

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 the
New York City Department
of Personnel managerial or
confidential pursuant to
Section 2.20 of the Revised
Consolidated Rules of the
Office of Collective Bargaining

DECISION NO. 9-87

DOCKET NO. RE-125-82

-and-

DISTRICT COUNCIL 37, AFSCME,
AFL-CIO; COMMUNICATIONS WORKERS
OF AMERICA, AFL-CIO; LOCAL 237,
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS; SERVICE EMPLOYEES
INTERNATIONAL UNION, LOCAL 300,
CIVIL SERVICE FORUM; NEW YORK STATE
NURSES ASSOCIATION,

Respondent.

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INTERIM DECISION

On April 6, 1987, District Council 37, AFSCME, AFL-CIO ("DC 37") submitted a motion to dismiss the petition filed by the City of New York, through its Office of Municipal Labor Relations ("the City" or "OMLR"), at docket number RE-125-82. DC 37's memorandum of law accompanied the motion. The City filed its answer on April 13, 1987, to which DC 37 replied on April 20, 1987.

Background

On January 28, 1982, the City filed a petition seeking the Board of Certification ("the Board") to issue an order

declaring all employees in the New York City Department of Personnel ("DOP") to be managerial or confidential within the meaning of the New York City Collective Bargaining Law ("NYCCBL"). The petition was filed pursuant to Section 2.20 of the Revised Rules of the Office of Collective Bargaining ("OCB Rules"), which provides in relevant part as follows

- b. 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; or
 - 2. During the pendency of a representation proceeding in which the unit includes the employees sought to be designated managerial or confidential; or
 - 3. In the discretion of the Board where unusual circumstances are involved.

f. determination by the Board made pursuant to this section regarding the managerial or confidential status of a title shall be final and binding and, subject to Section 2.20(b)(3) shall preclude a petition to represent the title and employees or a petition to designate the title and employees managerial or confidential for a period of two (2) years or until the period specified in Section 2.20(b)(1) above, whichever is later. A petition filed pursuant to the provisions of this Rule 2.20(f) shall include a statement of facts demonstrating such a material change in circumstances subsequent to the Board's prior determination as to warrant reconsideration of the managerial or confidential status of the title or employee.

In support of its petition, the City alleged that the prior decisions of the Board concerning DOP employees should be reconsidered because DOP underwent a major reorganization due to the revision of §813 of the New York City Charter. The City claimed that "[u]nder the reorganization, not only do employees previously excluded by the Board from bargaining by virtue of their particular functions perform those functions which were determined to be managerial or confidential, but all [DOP] employees now participate in the performance of those functions." The City attached an "Exhibit A" indicating the titles and numbers of employees affected by the petition.

On March 5, 1982, DC 37 filed an answer to the petition requesting that the case be dismissed because the "City has utterly failed to come forth with the requisite specificity such that the Board can arrive at conclusions which are rationally based on articulated facts and in substantial conformance with the statutory criteria." In the alternative, DC 37 requested that the City be ordered to submit a statement of the basis of the allegation that the titles and employees affected are managerial or confidential, including, inter alia: (1) the employees' names and specific work locations, (2) the explicit reason supporting the allegation of managerial or confidential status, and (3) the name and work locations of

their manager for individuals petitioned to be confidential. On September 17, 1982, the Office of Collective Bargaining ("OCB") informed DC 37 by letter that the Board had denied both requests.

In the meantime, the Director of OMLR informed OCB that he preferred to await the outcome of two pending representation cases before proceeding with RE-125-82. The matter was held in abeyance until December 10, 1986, when the City asked that the case be reactivated.

The trial examiner assigned to the case held a pre-hearing conference on February 25, 1987, at which time a series of hearings was scheduled. The City also agreed at this meeting to provide a document listing the titles and number of employees covered by its petition. This document was filed with the Board and served on DC 37 on March 13, 1987.

On April 6, 1987, the first scheduled day of the hearings, DC 37 submitted its motion to dismiss. Both the City and DC 37 requested that the hearings be delayed once again, pending the Board's decision on the motion. The trial examiner granted the parties' request.

Positions of the Parties

DC 37's Position

DC 37 argues that the January 28, 1982 petition and the March 13, 1987 document, which it terms the "1987 petition,"

are "insufficient as a matter of law because they lack specific allegations of fact, as required by Section 2.20(f) of the [OCB Rules], showing that a material change in circumstances has taken place since the prior ... determination in this case." Specifically, DC 37 contends that the 1982 petition contains allegations that are no longer factual and that the "1987 petition" is simply an attempt to circumvent the filing requirements of Section 2.20(b)(1).

DC 37 also claims that the "1987 petition" failed to comply with Section 2.20(a)(4), which requires the petitioner to identify the current collective bargaining status of the affected titles and whether any of the titles have ever been included in a collective bargaining unit or represented at any time by a certified employee organization.

As an additional basis in support of its motion, DC 37 argues that the "1987 petition" is untimely since it was not filed within the window period of the parties' 1984-1987 collective bargaining agreement. According to DC 37, the City must either rely on the factual allegations of the 1982 petition, which it "admits have been vitiated by the passage of time," or the City must rely upon the allegations of the "1987 petition," which is not timely under Section 2.20. Allowing the "1987 petition" to stand as an amendment or modification of the 1982 petition, in DC 37's view, would permit the City to completely circumvent the filing requirements of Section 2.20(b)(1).

Finally, DC 37 contends that the respect to the "1987 petition." the notice requirements of Section 2.8 and 2.20(c) of the OCB Rules have not been met. Specifically, Section 2.8 provides that upon the filing of a representation petition, "notice thereof shall be posted on the public docket maintained by the Board and shall be published in THE CITY RECORD." Section 2.20(c) permits any employee affected by the petition to apply for permission to intervene within twenty days of publication of the Section 2.8 notice.

City's Position

The City argues that the petition filed in 1982 fully complied with the requirements of Section 2.20 and that OCB held the matter in abeyance with the concurrence of all parties. The City maintains that OCB reactivated the case pursuant to a letter dated December 10, 1986 from OMLR. OCB thereafter convened a pre-hearing conference, at which time the respondent unions allegedly requested an updated list of the titles and number of employees working at DOP. The City supplied this information in the form of a three-page document on March 13, 1987. In the City's view, the document is not a new petition but, rather, the information sought by the respondent unions at the pre-hearing conference.

Furthermore, the City claims that, contrary to DC 37's contention, no substantive changes have occurred in the

material facts initially alleged. Although it agrees that DOP may have hired additional personnel during the period the matter was held in abeyance, the City maintains that this circumstance does not affect the factual and legal issues raised by the petition.

Discussion

We reject, at the outset, DC 37's contention that the 1982 petition is insufficient as a matter of law because it fails to comply with the requirements of §2.20(f). DC raised this same argument in its letter of March 5, 1982, which the Board rejected by notice to the parties on September 17, 1982. The doctrine of the "law of the case" prevents DC 37 from relitigating, during the course of the same action, the issues previously decided in it.¹

Furthermore, we are not persuaded that the document supplied by the City in March 1987 constituted a new petition, which must therefore meet the timeliness and pleading requirements of Sections 2.20(b) and (f). The City submitted this document because the unions herein requested the information at the pre-hearing conference. That the statistical compilation attached to the 1982 petition has changed in the five-year hiatus

¹ See Weinstein, CPLR Manual, §25.01 at 25-2.

in this case is to be expected and does not mean that the 1982 petition must fail. We note, moreover, that DC 37 has at no time claimed that it refused to consent to this case being held in abeyance.

Nevertheless, we appreciate DC 37's concern regarding the degree of information supplied by the City to date in this case. The City and DC 37, however, have already scheduled a date to meet with the trial examiner, at which time the parties will arrange for the submission of the information deemed necessary to move forward with this case. This procedure, in our view, will adequately safeguard DC 37's interest in proceeding with specific information concerning the employees and titles at issue.

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 to dismiss filed by District Council 37, AFSCME, AFL-CIO is denied.

DATED: New York, New York
April 23, 1987

ARVID ANDERSON
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER