Municipal Elevators Workers Ass. v. City, et. al,50 OCB 1 (BOC 1992) [1-92 (Cert.)]

1-92	affirmed	Municipal Elevator Workers Ass'n. v. City of N.Y., S.D.N.Y., 6/16/93.	58

OFFICE OF COLLECTIVE BARGAINING
BOARD OF CERTIFICATION
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In the Matter of the
Certification Petition of the : DECISION NO. 1-92

MUNICIPAL ELEVATORS WORKERS :
ASSOCIATION, INC.,
and : DOCKET NO. RU-1094-91

THE CITY OF NEW YORK and RELATED :
PUBLIC EMPLOYERS.
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In the Matter of the
Decertification Petition of the :

MUNICIPAL ELEVATORS WORKERS :
ASSOCIATION, INC.,
and : DOCKET NO. RU-1095-91

THE CITY OF NEW YORK and RELATED :
PUBLIC EMPLOYERS.
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DECISION AND ORDER

On July 30, 1991, the Municipal Elevators Workers Association, Inc. ("MEWA" or "the Association") filed two petitions concerning approximately 500 employees currently serving in the titles of Elevator Mechanic (90710), Elevator Mechanic's Helper (90711), and Supervisor Elevator Mechanic (90769) ("the Elevator Mechanic titles"). In the petition docketed as RU-1095-91, the Association seeks to decertify City Employees Union, Local 237, International Brotherhood of Teamsters, AFL-CIO ("Local 237" or "the Union") as the collective bargaining representative for this group of employees. In the petition docketed as RU-1094-91, MEWA seeks to replace Local 237 as the Elevator Mechanics' certified bargaining representative. The petitions were accompanied by 392 valid Designation Cards authorizing MEWA "to be my exclusive bargaining agent on all matters pertaining to my employment including but not limited to: wages, working conditions, grievances and appeals." The Association submitted a No Strike Affirmation on August 30, 1991.

On August 19, 1991, Local 237 moved to intervene. By letter dated October 16, 1991, the City stated that it was opposed to the removal of the Elevator Mechanic titles from their current certification.

Local 237 presently represents Elevator Mechanics under Certification No. 67-78 (as amended), a mixed unit composed of supervisory and non-supervisory employees in various stock, custodial, inspectional, maintenance, skilled craft, and related titles. Approximately 5,000 employees serving in over 60 job titles compose the entire bargaining unit. Of that number, more than half serve in a variety of skilled trades, including Elevator Mechanics, bricklayers, masons, plasterers, roofers, and maintenance workers. These skilled trades workers are subject to Section 220 of the Labor Law ("prevailing rate").

According to current payroll data, there are 490 employees (about 10% of the entire bargaining unit) serving in the Elevator Mechanic titles. The New York City Housing Authority employs a total of 433 Elevator Mechanics. Mayoral agencies (Police Department and Department of General Services) employ forty-two, and the Health and Hospitals Corporation employs fifteen. The contract covering Elevator Mechanics employed by the Housing Authority expired on December 31, 1991. The contract covering Elevator Mechanics working for the mayoral agencies and for the Health and Hospitals Corporation expired on June 30, 1990.

Positions of the Parties

Petitioner's Position

The Association contends that this Board should remove the Elevator Mechanic series of titles from Certification No. 67-78 (as amended), on the ground that Local 237 no longer represents their best interests. In MEWA's view, Local 237 has used these employees "as a bargaining chip" for other groups within the unit, and, for the last eight years, "has done virtually

nothing" to protect them.

According to the Association, since 1983, only a portion of employees serving in Elevator Mechanic titles have had an actual written labor contract. The rest have worked under previous agreements that were modified by Comptroller wage determinations. MEWA further contends that even in this regard, Local 237 has been lax in enforcing Elevator Mechanics' rights. Specifically, the Association accuses the Union of having neglected to enforce the determinations, and for refusing to fight for pay parity with elevator workers in the private sector. Instead, the Union allegedly has allowed Elevator Mechanics to receive wages and supplements at the lower wage scales of electrical workers. Local 237 also allegedly violated Section 220 of the Labor Law by negotiating a welfare fund contribution for retired employees. Other charges by MEWA include the Union's alleged refusal to provide Elevator Mechanics with access to proposed contract terms prior to a ratification vote, and with failure to supply data of proposed benefits they would receive under a Comptroller's determination.

The Association asserts that it is qualified to represent the Elevator Mechanics since it submitted 392 valid designation cards out of a proposed unit made up of approximately 500 members.

Local 237's Position

Local 237 maintains that the current certification should remain unchanged. The Union insists that it continues to represent employees serving in the Elevator Mechanic titles competently and diligently. In its view, the bargaining unit set forth in Certification No. 67-78 (as amended) is the most appropriate one for all its covered employees, and the Elevator Mechanic titles should not be taken from it.

