director of Operations wears four stars, the City Superintendent three, Principal Superintendents two and Supervising Superintendents one.

The rates of pay for the four titles are:

Director of Operations	\$24,168
City Superintendent	210,248
Principal Superintendent	18,973
Supervising Superintendent	15,571

Overtime is paid to all officer titles up to and including Supervising Superintendent; the three highest ranks received overtime pay until 1961-62 at which time each of these titles was granted a flat \$2,500 a year pay increase and overtime entitlement was terminated.

All of the titles are in the competitive class of the Civil Service.

None of these titles has the authority to hire, fire or promote employees. However, all have the power to assign and transfer employees within their own commands and to issue disciplinary complaints against employees. Officers below the four ranks involved here also

have these powers. All officer ranks, as supervisors, may participate in grievance procedures. Some of the officers in the titles-involved here, although they have no power to promote, do participate in the decision-making process relating to promotions. As members of the Department's Promotion Review Board, the Operations Advisor (Director of Operations), Chief of Staff (City Superintendent), an Assistant Chief of Staff (Principal Superintendent) and the Chief of the, Bureau of Waste Disposal (Principal Superintendent) review the qualifications of persons eligible for promotions within the discretion of the Commissioner. The Board then makes its recommendation, of the person best for any such promotion and the Commissioner makes the final decision.

All major decisions and all policy are made by the Commissioner. He has the ultimate responsibility and the exclusive authority for all policy decisions affecting his department. These decisions and the policies they produce are of a broad nature, however, and are reached in consultation with and intended for implementation by the experts who make up the Uniformed Officer Force. The Commissioner meets frequently with members of his staff both in regularly scheduled weekly staff meetings, and in other instances as the need arises, to discuss matters of policy and planning. These meetings and consultations are vital factors in the decision and policy-making process which culminates in each instance, with the action taken by the Commissioner. Some of the incumbents in each of the four titles involved here participate in these meetings and consultations.

The policies issued at the Commissioners level are relatively broad and leave considerable latitude for the exercise of judgment and discretion by the bureau heads and Borough Superintendents who bear the major _ burden of implementation. In the examples of the process whereby policy is made, promulgated and implemented, it was apparent that it is at this same level - a sort of mid-point in the command structure, where policy is received for implementation that much of the information, suggestions and recommendations which stimulate and provide the basis for the making of policy originate. The operations of the Department involve & steady flow of information and recommendations upward and a flow of directives downward. As information and recommendations draw closer to the top they assume more and more the form of finished plans and proposals requiring only the approval of the Commissioner. As directives and policy decisions issue from the Commissioner's office and descend through the various levels of the Department they tend to become increasingly specific and to reduce the degree of discretion to be exercised at each succeeding level.

The Borough Superintendent and that is to say the majority of Supervising Superintendents is at this mid-point in the system. The record clearly shows that considerable weight is given to his recommendations and that he is consulted and relied upon in decisions dealing with operations. He is the Department's highest level field representative and the head of an operating entity of great size, both in terms of the personnel, equipment and facilities under his control, and of the area and scope of the service rendered under his direction.

The officers above the level of the Borough Superintendent, i.e. the Principal Superintendent, the City Superintendent and, the Director of Operations have, as their chief functions, participation in planning and policy-making and in implementation at the highest level. If, as the testimony shows, the uniformed force is comparable to a military organization, these officers can be said to constitute its general staff.

Officers in all of the four titles involved here participate in labor relations activities on behalf of management. This is not to say that all employees in all of the titles engage in such activities, but that all of the titles are subject to assignment thereto.

The duties performed in this area include service on joint labor-management committees, attending and aiding in labor negotiations, reviewing and analyzing labor union demands and proposals And making recommendations in connection therewith, in support of management interests.

There has been de facto collective bargaining for the three highest titles involved here and bargaining pursuant to New York City Labor Department certification on behalf of the fourth, Supervising Superintendent. Agreements between Local 444 and the City and personnel orders reached "as a result of collective bargaining negotiations and related procedures" cover all eight officer titles. The testimony of several witnesses, including the Assistant Personnel Officer of the Department shows that bargaining has been conducted on the basis of treating the entire Uniformed Sanitation Officer force as a single group or unit.

B. Discussion

It is characteristic of the cases we have considered in which the managerial status of employees has been at issue - that the parties place an undue emphasis on certain criteria which tends to preclude an evaluation of all the relevant factors. For example, job specifications are regularly submitted as controlling proof as to what a given individual does or does not do in his work. They are not, however, an infallible source of accurate information. As has been observed in this case, the testimony showed that job specifications of three out of four titles were inaccurate in some respects, and the specification job/for the fourth title was so inaccurate that neither party offered it in evidence and both agreed that it in no way reflected the duties actually performed by the incumbent in the title. Job specifications, therefore, while of value in making a determination as to the nature of the duties performed by a title or an individual, are not, and should not be relied upon, as controlling proof.

It also is frequently urged that departmental policy is made only by the Commissioner. Department heads frequently are designated who have general executive experience and expertise in the particular field, but who are without experience in the department. But whatever is background, the department head's decisions are, and ordinarily must be based upon the information, advice and recommendations furnished by his assistants. Our concern is not limited to the final act, which changes a document from a proposal to a directive or policy statement, but covers the essential process which produces the decision. Significant

evidence of managerial status.

Similarly, that there is a history of collective bargaining for a title, is a fact to be considered and weighed in determining the managerial-executive status of the title. It is not, however, a conclusive or controlling factor. Section 1173-10.0 c. specifically provides that the Board of Certification shall have the power to make unit determinations contrary to prior determinations of the New York City Department of Labor.

Upon consideration of the entire record herein, we find and conclude that the Director of Operations, the City Superintendent, the Principal Superintendents and Supervising Superintendents are all managerial-executive employees.

We have stated in earlier decisions that certain titles, by reason of the nature of their duties, do not constitute units appropriate for collective bargaining. Thus, in Matter of Local 188, D.C. 37, Decision No. 70-68,, it was held that Personnel Examiners in the Department of Personnel were confidential employees - i.e. employees having access to confidential information relating directly 'or indirectly to labor relations activities involving the employer and that, as such, they did not constitute a unit appropriate for purposes of collective bargaining. A similar conclusion was "reached in Matter of City Employees Union, Local 237, I.B.T., Decision No. 79-68, where it was found that certain titles were managerial-executives.

The rationale followed in those cases was that certification of the titles in question would create conflicts of interest; would interfere with "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"; and would cause "disruption of managerial procedures, interference with the efficient operation of the City in personnel matters, and the impediment [of] collective bargaining".

Management functions, such as policy formulation and the development of operational procedures and production standards, can be carried out only through the services of high level personnel. Such personnel, of necessity, are required to make, or significantly assist in reaching, decisions essential to the managerial function and which, in many instances, relate to subjects, or potential subjects, of collective bargaining. The right of an employer to have assistance in the performance of managerial functions, including representatives capable of furnishing meaningful advice and assistance in the collective bargaining process necessarily is implicit in any law which requires the employer to bargain collectively with its employees.

The employees in the titles here concerned perform precisely such services and their exclusion from collective bargaining rights is essential to avoid conflicts of interest and interference with "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., ___ F.2d ___ 68 L.R.R.M. at 2850-2851; Matter of Local 188, D.C. 37, Decision No. 70-68; Matter of City Employees Union, Local 237, I.B.T., Decision No. 79-68).

Employer dominated unions are prohibited because collective bargaining is meaningless when the employer sits on both sides of the bargaining table. The same principle is equally applicable where employees occupy both seats.

We therefore find and conclude that the Director of Operations, the City Superintendent, the Principal Superintendents and the Supervising Superintendents employed in the New York City Department of Sanitation are managerial executives and do not constitute a unit or units appropriate for the purposes of collective bargaining in fact or within the meaning of the New York City Collective Bargaining Law.

Accordingly, we shall dismiss that portion of the petition herein which seeks certification as the representative of said titles.

ORDER

Pursuant to the powers vested in the Board of Certification by the New York City Collective Bargaining Law, it is, hereby

ORDERED, that so much of the petition herein as seeks certification as the collective bargaining representative of the titles Director of Operations, City Superintendent, Principal .Superintendent and Supervising Superintendent in the New York City Department of Sanitation be, and the same hereby is dismissed.

Dated: New York, N.Y.

June 24, 1969

Arvid Anderson
C H A I R M A N

Eric J. Schmertz
M E M B E R

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