

OSA v. City, 56 OCB 18 (BOC 1995) [18-95 (Cert Interim)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF CERTIFICATION

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In the Matter of : DECISION NO. 18-95
ORGANIZATION OF STAFF ANALYSTS, : DOCKET NO. RU-1160-94
-and- :
THE CITY OF NEW YORK AND :
RELATED PUBLIC EMPLOYERS :
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INTERIM DECISION AND ORDER

On February 28, 1994, the Organization of Staff Analysts ("OSA") filed a petition, docketed as RU-1160-94, requesting that the title Administrative Staff Analyst (MI-MIII) be added to its Certification No. 3-88 (as amended), covering Staff Analyst and related titles. By letter dated August 5, 1994, the City of New York, appearing by its Office of Labor Relations ("the City"), opposed the petition on the ground that the title is managerial or confidential. A pre-hearing conference in the matter was held on September 28, 1995. At the conference the City argued, for the first time, that the petition should be dismissed because the Board of Certification ("Board") has held in previous decisions that the Administrative Staff Analyst title is managerial or confidential. For this reason, pursuant to Title 61, Section 1-02(t)(6) of the Rules of the City of New York ("OCB Rules")¹, the Trial Examiner

¹ Section 1-02(t)(6) of the OCB Rules provides:

A determination by the board made pursuant to this
(continued...)

assigned to the case instructed OSA to submit a "statement of facts demonstrating such a material change in circumstances subsequent to the Board's prior determination as to warrant reconsideration of the managerial or confidential status of the title... ." On October 6, 1995, OSA submitted such a statement and, on October 20, 1995, the City submitted a reply to that statement.

BACKGROUND

The history of proceedings before the Board concerning the Staff Analyst title series (Staff Analyst, Associate Staff Analyst and Administrative Staff Analyst) is long and complicated. What follows is a summary of the aspects of that history relevant to the issues before us in the instant case.

In April of 1977, the City Personnel Director reclassified, or broadbanded, 17 Civil Service titles to the three Staff Analyst titles. In May of 1978, the City filed a petition with the Board requesting that employees in the Staff Analyst title series be

¹(...continued)

subdivision regarding the managerial or confidential status of a title shall be final and binding and, subject to §1-02(t)(2)(iii) shall preclude a petition to represent the title and employees or a petition to designate the title and employees managerial or confidential for a period of two (2) years or until the period specified in §1-02(t)(2)(i) above, whichever is later. A petition filed pursuant to the provisions of this §1-02(t)(6) shall include a statement of facts demonstrating such a material change in circumstances subsequent to the Board's prior determination as to warrant reconsideration of the managerial or confidential status of the title or employee.

declared managerial or confidential within the meaning of the New York City Collective Bargaining Law ("NYCCBL") and therefore ineligible for bargaining. This petition was subsequently withdrawn by the City.

Between March and December of 1979, five unions sought to represent employees working in the Staff Analyst series of titles. Each of the unions wanted to accrete the title series to a bargaining unit which it already represented. The unions included: Civil Service Technical Guild, Local 375, AFSCME, AFL-CIO; Local 1407, District Council 37, AFSCME, AFL-CIO; Social Service Employees Union, Local 371, AFSCME, AFL-CIO; Communications Workers of America, Local 1180; City Employees Union, Local 237, IBT. The City objected to all of the petitions on the ground that the employees in the title are managerial or confidential. The Board began its investigation of the representational claims; several days of hearings were held and, through a questionnaire prepared by the Office of Collective Bargaining ("OCB"), the Board identified Staff Analysts who previously held one of the 17 reclassified Civil Service titles, which the Board had already declared managerial or confidential, and continued to perform the work of that title.

Before the Board had completed its investigation, the unions filed a motion requesting that the Board make an initial determination as to whether the City had established a prima facie case on the issue of the managerial or confidential status of the titles. In Decision No. 39-80, the Board held that, regarding the title Administrative Staff Analyst, a prima facie case had been

established as to the managerial or confidential status. In arriving at this decision the Board relied on "the statement of the duties of an Administrative Staff Analyst, set forth in the job specification", the fact that "five of the six titles which were reclassified to the Administrative Staff Analyst title were determined to be managerial or confidential by the Board in Decision No. 19-75", and the fact that the title was included in the Managerial Pay Plan. The Board specifically held, however, that its determination was "not intended to foreclose any of the unions from presenting evidence or argument explaining why employees in the title should not be excluded from collective bargaining." Similarly, the Board found that as to the Staff Analysts and Associate Staff Analysts who previously held one of the 17 reclassified Civil Service titles which the Board had already declared managerial or confidential, the City had established a prima facie case of managerial or confidential status. Finally, as for the remaining Staff Analysts and Associate Staff Analysts, the Board held that the City had not established a prima facie case and that it had the burden of producing additional evidence and argument in support of its claim of managerial or confidential status. The Board directed that hearings continue on this issue as soon as possible.

Accordingly, in January of 1981, hearings resumed. During the course of the hearings, no testimony or evidence was offered by the unions concerning the duties of employees in the Administrative Staff Analyst title. Based on the hearings, the Board issued

Decision No. 20-82 in which it reaffirmed the prima facie rulings made in Decision No. 39-80. The Board also held that the City had established a prima facie case as to certain groups of the Staff Analysts and Associate Staff Analysts. With respect to the employees who did not fall within those groups, the Board held that the City had the burden of producing additional evidence and argument in support of its claim of managerial or confidential status.

Thus, hearings commenced once again and, as a result, Decision Nos. 8-86 and 14-86 were issued. Together, these decisions found approximately 369 Staff Analysts and Associate Staff Analysts eligible for bargaining. After Decision No. 14-86 was issued, at the request of OSA, a hearing was held to determine the unit appropriate for collective bargaining.² The Board determined in Decision No. 21-87 that a separate unit consisting of Staff Analysts and Associate Staff Analysts was the most appropriate bargaining unit and directed that an election be held among the eligible employees to determine the majority representative of the unit. Because the majority of employees voted in favor of representation by OSA, the Board, in Decision No. 3-88, certified OSA as the exclusive representative of the unit for the purpose of collective bargaining.

² OSA, previously affiliated with Local 237 IBT, voted to disaffiliate from that union in October of 1983. OSA thereafter filed a motion to intervene in the Staff Analyst representation case. In March of 1984, the Board granted OSA's motion and substituted OSA for Local 237 in the proceedings.

In January of 1990, OSA filed a petition seeking to add to its Certification No. 3-88 those employees in the titles Staff Analyst and Associate Staff Analyst who were not previously found by the Board to be managerial or confidential and who were not represented by OSA at that time.³ In Decision No. 17-91 the Board granted the petition, with the exception of a list of employees that the parties had agreed were managerial or confidential. In that decision, as an initial matter, the Board made the following statement: "Considering the long and complex history of this proceeding, we believe it valuable to state at the outset that we affirm the findings of this Board in all of our prior decisions involving the Staff Analyst series of titles..."

POSITIONS OF THE PARTIES

OSA's Position

OSA maintains that several facts demonstrate a change in circumstances subsequent to the Board's prior determination. First, OSA argues, it was not a party to the proceedings that resulted in Decision Nos. 39-80 and 20-82. Furthermore, OSA points out, no evidence or testimony was ever offered by any union concerning the duties of the Administrative Staff Analyst title; rather, Decision No. 39-80 was made based on the job specification and the inclusion of the title in the managerial pay plan, and Decision Nos. 20-82 and 17-91 simply reaffirmed that decision. OSA

³ By this time, the number of Staff Analysts and Associate Staff Analysts employed by the City had increased.

argues that the Board has held that the job duties set forth in a job specification and inclusion in the managerial pay plan, standing alone, cannot serve to sustain the City's burden of proving that the employees are managerial or confidential.

OSA further argues that changed circumstances can be found in the fact that OSA's bargaining unit has greatly expanded over the years. Prior to the issuance of Decision No. 17-91, OSA points out, the Board had permitted only about 600 employees in the Staff Analyst and Associate Staff Analyst titles to be represented. OSA maintains that "it was not until Decision No. 17-91 that the overwhelming majority of employees in those two titles were finally found eligible for collective bargaining."⁴

City's Position

The City argues that OSA's statement of changed circumstances makes it clear that the facts have not changed in this matter. According to the City, the only change is that OSA now seeks to contest the status of the employees in the Administrative Staff Analyst title.

In addition to arguing that OSA has failed to demonstrate changed circumstances to warrant the Board's reconsideration of its earlier decisions, the City asserts several other grounds for dismissing OSA's petition. First, the City argues that the petition should be dismissed as defective because it was filed

⁴ Currently, OSA's bargaining unit includes approximately 3000 employees.

without the required statement of changed circumstances; this statement was not filed until October of 1995.

Second, the City argues that OSA's showing of interest is inadequate. Noting that OSA cited "dues checkoff" authorizations in its petition as proof of interest, the City argues that "there is no such procedure for employees in the managerial service." In any event, the City contends, the showing of interest, which was submitted with the February 1994 petition, is "stale". This is so, the City maintains, because the petition did not become "perfected" until October of 1995 when the Section 1-02(t)(6) statement was filed and Section 1-02(f) of the OCB Rules requires that authorizations be no more than seven months old.

Third, the City contends that the petition should be dismissed pursuant to the contract bar doctrine, set forth in Section 1-02(g) of the OCB Rules, which prohibits the filing of a representation petition after the expiration of a contract. The City maintains that the instant petition, which seeks to add the Administrative Staff Analyst title to an existing unit whose contract expired on December 31, 1991, is untimely as it was filed in February of 1994, after the expiration of the contract.

DISCUSSION

Pursuant to Section 1-02(t)(6) of the OCB Rules, a determination by the Board regarding the managerial or confidential status of a title precludes a petition to represent the title for a period of two (2) years. If, after that two year period, a union

wishes to file a representation petition, the petition must include "a statement of facts demonstrating such a material change in circumstances subsequent to the Board's prior determination as to warrant reconsideration of the managerial or confidential status of the title or employee." For this reason, OSA was instructed to submit a statement of changed circumstances. However, upon closer examination of the history surrounding the Administrative Staff Analyst title, we find that Section 1-02(t)(6) is of questionable applicability.

Unlike Decision Nos. 8-86 and 14-86, which were based upon fully contested evidentiary records which included testimony by employees in the title, Decision No. 39-80 was based upon the Administrative Staff Analyst job specification, inclusion in the managerial pay plan, and the fact that titles which were reclassified to the Administrative Staff Analyst title were determined to be managerial or confidential by the Board in a prior decision determination.⁵ Viewing the evidence in this context, the Board specifically stated that its determination that the City had established a prima facie case was "not intended to foreclose any of the unions from presenting evidence or argument explaining why employees in the title should not be excluded from collective bargaining." This statement is consistent with the Board's well-established policy that the purpose of proceedings before it, which

⁵ We note that Decision Nos. 20-82 and 17-91, insofar as the Administrative Staff Analyst title was concerned, did no more than affirm Decision No. 39-80; in neither case was testimony and evidence presented as to that title.

are investigatory in nature, is to develop as full a record as possible upon which to make a decision.⁶ The unions involved in the proceedings in 1980 did not attempt to rebut the City's prima facie showing of managerial or confidential status as to the Administrative Staff Analyst title. Inasmuch as OSA is now prepared to present testimony and evidence to rebut the City's showing, and we expressly stated in Decision No. 39-80 that the decision was not intended to foreclose any union from presenting evidence, we see no reason to prevent OSA from fully litigating this matter.

In any event, there has been a material change in circumstances subsequent to the determination in Decision No. 39-80 to warrant reconsideration. Fifteen years have passed since that decision was signed and six subsequent decisions have been issued concerning the Staff Analyst title series. When Decision No. 39-80 was issued, OSA was not a party to the proceedings. Since that time, the unit that OSA represents was certified and has expanded greatly. Currently, OSA represents approximately 3000 employees in the Staff Analyst and Associate Staff Analyst titles.

The City's arguments concerning OSA's showing of interest and the contract bar doctrine are not applicable to the circumstances presented in this case, i.e., where a union seeks to add a title to an existing unit. In order for the contract bar doctrine to be applicable, there must be a contract between the City and a

⁶ Decision No. 68-74.

collective bargaining representative covering the title which is the subject of the representation petition. The contract open period is not measured by reference to a contract that covers some other title. In this case, no contract covers the Administrative Staff Analyst title.

Moreover, the policy considerations behind the contract bar and showing of interest requirements are not related to the circumstances of this case. The intent of Section 1-02(g) of the OCB Rules (contract bar) is to strike a balance between stability in labor relations and the right of employees to change their collective bargaining representative.⁷ It is, in part, for this reason that proof of interest is required where a challenge to representation is offered. The proof of interest is a demonstration that at the time a petition is filed, a substantial number of interested employees support the proposed change in representation.⁸ In the instant case, there has been no challenge to representation; a change in representation is not being proposed.

Moreover, the Board has repeatedly held that where a petition seeks to add newly-created titles to an existing unit of titles, no proof of majority status is required.⁹ This holding is equally applicable to the instant case by analogy; OSA seeks to add an

⁷ Decision No. 50-74.

⁸ Id.

⁹ Decision No. 33-74.

unrepresented title to an existing unit. While the Administrative Staff Analyst title is not newly-created, it had not been found eligible for bargaining when OSA's existing unit was certified.

As for the City's argument that the petition is defective because it was filed without the statement of changed circumstances, we note that it was for this reason that OSA was directed to submit such a statement. The submission of the statement cured the defect.

For all of the above stated reasons, we find that this matter should proceed to a hearing as soon as possible.

ORDER

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

ORDERED, that hearing be held to determine whether the employees serving in the Administrative Staff Analyst title are managerial or confidential within the meaning the New York City Collective Bargaining Law.

DATED: New York, New York
November 15, 1995

Steven C. DeCosta
Chairman

George Nicolau
Member

Daniel G. Collins
Member