L.3750, DC37 v. City,52 OCB 25 (BOC 1993) [25-93 (Cert.)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF CERTIFICATION
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In the Matter of

D.C. 37 AFSCME, AFL-CIO,

Petitioner,

DECISION NO. 25-93

-and-

L.3750 D.C. 37, AFSCME, AFL-CIO,

Intervenor, DOCKET NO. RU-1102-91

-and-

THE CITY OF NEW YORK,

Respondent.
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INTERIM DECISION AND ORDER

On September 30, 1991,, by Personnel Order No. 91/13, Assignment Level III was added to the title of Telecommunications Associate. Pursuant to Section 1-02(s) of the Revised Consolidated Rules of the office of Collective Bargaining, formerly Rule 2.19, District Council 37, AFSCME, AFL-CIO (hereinafter, "D.C. 37") filed a petition on November 22, 1991, seeking to accrete the title of Telecommunications Associate--Assignment Level III to its Certification No. 46D-75, as amended, covering a unit of accounting, computer and related titles.

On January 29, 1992, the Civil Service Technical Guild, Local 375 of D.C. 37 (hereinafter, "L.375" and "Movant"), filed an application to intervene in the proceeding. On March 3, 1992, D.C. 37 served a notion to dismiss L.375's application. By Interim Decision No. 4-93, the Board of Certification (hereinafter, "the Board" and "we") denied the notion of D.C. 37 notion and granted the application of L.375 to intervene.

After a prehearing conference and adjournment of several hearing dates to permit settlement discussions, L.375 filed the instant notion to stay the representation proceeding docketed as RU-1102-91, on September 30, 1993. Simultaneously, L-375 filed a verified petition seeking to set aside the determination In the Natter of Communications Workers of America. Local 1180, AFL-CIO, Petitioner, and Civil Service Technical Guild, Local 375, District Council 37, AFSCME, AFL-CIO, Intervenor, and Local 2627, District Council 37, AFSCME, AFL-CIO. Intervenor, and the City of New York, Respondent,[1] and to terminate the certification awarded therein to D.C. 37. That certification concerned unit determination of Assignment Levels I and II of the Telecommunications Associate title an wall an of the Telecommunications Specialist title.

The Trial Examiner set October 20, 1993, as the date for receipt of papers in response to the notion to stay. On October 20, D.C. 37 filed a letter dated October 19. On October 21, the City of Nov York (hereinafter, "the City"), by the Office of Labor Relations# filed a letter dated October 14.

The verified petition to met aside Decision No. 9-88 and to terminate certification of Levels I and II of the Telecommunications Associate and of the Telecommunications

[1] Decision No. 9-88.

Specialist titles is dealt with separately from the instant motion to stay and has been docketed as RD-10-93.

BACKGROUND

On July Be 1986, a petition docketed as RU-972-86 was filed with the Office of Collective Bargaining soaking to accrete the titles of Telecommunications Associate--Assignment Levels I and II and Telecommunications Specialist to Certification No. 41-73 hold by the Communications Workers of America, Local 1180 (hereinafter, "L.1180"). L.375 moved to intervene, seeking to secrete the titles to its Certification No. 26-78 It was the position of the City of Now York that the unit represented by L.1180 vas the appropriate placement for the now titles. After hearings had begun, Local 2627, D.C. 37, AFSCME (hereinafter, "L.2627") moved to intervene, soaking accretion of the titles to Certification No. 46D-75. Following conclusion of the hearings, we rendered Decision No. 9-88 on July 27, 1988, accreting the petitioned-for titles to Certification No.46D-75. D.C. 37 assigned internal jurisdiction of the petitioned-for titles to its L.2627.

By a petition dated September 6. 2988, pursuant to Article 78 of the Civil Practice Law and Rules (hereinafter, "CPLR") L.375 sought judicial review of the Board's determination

with respect to Decision No. 9-88, on the grounds that it was arbitrary, capricious, contrary to law, an abuse of discretion and unsupported by the evidence. A stipulation of discontinuance with prejudice, dated October 19, 1988, was filed in Now York State Supreme Court, Now York County, on December 8, 1988.

POSITIONS OF THE PARTIES

L. 375's Position

L.375 moves the Board for a stay in RU-1102-91 citing the Rules of the Office of Collective Bargaining (hereinafter, the Rules"), §§11-13(k) (Notions other than those made during a hearing) and (f) (Time--board (of collective bargaining] action) as authority for the stay. The stay in sought until the Board issues a determination of L.375's petition, filed simultaneously, to set aside Decision No. 9-88 and to terminate the certification awarded in that decision. The petition has boon filed notwithstanding the Board's admonition in Interim Decision No. 4-93 that "permission for L-375 to intervene [in RD-1102-91] is not to be taken as an invitation to relitigate the unit placement of Levels I and 11 (as determined in Decision No. 9-88]." This admonition is dismissed by L.375's supporting affirmation as dictum. L.375 argues that the Board must stay the representation proceedings docketed as RU-1102-91 because of what it describes as the Board's responsibility . . . to ensure that the taint of

[alleged procedural errors in the] proceedings [under Docket No. 30-972-86] doesn't carry over into these [RU-1102-91] proceedings."

The procedural errors which L.375 alleges are what it states was (1) the grant of standing to L.2627 to intervene in RU-972-86 and (2) either (i) that the Board allegedly lacked Jurisdiction ever the intervention of L.2627 or (ii) that, if D.C. 37 is deemed to have been the intervenor rather than L.2627, L.375 was allegedly deprived of due process of law in the prosecution of its case because of the fact that the Office of the General Counsel of D.C. 37 represented L.375 in RU-972-86 against another local of D.C. 37, viz., L.2627, and served in two profoundly and fundamentally conflicted roles . . . taint[inq] the entire proceedings.

D.C. 37's Position

With regard to the instant action to stay, D.C. 37 takes the position that the action has no basis in law or in fact. It argues that this is not a proper case for a stay, citing contract bar, laches, finality and unlikelihood of success an the merits of the underlying petition as reasons for which the motion to stay should be denied.

D.C. 37 maintains that it in unlikely that the petition of L.375 to set aside Decision No. 9-88 and to terminate the

certification awarded therein will succeed on the merits. To support its position, D.C. 37 states that facts which were known to the parties at the time of the hearing in the proceeding docketed as RU-972-86 were and continue to be binding on all concerned. It also states, "[T]here is not a shred of doubt that all parties who participated in the prior representation proceeding for telecommunication titles know exactly which unions hold what certificates and who was representing whom." As an exam le of a certification proceeding in which D.C. 37 represents one of its affiliated locals against another affiliate regardless of whether the locals hold their own bargaining certificate, D.C. 37 cites the proceeding docketed as RU-710-79 in which it seeks to accrete various titles in the Systems Analyst series to its Certification No. 46D-75; another constituent local of D.C. 37, viz., Local 371, intervened before withdrawing for reasons unrelated to status as the holder of the bargaining certificate.

Finally, D.C. 37 argues that the papers submitted by L.375 exhibit a misunderstanding about the relationship of the locals of D.C. 37 to each other and to the Council. For the above reasons, D.C. 37 argues that the instant certification proceeding should not be stayed.

City's Position

The City takes no position as to the instant motion to

stay the proceeding docketed an RU-1102-91.

DISCUSSION

Pursuant to 112-309 of the New York City Collective Bargaining Law,[2] the Board of Certification has the power and duty, inter alia, to determine units which are appropriate for purposes of collective bargaining and to determine the length of time during which a certification remains in effect and free from challenge or attack. It is axiomatic that the Board possesses the discretionary power to entertain and determine interlocutory

[2] Section 12-309 of the New York city collective Bargaining Law provides, in relevant part:

> b. Board of certification. The board of certification . . . shall have the power and duty:
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> (1) 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 public service, and sound labor relations . . .
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> (2) . . . to determine the length of time during which . . . certification or designation shall remain in effect and free from challenge or attack;
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> (3) to decertify as exclusive bargaining representative an employee organization . . . which shall . . . become ineligible for certification under the provisions of this chapter, and to terminate or vacate designations of representatives . . . .

motions regarding the matters thus prescribed to it by statute.

With respect to the notion to stay the instant proceeding pending determination of the petition to set aside Decision No. 9-88 and to terminate the certification granted therein, we are guided by (i) the criteria prescribed for granting provisional relief as provided in CPLR §6301[3] and (ii) court-prescribed criteria for granting a stay of enforcement of administrative orders.[4]

L. 375 asks us to stay the representation proceeding

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[3] CPLR §6301. Grounds for preliminary injunction and temporary restraining order.

A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff to rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff. A temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had. [Emphasis added.]

[4] De La Nueces v. U.S., 778 F. Supp. 191 (S.D.N.Y., 1991) (Pharmacy operator showed irreparable injury which would accrue if not granted a stay of administrative disqualification from participating in food stamp program, but failed to show likely success on merits in full hearing); Matter of Town of East Hampton at al. v. Jorling, etc. at al., 181 A.D.2d 781, 581 N.Y.S.2d 95 (N.Y.A.D. 2d Dep't, 1992) (Possibility of irreparable injury to petitioner-towns if Department of Environmental Conservation were permitted to proceed with enforcement of order closing local landfills).

docketed as RU-2202-92 pending our determination of its petition to set aside Decision No. 9-88 and to terminate the certification awarded in that decision on the grounds that we lacked jurisdiction to entertain L.2627's application to intervene in the matter docketed at RU-972-86. Applying the above-described criteria, we decline to stay the instant proceeding.

Movant has not presented us with evidence that it faces Irreparable injury without a stay of proceedings. That L.375 may legal expenses if it is required to prosecute its case at an evidentiary hearing on the issue of unit determination is not a sufficient ground on which to support a stay. Regardless of the outcome of L.375's challenge to the decision which certified the placement of Levels I and II of the Telecommunications Associate title, the issue of the placement of Level III will remain to be determined. Moreover, a stay in the certification proceeding docketed as RU-1102-91 would delay the enjoyment of collective bargaining rights by the public employees in the title of Telecommunications Associate--Assignment Level III. Were we to grant the stay, we would be hindered in the execution of our statutory mandate to determine appropriate bargaining units, to certify exclusive bargaining representatives, and to promote sound labor relations.[5]

[5] NYCCBL § 12-309b (1) and (2).

As to the likelihood of success on the merits of the underlying petition to set aside or terminate, we not in brief that the Legislature has committed to this Board jurisdiction over matters concerning the certification of bargaining units for the purpose of furthering the collective bargaining rights granted to public employees under the NYCCBL. The only qualification for standing that we require of an organization before us is that it qualify as a labor organization within the meaning of the NYCCBL. An organization which does not qualify as a labor organization under the statute is not entitled to represent public employees or to have a certification petition processed by this Board.[6] However, the test of a bona fide labor organization is not a demanding one. Section 12-303j of the NYCCBL provides that:

> [t]he term "public employee organization" shall mean any municipal employee organization and any other organization or association of public employees, a primary purpose of which is to represent public employees concerning wages, hours, and working conditions."

Boards which rule on representation issues, including this Board, generally employ such identifiable indices of a bona fide labor organization status as a constitution and by-laws, recorded membership meetings, election of officers, collection of dues,

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[6] Decision Nos. 11-87 and 21-76.

and maintenance of financial records and bank accounts.[7] The Movant falls to cite any authority, and we are aware of none, which supports its contention that a local union must be "certificated" in order to possess standing to seek to represent a title. This would appear to be a matter of internal union disputer the resolution of which in not within the jurisdiction of this Board. Nevertheless, we will examine all of the evidence submitted by a union whose status is at issue and resolve any questions that say be raised by our investigation or by opposing parties on a case-by-case basis.[8]

For purposes of determining the instant notion to stay, we have reviewed the Movant's challenge to the certification proceedings docketed as RU-972-86 and RU-2102-91 in limited fashion consistent with judicial and administrative procedure in determining requests for injunctive relief. We find that Movant has failed to establish that its underlying petition has a likelihood of success an the merits. L.2627 is clearly a bona fide employee organization, under the indices referred to above. So is its parent, D.C. 37. Throughout the more than 25 years since enactment of the NYCCBL, D.C. 37 and its affiliated locals including L.2627 and L.375 have operated on the basis that D.C.

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[7] Decision Nos. 11-97, 24-76, and 21-76.

[8] Decision Nos. 11-87 and 21-76.

37 has authority to assign internal jurisdiction to its affiliates of certifications awarded to it in our decisions. From time to time, there have been temporary periods of disagreement and dispute between D.C. 37 and L.375 with regard to the effects of this internal practice. We are not aware that L.373 has ever sought within D.C. 37 or through the parent organization, the American Federation of State, County and Municipal Employees (AFSCME), to obtain any major change in this practice. In any event, it has not been demonstrated here that there is a substantial issue either as to L.2627's standing or of this Board's jurisdiction to permit its intervention.

We also take notice of the fact that in the Article 78 proceeding commenced by L.375 in 1988 to challenge our certification of Levels I and 11 of the title in question, a stipulation of discontinuance, entered and filed December 8, 1988, in the Supreme Court of New York, was made with prejudice to any further proceeding on the issue of unit determination. This stipulation would seem to undermine the validity of the underlying petition to set aside and terminate certification. L.375 was represented by independent counsel of its own choosing and was a willing party to the stipulation which discontinued with prejudice the Article 78 proceeding for judicial review of the Board's Decision No. 9-88. L-375 has not shown, either in the request for a stay or in the petition to set aside and

terminate, that L.375's participation in that stipulation was the result of duress or fraud.

Finally, we believe that there is substantial question whether the petition of L.375 to set aside and terminate has surpassed the applicable statute of limitations for judicial review under Article 78.[9] The petition cites case law[10] for the proposition that a claim is not time-barred if it alleges that an administrative agency has acted in excess of authority. The citation is inapposite here, since the issue in that case -- whether the Board's development and application of certain "guidelines or criteria to help govern the determination of what

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[9] CPLR § 217, Proceeding against body or officer; four months, provides, in pertinent part, as follows:

> Unless a shorter time is provided in the law authorizing the proceeding, a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner or the person whom he represents in law or in fact, or after the respondent's refusal, upon the demand of the petitioner or the person whom he represents,, to perform its duty; or with leave of the court where the petitioner or the person whom he represents, at the time such determination became final and binding upon him or at the time of such refusal, was under a disability specified in section 208. [infancy, insanity], within two years after such time.

[10] In the Matter of Civil Service Technical Guild, Local 375, D.C. 37, AFSCME, AFL-CIO, Respondent. v. Arvid Anderson, Chairman of the Board of Certification, at al., Appellants, 55 N.Y.2d 618, 446 N.Y.S.2d 264 (Nov. 17, 1981).

falls within . . . requirement[s]"[11] of the Taylor Law -- was whether the Board had acted in excess of its authority. None of the contentions of the Petitioner herein can be construed as similarly alleging that the Board has acted in excess of its authority. There can be no question that the Board has authority to sake unit findings and to establish bargaining units and to designate majority representatives of such units. Even if there were merit to the Petitioner's contentions here, they would add up only to a claim that the Board had exercised its lawful authority improperly and in error. The "error" posited by the Petitioner is that L.2627 in not "certificated"[12] and therefore lacked standing to intervene in Case No. RU-972-8.6 and that this Board consequently lacked jurisdiction over L.2627.

Under the criteria cited above,[13] any bona fide labor organization which has as its purpose the representation of public employees in the City of New York with respect to wages, hours and conditions of employment has standing to come before us. L.2627 meets this text. This in the only requirement in order for a public employee organization to have standing to

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[11] In the Matter of Civil Service Technical Guild, L. 375, AFSCME, AFL-CIO, v. Anderson, et al., 79 A.D.2d 541; 434 N.Y.S.2d 13, 16 and note; reversed; 55 N.Y.2d 618, 446 N.Y.S.2d 264, 430 N.E.2d 1317.

[12] Petitioner's terminology.

[13] P.10 and note 78 supra.

appear before us; the jurisdictional status of a local within its parent organization has no relevance to us in the determinations which we are charged by statute to make. The suggestion by L.375 to the contrary contraverts the plain language of the governing statutes as well as court-sanctioned practice and procedures of this Board.

Further on the matter of timeliness of the underlying petition herein, we believe, as well, that there is substantial question an to whether the petition of L.375 is precluded under the contract bar rule.[14]

Regardless of the outcome of the pending petition to set aside Decision No. 9-88 and to terminate the certification of the titles Telecommunications Associate--Levels I and II and Telecommunications Specialist to Certificate No. 46D-75, a determination must be made as to unit placement of Level III.

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[14] Section 1-02(g) of the Rules provides as follows:

> 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 loss 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 sore than three (3) years, before the third anniversary date thereof. Subject to the provisions of §1-02(r) [Certification; designation--life; modification.] 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.

Thus, in furtherance of the collective bargaining rights of the public employees in the title at issue, we hereby deny the instant action to stay the proceeding docketed as RU-1102-91 and order that the hearing on the issue of community of interest be hold on October 26 and 28, 1993, at 9:00 a.m., as scheduled, and at such additional times as the Trial Examiner shall deem necessary.

O R D E R

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 to stay the proceedings docketed as RU-1102-91 be, and the same is hereby, dismissed, and

ORDERED, that the hearing on the issue of community of interest be held on October 26 and 28, 1993, at 9:00 a.m., as scheduled, and at such additional times an the Trial Examiner shall deem necessary.

Dated: New York, New York
October 23, 1993

MALCOLM D. MacDONALD
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER