OSA v. City & HHC,74 OCB 1 (BOC 2004) [1-2004 (Interim Decision)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF CERTIFICATION

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In the Matter of the Certification Proceeding

-between-

ORGANIZATION OF STAFF ANALYSTS, Decision No. 1 - 2004

Petitioner, Docket No. AC-11-03

-and-

THE CITY OF NEW YORK AND
THE CITY OF NEW YORK HEALTH AND
HOSPITALS CORPORATION,

Respondents.

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INTERIM DECISION

On July 14, 2003, the Organization of Staff Analysts ("Union") filed a petition for certification, docketed as AC-11-03, seeking to add 240 employees in the title Senior Management Consultant (Business Organization and Methods) at the New York City Health and Hospitals Corporation ("HHC") to Certification No. 3-88, which presently covers the title Staff Analyst and related titles. Opposing the petition, HHC alleges that its determination that the employees are managerial and/or confidential is entitled to broad deference and that its enabling legislation, the New York City Health and Hospitals Corporation Act, N.Y. Unconsolidated Law §§ 7381-7406 (2003) ("HHC Act"), provides the applicable standard for determining whether the employees are managerial and/or confidential. Regarding these threshold questions, this Board finds that HHC's designation of the employees as managerial and/or confidential is not entitled

to deference and that the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") and the New York Civil Service Law Article 14 ("Taylor Law") govern the determination of managerial and/or confidential status.

POSITIONS OF THE PARTIES

HHC's Position

HHC argues that its personnel decisions are entitled to broad deference since HHC Act § 7382 specifies the necessity for "a system permitting legal, financial and *managerial flexibility*." (Emphasis added.)

In addition, HHC asserts that the standard for determining managerial and/or confidential status set forth in HHC Act § 7385.11 is more liberal than the standard applied under the NYCCBL and the Taylor Law.[1] According to HHC, the HHC Act preempts the NYCCBL and

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[1] HHC Act § 7385.11 empowers HHC:
To employ officers, executives, management personnel, and such other employees who formulate or participate in the formulation of the plans, policies, aims, standards, or who administer, manage or operate the corporation and its hospitals or health facilities, or who assist and act in a confidential capacity to persons who are responsible for the formulation, determination and effectuation of management policies concerning personnel or labor relations, or who determine the number of, and appointment and removal of, employees of the corporation, fix their qualifications and prescribe their duties and other terms of employment.
All such personnel shall be excluded from collective bargaining representation.

NYCCBL § 12-305 provides, in relevant part:
[N]either managerial nor confidential employees shall constitute or be included in any bargaining unit, nor shall they have the right to bargain collectively; provided, however, that public employees shall be presumed eligible for the rights set forth in this section, and no employee shall be deprived of these rights unless, as to such employee, a determination of managerial or confidential status has been rendered by the board of certification.

the Taylor Law because HHC Act § 7405 provides that "[i]nsofar as the provisions of this act are inconsistent with the provisions of any other law, general, special or local, the provisions of this act shall be controlling." For these reasons, HHC argues that the Board should review HHC's designation of the employees as managerial and/or confidential under the HHC Act's more liberal standard.

HHC contends that the Board's decision in *Communication Workers of America*, Decision No. 5-87, should not be followed because that case considered different titles and did not address the preemptive effect of § 7405 of the HHC Act. Since the doctrines of collateral estoppel and *stare decisis* are inapplicable, the Board should consider HHC's statutory arguments anew.

Union's Position

The Union asserts that issues raised by HHC were fully litigated and decided in *Communication Workers of America*, Decision No. 5-87. According to the Union, HHC did not cite HHC Act § 7405 in that case despite a full and fair opportunity to do so. Section 7405 does not raise a new issue. At most, it is another argument in support of HHC's preemption claim. The Union argues that, therefore, the doctrine of collateral estoppel prevents HHC from relitigating these issues.

Section 201.7(a) of the Taylor Law provides, in relevant part:
Employees may be designated as managerial only if they are persons (i) who formulate policy or (ii) who may reasonably be required on behalf of the public employer to assist directly in the preparation for and conduct of collective negotiations or to have a major role in the administration of agreements or in personnel administration provided that such role is not of a routine or clerical nature and requires the exercise of independent judgment. Employees may be designated as confidential only if they are persons who assist and act in a confidential capacity to managerial employees described in clause (ii).

The Union further argues that there are no grounds for the Board to overrule its prior determination that the Taylor Law provides the applicable criteria in determining managerial and/or confidential status. The preemption cases cited by HHC are distinguishable because HHC Act § 7390.5 specifically provides that HHC is subject to the Taylor law and the NYCCBL.[2] The Union claims that the Board is thus bound by *stare decisis* to apply the Taylor Law definitions in determining eligibility for collective bargaining.

DISCUSSION

This Board previously addressed the preemption and deference issues raised by HHC in *Communication Workers of America*, Decision No. 5-87. In that case, a union sought to add HHC employees in the titles Assistant Coordinating Manager and Coordinating Manager to an existing bargaining unit. HHC argued that the description of managerial and confidential duties in HHC Act § 7385.11 is broader than the Taylor Law criteria and that under the rules of general statutory construction the HHC Act superseded – or, in the alternative, supplemented – the Taylor Law criteria. In addition, HHC argued that its designation of the titles as managerial since their inception was analogous to a prior Board determination of manageriality, rebutted the presumption of eligibility for bargaining, and shifted the burden of proof to the union.

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[2] HHC Act § 7390.5 provides, in relevant part:
The corporation, its officers and employees shall be subject to article fourteen of the civil service law [Taylor Law] and for all such purposes the corporation shall be deemed "public employees," provided, however, that chapter fifty-four of the New York City Charter and Administrative Code [NYCCBL] and Executive Order No. 52 dated September 29, 1967, promulgated by the mayor of the city of New York, shall apply in all respects to the corporation, its officers and employees except that paragraph seven and paragraph eight of said executive order shall be not applicable to the corporation, its officers and employees.

The Board rejected these arguments. The Board stated:

> The clear language of the statute [HHC Act § 7390.5] thus expresses the Legislature's intent that HHC and its employees be subject to the provisions of both the Taylor Law and the NYCCBL. No exception or limitation is placed upon the applicability of these laws. Certainly, the Legislature knew how to express an exception when such was intended, as was done concerning the applicability of certain terms of Executive order No. 52.
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> [A]t the time the HHC Act was passed, the Legislature was or should have been aware of prior decisions of this Board in cases which involved, inter alia, employees of HHC's predecessor, the Department of Hospitals, in which managerial/confidential criteria were used which were substantially equivalent to the subsequently-enacted Taylor Law criteria. We believe that if the Legislature had intended that different criteria be applied by this Board with respect to employees of HHC, it would have said so in placing HHC under this Board's jurisdiction.[3]
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> [In *Civil Service Technical Guild v. Anderson*, 55 N.Y.2d 618 (1981)], the Court of Appeals in confirming a decision of this Board which affected, *inter alia*, employees of HHC, made no mention of the § 7385 "criteria" but affirmed that this Board is required to administer the Taylor Law in determining questions of managerial status, and that other guidelines or indicia of manageriality may be used only with constant reference to the Taylor Law criteria and its goals.[4]

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[3] When the Taylor Law and the NYCCBL were enacted in 1967, both statutes were silent as to the status and bargaining rights of managerial and/or confidential employees. Once this Board was established in 1968, we held that managerial and/or confidential employees were excluded from bargaining units and set forth criteria to determine managerial and/or confidential status. The HHC Act was enacted in 1969. The Taylor Law was amended in 1971 to set forth the definitions of managerial and/or confidential and to provide that managerial and/or confidential employees were not to be considered public employees for purposes of collective bargaining. *See* Taylor Law § 201.7(a); *see also Ass'n of Deputy Wardens and Deputy Superintendents*, Decision No. 73-71 at 9 (holding that the criteria previously used by the Board were substantially equivalent to the criteria set forth in the Taylor Law). The NYCCBL was amended in 1972 to provide that managerial and/or confidential employees should not be included in bargaining units and do not have collective bargaining rights. *See* NYCCBL § 12-305.

[4] In the underlying Board decision in *Civil Service Technical Guild*, we rejected HHC's argument that its classification of titles as managerial was controlling under HHC Act § 7385.11. See *Local 375, Civil Service Technical Guild, District Council 37*, Decision No. 45-78 at 34,

Id. at 18-20. The Board did not find that the criteria set forth in the HHC Act were broader than Taylor Law criteria. *Id.* at 20. "Both sections are designed to accomplish the same end," and "the definition contained in § 201.7(a) [of the Taylor Act] did not exist when § 7385.11 [of the HHC Act] was enacted, so identity of language could not be expected." *Id.* at 21. The descriptions in HHC Act § 7385.11 were "to be construed as indicia of managerial and/or confidential status, to be used by this Board solely as aids in applying the governing criteria set forth in § 201.7(a) of the Taylor Law." *Id.* at 22. The Board "emphasized that it will be the Taylor Law criteria which will control our final determination in this matter." *Id.* at 23. Lastly, the Board noted that "the employer's unilateral designation of the titles as managerial is entitled to no weight in assessing the obligation to be placed on the union." *Id.* at 25.

HHC has not raised a persuasive argument that *Communication Workers of America*, Decision No. 5-87, should not be followed. The fact that the case concerned different titles at HHC is insignificant since the impact of the legal issues addressed was not limited to those titles. Similarly, the fact that the decision did not specifically cite HHC Act § 7405 is inconsequential. The Board considered and rejected the argument that § 7405 supports, namely that the Taylor Law was preempted because it was inconsistent with the provisions of the HHC Act. The cases that HHC cited concerning HHC Act § 7405 do not further HHC's position.[5] They are

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rev'd sub nom. Civil Service Technical Guild, Local 375 v. Anderson, N.Y.L.J., Oct. 9, 1979, at 10 (Sup. Ct. N.Y. Co.), *aff'd*, 79 A.D.2d 541 (1st Dep't 1980), *rev'd on dissenting mem.*, 55 N.Y.2d 618 (1981).

[5] In *Burnes v. Quinones*, 68 N.Y.2d 719, 721-722 (1986), the court held that managerial employees were not entitled to the protection afforded to honorably discharged veterans under Civil Service Law § 75. In reaching that determination, the court relied upon HHC Act § 7385, which distinguishes between managerial and non-managerial employees; HHC Act § 7390.1, which requires HHC to promulgate rules and regulations consistent with the Civil Service Law

distinguishable because HHC Act § 7390.5 specifically provides that HHC is subject to the Taylor Law and the Taylor Law is consistent with the criteria set forth in HHC Act § 7386.11.

For the reasons set forth in *Communication Workers of America*, Decision No. 5-87, this Board holds that the determination of managerial and/or confidential will be governed by the NYCCBL and the Taylor Law and that HHC's designation of employees in the title Senior Management Consultant (Business Organization and Methods) as managerial and/or confidential is not entitled to deference. Therefore, the case is remanded to determine whether the petitioned-for employees are eligible for bargaining under § 12-305 of the NYCCBL and § 201.7(a) of the Taylor Law.

Dated: January 20, 2004
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

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especially for non-managerial employees; and HHC Act § 7405. In *New York City Health and Hospitals Corp. v. Council of the City of New York*, 303 A.D.2d 69, 70 (1st Dep't 2003), the court held that Local Law 26 of 2001, which required HHC to utilize peace officers employed by the City or HHC as security guards, was invalid in that it unconstitutionally conflicted with and was preempted by the HHC Act, which permitted HHC to outsource security to private services.