

City v. L.1180, CWA, et. al, 42 OCB 17 (BOC 1988) [17-88 (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 certain employees
of the Parking Violations Bureau of the
Department of Transportation managerial
and/or confidential pursuant to Section
2.20 of the Revised Consolidated Rules
of the Office of Collective Bargaining,

DECISION NO. 17-88

DOCKET NO. RE-161-87

-and-

LOCAL 1180, COMMUNICATIONS WORKERS OF
AMERICA, AFL-CIO; LOCAL 1549, DISTRICT
COUNCIL 37, AFSCME, AFL-CIO; LOCAL 2627
DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

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 positions in the Parking
Violations Bureau of the Department of Transportation are
managerial and/or confidential within the meaning of Section 12-
305 of the New York City Collective Bargaining Law ("NYCCBL").¹

¹ Section 12-305 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

(continued...)

The nine 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")² and District Council 37, AFSCME, AFL-CIO and its affiliated locals ("DC 37").³

On April 23, 1987, DC 37 filed an answer and motion to dismiss the City's petition on behalf of itself and its affiliated locals. DC 37 contends that the petition should be dismissed on the grounds that it (1) fails to state a cause of action pursuant to Section 201.7(a) of the Civil Service Law and Section 2.20a(7) of the OCB Rules, and (2) is untimely pursuant to Section 2.7 of the OCB Rules.

DC 37 takes the position that the petition fails to meet the minimum pleading requirements set forth in Section 2.20a(7),

(...continued)

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).

² Employees represented by CWA are serving in the title of Principal Administrative Associate. Certification No. 41-73 (as amended).

³ Employees represented by DC 37 are serving in the titles of Stenographer/Secretary (Certification No. 46C-75, as amended) and Computer Specialist (Software) (Certification No. 46D-75, as amended). The City names Locals 1549 and 2627, District Council 37, AFSCME, AFL-CIO, respectively, as the certified bargaining representative for employees in the aforementioned titles. In fact, we note that the appropriate bargaining representative of both units in which these employees are included is designated as "District Council 37, AFSCME, AFL-CIO and/or its affiliated locals."

which provides that a petition alleging that employees are managerial or confidential must contain "(a) statement of the basis of the allegation that the titles and employees affected by the petition are managerial or confidential." Section 201.7(a) of the civil Service Law sets forth the criteria for designation of employees as managerial or confidential:

Employees may be designated as managerial only if they are persons (i) who formulate policy or (ii) who may reasonably be required on behalf of the public employer to assist directly in the preparation for and conduct of collective negotiations or have a major role in the administration of agreements or in personnel administration provided that such role is not of a routine or 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).

According to DC 37, the City's petition merely states in conclusory fashion the legal standard for manageriality and confidentiality while failing to allege any facts to support this conclusion and without stating "which of these employees are purported to be performing managerial functions and which are purported to be performing confidential duties."

DC 37 argues further that the petition, filed and served on January 30, 1987, is untimely under Section 2.7 of the OCB Rules, which provides:

A valid contract between a public employer and a public employee organization shall bar the filing of a petition for certification, designation, decertification or revocation of designation during a contract term not exceeding three (3) years. Any such petition shall be filed not less than five (5) or more

than six (6) months before the expiration date of the contract, or, if the contract is for a term of more than three (3) years, before the third anniversary date thereof. Subject to the provisions of Section 2.18 of these rules, no petition for certification, decertification or investigation of a question or controversy concerning representation may be filed after the expiration of a contract (emphasis added).

According to DC 37, the last collective bargaining agreement covering employees in the title of Stenographer/Secretary expired on June 30, 1982, and the last agreement covering employees in the title of Computer Specialist (Software) expired on June 30, 1984. Contrary to the City's contention, DC 37 maintains that the contract negotiated by it for the 1982-84 period covering Stenographer/Secretary employees was only a draft agreement and that contracts for the 1984-87 period covering both units have yet to be completed. DC 37 concludes that the instant petition, filed some four years and six months after the expiration date of the agreement covering Stenographer/Secretary employees and two years and six months after the expiration date of the agreement covering Computer Specialist (Software) employees is, therefore, untimely.

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 the above-described pleadings or statement was submitted by the City.

DISCUSSION

At the outset, we note that the facts of this case and the arguments advanced by DC 37 in support of its motion to dismiss closely parallel those raised, inter alia, in three other cases that were filed concurrently with the instant one.⁴ On these analogous questions, our rulings in Decision Nos. 4-88, 18-87 and 16-87 restated the standards by which we measure the sufficiency and timeliness of a petition for designation of persons as managerial or confidential pursuant to Section 2.20 of the NYCCBL. Thus, to this extent, these decisions shall dictate the result in the instant matter.

Sufficiency of the Petition

DC 37 contends that the City's petition must be dismissed because it fails to state the basis for the allegation that the employees affected by the petition are managerial and/or confidential, as required by Section 2.20a 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 filed with the Board

⁴ Docket Nos. RE-159-87 (Decision No. 4-88); RE-158-87 (Decision No. 16-87); and RE-157-87 (Decision No. 18-87).

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 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.

In determining whether the petition sufficiently states the basis for an allegation of manageriality and/or confidentiality so as to be in compliance with Section 2.20a(7), we have stated

that

[t]he 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.⁵

It is well settled that, for the purpose of initiating a proceeding under Rule 2.20, it is not necessary that the 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.⁶ Nor is it necessary, at the commencement of a proceeding under Rule 2.20, to indicate which employees are alleged to be managerial, which are alleged to be confidential and which employees may be managerial and confidential.⁷

In the instant case, the City states at paragraph 7 of the petition that

[t]he functions performed by these employees of the PVB involve, inter alia, personnel administration, labor relations or policy formulation, either directly or by regularly assisting and acting in a confidential

⁵ Decision Nos. 4-88; 18-87; 16-87; 3-81. The referenced "statutory criteria" are those set forth in Section 201.7(a) of the Civil Service Law (Taylor Law), supra at 3.

⁶ Decision Nos. 4-88; 18-87; 16-87; 3-81.

⁷ See, Decision No. 18-87. This information, however, shall be required prior to any hearing that may be held in this matter.

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 the City'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. We also note that the City has supplied the name, civil service title and office title for each person covered by its petition. For these reasons, we shall deny the motion to dismiss based upon an alleged insufficiency of the petition.

Timeliness of the Petition

Turning to the allegation that the petition should be dismissed as untimely, we note that DC 37 and the City agree that the relevant collective bargaining agreements covering employees in the titles of Stenographer/Secretary and Computer Specialist (Software) expired on June 30, 1982 and June 30, 1984, respectively, and that successor agreements have yet to be finalized for either bargaining unit. Citing Section 2.7 of the OCB Rules as authority for its position, DC 37 maintains that the petition should be dismissed as to DC 37 employees for this reason alone.

We quote from our discussion in Decision 4-88 pertaining to this same allegation:

the filing of a petition for designation of persons as managerial or confidential employees is not expressly covered by the prohibition of Section 2.7 but, rather, is covered by a separate section of the Rules, §2.20, which contains separate filing provisions. However, Section 2.20b(1) does presuppose the existence of a contract with a definite termination date at the time the petition is filed. Here there was no contract in existence in January 1987 and the rule prescribing the time period within which a petition for managerial and confidential designations may be filed can not be strictly applied. Under Section 2.20b(3), however, the Board may, in its discretion, permit the filing of such a petition "where unusual circumstances are involved." ... [W]e have determined that this is an appropriate case for the exercise of that discretion.

In that case, as well as in Decision No. 18-87, we took cognizance of the realities of the bargaining process between the City and its various unions and the proliferation of successor separate unit "draft agreements," in lieu of fully executed collective bargaining agreements, for the 1982-84 and 1984-87 periods. We also noted that both DC 37 and the City were parties to the 1984-87 Municipal Coalition Economic Agreement ("MCEA"), which prescribed economic terms and conditions of employment for all non-uniformed municipal employees during the period July 1, 1984 to June 30-, 1987, and which contemplated the incorporation of its terms into the separate unit agreements.

Based on the foregoing, we found it reasonable to conclude that, had the parties completed their bargaining in a timely fashion, each of the unit agreements involved would have expired

on June 30, 1987. Accordingly, pursuant to our authority under Section 2.20b(3) of the OCB Rules, we held the City's petitions in those cases, which were filed on January 30, 1987, to be timely.

Given that the identical facts apply to the matter now before us, inasmuch as DC 37 and the City are also parties to this proceeding and whereas the draft agreements which cover the titles of employees affected by this petition cover the period of July 1, 1984 to June 30, 1987, we find that the instant petition, also filed on January 30, 1987, is timely as well.

Having determined that the City's petition is both legally sufficient and timely, as a prerequisite to the determination of whether the holding of an investigatory hearing is warranted, we require that the City supply the following additional information:

(a) as to each employee or category of employee alleged to be managerial and/or confidential, a statement of whether said employees are claimed to be managerial, confidential or managerial and confidential;

(b) as to each employee or category of employee alleged to be managerial and/or confidential, a statement as to whether it is contended that the services rendered or functions performed by the affected employees involve:

(i) formulation of policy

(ii) direct assistance in the preparation for and conduct of collective negotiations;

(iii) a major role in the administration of collective bargaining agreements;

(iv) a major role in personnel administration;

(v) assistance or action in a confidential capacity to managerial employees whose function is described in (ii), (iii), and/or (iv) above;

(c) as to each employee alleged to be confidential, the name, title and position of the managerial employee with whom a confidential relationship is alleged to exist, or other basis for the allegation that such employee is confidential.

The further processing of this matter shall be contingent upon receipt of the aforementioned information within 45 days of issuance of this Interim Decision and Order, and the failure to provide same to the Board and to all parties in interest⁸ will constitute a basis for a motion to dismiss the petition in due course for failure of prosecution.

ORDER

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 District Council 37, AFSCME, AFL-CIO, to dismiss the petition docketed as RE-161-87 be, and the same hereby is, denied; and it is further

⁸ One copy should be served on each respondent, and the original and three copies, with proof of service, should be filed with the Board. Cf. OCB Rules §2.20a.

ORDERED, that as a precondition to the processing of its petition, the City shall serve on all parties and file with the Board within 45 days of issuance of this Interim Decision and Order, the additional information specified at pages 10-11 of our opinion herein.

DATED: New York, N.Y.
November 21, 1988

MALCOLM D. MacDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER