United Fed. Of Law Enforcement Officers v. City, et. Al,40 OCB 14 (BOC 1987) [14-87 (Cert.)]

interm-11-87 & 14-87	due process claim - dismissed	United Fed'n of Law Enforcement Officers v. Office of Collective Bargaining, 66506 S.D.N.Y., 7/30/90.	50

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

of

UNITED FEDERATION OF LAW ENFORCEMENT OFFICERS,

-and- DECISION NO. 14-87

THE CITY OF NEW YORK, DOCKET NO. RU-982-87

-and-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO

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DETERMINATION AND ORDER

On May 21, 1987, the Board of Certification (hereinafter referred to as "the Board") issued Interim Decision No. 11-87 in which we found, inter alia, that a petition filed on January 21, 1987 by the United Federation of Law Enforcement Officers (hereinafter referred as to as "the UFLEO" or "petitioner"), seeking certification as the exclusive collective bargaining representative of approximately 165 employees in the title Urban Park Ranger, was sufficient to withstand a motion for summary dismissal interposed by District Council 37, AFSCME, AFL-CIO (hereinafter referred to as "D.C. 37" or "Intervenor"). Specifically, we determined that the UFLEO is a bona fide labor organization within the meaning of the New York City Collective Bargaining Law ("NYCCBL"); that the showing of

interest supplied by petitioner met the requirements of the Revised Consolidated Rules of the Office of Collective Bargaining ("OCB Rules"); and that the petitioner was not required to assert a basis for challenging the appropriateness of the existing unit or to demonstrate that a change in unit structure was necessitated by changed circumstances. In addition, we granted D.C. 37's motion to intervene in the proceedings as the certified representative of employees subject to the petition,[1] and directed that a hearing be held before a Trial Examiner designated by the Office of Collective Bargaining ("OCB") to take testimony and evidence on the question of appropriate unit placement for Urban Park Rangers.

On June 25, 1987, a hearing was held before Marjorie A. London, Esq. In an opening statement, counsel for D.C. 37-moved for reconsideration of the interim decision insofar as the Board therein declined to require that petitioner demonstrate either that the present bargaining unit is not appropriate bt that there have been substantial changes in circumstances since the initial certification of D.C. 37 which would justify an alteration of unit structure. Intervenor also requested and was

[1] Decision No. 33-82

granted an opportunity to brief its motion at the close of the proceedings.

Thereafter, counsel for the petitioner was invited to call his first witness. Instead, however, counsel sought to have written statements previously prepared by the President and Vice-President of the UFLEO read into the record or admitted into evidence as the sworn statements of officers of that organization. Counsel for D.C. 37 and the City of New York (hereinafter referred to as "the City" or "Employer") objected to the receipt of said statements in either of the forms proposed. The Trial Examiner sustained these objections.[2] Thereafter, D.C. 37 moved to dismiss the petition without further proceedings, alleging that the UFLEO had failed to provide any evidence to support its petition. The Trial Examiner advised counsel that that motion, together with all of the evidence in the record, would be submitted to the Board for final disposition.

On June 30, 1987, the UFLEO submitted a memorandum of law in support of its position. D.C. 37 and the City filed letter briefs on July 7 and July 8, 1987, respectively. on July 15, 1987, petitioner filed a reply memorandum of law.

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[2] Transcript of hearings, p. 29.

The Motion for Reconsideration

In support of its motion for reconsideration, D.C. 37 reiterates its argument that the Board previously has required that a substantial change in circumstances be demonstrated before it will permit a union seeking to alter the structure of a bargaining unit to proceed to hearing. Alternatively, it is suggested, prejudice to the collective bargaining status of the employees involved must be demonstrated by a party seeking a change in unit structure.

Neither these arguments nor any of the precedents cited by D.C. 37 adds materially to its previous statements relating to the burden which a petitioner must meet in order to have its challenge to an existing bargaining unit entertained by the Board. Where, as here, there has been no prior Board decision involving consideration of the unit structure sought by the petitioner, the Board will not require a demonstration of changed circumstances. As we noted in our interim decision, the cases cited by D.C. 37 (Decision Nos. 29-82 and 12-83) are distinguishable from the present case in that both involved repeated attempts to obtain results previously rejected by the Board.[3] Public Safety and Municipal Em-

[3] Decision No. 11-87 at 12, n. 12.

ployees, Inc. and City of New York (Decision No. 10-87), additionally cited by D.C. 37 in its post-hearing brief, is the most recent of several Board decisions dealing with the representation status and unit placement of the Special Officer series of titles.[4] However, our determination in that case that the petitioner failed to raise any issues that would justify a hearing is no precedent for our treatment of the instant petition which poses an issue of unit placement not previously considered by the Board. For the aforementioned reasons, we shall deny Intervenor's motion for reconsideration and proceed to consider the substantive question presented in this case.

Positions of the Parties

Petitioner's Position

The principal basis for the UFLEO's assertion that the appropriate unit for Urban Park Rangers is a separate unit certified to the UFLEO is the fact that more than 110 Urban Park Rangers (in excess of 70 percent of the proposed bargaining unit) submitted dues checkoff cards allegedly designating the UFLEO as their sole and exclusive collective bargaining representative. Petitioner

[4] See, Decision Nos. 55-76; 24-79; 29-82.

argues that, by this showing of interest, the UFLEO has been identified as the Urban Park Rangers' representative of choice. Petitioner also offers the novel assertion that D.C. 37, by failing to provide a showing of interest in this matter, has not met a precondition for representation of this group of employees. At the very least, it is argued, an election should be held to enable Urban Park Rangers to select a collective bargaining representative of their own choosing.

As a second basis for its petition, the UFLEO asserts that Urban Park Rangers, some of whom are peace officers within the meaning of Section 2.10 of the New York State Criminal Procedure Law, are a unique craft within D.C. 37's existing unit. These employees, it is argued, perform special duties which differ from the duties of non-peace officer members of the bargaining unit. In addition, peace officers, unlike other members of the existing unit, work on a twenty-four hour clock. Petitioner maintains that these conditions necessitate separate and specialized representation by a union, such as UFLEO, which possesses expertise in the field of law enforcement.

Petitioner argues further that the inclusion of peace officers with other personnel in a single bargaining unit presents the potential for a conflict of interest,

as peace officers might be placed in the position of having to arrest or issue summonses to their fellow unit members. Moreover, it is alleged, the constitution and by-laws of D.C. 37 also prevent peace officers from carrying out certain of their functions against other members of the union.

The UFLEO alleges that Urban Park Rangers are increasingly required to perform duties similar or identical to those performed by police officers. Therefore, it is argued, the proscription of Section 1173-10.0(b) of the NYCCBL against the certification of a union to represent members of the New York City police force if it also represents non-New York City police force personnel should, by analogy, apply here.[5]

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[5] Section 1173-10.0(b) of the NYCCBL provides:

> No organization seeking or claiming to represent members of the police force of the police department shall be certified if such organization (i) admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than members of the police force of the police department, or (ii) advocates "the right to strike.

Petitioner also cites Section 9(B)(3) of the Labor Management Relations Act which provides that an appropriate bargaining unit for employees subject to the jurisdiction of the National Labor Relations Board shall not include, "together with other employees, any individual em-

Petitioner argues that, in any event, the initial certification of D.C. 37 as the representative of Urban Park Rangers in 1982 was improper, as the accretion order of the Board was issued without notice to affected employees or an opportunity to be heard in opposition. Therefore, absent the submission of a 30 percent showing of interest at this time, it is alleged, D.C. 37 is without standing to participate in the present dispute.

As a further basis for its petition, the UFLEO reiterates its contention that the representation accorded Urban Park Rangers since 1982 has been inadequate, amounting to an abandonment of this group of employees. The UFLEO charges that D.C. 37 has failed to demonstrate a willingness to represent Urban Park Rangers except to the extent of its collection of dues under a "license" from the OCB.

(Footnote 5/ continued):

ployed as a guard with authority to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises"; and further provides that "no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards." 29 U.S.C. §159(B)(3). This is the so"called "plant guard rule."

Finally, petitioner argues that the Board policy against fragmentation of existing bargaining units does not provide sufficient basis for denying public employees the freedom to choose their union representatives. In fact, it is alleged, the application of the policy in this case amounts to a denial of statutory and constitutional rights, including the right of freedom of association.

For all of the aforementioned reasons, petitioner now seeks an order of the Board (a) directing the City to refrain from recognizing D.C. 37 as the exclusive representative of Urban Park Rangers pending an election; (b) finding that unfair labor practices have been committed, in violation of Sections 8a(l), 8a(3), and 8b(l)(A) of the National Labor Relations Act in that exclusive-recognition has been granted to a union which, it is alleged, represents only a minority interest among the employees subject to this petition; and (c) granting the petition in full based upon the UFLEO's showing of interest among Urban Park Rangers.

Intervenor's Position

D.C. 37 asserts that the pre-existing bargaining unit to which the title Urban Park Ranger was added, by

accretion, in Decision No. 33-82 is the appropriate unit for those employees. D.C. 37 maintains that the factors considered by the Board in determining appropriate unit placement, including a community of interest with other workers in the unit and the history of collective bargaining, support its position. Further, D.C. 37 stresses that longstanding Board policy favors the certification of large units based upon broad occupational groupings and including as many employees and titles as may bargain effectively as a single entity. Based upon these considerations, D.C. 37 concludes, the existing unit should not be disturbed.

Intervenor also disputes the applicability of the plant guard rule to the proceeding at bar. D.C. 37 observes that this Board hap repeatedly held that principles established in the private sector are not applicable to labor relations between public employers and their employees. In any event, Intervenor argues, even if the plant guard rule were applicable here, the certification of a separate unit of Urban Park Rangers would not satisfy the rule as the title itself encompasses both peace officers (Parks Enforcement Personnel) and non-peace officers.

D.C. 37 argues further that the quality of repre-

sentation accorded Urban Park Rangers by the union, a matter previously raised by petitioner and dealt with in the Board's interim decision, is not relevant to the issue of unit placement. Moreover, as the Board has already ruled on this point, D.C. 37 asserts, petitioner's reiteration of the argument ignores "the law of the case."

Finally, D.C. 37 asserts, petitioner, by its refusal to offer evidence in support of its position at the hearing in this matter, must be found to have failed to sustain its burden of going forward or its burden of proof on the unit issue. In accordance with precedents of the State Public Employment Relations Board dismissing a representation petition for lack of prosecution, it is argued, the Board should dismiss the instant petition without further proceedings.

Employer's Position

The Employer asserts that the UFLEO's petition should be dismissed because there has been no evidence offered relating to the question before the Board. The City opposes the petition on the further ground that a change in the present certification would result in the fragmentation of a pre-existing bargaining unit in

contravention of express Board policy. Finally, the City asserts that the present bargaining unit is the appropriate unit for Urban Park Rangers.

