

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 certain employees of the Law Department of the City of New York managerial and/or confidential pursuant to Section 2.20 of the Revised Consolidated Rules of the Office of Collective Bargaining,

DECISION NO. 18-87

DOCKET NO. RE-157-87

-and-

LOCAL 1180, COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO; LOCAL 1549, DISTRICT COUNCIL 37, AFSCME, AFL-CIO; and LOCAL 237, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondents.

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INTERIM DECISION AND ORDER

On January 30, 1987, the City of New York ("City"), appearing by its Office of Municipal Labor Relations, filed a petition pursuant to Section 2.20 of the Revised Consolidated Rules of the office of Collective Bargaining ("OCB Rules") seeking a determination that certain employees of the Law Department of the City of New York are managerial and/or confidential within the meaning of Section 1173-4.1 of the

New York City Collective Bargaining Law ("NYCCBL").<sup>1</sup> The 37 employees affected by the petition are serving in titles that are included in collective bargaining units represented by Local 1180, Communications Workers of America, AFL-CIO ("CWA"); District Council 37, AFSCME, AFL-CIO and its affiliated locals ("D.C. 37"); or by Local 237, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Local 237") and its affiliate, Civil Service Bar Association ("CSBA").<sup>2</sup>

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<sup>1</sup> Section 1173-4.1 of the NYCCBL provides, in relevant part, that:

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; .... (Emphasis added).

<sup>2</sup> Employees represented by CWA are serving in the titles of Principal Administrative Associate and Legal Secretarial Assistant, Levels II and III. Certification No. 41-73 (as amended). Employees represented by D.C. 37 are serving in the titles of Legal Secretarial Assistant, Level I; Office Aide; Office Associate; and Stenographer/Secretary. Certification No. 46C-75 (as amended). Employees represented by Local 237 and CSBA are serving in the titles of Student Legal Specialist, Attorney and Associate Attorney. Certification No. CWR-44/67 (as amended).

On April 14, 1987, the Law Offices of Adam Ira Klein, P.C. served and filed with the Office of Collective Bargaining ("OCB") two separate documents, one a motion on behalf of CSBA to "intervene[] as of right for the purpose of moving to dismiss" the petition, and the other an answer and cross-motion to dismiss on behalf of Local 237.

On April 23, 1987, D.C. 37 served and filed an answer and motion to dismiss the petition.

On May 20, 1987, in response to a request from the OCB Director of Representation for a statement of its position, CWA submitted a letter in which it asserts that "the CWA-represented employees which are the subject of the captioned petition perform no functions which will make them ineligible for collective bargaining."

No response to any of the above-described pleadings or statements was submitted by the City.

It is the limited purpose, of this interim decision to determine the issues raised in the motions and cross-motion to dismiss which have been submitted by Local 237, CSBA and D.C. 37 so as to determine whether further proceedings may be had on the City's petition. Preliminarily, however, we note that the Certification No. CWR-44/67 (as amended) which covers, inter alia, employees serving in the titles of Student Legal Specialist, Attorney and Associate Attorney

is held jointly by "Local 237, I.B.T. and its affiliate, Civil Service Bar Association." <sup>3</sup> Accordingly, CSBA is a proper party to this proceeding and its request to intervene herein shall be granted. <sup>4</sup>

Positions of the Parties

Local 237

Local 237 asserts two bases for its cross-motion to dismiss the petition:

(a) the petition is insufficient on its face and thus fails to state a claim as to the manageriality and/or confidentiality of the affected employees;

(b) the petition is untimely.

In support of its first alleged basis for dismissal, Local 237 argues that:

the Petitioner's parroting of the statutory criteria for manageriality and/or confidentiality and unsubstantiated allegation that these employees' duties involved same, in Paragraph 7 of the Petition, are insufficient to satisfy the requirements of Section 2.20a.7 of the [OCB Rules].

The union notes that the question of whether an employee is managerial or confidential depends on the actual duties per-

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<sup>3</sup> Decision No. 11-74

<sup>4</sup> See, Decision Nos. 11-87; 33-82; 5-78; 4-78; 27-72; 7-72.



formed. Here, it is alleged, the petition is devoid of any allegations concerning the duties actually performed by the employees for whom managerial and/or confidential designations are sought; further, the petition fails to demonstrate a "nexus" between the duties performed and the claim of managerial and/or confidential status.

In support of its contention that the petition is untimely, Local 237 explains that:

Allowing 3 days for mailing pursuant to OCB Rule Section 13.5, the Petition is deemed to have been served on the first business day after the examination [sic] of the 3rd day from the date of mailing [January 29, 1987], or in this case, Monday, February 2, 1987.

Therefore, it is argued, the petition which was due to be served upon Local 237 not later than January 30, 1987 was untimely under Section 2.20b.1 of the OCB Rules.

CSBA

In support of its motion to dismiss the petition, CSBA makes the same arguments as those advanced by Local 237 and summarized above. With respect to the question of timeliness, CSBA notes additionally, however, that the period for bringing on a petition to have the employees represented by it designated as managerial or confidential expired several months ago and that the City still has not served

notice of the filing of the petition on CSBA.<sup>5</sup>

In addition to these arguments, CSBA alleges that the failure to serve it with notice of the filing of the petition and to submit proof of such service to the Board of Certification, in violation of the express terms of Section 2.20a.9 of the OCB Rules, itself warrants dismissal of the petition with respect to the employees represented by CSBA.

D.C. 37

D.C. 37 moves to dismiss the City's petition on the grounds that it (a) fails to state a cause of action, and (b) is untimely.

D.C. 37 asserts that, despite the explicit requirement of Section 2.20a.7 of the OCB Rules that a petition alleging that employees are managerial or confidential must contain a statement of the basis for such allegation, the City "merely repeats, in conclusory fashion, the legal standard for confidentiality." D.C. 37 contends that since the City has failed to allege any facts to support its conclusory allegation and has not even alleged facts from which the Board may ascertain to which managers the petitioned-for employees allegedly serve in a confidential capacity, the petition, by analogy to a complaint which in failing to assert factual allegations is subject to dismissal for failure to state a cause of action, should be dismissed.

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<sup>5</sup> It is alleged that CSBA only learned of the pendency of this matter because it was advised of same by Local 237.

With respect to the alleged untimeliness of the petition, D.C. 37 invokes Section 2.7 of the OCB Rules which provides, inter alia, that a petition raising a question about representation may not be filed less than five or more than six months before the expiration of the contract covering the employees subject to the petition. Contrary to the City's contention, D.C. 37 maintains that contracts negotiated by it for the 1982-84 and 1984-87 periods were only draft agreements and that the last valid contract covering the employees affected by the instant petition expired on June 30, 1982. D.C. 37 concludes that the petition, dated January 29, 1987, was filed four and one-half years after the expiration of the last relevant collective bargaining agreement and therefore must be dismissed as untimely.

#### Discussion

A proceeding to determine whether designated employees are managerial and/or confidential, and therefore excluded from collective bargaining is commenced by the filing of a petition in the manner prescribed by Section 2.20 of the OCB Rules. Section 2.20a provides:

A petition for the designation of certain of its employees as managerial or confidential may be filed by a public employer or its representative. The petition shall be in writing and signed. The original and three (3) copies thereof shall be fil-



ed with the Board together with proof of service on any other parties. The petition shall 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 titles;
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 fil-

ing of the petition has been mailed to any certified employee organization which represents employees in such titles.

The moving parties in this matter contend, inter alia, that the petition is fatally defective in that it fails to state the basis for the allegations of managerial and/or confidential status as required by Section 2.20a.7.

In determining whether there has been compliance with Section 2.20a.7, we have stated that:

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.<sup>6</sup>

We have held that, for the purpose of initiating a proceeding under Rule 2.20, it is-not necessary that petitioner substantiate its claim by enumerating the duties actually performed by the employees for whom managerial and/or confidential status is sought,, or that petitioner show a "nexus" between duties actually performed and the statutory criteria that are deemed relevant to a determination of such status. Nor is it necessary, at the commencement

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<sup>6</sup> Decision Nos. 16-87; 3-81. The referenced "statutory criteria" are prescribed by Section 201.7a of the Taylor Law which is also the basis for our own statutory exclusion from collective bargaining of employees who have been determined to be managerial or confidential.

of a proceeding under Rule 2.20, to indicate with respect to employees alleged to be confidential the names of managerial employees with whom such confidential relationships allegedly exist.<sup>7</sup>

In the instant case, the City's petition states that:

The functions performed by these employees of the Law Department involve, inter alia, personnel administration, labor relations or policy formulation, either directly or by regularly assisting and acting in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of personnel administration and/or labor relations.

We find that this statement of the "basis" for petitioner's claim of managerial and/or confidential status satisfies the requirement of Section 2.20a.7 as it clearly alleges that the duties performed by the employees in question involve personnel administration, labor relations or policy formulation and that the employees are alleged to be managerial and/or confidential.<sup>8</sup> In addition, for purposes of identifi-

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<sup>7</sup> Decision Nos. 16-87; 3-81.

<sup>8</sup> We have not required that the City specify in its petition under Rule 2.20 which employees are alleged to be managerial, which are alleged to be confidential and which employees may be managerial and confidential. Such information will be required, however, prior to any hearing that may be held in this matter.

cation, a list of the employees covered by the petition, their civil service titles and the union currently certified to represent each title is appended to the petition.

We emphasize that proceedings under Part 2 of the OCB Rules are investigatory in nature. As part of our investigation, we will, of course, require further substantiation of a petitioner's claim that employees are managerial and/or confidential and, if such substantiation is not forthcoming, we may dismiss the petition.<sup>9</sup> However, 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 or as a prerequisite to the holding of an investigatory hearing therein. At this time, we need not determine what additional information may be required of the City in support of its petition. We simply find that the petition is not dismissable on grounds of legal insufficiency.

Turning to the allegation that the petition should be dismissed as untimely, we emphasize that the relevant provision of our Rules, Section 2.20b.1, refers only to the time for filing, not for service, of a petition.<sup>10</sup> We

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<sup>9</sup> Decision No. 29-81.

<sup>10</sup> Section 2.20b.1 of the OCB Rules provides:  
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find accordingly that the petition in this case, filed on January 30, 1987, is timely with respect to employees covered by collective bargaining agreements that expired on June 30, 1987, regardless of the date on which the petition was served on or received by a party.<sup>11</sup> However, while the City avers that agreements expiring on June 30, 1987 "have been negotiated", D.C. 37 contends that its last agreement covering employees affected by the petition expired on June 30, 1982 and that successor contracts for the 1983-84 and 1984-87 periods were only "draft agreements." We find this basis for objection to the timeliness of the City's petition to be disingenuous and unfounded and, for the reasons stated below, we conclude that the motion to dismiss should be denied.

It is a well-established principle that technical rules of contract do not control the question whether a collective bargaining agreement has been reached; once the parties have

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(Footnote 10/ continued):

A petition for the designation of employees as managerial or confidential may be filed:

1. Not less than five (5) or more than six (6) months before the expiration date of the contract covering the employees sought to be designated managerial or confidential....

<sup>11</sup> See, Decision No. 16-87 at pp. 3-4.

agreed to the substantive terms of a contract, they can be held to those terms.<sup>12</sup> An agreement need not be formally executed<sup>13</sup> or reduced to writing<sup>14</sup> in order to be enforceable.

In the instant case, D.C. 37 was a party to a Municipal Coalition Economic Agreement ("MCEA") for the period 1984-1987. The MCEA covered all economic matters between non-uniformed municipal unions and the City for that period. It also contemplated that the terms of the Coalition Agreement would be incorporated into separate unit agreements between each union and the respective public employer, the terms of which "shall be three (3) years from the date of termination of the applicable existing separate unit agreement" (MCEA, Section 1(a)). Contrary to D.C. 37's assertion, the "applicable existing separate unit agreement" covering the employee's represented by D.C. 37 in this matter covers the period of July 1, 1982 to June

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<sup>12</sup> American Federation of Television & Radio Artists, AFL-CIO (AFTRA) v. Inner City Broadcasting Corp., 784 F 2d 884, 117 L.R.R.M. 3199 (2d Cir. 1984).

<sup>13</sup> See, e.g., Georgia Purchasing, Inc., 230 N.L.R.B. 1174, 95 L.R.R.M 1469 (1977); Bendix Corp. 210 N.L.R.B. 1026, 86 L.R.R.M. 1547 (1974).

<sup>14</sup> AFTRA, supra.

30, 1984.<sup>15</sup> Accordingly, we may conclude that the term of the latest "draft agreement" which concededly has been negotiated by D.C. 37 and which, under the legal principles expressed above, is a valid and enforceable contract notwithstanding the absence of a fully executed written document, is July 1, 1984 to June 30, 1987. We find therefore that a petition filed on January 30, 1987 seeking managerial and/or confidential designations for employees covered by this agreement is timely.<sup>16</sup>

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<sup>15</sup> The OCB receives for its files official copies of executed collective bargaining agreements as they become available. The 1982-1984 clerical agreement between the City and D.C. 37 is currently on file with the OCB.

<sup>16</sup> If we were to find otherwise, the failure to conclude a fully executed agreement could foreclose indefinitely a challenge to a union's representative status by another union as well as a petition by the employer seeking to have employees removed from collective bargaining. Such result would violate the purpose of the contract bar doctrine (Rule 2.7) and of Section 2.20b.1 of the Rules which is to promote a period of stability in labor relations during the term of a contract and the period of negotiations while permitting the changing of representatives or a challenge to bargaining eligibility on a periodic basis. In any event, the Board may entertain a petition for the designation of employees as managerial or confidential outside of the prescribed open period "where unusual circumstances are involved." OCB Rules §2.20b.1.



Finally, we consider whether the City's petition should be dismissed insofar as it concerns employees in titles represented by CSBA because the City did not serve notice of the petition on CSBA or submit proof of such service to the Board. While Section 2.20a.9 does specify that a petition shall contain "a statement that notice of the filing of the petition has been mailed to any certified employee organization which represents employees in such titles", we would not deem a failure of compliance with this section to be a fatal pleading defect where there is no prejudice to the complaining union or to substantial rights of individuals, and where the petition is otherwise properly filed with the Board.<sup>17</sup> Here, CSBA concedes that it received notice of the pendency of this matter from Local 237. Moreover, it appears that notice was received at an early stage of the Proceedings, CSBA's motion to intervene and to dismiss the petition having been filed on April 14, 1987, simultaneously with the answer and cross-motion of Local 237 and well before the Board commenced its investigation of this matter. Therefore, it, does not appear that either the union or the employees it represents were prejudiced in any way. Accordingly, we shall deny CSBA's mo-

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<sup>17</sup> Decision No. 28-80. See, County of Clinton, 13 PERB ¶13021 (1980).

tion in its entirety.<sup>18</sup>

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, the motions to dismiss filed by Local 237, CSBA, and D.C. 37 shall be denied.

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 filed by the Civil Service Bar Association seeking to intervene in the proceeding docketed as RE-157-87 be, and the same hereby is, granted; and it is further

ORDERED, that the motions filed by Local 237, Inter-

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<sup>18</sup> It should be noted additionally that, unlike other jointly certified unions, CSBA represents no employees independently-of its affiliation relationship with Local 237. Additionally, Local 237 appears to act on CSBA's behalf in other respects as, for example, in filing its bargaining notice for the attorney unit that is at issue here. (A bargaining notice dated March 31, 1987 was filed with the OCB on April 10, 1987 by Frank J. Scarpinato, Secretary-Treasurer of Local 237). Given these circumstances, it is questionable whether there was any obligation to serve notice of the petition on CSBA as a separate entity in this case.

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national Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; by the Civil Service Bar Association; and by District Council 37, AFSCME, AFL-CIO to dismiss the petition docketed as RE-157-87 be, and the same hereby are, denied.

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

ARVID ANDERSON  
CHAIRMAN

DANIEL G. COLLINS  
MEMBER

GEORGE NICOLAU  
MEMBER