Emergency Med. Benevolent Ass. v. City, et. al,46 OCB 7 (BOC 1990) [7-90 (Cert.)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF CERTIFICATION
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In the Matter of

EMERGENCY MEDICAL BENEVOLENT ASSOCIATION,

-and-

DISTRICT COUNCIL 37, AFSCME

-and-

LOCAL 237, INTERNATIONAL BROTHERHOOD OF TEAMSTERS; AFL-CIO,

-and-

LOCAL 144, SERVICE EMPLOYEES INTERNATIONAL UNION; AFL-CIO,

-and-

THE CITY OF NEW YORK and RELATED PUBLIC EMPLOYERS.
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DECISION NO. 7-90

DOCKET NOS. RU-1070-90
RU-1071-90

DECISION and ORDER

On January 31, 1990, a representation petition (Docket No. RU-1070-90) was filed by the Emergency Medical Benevolent Association (hereinafter "EMBA" or "petitioner"), together with a number of authorization cards and a No Strike Affirmation. The petition seeks representation of a unit alleged to be appropriate for the purpose of collective bargaining, consisting of 32 specified titles which are included in Certification No. 62D-75 (as amended). That Certification is held jointly by District Council 37, AFSCME ("D.C.37"); Local 237, International Brotherhood of Teamsters ("Local 237"); and Local 144, Service

Employees International Union ("Local 144"). Certification No. 62D-75 (as amended) is a collective bargaining unit consisting of over 4,700 employees serving in various medical, hospital, and laboratory technician titles, including Emergency Medical Service personnel. Persons in these titles are employed by the New York City Health and Hospitals Corporation ("HHC") and by several City departments or agencies.

The petition failed to seek representation for several titles which were included in Certification No. 62D-75 (as amended) as of the date of filing. The omitted titles are: Emergency Medical Service Cadet Trainee, Nuclear Medicine Technician, Radiographer, Associate Radiographer, Associate Supervising Radiographer, Senior Clinician/Educator, and Technician (X-Ray) [restored Rule X].

The petition used incorrect nomenclature in referring to several of the requested titles.[1] These nomenclature errors have been overlooked by the Board since it is clear which titles the petition was seeking.

Written notice of the filing of the petition was given to the unions jointly certified to represent the existing bargaining unit and to the City of New York on March 1, 1990. Local 144, Local 237, and D.C.37 submitted applications to intervene in this proceeding on March 13, March 21, and April 23, respectively.

[1] E.g., "Lavoratory Technician" for Laboratory Technician; "Beautician Bio-Medical Equipment Technician" for the separate titles of Beautician and Bio-Medical Equipment Technician.

The City submitted a letter dated April 24, 1990, in which it stated that it "...will not at this time take a position..." in this matter.

Subsequently, on April 30, 1990, EMBA filed a second petition (Docket No. RU-1071-90) to represent the same titles. This petition was accompanied by duplicates of the authorization cards previously submitted, together with a number of additional authorization cards.

On March 20, 1990, the Director of Representation made a written request to HHC to supply a payroll printout with employees' names for pay date February 2, 1990 (covering the payroll period January 14 through 27, 1990), representing the payroll period immediately preceding the date of filing of the petition herein. The requested payroll printout was supplied shortly thereafter. However, on March 30, 1990, HHC informed the Director that the payroll printout submitted was not accurate. A corrected payroll run was requested and was received on May 14, 1990. This payroll printout, together with the payroll printout supplied by the City of New York for City employees in the titles in question as of January 1990, form the basis used by this Board for our analysis of the sufficiency of the showing of interest submitted by EMBA under § 2.3b.1. of the Revised Consolidated Rules of the Office of Collective Bargaining ("OCB Rules").[2]

[2] § 2.3b.1. provides:
b. Simultaneously with the filing of the petition petitioner shall: 1. In the case of a petition for certification, submit to the Board evidence that at least thirty (30) per cent of the employees in the appropriate unit, or in each appropriate unit, desire petitioner to represent them for the purposes of collective bargaining;...

Although Certification No. 62D-75 (as amended) constitutes a single bargaining unit, it appears that there are four collective bargaining agreements covering different titles within the unit.[3] The relevant information concerning these agreements is as follows:

UNION	TERM OF AGREEMENT	DURATION
Local 2507, DC 37, AFSCME	7/1/87-9/30/90	3 yrs & 3 mos.
Local 420, DC 37, AFSCME	7/1/87-9/30/90	3 yrs & 3 mos.
Local 144, SEIU	8/1/87-9/30/90	3 yrs & 2 mos.
Local 237, IBT	7/1/87-6/30/90	3 yrs.

This representation proceeding presents threshold issues concerning contract bar and sufficiency of proof of interest which must be resolved before there can be any consideration of the merits of the petition.

DISCUSSION

A. Contract Bar

Section 2.7 of the OCB Rules provides, in pertinent part, as follows:

> **§ 2.7 Petitions-Contract bar; Time to file.** A valid contract between a public employer and a public employee organization shall bar

[3] It should be noted that for the three year period ending July 31, 1987, there existed a single collective bargaining agreement covering all titles in the unit, which was signed by representatives of all three of the jointly certified unions.

> 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...

It is well established that the purpose of the contract bar doctrine reflected in § 2.7 is to accommodate two sometimes conflicting objectives: first, to protect the freedom of employees to select or change bargaining representatives; and, second, to give continuity and stability to an established bargaining relationship by protecting the relationship from challenge during the term of a valid contract of reasonable duration.[4]

The provisions of § 2.7 are based upon the premise that a single collective bargaining contract applies to the relationship between the employer and the certified representative in a single bargaining unit. However, in the instant matter, when the prior single, comprehensive collective bargaining agreement between the three jointly certified representatives and the public employers expired on July 31, 1987, each of the joint representatives entered into a separate contract[5]

[4] Decision Nos. 11-71; 42-70; accord, Matter of Public Employees Federation, AFL-CIO, and Civil Service Employees Association, 10 PERB ¶ 4063 (1977).

[5] In fact, one representative, D.C. 37, entered into two separate contracts, one on behalf of each of two of its affiliated Locals.

which extended most of the substantive terms of the prior agreement for an additional period of time.[6] Consequently, where once there was one unit contract, executed by all parties, there now exist four contracts, each executed by one of the three joint unit representatives, differing in effective dates and periods of duration.

For purposes of the application of the New York City Collective Bargaining Law ("NYCCBL") and our Rules, a bargaining unit with two or more jointly certified representatives possesses no different or greater status than a bargaining unit with a single certified representative. In the rare instances in which this Board has granted a joint certification, at the request of the parties, we have done so for the purpose of permitting the most effective representation of the affected employees. We have not permitted and will not permit the existence of a joint certification to diminish the protected rights of employees, including the right to select or change bargaining representatives. The existence of a single unit covered by four contracts, of differing lengths and time periods, such that in no one period are all four contracts simultaneously open to challenge under § 2.7 of our Rules, cannot be condoned.

Therefore, without determining the validity of the four contracts for purposes other than contract bar, we hold that for purposes of § 2.7, there can be only one effective contract for a

[6]In each case, the provisions of the prior agreement were modified with respect to certain economic terms and, as modified, were extended.

single bargaining unit. In this case, the petitioner was entitled to choose one period which was open under any of the four contracts and, by filing within such period, to commence a representation proceeding which was effective with respect to all of the jointly certified representatives. The filing of the petition by EMBA on January 31, 1990, was timely under the contracts of D.C. 37 and Local 237.[7] We find this timely challenge to have been effective as to all of the jointly certified representatives, including Local 144.

EMBA filed a second petition for the same titles on April 30, 1990. We find that this petition was not timely submitted. We previously have interpreted § 2.7 of our Rules to permit alternate filing periods only in cases involving contracts of longer than three years' duration -- which would be the case here, with respect to the contracts of D.C. 37 and Local 144 (but not Local 237) if we were to recognize the effectiveness of more than one contract in a unit. In such cases, the two possible filing periods are:

> "...either during the sixth month before the third anniversary date of the contract or during the sixth month before the expiration of the contract, at the option of the petitioner."[8]

[7] The month of January was the sole open period under the contract of Local 237 and one of two alternative open periods under the contracts of D.C. 37, as will be discussed more fully infra.

[8] Decison No. 10-87.

However, as the above quotation clearly indicates, this is an "either-or" proposition. A petitioner may file during either one open period or the other; it may not choose both effectively.

Having chosen to file during the first open period under the contracts of D.C. 37 (which coincidentally was also the only open period under the contract of Local 237), EMBA exercised its option under § 2.7 and could not submit an effective petition at a later, alternate open period. Moreover, since the January, 1990, filing is deemed to have been binding on all of the jointly certified unit representatives, including Local 144, we find that the first timely filing by EMBA foreclosed all attempts to submit another petition with respect to the requested titles during any alternate open period. Accordingly, we shall dismiss the second petition filed by the EMBA.

B. Proof of interest

§ 2.3b.1. of our Rules requires that a petition for certification be accompanied by proof that at least thirty (30) per cent of the employees in an appropriate unit desire the petitioner to represent them for purposes of collective bargaining.[9] § 2.6 of our Rules provides that designation and authorization cards submitted as proof of interest under § 2.3b,

> "...must be dated and signed by the employees not more than seven (7) months prior to the commencement of the proceeding before the Board."

[9] The full text of § 2.3b.1. is set forth in footnote 2, supra.

§ 2.6 further provides that:

> "Proof of interest shall be based on the payroll immediately preceding the date of the petition, unless the Board deems such period to be unrepresentative."

Based upon the January 1990 payroll printout supplied by the City for employees serving in City departments or agencies, and the payroll printout supplied by HHC for its employees for the payroll period from January 14 through 27, 1990, we find that there were 4,718 employees in the bargaining unit covered by Certification No. 62D-75 (as amended) at the time the petition was filed herein. However, as noted supra, the petition fails to request certification for seven titles included in the unit. There were 113 employees serving in those omitted titles. Therefore, we find that the titles requested in the petition were comprised of 4,605 employees at the relevant time. The required thirty per cent proof of interest, based upon a proposed unit of 4,605 employees is 1,382 employees.

There were 1,386 authorization cards submitted with the petition filed on January 31, 1990. Our analysis of these cards reveals the following defects:

Cards with no date		26
Duplicate cards	10	
Cards with no signature	1	
Cards dated January 1989, not 1990	41	

We will give the petitioner the benefit of the doubt and consider the 41 cards dated January, 1989 to be valid, on the assumption that they were the result of unintentional misdating occasioned

by the start of a new year. However, the other cards cited above, totalling 37 in number, are deficient and may not be considered as proof of interest. Therefore, the number of facially valid authorization cards submitted by EMBA is 1,349. This number is 33 less than the 1,382 cards required as proof of interest.[10]

Inasmuch as the petition filed by EMBA on April 30, 1990 is identical to the one filed on January 31, except for the date, the significance of our dismissal of the April petition lies in the fact that the additional authorization cards submitted therewith have not been considered in determining the sufficiency of the petitioner's proof of interest. In this regard, we point out that § 2.3b. states that the requisite proof of interest shall be submitted,

"[s]imultaneously with the filing of the petition..."

Here, the only effective petition was filed on January 31, 1990.

While it has been our practice to consider additional or supplementary proof of interest submitted after the filing of a representation petition, we have done so only where such proof was submitted during the month of the open period in which the petition was filed. For example, where the open period is the month of January, and a petition is filed on January 15, we would

[10] We note that if we were to assume that EMBA intended to petition for the whole of the unit covered by Certification No. 62D-75 (as amended), its proof of interest would be 66 cards less than the number required in that 4,718 employee unit.

accept and consider additional proof of interest submitted up to and including January 31. However, proof submitted after the end of the applicable open period is untimely and cannot be considered. In the present case, where a timely petition was filed during the open period ending January 31, 1990, additional authorization cards submitted on April 30, 1990 are untimely and cannot be used to support the earlier petition.

The above result is consistent with our Rules and our well established practice in applying those Rules. Moreover, this result effectuates the dual objectives underlying the contract bar provisions of § 2.7 of our Rules, as described supra. A contrary result permitting multiple challenges to the representative(s) of a single unit to be filed at various times and/or allowing the cumulative counting of authorization cards submitted at various times would disrupt the continuity and stability of the bargaining unit and would alter the fair balance of conflicting objectives which is struck by § 2.7 as applied by this Board. We cannot countenance such a result.

C. Appropriateness of the requested unit

As stated above, the petition herein fails to request certification for seven titles included in the existing unit under Certification No. 62D-75 (as amended). The petition thus seeks a unit the creation of which would be contrary to this Board's established policy of discouraging the fragmentation

of existing bargaining units.[11] As we have stated repeatedly in our decisions on this issue, the rationale for this policy is rooted in the purposes underlying public sector labor law.[12] Therefore, if we were not dismissing the petitions herein on other grounds, we would require the petitioner to submit convincing proof that the current bargaining unit prejudices the collective bargaining status of the employees serving in the titles covered by the petition. In the absence of such proof, the fragmentation of the existing unit and the creation of an additional unit would be in derogation of both the public interest and the legislative intent of the drafters of the New York City Collective Bargaining Law.[13]

Conclusion

For the reasons set forth above, we find that the petition filed by EMBA on January 31, 1990 constituted a timely challenge to the representation of all three jointly certified representatives of the unit established in Certification No. 62D-75 (as amended), that the petition filed by EMBA on April 30, 1990 was untimely, and that EMBA has failed to submit sufficient proof that thirty per cent of the employees in the requested titles desire to be represented by the petitioner. Accordingly, we shall dismiss both petitions filed by EMBA.

[11] Decision Nos. 19-87; 10-87; 12-83; 29-82; 25-79; 24-79; 7-68.

[12] Decision Nos. 19-87; 24-79; 28-78; 67-78.

[13] Decision No. 24-79.

ORDER

NOW, THEREFORE, pursuant to the powers vested in the Board of Certification by the New York City Collective Bargaining Law, it is hereby

ORDERED, that the petitions of the Emergency Medical Benevolent Association be, and the same hereby are dismissed.

Dated: New York, N.Y.
May 24, 1990

MALCOLM D. MACDONALD
Chairman

DANIEL G. COLLINS
Member

GEORGE NICOLAU
Member