DC 37 v. City & FDNY,72 OCB 1 (BOC 2003) [1-2003 (Cert)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF CERTIFICATION
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In the Matter of the Certification Proceeding

-between-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO

Petitioner,

Decision No. 1-2003
Docket No. RU-1246-02

-and-

CITY OF NEW YORK and THE CITY OF
NEW YORK FIRE DEPARTMENT,

Respondents.
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INTERIM DECISION AND ORDER

On January 30, 2002, District Council 37 ("Union") filed a Petition for Certification seeking to remove approximately 2900 Emergency Medical Services ("EMS") employees in the New York City Fire Department ("FDNY") from their current certified bargaining unit and to create a separate unit for them. The Union argues that certification of a new and separate unit is mandated by § 12-307(a)(4) of the New York City Collective Bargaining Law (City of New York Administrative Code, Title 12, Chapter 3) ("NYCCBL") as amended by Local Law 19/2001. The City of New York ("City") opposes the petition. Since the amendment now allows the petitioned-for employees the right to bargain independently, we find that their inclusion in the existing unit is no longer appropriate and we refer the matter to the Director of Representation for further processing of the petition in order to resolve the appropriateness of the petitioned-for bargaining unit.

BACKGROUND

The Union is the certified employee organization representing the employees involved herein. These employees are included in a bargaining unit created pursuant to Certification No. 62D-75. The petitioned-for employees are in the following titles: Emergency Medical Specialist - EMT (Title Codes 53053, 002220), Emergency Medical Specialist - Paramedic (Title Codes 53054, 002240), Emergency Medical Services Specialist (Title Codes 96321, 96322), Supervising Emergency Medical Services Specialist - Levels I and II (Title Codes 53005, 96331, 96332), EMS - Cadet (Title Codes 53056, 005030), and Emergency Medical Specialist-Trainee (Title Code 53052).[1]

These employees are covered by the 2000 District Council 37 Memorandum of Economic Agreement which expired June 30, 2002, and the District Council 37 Hospital Technicians Unit Agreement which expired on March 31, 2000. These agreements are in status quo pursuant to NYCCBL § 12-311(d).[2]

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[1] The petitioned-for unit does not include employees in the title, Supervising Emergency Medical Services Specialist - Levels I and II, detailed as Deputy Chiefs and Division Commanders who are represented by the Emergency Medical Services Superior Officers Association pursuant to Certification No. 10-01.

[2] NYCCBL § 12-311(d) provides in relevant part that during "the period of negotiations between a public employer and a public employee organization concerning a collective bargaining agreement, . . . the public employee organization party to the negotiations, and the public employees it represents, shall not induce or engage in any strikes, slowdowns, work stoppages, or mass absenteeism, nor shall such public employee organization induce any mass resignations, and the public employer shall refrain from unilateral changes in wages, hours, or working conditions. . . ."

In addition, the petitioned-for titles are currently covered by the Citywide Agreement which expired on June 30, 2001, which is also in status quo. As required by NYCCBL § 12-307(a)(2), the Citywide Agreement provides for those matters which must be uniform for all employees subject to the career and salary plan such as overtime and time and leave rules. Uniformed police, fire, sanitation, and correction services are distinct from career and salary plan personnel and are not covered by the Citywide Agreement. Pursuant to NYCCBL § 12-307(a)(4), their certified representatives bargain separately with the City over all matters including but not limited to overtime and time and leave rules.

On October 13, 1999, the New York City Council ("Council") proposed an amendment to NYCCBL § 12-307. The Council's Declaration of Legislative Intent and Findings provides:

> The Council finds that employees working for the fire department of the city of New York ("FDNY") as emergency medical technicians ("EMT's"), advanced emergency medical technicians ("paramedics") and the supervisors of EMT's or paramedics have certain terms and conditions of employment similar to those, of the uniformed services of the city of New York, including, police, fire, sanitation and correction services. These terms and conditions of employment raise issues, which are materially different than the issues affecting non-uniformed city employees. Furthermore, the Council recognizes that uniformed forces in the police, fire, sanitation and correction departments have certain unique bargaining rights under the New York City Collective Bargaining Law. The Council intends by this amendment to the administrative code that those individuals employed by the FDNY as EMT's, paramedics and supervisors of EMT's or paramedics be accorded the same unique bargaining rights as the uniformed forces of the City.

On April 25, 2001, overriding the Mayor's veto, the Council passed Local Law 19, which amended NYCCBL § 12-307(a)(4) to include the petitioned-for employees. NYCCBL § 12-307 now provides in relevant part:

> (a) Subject to the provisions of subdivision b of this section and subdivision c of section 12-304 of this chapter, public employers and certified or designated employee organizations shall have the duty to bargain in good faith on wages

(including but not limited to wage rates, pensions, health and welfare benefits, uniform allowances and shift premiums), hours (including but not limited to overtime and time and leave benefits), working conditions and provisions for the deduction from the wages or salaries of employees in the appropriate bargaining unit who are not members of the certified or designated employee organization of an agency shop fee to the extent permitted by law, but in no event exceeding sums equal to the periodic dues uniformly required of its members by such certified or designated employee organization and for the payment of the sums so deducted to the certified or designated employee organization, subject to applicable state law, except that:

* * *

(2) matters which must be uniform for all employees subject to the career and salary plan, such as overtime and time and leave rules, shall be negotiated only with a certified employee organization, council or group of certified employee organizations designated by the board of certification as being the certified representative or representatives of bargaining units which include more than fifty percent of all such employees, but nothing contained herein shall be construed to deny to a public employer or certified employee organization the right to bargain for a variation of a particular application of any city-wide policy or any term of any agreement executed pursuant to this paragraph where considerations special and unique to a particular department, class of employees, or collective bargaining unit are involved;

* * *

(4) all matters, including but not limited to pensions, overtime and time and leave rules which affect employees in the uniformed police, fire, sanitation and correction services, or any other police officer as defined in subdivision thirty-four of section 1.20 of the criminal procedure law who is also defined as a police officer in this code, shall be negotiated with the certified employee organizations representing the employees involved. For purposes of this paragraph only, employees of the uniformed fire service shall also include persons employed by the fire department of the city of New York as fire alarm dispatchers and supervisors of fire alarm dispatchers. <u>For purposes of this paragraph only, employees of the uniformed fire service shall also include persons employed by the fire department of the city of New York as emergency medical technicians and advanced emergency medical technicians, as those terms are defined in section three thousand one of the public health law, and supervisors of emergency medical technicians or advanced emergency medical technicians</u>. . . .[3]

Following the enactment of Local Law 19/2001, the City commenced an action in New

[3] The underlined portion represents the language which was added to NYCCBL § 12-307(a)(4) by Local Law 19/2001.

York State Supreme Court entitled *The Mayor of the City of New York v. Council of the City of New York*, Index No. 404987/01. The City's complaint, dated August 17, 2001, seeks a judgment declaring the amendment to NYCCBL § 12-307(a)(4) unlawful. The City claims that: (1) the Mayor has the exclusive power and authority to bargain agreements collectively with employee organizations, and the amendment restricts, usurps, and erodes the Mayor's power to do so; (2) the Commissioner of the Department of Citywide Administrative Services has the exclusive power to classify civil service employees, and the amendment which reclassifies career and salary employees as uniform personnel is in violation of the Civil Service Law and the City Charter; and (3) the amendment is violative of public policy. Issue was joined in June 2002. There is no indication when there will be a final and binding decision on whether the Council's amendment to NYCCBL § 12-307(a)(4) was unlawful.

On January 30, 2002, the Union filed the instant petition seeking to certify the petitioned-for EMS personnel as a separate bargaining unit. The pleadings were complete on July 19, 2002. By letter dated October 7, 2002, the Director of Representation granted the City's request to allow the parties to file briefs on whether the amendment to NYCCBL § 12-307(a)(4), which adds EMS personnel to the provision, necessitates a separate bargaining unit for them or as a result of the amendment, whether a separate bargaining unit for EMS personnel is appropriate. Subsequently both parties informed the Director of Representation that they did not wish to files briefs.

DISCUSSION

This Interim Decision addresses the question whether the amendment adding EMS

personnel to the provision to NYCCBL § 12-307(a)(4) mandates their placement in separate bargaining unit. We conclude that the inclusion of the petitioned-for employees in NYCCBL § 12-307(a)(4) does not compel the establishment of a separate bargaining unit for them. However, removing these employees from their current bargaining unit is proper because they now have the right to bargain independently from those employees who must negotiate certain terms and conditions of employment on a Citywide basis.

NYCCBL § 12-307(a)(1) through (5) prescribes levels at which certain mandatory subjects may be bargained. Until now, EMS personnel, as members of the career and salary plan, have been covered by those matters negotiated at the Citywide level pursuant to NYCCBL § 12-307(a)(2). Local Law 19/2001 makes subdivision (a)(4), the uniformed services or unit level of bargaining, instead of subdivision (a)(2), the Citywide level of bargaining, applicable to EMS personnel. The effect of transferring EMS personnel from the governing provisions of NYCCBL § 12-307(a)(2) to § 12-307(a)(4), is to remove them from coverage of the Citywide Agreement and to accord them the same bargaining rights as other uniformed employees have. However, contrary to the Union's claim, this amendment does not provide the basis to rule as a matter of law that certification of a separate and independent unit is mandated or even appropriate. The amended statute describes only the duty to bargain over conditions of employment for EMS personnel, not the creation of appropriate bargaining units for them.

Pursuant to NYCCBL § 12-309(b)(1),[4] the power to determine whether a bargaining unit is appropriate is vested with this Board utilizing the factors set forth in § 1-02(k) of the Rules of

[4] NYCCBL § 12-309(b)(1) provides in relevant part that this Board is charged with the duty "to make final determinations of the units appropriate for purposes of collective bargaining between public employers and public employee organizations."

the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("RCNY").[5] Given that the statutory amendment now allows the petitioned-for employees the right to bargain independently, their inclusion in the existing unit is no longer appropriate. Therefore, we refer the matter to the Director of Representation for further processing of the petition in order to resolve other issues concerning the appropriateness of the petitioned-for bargaining unit.

[5] RCNY § 1-02(k) states that in determining appropriate bargaining units, the Board will consider, among other factors:

(1) Which unit will assure public employees the fullest freedom in the exercise of the rights granted under the statute and the applicable executive order;

(2) The community of interest of the employees;

(3) The history of collective bargaining in the unit, among other employees of the public employer, and in similar public employment;

(4) The effect of the unit on the efficient operation of the public service and sound labor relations;

(5) 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;

(6) Whether the unit is consistent with the decisions and policies of the board.

INTERIM 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 Petition for Certification filed by District Council 37, Docket No. RU-1246-02, is remanded to the Director of Representation for further processing of the petition.

DATED: February 10, 2003
New York, New York

Marlene A. Gold
Chair

Carol A. Wittenberg
Member

George Nicolau
Member