City's Position

The City opposes the new unit proposed by the Association, based upon its long-standing policy opposing the proliferation of bargaining units.

Discussion

The caption of the petition in Docket No. RU-1095-91 designates it as a "decertification" petition. The filing is not a proper decertification petition, however, since MEWA does not seek to prove that Local 237 "is no longer the representative of the public employees" in the entire unit.[1] Instead, the petition asks that we remove a limited number of employees (those holding Elevator Mechanic titles) from their present bargaining unit, and place them into a separate bargaining unit that does not exist presently. In a second petition, filed as Docket No. RU-1094-91, the Association claims that it should be certified as the bargaining representative of these employees in their proposed new unit. For the sake of expediency, we will deem both petitions, singly and in conjunction with one another, as a request by MEWA to remove the Elevator Mechanic titles from Certification No. 67-78 (as amended), and to represent these employees in the new unit that it claims to be appropriate. We will evaluate the procedural and substantive aspects of this request accordingly.

Timeliness of Filing

Section 2.7 of the OCB Rules establishes a "window period," which requires that a certification or decertification petition be filed "not less than five (5) or more than six (6) months" before the expiration date of a

[1] See Section 2.5 of the Revised Consolidated Rules of the Office of Collective Bargaining ("OCB Rules"), and Decision Nos. 10-87 and 18-77.

contract. We have said that this window period also applies to a petition that seeks the removal of certain titles from an existing unit and their placement into a new, allegedly more appropriate unit.[2]

Calculating the window period becomes complicated when, as here, more than one collective bargaining contract applies to the relationship between the employer and the certified representative in a single bargaining unit. As we held recently, however, we will not permit the protected rights of employees, including the right to select or change bargaining representatives, to be diminished by the fact that discrete groups of employees within a single certified collective bargaining unit are covered by separate collective bargaining agreements with differing durations and termination dates.[3] In Decision No. 7-90, we set forth the following policy:

> [F]or purposes of § 2.7, there can be only one effective contract for a single bargaining unit. [A petitioner is] entitled to chose one period which [is] open under any of the [existing] contracts and, by filing within such period, to commence a representation proceeding which [is] effective with respect to all of the jointly certified representatives.

Thus, by operation of this policy, the filing of the certification petition by the Association on July 30, 1991, was timely under the term of the Housing Authority contract, which expired on December 31, 1991.

Proof of Interest

When a petitioner seeks to represent employees in a new unit that it claims is appropriate, Section 2.3b.1. of the OCB Rules requires that the petition be accompanied by proof that at least thirty percent of the employees in the proposed unit desire the petitioner to represent them for purposes of

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[2] Decision Nos. 12-91; 7-90; 10-87; and 29-82.

[3] Decision No. 7-90.

collective bargaining.[4]

The Association proposes that we approve a unit composed of public employees serving in Elevator Mechanic titles that will have approximately 500 members. Rule 2.3b.1. thus would require MEWA to have filed at least 150 valid designation cards. In fact, the Association submitted 392 valid cards.[5]

Certification of MEWA as Bargaining Representative

In its petition filed as Docket No. RU-1094-91, the Association seeks to "be certified as the exclusive collective bargaining representative of the employees [serving in the Elevator Mechanic titles]." However, before we will certify MEWA, or any other employee organization, as bargaining representative for employees holding these titles, there are several preliminary matters that must be resolved.

First, we must decide whether the evidence demonstrates that it is no longer appropriate for the Elevator Mechanic titles to be included in Certification No. 67-78 (as amended). If we find that the present unit placement continues to be appropriate, then the petition must be dismissed. On the other hand, should we find that it is appropriate to remove these titles from Certification No. 67-78 (as amended), our consideration of the appropriate unit in which to place the titles would not be limited to the one proposed by the Association. Another alternative, for example, might be to place the Elevator Mechanic titles under a different pre-existing certification, if we determined that the inclusion in such pre-existing unit was more appropriate.

Assuming, arguendo, that we find that it would be appropriate to remove

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[4] Decision No. 23-75.

[5] We note that if we were to review this matter as a decertification proceeding rather than as a unit placement proceeding, 392 cards would not suffice to establish the required proof of interest in the entire presently-certified unit.

the Elevator Mechanic titles from their present certification and place them into a separate unit as proposed by MEWA, we still would need to determine who the majority of the employees in this new unit want as their bargaining representative. The Association submitted 392 valid designation cards for a proposed unit that will have approximately 500 members. While these cards satisfy the proof of interest requirement under Section 2.3b.1. of the OCB Rules, they would not necessarily guarantee the automatic certification of MEWA as the proposed unit's bargaining representative. We would investigate before deciding whether further proceedings were warranted, and we would order an election if we had any doubt about whether any employee organization enjoyed majority status.

Unit Placement of Elevator Mechanic Titles

The City of New York enacted the New York City Collective Bargaining Law ("NYCCBL")[6] pursuant to Section 212 of the Taylor Law,[7] which permits local governments to adopt their own provisions and procedures covering public employment relations matters, provided such provisions and procedures are substantially equivalent to the state law. The NYCCBL was specifically designed to deal with the City's unique labor relations environment.[8]

Section 12-309b.(1) of the NYCCBL provides that this Board shall have the power and duty:

> to make final determinations of the units appropriate for purposes of collective bargaining between public employers and public employee organizations, which units shall be such as shall assure to public employees the fullest freedom of exercising the rights granted hereunder and under executive orders, consistent with the efficient operation of the

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[6] New York City Collective Bargaining Law, Local Law 1967, No. 53, July 14, 1967, effective Sept. 1, 1967.

[7] Civil Service Law, Article 14, §200 et. seq.

[8] Decision Nos. 12-91 and 29-82.

public service, and sound labor relations. . .

When the NYCCBL became effective, there were approximately four hundred existing bargaining units of municipal employees in the City. Although NYCCBL Section 12-314c. allows for the continued viability of pre-act certifications, it also allows

this Board to change pre-existing units and certifications.[9]

Pursuant to NYCCBL Section 12-314c., we have established a policy that favors consolidation of bargaining units and discourages fragmentation whenever possible.[10] Through a process that encourages gradual change by ad hoc determinations rather than a sudden, and perhaps disruptive revamping of the City's bargaining structure, we have created larger units based on broad occupational groupings, comprising as many employees and titles as can effectively operate as single entities.[11] This process has enabled us to reduce the number of units with which the City must negotiate from four hundred to less than one hundred.

As part of our analysis in making consolidation determinations, we balance public employees' freedom of choice in organizing and designating representatives, against the efficient operation of public services and sound labor relations.[12] Section 2.10 of the OCB Rules, which is designed to implement NYCCBL Section 12-309b.(1), sets forth criteria that we apply in making determinations of appropriate unit placement of employees. The Rule provides that we must consider, among other factors:

> a. Which unit will assure public employees the fullest freedom in the exercise of the rights granted under the [NYCCBL] and the applicable executive order;
>
> b. The community of interest of the employees;

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[9] NYCCBL Section 12-314c. provides as follows:
> Certificates or designations issued by the department of labor prior to the effective date of this chapter and in effect on such date shall remain in effect until terminated by the board of certification pursuant to its rules. Nothing contained in this subdivision shall limit the power of the board of certification to determine bargaining units differing from those determined by the department of labor.

[10] Decision No. 12-91.

[11] See Decision Nos. 12-91 and 29-82.

[12] Decision Nos. 29-82; 24-79; 55-76.

> c. The history of collective bargaining in the unit, among other employees of the public employer, and in similar public employment;
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> d. The effect of the unit on the efficient operation of the public service and sound labor relations;
>
> e. Whether the officials of government at the level of the unit have the power to agree or make effective recommendations to other administrative authority or the legislative body with respect to the terms and conditions of employment which are the subject of collective bargaining;
>
> f. Whether the unit is consistent with the decisions and policies of the Board.

These criteria are substantially equivalent to the analogous provisions of Section 207(1) of the Taylor Law, which governs unit determinations made by the New York State Public Employment Relations Board.[13] The present case again requires us to attempt to harmonize these considerations.

According to the Association, the present certification for the Elevator Mechanic titles is not appropriate because the interests and rights of the petitioned-for employees have been sacrificed or submerged by their current bargaining representative. It is well-settled that allegations or evidence of inadequate representation are not relevant to the issue of unit placement unless it can be shown that the inadequacy is a consequence of conflicting interests within the unit.[14] It was upon this basis that we dismissed an earlier petition filed by a group of employees serving in the Elevator Mechanic titles when they sought an independent bargaining unit for themselves.[15] Under the present circumstances, we find no evidence of conflict or inconsistency between Elevator Mechanics and other titles in their current unit sufficient to warrant deviating from our established policy against unit fragmentation.

If Elevator Mechanics believe that their interests have not been pursued responsibly by their Union, they have proper legal recourse through the filing

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[13] Decision No. 29-82.

[14] Decision Nos. 12-91; 11-87; 12-83; 29-82; and 58-68.

[15] Decision No. 12-83.

of a duty of fair representation charge under the Board of Collective Bargaining's improper practice procedures. Alternately, if they feel that there is a more general dissatisfaction among members of their entire bargaining unit with their current representative, they may seek a change of representative by commencing a decertification proceeding, supported by adequate proof of interest in the entire unit.[16]

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 petition for certification of the Municipal Elevators Workers Association, Inc. to represent employees serving in the Elevator Mechanic series titles as their collective bargaining representative, docketed as RU-1094-91 be, and the same hereby is, dismissed; and it is further

ORDERED, that the petition for decertification (removal) of the Elevator Mechanic series titles from Certification No. 67-78 (as amended) filed by the Municipal Elevators Workers Association, Inc., docketed as RU-1095-91, be, and the same hereby is, dismissed.

Dated: New York, New York
January 14, 1992

MALCOLM D. MacDONALD
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

[16] OCB Rule 2.5.

Not Part of Decision No. 1-92

ELEVATOR MECHANICS' REPRESENTATION HISTORY

Decision No. 1-92 did not concern initial unit placement for Elevator Mechanics, nor was it the first time the Board of Certification examined the question of which unit is appropriate for them. Proponents for members of this title group have a long history of appearances before the Board.

In 1978, at the City's request and over the objections of Local 237, the Board consolidated the previously independent Elevator Mechanic titles (Certification No. 16-77) with a much larger bargaining unit (Certification No. 9-77).[1] Local 237 represented both units at the time that the Board ordered them combined. Since then, several attempts at reversing the 1978 consolidation order have been made. In a 1979 petition, the proponent, Local 1 of the International Union of Elevator Constructors, argued that Elevator Mechanics are unique, and that no other City employees have the skills, qualifications or abilities to perform this work. In denying the IUEC's petition, the Board held that the arguments presented did not warrant deviation from its established policy against fragmentation.[2] In a 1983 petition, the same proponent argued that changed circumstances concerning wages and allegedly detrimental representation by Local 237 would justify a decision different from the previous ruling. Without a hearing the Board dismissed that petition and a subsequent motion for reconsideration as well, holding that the allegations, even if true, would not represent a substantial change in the relationship of Elevator Mechanics to Local 237, nor would they

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[1] Decision No. 67-78.

[2] Decision No. 25-79 (Local 1, IUEC v. City and Local 237).

affect the makeup of the consolidated unit.[3]

The petitions leading to Decision No. 1-92 represented a fourth attempt at reversing the earlier consolidation decision.

The argument is little more than a restatement of the main contention voiced by IUEC Local 1 nine years ago, however, when it claimed that Elevator Mechanics "have literally been swallowed up by a large bargaining unit consisting of thousands of employees whose work has absolutely no relationship to that of . . . the Elevator titles."[4] Local 1's 1983 letter brief went on to assert that:

> Employees in [these] titles . . . have never received any effective or forceful collective bargaining representation from Local 237. The fact is that their interests have been ignored and disregarded.

The brief continued:

> [E]mployees in the Elevator titles have their wages determined pursuant to Section 220 of the Labor Law rather than through the traditional collective bargaining process. . . . . [T]he fact is that the rights of employees in the Elevator titles under Section 220 of the Labor Law have been ignored by Local 237 and no determination of the salaries of these titles has been sought from the City Comptroller.

In concluding its request for relief, Local 1 stressed that the wage rates that Local 237 asked the Elevator Mechanics to accept were "far below those prevailing in the New York City metropolitan area for similarly skilled employees."

After reviewing Board precedents and weighing the arguments of the interested parties, the Board dismissed Local 1's claim of deficient representation.[5] The decision held that:

> Even if Local 237 sought to persuade the Elevator Mechanics to accept wage rates lower that the prevailing rates for 220 employees, this alleged changed circumstance would not represent a substantial change in the relationship of Elevator Mechanics to Local 237, nor would it affect the

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[3] Decision No. 12-83 (Local 1, IUEC v. City and Local 237).

[4] IUEC Local 1 letter brief, dated April 26, 1983.

[5] Decision No. 12-83.

makeup of the consolidated unit.

Upon its receipt of Decision No. 12-83, Local 1 asked for reconsideration, arguing that Elevator Mechanics "do not desire continued representation by the apparently favored incumbent which has shown no interest in bargaining for them or in recognizing their separate and distinct needs."[6] In denying the motion, the Board informed Local 1 that its decision was "appropriate and correct and that it should stand."[7]

While the details of the Association's current petitions are slightly different, the underlying theory of its case is the same as that argued by Local 1 nine years ago.

[6] Motion for reconsideration filed by IUEC Local 1 on July 28, 1983.

[7] Letter from the Director of Representation on behalf of the Board of Certification, dated August 18, 1983.