Discussion

At the outset, we wish to state our approval of the ruling of the Trial Examiner denying petitioner's application to have prepared statements of officers of the UFLEO read into the record of the hearing in this matter or otherwise admitted into evidence in lieu of testimony. In accordance with our rules of procedure, witnesses at hearings are to be examined orally under oath or affirmation.[6] The Rules also provide that, during the course of a hearing, the Trial Examiner "shall have full authority to control the conduct and procedure of the hearing and the record thereof, to admit or exclude testimony or other evidence, and to rule upon all motions and objections."[7] We find that the determination of the Trial Examiner to disallow the submission of evidence in unusual form for which no foundation had been laid and concerning which there could be no cross-exami-

[6] OCB Rules §11.1

[7] OCB Rules §10.3

nation was a proper exercise of authority. We note moreover that the statements offered at the hearing were subsequently submitted as part of petitioner's memorandum of law and we have considered them to the limited extent that they elucidate and amplify arguments contained in the UFLEO's petition, reply and brief. It should be noted, however, that even if we were accept the allegations of fact contained in these statements as evidence in support of petitioner's position on the question of appropriate unit placement, our conclusion in this matter would be the same.

Section 2.10 of the OCB Rules prescribes factors which the Board shall consider, among others, in determining appropriate bargaining units.[8] These include:

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[8] The Board's authority to determine unit appropriate for collective bargaining derives from Section 1173-5.0(b)(1) of the NYCCBL which provides:

> The board of certification, in addition to such other powers and duties as it has under this chapter and as may be conferred upon it from time to time by law, shall have the power and duty: (1) 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,....

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

Since early 1968, we have followed a consistent policy of consolidating bargaining units, creating larger units based on broad occupational groupings. The purpose of this policy was to reduce the number of units with which the City must negotiate, so as to develop a structure of bargaining that is coherent and viable.[9] From 1968 to the present, the number of units has been reduced

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[9] Decision No. 46-75 at 7, n. 4.

from 400 to 80. While the function of this Board generally is to provide the machinery whereby the desires of employees may be ascertained, in dealing with a petition for certification we may not base our determination of appropriate unit on employees' opinions as to a union's ability to advance the interests of the affected group. Although, in a given case, employee wishes may be considered as one factor in determining this issue, such considerations must be balanced against considerations of efficiency of operation of the public service and sound labor relations. It is the practice, not only in our jurisdiction, but also in the operations of analogous bodies, to make determinations of appropriate bargaining units first and then to allow expressions of employee preference in the choice of the exclusive representative for the unit determined to be appropriate.

In the instant matter, the UFLEO grossly overstates the significance, for purposes of unit determination, of its concededly substantial showing of interest among Urban Park Rangers. The issue before the Board is not merely whether employees in the title prefer representation by the UFLEO to representation by D.C. 37. Rather, the issue includes the initial question of whether, con-

sistent with the criteria quoted above, Urban Park Rangers should be placed in a separate bargaining unit or whether they should remain in the existing unit, together with employees in numerous other titles, which the Board found to be appropriate in 1982.

In support of its contention that a separate unit for Urban Park Rangers is warranted, petitioner relies on the fact that some of the employees in that title (those assigned to the Parks Enforcement Patrol) may be deputized by the New York City Police Department as Special Patrolmen, and may be called upon to serve as peace officers within the meaning of Section 2.10 of the Criminal Procedure Law. Petitioner argues, inter alia, that, as peace officers, Urban Park Rangers are unique within the existing bargaining unit, performing different duties and having different working conditions from non-peace officers in the unit, and that the inclusion of peace officers and other personnel in a single unit presents the potential for conflicts of interest among members of the unit.

In a matter involving a question of appropriate unit placement for Special Officers, who are peace officers under the Criminal Procedure Law, we observed that if we were writing on a clean slate, i.e., if there were no pre-existing bargaining units, a persuasive argument might

be made for the creation of a security and law enforcement unit, including such titles as Special officers, Traffic Enforcement Agents, Sanitation Enforcement Agents and possibly School Crossing Guards. However, as these titles were all in different units, represented by different labor organizations, and functioning effectively therein, we were unwilling to disturb the unit structure at such a late date in our history.[10] Such considerations also provide a basis for a refusal to disturb an existing unit in the present case; however, there is a more compelling reason for declining to accept arguments in favor of a separate bargaining unit for peace officers in the instant matter. Since only those Urban Park Rangers who are assigned to the Parks Enforcement Patrol have the special status of peace officer, it is apparent that a separate unit for Urban Park Rangers would, itself, be a mixed, unit of peace officer and non-peace officer employees, thus, no more or less appropriate than the existing unit insofar as this factor is concerned.[11]

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[10] Decision No. 29-82 at 24-5.

[11] In Decision No. 29-82, we found no inherent inconsistency in placing peace officers in mixed bargaining units and noted that, for those categories of peace officers for which information was available, approximately half were, at that time, in mixed units.

In the present case, the UFLEO has failed to provide any convincing evidence that the inclusion of Urban Park Rangers in their current unit prejudices the collective bargaining status of the employees involved or that special interests have been sacrificed or submerged in the existing unit structure. Nor do petitioner's conclusory allegations as to deficiencies in the representation accorded Urban Park Rangers by D.C. 37 demonstrate that the interests and needs of these employees differ significantly from the interests and needs of other employees in the bargaining unit. Under such circumstances, we have held that the fragmentation of an existing bargaining unit would be in derogation of the public interest and the legislative intent of the drafters of the NYCCBL and would have an adverse effect on the conduct of labor relations in the City of New York.[12] Moreover,

[12] In Police Benevolent Association, Long Island Railroad Police, Inc. v. Anderson, 78 A.D. 2d 777, 435 N.Y.S. 2d 200 (lst Dept. 1980), the Appellate Division, First Department unanimously confirmed Board Decision No. 24-79, in which a petition seeking certification of a separate bargaining unit for employees in the special officer series of titles was dismissed, in part, because the creation of the requested unit would have required an unwarranted deviation from our established policy against fragmentation of units. The Court of Appeals denied leave for further appeal. 53 N.Y. 2d 602, 439 N.Y.S. 2d 1025 (1981).

if we were to grant certifications based solely on occupational specialties, as petitioner would have us do in this case, we would have literally hundreds of separate bargaining units. This is precisely the situation which existed when the OCB was created, and one which we have spent nearly twenty years attempting to alleviate.

Finally, we should state that the present collective bargaining unit appears to be an appropriate unit for the employees petitioned for herein. Consisting of approximately 5,000 employees serving in 33 non-supervisory custodial, maintenance, parks and public works titles, the existing unit includes the related title of Park Service Worker, among others.[13] Although petitioner also has alleged that the initial certification of D.C. 37 as the representative of Urban Park Rangers was improper, as it was effected without notice to employees, it is a matter of record that when D.C. 37 filed its petition in 1982 seeking certification to represent employees in the then-unrepresented Urban Park Ranger title, notice of the pendency of the petition was posted in the work places of the affected employees and was published in The City Record, in accordance with the re-

[13] Certification No. 38B-78 (as amended).

quirements of Section 2.8 of the OCB Rules. No other employee organization and no individual employee sought to intervene in the matter.

Based upon our review of the entire record herein, we conclude that no evidence has been offered which would persuade us that such an exceptional situation exists in this case as to warrant deviating from our established policy against fragmentation of existing bargaining units. Accordingly, we shall grant D.C. 37's motion to dismiss the petition filed by the UFLEO in this matter. We note that, in doing so, we have considered and rejected all of the arguments raised in petitioner's submissions to the Board, including those not specifically discussed in this opinion.

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 motion submitted by Intervenor, District Council 37, AFSCME, AFL-CIO for reconsideration of Interim Decision No. 11-87 be, and the same hereby is, denied; and it is further

ORDERED, that the motion submitted by Intervenor, District Council 37, AFSCME, AFL-CIO to dismiss the petition of the United Federation of Law Enforcement Officers be, and the same hereby is, granted; and it is further

ORDERED, that the petition of the United Federation of Law Enforcement Officers be, and the same hereby is, dismissed.

DATED: New York, N.Y.
July 22, 1987

ARVID ANDERSON
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER