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

OFFICE OF COLLECTIVE BARGAINING
BOARD OF CERTIFICATION

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

SECOND 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. 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. At the pre-hearing conference in the matter 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"), the Trial Examiner 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. On November 15, 1995 the Board issued Decision No. 18-95, the first interim decision and order in this case, in which it ordered that a hearing be held to determine whether the employees serving in the Administrative Staff Analyst title are managerial or confidential. On November 29, 1995, the City filed a "motion for reconsideration" of Decision No. 18-95, on December 5, 1995, OSA filed an answer to that motion, and on December 15, 1995, the City filed a "reply".[1]

BACKGROUND

The factual background of this case, as well as the complicated history of proceedings before the Board concerning the Staff Analyst title series (Staff Analyst, Associate Staff Analyst and Administrative Staff Analyst), is set forth fully in Decision No. 18-95. Accordingly, it will not be repeated herein.

In Decision No. 18-95, the Board noted that it has repeatedly held that where a petition seeks to add newly-created titles to an existing unit of titles, no showing of interest is required. The Board found that this holding is applicable to the instant case by analogy since OSA seeks to add an unrepresented title to an existing unit. While the Board recognized that the Administrative Staff Analyst title is not newly-created, it held that the analogy to the typical accretion case was appropriate given that the title

[1] Section 1-13(k) of the OCB Rules, which governs motions, does not provide for the filing of a reply.

had not been found eligible when OSA's existing unit was certified.

POSITIONS OF THE PARTIES

City's Position

Citing decisions of the National Labor Relations Board ("NLRB"), the City argues that in Decision No. 18-95 the Board "overlooked significant contrary precedent" when it held that a showing of interest was not required in this case. The City points out that the Board arrived at that holding by drawing an analogy between this case and typical accretion cases where a petition seeks to add newly-created titles to an existing unit of titles. According to the City, this analogy is not valid.

The City maintains that employees accreted into an existing bargaining unit are "deprived of their fundamental right to determine for themselves whether to be represented for collective bargaining." Deprivation of this right, the City contends, is rarely justified. The City maintains that in the typical accretion case, where a new title is created and then gradually staffed, the deprivation of the right to vote is justified because of the need to "protect the rights of the established bargaining unit" by "stabiliz[ing] bargaining relationships"; accretion stabilizes bargaining relationships insofar as it "removes from employers the temptation to erode covered titles through attrition or layoff and place new hires into uncovered titles." However, the City argues, the instant case is unlike the typical accretion case because the Administrative Staff Analyst title has a fifteen year history of "separate treatment." The City contends that under these

circumstances, depriving the employees of the right to vote cannot be justified.

The City argues that, pursuant to §209.3 of the Civil Service Law, the Board is "cautioned to give effect to the fundamental differences to be drawn between the private and public sectors." The City contends that these differences "militate strongly against the use of accretion in this case" (and towards the use of an election) because, in the public sector, a "constitutional dimension...attaches to the rights of association at issue."

Finally, the City argues, §12-309b.(1) of the New York City Collective Bargaining Law ("NYCCBL") provides that the Board may not include supervisory employees in a bargaining unit which includes non-supervisory employees unless a majority of the supervisory employees voting in an election vote in favor of such inclusion. Therefore, the City contends, should the Board determine that some of the Administrative Staff Analysts are eligible for collective bargaining, an election will have to be held. The City maintains that since an election is "inevitable", it is inappropriate for the Board to order a hearing without a showing of interest because "the entire hearing process may be unnecessary absent some expression by the persons at issue that they desire union representation."

OSA's Position

Initially, OSA argues that the instant motion should be denied because it raises no new facts or issues which were not previously

raised, or could not have been raised, in the prior motion to dismiss.

In any event, OSA contends, the NLRB decisions cited by the City are inapplicable. OSA points out that a substantial majority of employees in the bargaining unit in question have indicated, by dues checkoff, their desire to be represented by OSA. According to OSA, this Board, as well as the Public Employment Relations Board ("PERB"), has permitted the addition of titles where the continuing majority status of the petitioner is not affected by such an addition.

As for the City's arguments concerning an inevitable election, OSA argues that they are relevant to the question of appropriate unit placement, not to the necessity of a showing of interest.

DISCUSSION

The City argues that the Board should now modify Decision No. 18-95. According to the City, the Board overlooked private sector law which mandates a showing of interest and an election under the circumstances presented in this case i.e., where a title has been in existence and unrepresented for at least 15 years.

The fact that a title has been unrepresented for 15 years does not negate the presumption of eligibility for collective bargaining.[2] Moreover, the existence of fundamental distinctions

[2] The NYCCBL expresses a statutory policy "...to favor and encourage the right of municipal employees to organize and be represented...", which creates a presumption under the NYCCBL that (continued...)

between public and private employment has been recognized.[3] Accordingly, we find that the private sector law cited by the City does not invalidate the Board's holding, by analogy to well-established precedent, that a showing of interest is not required where a petition seeks to add a previously unrepresented title to an existing unit with which it is alleged to share a community of interest, and where the continuing majority status of the petitioner would not be affected by such an addition.

More to the point, the City's arguments confuse the issues in this case because they essentially seek to have this Board reorganize the statutory scheme with regard to representation petitions. According to the City, an election should be held even before a determination is made on eligibility for bargaining. However, representational matters do not proceed before the Board in this manner. Instead, where a union files a petition for representation and the City opposes the petition on the ground that the title is managerial or confidential, the threshold matter for our determination is whether the employees are eligible for collective bargaining. The desires of the employees play absolutely no role in this determination. If the Board determines that the employees are eligible for collective bargaining, the Board next makes a unit determination. At this point, should the

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[2](...continued)
public employees are eligible for collective bargaining. See, NYCCBL §12-302 and, e.g., Decision No. 5-87; see also, Taylor Law §200.

[3] Sperling v. Helsby, 60 A.D.2d 559 (1st Dept. 1977).

Board determine that more than one unit is equally appropriate for bargaining, then an election is held. Also at this point, the City is permitted to file an objection to a petition for certification of a unit of supervisory employees and non-supervisory employees, pursuant to 12-309b.(1) of the NYCCBL. If such an objection is filed, an election is held.

Finally, the City argues that since an election is "inevitable", a showing of interest should be required. As we held in Decision No. 18-95, a showing of interest is required where a challenge to representation is offered. The purpose of the requirement is to assure that a substantial number of interested employees support the proposed change in representation. The showing of interest requirement is completely unrelated to a §12-309b.(1) election. The Board has never held that a showing of interest is required to justify a hearing on the issue of managerial or confidential status simply because a determination of eligibility may result in a §12-309b.(1) election.

We have considered the other arguments asserted by the City, and find that they do not allege new facts or issues which were not, or could not have been, raised in the prior motion to dismiss. In sum, we find no reason to alter our holding in Decision No. 18-95.

ORDER

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

ORDERED, that the request for reconsideration of Decision No. 18-95 be, and the same hereby is, denied.

DATED: New York, New York
December 29, 1995

Steven C. DeCosta
Chairman

Daniel G. Collins
Member

George Nicolau
Member