City v. L.1180, CWA,44 OCB 1 (BOC 1989) [1-89 (Cert.)]

BOARD 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 positions of Executive Secretary to the following titles in the Human Resources Administration confidential pursuant to Section 2.20 of the Revised Consolidated Rules of the Office of Collective Bargaining: Deputy Administrator, Office of Community Affairs; Deputy Administrator, Office of Intergovernmental Relations; Executive Deputy Commissioner, Adult Services Agency; Executive Deputy Administrator, Management Budget & Policy Unit: First Deputy Commissioner, Adult Services; First Deputy Administrator, HRA; First Deputy Commissioner, Family and Children's Services; Deputy Administrator, office of Management Planning; Executive Deputy Commissioner, Income Assistance Program; Executive Deputy Administrator, External Affairs; Deputy Administrator, Office of Budget; Deputy Administrator, Office of Intergovernmental Relations; and Deputy Commissioner, Office of Employment Services.

DECISION NO. 1-89

DOCKET NO. RE-155-87

-and-

LOCAL 1180, COMMUNICATIONS WORKERS OF AMERICA; LOCAL 1549, 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" or "petitioner"), 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"). The petitioner seeks a determination that various employees alleged to be Executive Secretaries to the following titles in the Human Resources Administration ("HRA") are confidential within the meaning of Section 12-305 of the New York City Collective Bargaining Law ("NYCCBL"):[1]

> Deputy Administrator, Office of Community Affairs; Deputy Administrator, Office of Intergovernmental Relations; Executive Deputy Commissioner, Adult Services Agency; Executive Deputy Administrator, Management Budget & Policy Unit; First Deputy Commissioner, Adult Services; First Deputy Administrator, HRA; First Deputy Commissioner, Family and Children's Services; Deputy Administrator, Office of Management Planning; Executive Deputy Commissioner, Income Assistance Program; Executive Deputy Administrator, External Affairs; Deputy Administrator, Office of Budget; Deputy Administrator, Office of Intergovernmental Relations; and Deputy Commissioner, office of Employment Services.

The petition affects thirteen employees serving in the following civil service titles:

> Principal Administrative Associate (4)
> Office Associate (4)
> Word Processor (1)
> Stenographic/Secretarial Associate (4)

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[1] Section 12-305 of the NYCCBL provides, in relevant part:

> **Rights of public employees and certified employee organizations.** 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 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).

On April 23, 1987, District Council 37, AFSCME, AFL-CIO ("D.C. 37"), the certified bargaining representative for employees in the titles of Office Associate, Word Processor and Stenographic/Secretarial Associate (Certification No. 46C-75, as amended),[2] on behalf of itself and its affiliated locals filed an answer and motion to dismiss the City's petition.

On May 20, 1987, Local 1180, Communications Workers of America, AFL-CIO ("CWA"), the certified bargaining representative for employees in the title of Principal Administrative Associate (Certification No. 41-73, as amended), 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 aforementioned pleadings or statement was submitted by the City.

It is the limited purpose of this interim decision to resolve the issues raised in the motion to dismiss submitted by D.C. 37 so as to determine whether further proceedings may be had on the City's petition.

[2] We take administrative notice that the appropriate bargaining representative for employees referred to in the City's petition as represented by Local 1549, District Council 37, AFSCME, AFL-CIO, is "District Council 37, AFSCME, AFL-CIO and/or its affiliated locals."

Notion to Dismiss

D.C. 37 takes the position that the petition, filed and served on January 30, 1987, is untimely under Section 2.7 of the OCB Rules.[3] According to D.C. 37, the last collective bargaining agreement covering employees in the relevant titles expired on June 30, 1982, only a draft agreement exists for the 1982-84 period, and a contract for the 1984-87 period has also not been completed. D.C. 37 concludes that the instant petition, filed four years and six months after the expiration date of the applicable agreement, is, therefore, untimely and should be dismissed for this reason alone.

D.C. 37 further contends that "[a]t least five of the employees set forth in the [p]etition are in titles which have no secretarial duties assigned' referring to the five named employees in the titles of Office Associate (4) and Word Processor (1) and their respective job specifications. D.C. 37

[3] **OCB Rule 2.7** provides:

Petitions-Contract bar; Time to file. 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).

maintains that these employees perform no secretarial duties and alternatively asserts that if, in fact, these employees are performing significantly different functions than are found in their respective job specifications, they are doing so illegally.[4] On this basis, D.C. 37 argues that any allegations that such employees are performing such duties cannot support a claim of confidentiality and, therefore, seeks dismissal of the petition as to these employees.

Discussion

We recognize that the dispute concerning the timeliness of the instant petition has evolved from the protracted bargaining

[4] D.C. 37 cites Section 61(2) of the Civil Service Law and the applicable collective bargaining agreement in support of its position.

Civil Service Law §61(2) provides, in relevant part:

> Prohibition against out-of-title work. No person shall be appointed, promoted or employed under any title not appropriate to the duties to be performed and, except upon assignment by proper authority during the continuance of a temporary emergency situation, no person shall be assigned to perform the duties of any position unless he has been duly appointed, promoted, transferred or reinstated to such position in accordance with the provisions of this chapter and the rules prescribed thereunder....

Article VI, Section 1 of the July 1, 1980 - June 30, 1982 collective bargaining agreement covering clerical employees employed by the City and represented by D.C. 37, defines a grievance, inter alia, as follows:

> A claimed assignment of employees to duties substantially different from those stated in their job specifications.

process that exists between the City and many of its public employee organizations and the resultant proliferation of successor "draft agreements," in lieu of fully executed collective bargaining agreements, covering the 1982-84 and 1984-87 contract terms. Indeed, this timeliness issue has been considered and determined in several recent decisions by this Board involving the same parties, facts, and arguments advanced by D.C. 37 in support of a motion to dismiss for untimeliness in each instance.[5]

In those cases, our rationale for denying the Union's motions on this ground was based upon the following considerations: (1) The filing of a petition for designation of persons as managerial or confidential is not expressly covered by Section 2.7 of the OCB Rules but, rather, is covered by Section 2.20b., which contains separate filing provisions, to wit:

> A petition for designation of employees as managerial or confidential may be filed:
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> 1. Not less that 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 (emphasis added).

[5] Docket Nos. RE-161-87 (Decision No. 17-88); RE-159-87 (Decision No. 4-88); RE-157-87 (Decision No. 18-87).

(2) Both the City and D.C. 37 are parties to the 1984-87 Municipal Coalition Economic Agreement ("MCEA"). The MCEA prescribed the economic terms and conditions of employment for all non-uniformed municipal employees during the period July 1, 1984 to June 30, 1987, and contemplated the incorporation of its terms into the separate unit agreements applicable to the relevant titles.

Applying the well-established legal principle that technical rules of contract do not control the question whether a collective bargaining agreement has been reached or is enforceable,[6] and concluding that the terms of the latest "draft agreement" that exists between the City and D.C. 37, which expired on June 30, 1987, would have been incorporated into a fully executed separate unit agreement if the parties had completed their bargaining in a timely fashion, we determined that the exercise of our discretion pursuant to Section 2.20b.(3) in finding those petitions timely filed on January 30, 1987, was appropriate under the circumstances.[7]

Thus, inasmuch as the same considerations apply to the instant matter, we find the City's petition, filed on January 30, 1987, pertaining to employees covered by a draft agreement

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[6] Decision No. 18-87 at pp. 12-13.

[7] See, Decision Nos. 17-88 at pp. 8-10; 4-88 at pp. 6-9; and 18-87 at pp. 12-14 for a complete analysis relating to this issue of timeliness.

between the City and D.C. 37 having an expiration date of June 30, 1987, is timely as well.

We also reject D.C. 37's contention that because five of the employees set forth in the petition allegedly have no secretarial duties assigned or otherwise are performing these duties illegally, this is a sufficient basis for dismissal of the petition as to them. D.C. 37 correctly points out that the Civil Service Law prohibits out-of-title work and that the applicable collective bargaining agreement does define as a grievance, inter alia, out-of-title work. However, this is not the appropriate forum for the resolution of such matters. Moreover, it is well established that employees determined to be managerial and/or confidential are excluded from collective bargaining, not on the basis of their civil service titles, but solely by virtue of the functions they perform in connection with labor-management relations.[8] We have long held that while job specifications are of some value in making a determination as to the nature of the duties performed by a title or an individual, they "are not, and should not be relied upon, as controlling proof" as to what a given individual does or does not do in his work.[9] We are also

[8] Decision Nos. 11-76; 76-72.

[9] Decision Nos. 45-78; 43-69.

guided by Section 201.7 of the Taylor Law,[10] which requires that determinations of confidential status be made on an individual basis and that such determinations be based upon a relationship in which the confidential employee assists and acts in a confidential capacity to a manager or managers who have an active role in collective bargaining, negotiations, contract administration or personnel administration.[11]

Therefore, we find that the instant petition states a claim of confidentiality with respect to all the employees placed in issue by the instant petition sufficient to warrant a hearing in this matter. We note that this finding is based upon the City having provided the titles of the managerial employees with whom these employees allegedly have a confidential relationship and through whom they allegedly have regular access to confidential information in labor relations and personnel matters.

Accordingly, we find that there exists no basis for

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[10] **Section 201.7.(a) of the Taylor Law** provides, in relevant part:

> 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 preparation for and conduct of collective negotiations or to 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) (emphasis added).

[11] See, Decision No. 20-82.

dismissal of the action and direct that a hearing in this matter be commenced.

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-155-87 be, and the same hereby is, denied.

DATED: January 19, 1989
New York, N.Y.

MALCOLM D. MacDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER