Assistant Deputy Wardens Ass. v. City,50 OCB 8 (BOC 1992) [8-92 (Cert.)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF CERTIFICATION

Assistant Deputy Wardens Association,

Petitioner,

DOCKET NO. RU-1093-91

-and-

DECISION NO. 8-92

The City of New York,

Respondent.

INTERIM DECISION AND ORDER

On June 25, 1992, the City of New York ("City") filed a motion to dismiss a petition for certification filed by the Assistant Deputy Wardens Association ("ADWA" or "Union"). The Union filed a response to the motion to dismiss on June 29, 1992.

BACKGROUND

On July 30, 1991, a petition was filed by the ADWA requesting that the unrepresented title of Warden (Correction) Level II be added to its Certification No. 65-67 (as amended) covering certain employees in the Warden (Correction) Level I title. In an addendum filed with the petition, the Union explained that pursuant to Resolution 79-14, the Director of Personnel ordered the consolidation of several Department of Correction ("DOC") positions into the single title of Warden. According to the addendum, "[t]he Assistant Deputy Wardens Association ... by stipulation dated January, 1980, agreed to receive a bargaining certificate excluding from their right to bargain 'employees in the title (Warden) who are detailed to act in a higher level assignment (emphasis added].'" The Union

contended that "[a]t the time of entering into the stipulation the [ADWA] did not represent ... (the higher title of] Warden Level II." Therefore, according to the Union, "the stipulation was not binding on any Warden Level II (Deputy Warden)" in the Department of Correction. The Union further argued that because the position of Warden Level II is not managerial, it may now be added to its Certification No. 65-67.

In a letter dated October 29, 1991, the City stated that it opposed the petition for certification on "[t]he grounds ... that the position of Warden Level II is a management class of position and, therefore, not appropriate for representation by the petitioner." Accordingly, the City requested that the Board of Certification dismiss the instant petition and declare the title to be managerial and/or confidential.

A pre-hearing conference before a Trial Examiner designated by the Office of Collective Bargaining was held on March 5, 1992. At the pre-hearing conference, the Trial Examiner reviewed with the parties the factors that the Board of Certification considers when a challenge to certification is made on the basis of managerial and/or confidential status. The parties agreed that the Trial Examiner would schedule hearing dates for July 1, 2, 6, 8, 9, 1992 and August 10, 11 and 12, 1992.

On June 25, 1992, the City filed a motion to dismiss the petition for certification. According to the City, "[b]ased upon a search of records subsequent to the filing of Respondent's

objections, a stipulation between the parties has come to Respondent's attention which has the effect of making the instant matter moot." The Union filed a response to the motion to dismiss on June 29, 1992.

POSITIONS OF THE PARTIES

City's Position:

The City explains that the title Warden (Correction) was created in 1979 when the Department of Personnel broadbanded the titles of Assistant Deputy Warden, Deputy Warden and Warden into the title Warden. The City notes that the title Assistant Deputy Warden, prior to broadbanding, had been represented in collective bargaining by the ADWA. The City adds that, subsequent to broadbanding, it and the ADWA "entered into a stipulation regarding the broadbanded title Warden (Correction), whereby it was agreed that the ADWA would represent Warden (Correction) Level I as persons serving in that title were assigned to specific duties as set forth in the stipulation of settlement." According to the City, "[a]s provided in this stipulation of settlement, only Warden Level I was to be included within the ADWA bargaining unit." The City alleges that the stipulation was accepted and adopted by the Board of Certification, as set forth in Decision No. 12-80, dated April 30, 1980.

Accordingly, the City argues that "[t]he ADWA having agreed that, of the titles broadbanded into the title Warden (Correction), only Warden (Correction) Level I would be included

in their bargaining unit, the ADWA is now precluded from seeking to accrete the Warden (Correction) Level II into the ADWA bargaining unit as set forth in their petition to amend certification." The City contends that "[h]aving previously agreed to a settlement of the representation status of the disputed title, the issue now pending before the Board of Certification is moot."

In an affirmation in support of the motion to dismiss, Robert Daly, the General Counsel for the Department of Correction, states that in 1979, when he was the Director of the Legal Division of the DOC, the City moved to broadband uniformed titles in DOC. According to Mr. Daly, "[a]s part of this broadbanding effort the City intended to move to have the ADW's decertified as a bargaining unit on the basis of their managerial status." Mr. Daly adds that

> "[f]ollowing discussions with the then-ADWA President Brendan Nash, the City and the ADWA agreed that the Warden Level I title would not be decertified but that the ADW's would not seek to have any Warden title higher than Level I certified within their bargaining unit. I was fully involved in these negotiations between the City and the ADWA. The clear understanding and intent of that agreement was to allow the ADW's to continue as a bargaining unit and in return they agreed to be precluded from representing any warden title higher than Level I. That agreement was memorialized in a stipulation .... At no time did the Deputy Wardens ask to be included within the ADWA bargaining unit.

Mr. Daly contends that the current attempt by the ADWA to have the Warden Level II title certified within their bargaining unit

is a violation of the stipulation.

Union's Position:

The Union points out that, until the City's filing of the instant motion to dismiss, the City's objection to the petition "was based solely on the argument that 'the position of Warden Level II is a management class of position.'" The Union notes that "[o]n June 25, 1992, on the eve of the commencement of hearings to determine whether, in fact, the position of Warden Level II is a management class of position," the City filed the instant motion to dismiss.

Noting that the stipulation upon which the City seeks dismissal of the instant petition was specifically referred to in the petition itself, the Union claims the doctrine of laches requires the denial of the motion to dismiss. The Union contends that "[a] delay of eleven months is inexcusable," as the City was given specific notice of the stipulation in the Union's petition, which was filed on July 30, 1991. The Union notes that the City could have included the effect of the stipulation as an affirmative defense in its formal objections to the petition or could have moved to dismiss earlier.

The Union further argues that the stipulation does not bar the relief sought by the petition. The Union contends that, contrary to the City's assertions, there is "no language contained in the stipulation whereby ADWA agreed to be precluded from seeking to [accrete] the Wardens Level II into the ADWA

bargaining unit." Instead, the Union alleges that the stipulation merely defines those members of ADWA. In this respect, the Union adds that those employees in the title of Warden Level I who are detailed to act in a higher level assignment are not considered Warden Level I for the purposes of being members of ADWA. The Union claims that Wardens Level I have never been detailed to work as Wardens Level II, as that is considered a promotional advancement. The Union adds, however, that Wardens Level I have been detailed to higher non-promotional ranks such as Assistant Deputy Chief.

Finally, the Union argues that 11[w]here, as here, on the eve of a trial of the substantive issues, a party moves to add defenses that could readily have been pleaded earlier, such motions are denied" (citations omitted). The Union contends that in such cases "prejudice is suffered by the non-moving party by the loss of time and effort expended in preparing their cases against a pleading from which significant material had been needlessly withheld." Accordingly, the Union requests that in the instant case the doctrine of laches be used to deny the motion to dismiss.

DISCUSSION

The City moves to dismiss the instant petition because of a stipulation, which, it contends, has the effect of rendering the instant matter moot. In its motion to dismiss, the City stated that:

> [b]ased upon a search of records subsequent to the filing of Respondent's objections, a stipulation between the parties has come to Respondent's attention which has the effect of making the instant matter moot.

In an addendum attached to its petition for certification, the Union stated that "[t]he Assistant Deputy Wardens Association ... by stipulation dated January, 1980, agreed to receive a bargaining certificate excluding from their right to bargain 'employees in the title (Warden) who are detailed to act in a higher level assignment [emphasis added].'" Accordingly, the City had notice that a stipulation existed affecting employees in the Warden title as of the date the petition for certification was filed. Moreover, it is disingenuous for the City to claim that it had no prior notice of a document its Director of Labor Relations signed in January, 1980. Now, approximately eleven months after the petition was filed and less than one week before the start of hearings on the question presented by the City's challenge to the managerial/confidential status of the employees in the Warden Level II title, the City moves to dismiss the petition on the basis of the stipulation. Although the prejudice to the Union caused by the City's inexcusable delay in making its motion, alone, would provide us with an ample basis to deny the instant petition, we will address the City's arguments.

The City argues that as the ADWA agreed that only Warden Level I would be included in its bargaining unit, the Union is now precluded from seeking to accrete Warden Level II into its

bargaining unit. The City contends that as the ADWA agreed to a settlement of the representation status of the disputed title in the stipulation, it cannot now seek to represent those in a higher title. We find this argument to be without merit for two reasons.

First, a reading of the language of the stipulation clearly does not support the position argued by the City. The stipulation states:

> It is hereby stipulated and agreed [that the certificate] be amended as follows: .... Add those employees in the title Warden (Correction) who are assigned under direction to assist in the administration of a larger correctional facility or command by serving as Tour Commander and/or Officer-in-Charge of an assigned Department of Correction field command; to serve as Executive Officer of a smaller facility or command; to serve as Training Officer at the Correction Academy; to serve in a command function over such activities as a central office unit or the Transportation Division; or to perform related work, **but not those employees in the title who are detailed to act in a higher level assignment**; and are paid within the salary range for those assigned to the Level I Warden duties listed above ....

The language upon which the City relies in making its claim that the Union waived its right to represent the employees in the Warden Level II title appears in bold. We do not agree that this language supports the City's interpretation. We find that the language simply defines certain employees whom the parties have agreed not to include in the certification. There is no express or implied waiver of the right to seek to represent those employees in the future.

Moreover, even if the City and the Union had intended a waiver of the Union's right to represent the Warden Level II title, such a waiver would be in contravention of the New York City Collective Bargaining Law ("NYCCBL"). Section 12-305 of the NYCCBL grants public employees the right "to bargain collectively through certified employee organizations of their own choosing." Under the NYCCBL, the City is permitted to challenge a petition for certification on the basis that the employees in the title for which the Union seeks representation are managerial and/or confidential. This is the only basis upon which the City may oppose the assertion by public employees of their rights under the NYCCBL to organize and to exercise free choice in the designation of their collective bargaining representatives. Moreover, even in cases, unlike the instant one, where the Board itself excluded employees on the basis of their managerial or confidential status, a challenge may be made after two years if circumstances have changed.[1] Accordingly, for the reasons stated above, we deny the City's motion to dismiss.

ORDER

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

[1] Title 61, Section 1-02(t)(6) Rules of the City of New York (formerly Section 2.20(f) of the Revised Consolidated Rules of the Office of Collective Bargaining).

ORDERED, that the motion to dismiss filed by the City of New York be, and the same hereby is, denied.

Dated: July 1, 1992
New York, NY

MALCOLM D. MacDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER