LOCAL 246, S.E.I.U. V. CITY, 8 OCB 61 (BOC 1971) [Decision No. 61-71 (Cert.)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF CERTIFICATION

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In the Matter of

NEW YORK CITY LOCAL 246,
S.E.I.U., AFL-CIO

DECISION NO. 61-71

-and-

THE CITY OF NEW YORK AND
RELATED PUBLIC EMPLOYERS

DOCKET NO. RU-246-70

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In the Matter of

CITY EMPLOYEES UNION,
LOCAL 237, I.B.T.

-and-

DOCKET NO. RU-256-71

THE CITY OF NEW YORK

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DECISION, ORDER, AND
DIRECTION OF ELECTION

On December 16, 10,70, Local 246, S.E.I.U., filed a petition (RU-246-70) requesting certification as the collective bargaining representative of a City-wide unit of Sign Painters and Letterers. About fifteen persons are employed in the two titles in six City agencies.

On February 19, 1971, Local 237, I.B.T., filed a petition (RU-256-71) requesting certification as the collective bargaining representative of the Painters, House Painters, Foreman Painters and Foreman House Painters (hereinafter called "Painter Titles"). About 320 Painters and House Painters, and about 90 Foremen Painters and Foreman House Painters are employed in thirteen City departments and the Housing Authority.

The six titles involved in the two cases are all prevailing rate titles subject to §220 of the Labor Law.

District Council 9, Brotherhood of Painters, Decorators, and Paper Hangers of America, AFL-CIO (hereinafter called District Council 9), which had been certified after an election in 1969 (Dec. #37-69) for the mixed supervisory-non-supervisory unit of Painter Titles, and whose contract for non-economic terms expires on July 31, 1971, intervened in case No. RU-256-71, but not in case No. RU-246-70.

On March 30, 1971, the Board of Certification ordered the two cases consolidated and a hearing was held before Ernest Doerfler, Esquire, Trial Examiner, on April 27, 1971.

In earlier cases involving the very same titles, District Council 9, contrary to its present position, had contended for the inclusion of Sign Painters and Letterers in the same unit as the Painter titles.

Upon consideration of its investigation, and after due deliberation, the Board of Certification issues the following decision.

It is undisputed, and we find and conclude, that Local 237, 1.B.T.; Local 246, S.E.I.U., AFL-CIO; and District Council 9, B.P.D.P.H.A., AFL-CIO, are public employee organizations in fact and within the meaning of the New York City Collective Bargaining Law.

I. The Appropriate Bargaining Unit

It is clear from the record that the City and the three unions are in agreement that the Sign Painters and Letterers constitute an appropriate bargaining unit separate and apart from the House Painters, Painters, Foreman Painters and Foreman House Painters.

No specifications or other descriptions are available for the title of Sign Painter, but the parties agree that the title is virtually identical with that of Letterer. There is no title of Foreman Letterer.

Both Painters and House Painters, under supervision, mix and match paints, and prepare, prime, and finally coat walls and other surfaces, both inside and outside, with paint. Painters also rig lines and scaffolds. Letterers, under supervision, hand paint letters and displays directly on objects such as trucks and office doors, and also by hand, make lettered or picture layouts from which they then cut silk screen stencils for the mechanical mass production of the layouts on a variety of materials (cardboard posters, plaques, peelbacks, etc.). When assigned, they may work on scaffolds on rigging, though this is rare. Painters and House Painters are sometimes called upon to do lettering with the use of ready-made stencils.

Sign Painters and Letterers must have a knowledge of type faces and must possess draftsman and stencil-cutting skills. Painters must possess a knowledge of mixing paint components and matching colors. Sign Painters and Letterers employ pens, cutting knives, inks and show card colors; painters use brushes, rollers and buckets of paint. No prior experience of wall painting is required for Sign Painters and Letterers, and no lettering or layout experience is required for Painters.

Local 246, S.E.1.U., contends that the Sign Painters and Letterers are graphic arts personnel while the painter titles are building construction workers.

Only two witnesses were called to testify to the relationship between the Sign Painters and Letterers and the Painter Titles -- one, a provisional Letterer in the Sanitation Department, called by Local 246, S.E.I.U., the other, a Foreman House Painter serving as Acting Supervisor of the Painter Field Office, New York City Housing Authority,

called by Local 237,.I.B.T. The Housing Authority, however, employs no Sign Painters or Letterers, virtually all the lettering and display work being contracted out to commercial establishments. As a result, the only testimony received in the case as to relationship between Sign Painters and Letterers and the Painter Titles, concerns itself with the Sanitation Department. That department, however, employs the largest single group of Letterers in the City (five) and also a large group of Painters (twenty-three).

For the reasons cited hereinafter, we find that the employees in the six titles involved in this proceeding have a sufficient mutuality of interest in their terms and conditions of employment, are sufficiently allied in skills, and, more uften than not, are under the same overall administrative supervision, warranting their inclusion in a single unit appropriate for bargaining purposes.

Thus, at the Sanitation Department, the Letterers' workshop adjoins the workroom in which Painters handpaint furniture, cans, and truck parts. The Letterers also frequently handpaint or affix mechanically reproduced signs on garbage trucks and other vehicles which are sprayed by Painters in booths at another location on the same premises. The Letterers, Painters and House Painters who work in the paint shop are subject to the same overall administrative supervision, being supervised by the same Foreman Painter. Immediate or technical supervision of the Letterers is done by one of their own number, a permanently appointed Letterer who acts as foreman (there is no title of Foreman Letterer), but, as stated above, the general and overall administrative supervision (signing in and out, attendance, approval of leave, intercession with superiors), is done by the Foreman Painter who is the superior of the acting foreman as well. The Foreman Painter also assigns to Letterers the lettering work to be done on trucks after the Painters have finished spraying them.

In addition to these job contracts and the common supervision of Letterers and Painters at the Sanitation Department, on at least two occasions the City Civil Service Commission has acknowledged in examination notices that the duties and skills of the titles are related. Thus, in 1962, an examination notice for Painter declared that the eligible list resulting from the examination might be certified as appropriate for Fouse Painter and might also be selectively certified for vacancies in the title of Letterer; and, in 1967, in a promotion examination for Foreman Painter, Letterers were declared eligible on a collateral basis along with Painters and House Painters, although this was not to be considered a precedent for future examinations.

Other labor relations agencies have combined Sign Painters and Letterers in units embracing so-called "construction" occupations. Thus, the National Labor Relations Board has included Sign Painters and Sign Letterers in a basic production and maintenance unit, dismissing as inappropriate a petition for a separate unit of these titles. (Display Sign Services Inc., 180 N.L.R.B. No. 6) The New York State Public Employment Relations Board has included in its Operational Services Unit for state employees, painters, sign shop painters, printing shop operators, and construction craftsmen of all sorts. (In the Matter of State of New York, 2 PERB 3036)

An important consideration in unit determination in the municipal public employment, in addition to the traditional tests of the private sector, must be the scope of bargaining with which the proposed unit will be faced. All the titles in the instant cases are prevailing rate titles in the Skilled Craftsman and Operative Service. The collective bargaining of such 5220-titles is limited to non-economic matters, i.e., subjects other than wages and supplements. Such a unit may properly be more diverse and heterogeneous than a bargaining unit of ordinary titles faced with the full range of bargainable issues.

Accordingly, we find and conclude that there exists a sufficient mutuality of interest between the related titles of Sign Painter, Painter, House Painter, Foreman Painter,

an d Foreman House Painter to justify their inclusion in the same bargaining unit which we find is appropriate. We shall, therefore, dismiss the petition oil Local 246, S.E.I.U., AFL-CIO, as inappropriate. D.C. 9 and Local 237, I.B.T. have expressed a desire to appear on the ballot if the Board found appropriate a unit of all six titles. The request is granted.

II. Request for Self-Determination Election

Although Local 237, I.B.T. filed a petition for an election among the Painters, House Painters, Foreman Painters, and Foreman House Painters, it requested at the hearing that the Foreman Painters and Foreman House Painters be afforded a current opportunity to vote, pursuant to §1173-3.01 of the New York City Collective Bargaining Law, as to whether they desire to be placed in the same unit as the non-supervisory employees. In an earlier proceeding (Dec. No. 30-69), the City, Local 237, and D.C. 9 stipulated that these employees were supervisory, and in 1969, these supervisory employees voted in a separate election to be part of a combined unit of supervisory-nonsupervisory employees (see Dec. No. 37-69).

Local 237, in an implied reference to a principle concerning self-determination elections enunciated by the National Labor Relations Board, urges a further self-determination election among the supervisory employees because " supervisors who are given the option to either be or not be in a unit with a subordinate title do not give up their option permanently once they have exercised it in an election." This principle finds support with respect to <u>professional</u> employees under §9(b)(1) of the Labor Management Relations Act ("There is nothing in the statute limiting the privilege thus accorded to <u>professional</u> employees <u>to a single opportunity</u> in the course of their employment for a particular employer" <u>Westinghouse Electric Corp</u>., 39 N.L.R.B. 1039). However, the same principle does not, nor can it, extend to <u>supervisory</u> employees for the reason that: "Under express provisions of the National Labor Relations Act * * * individuals employed as supervisors are not within the scope of the protective provisions extended to employees" (51. C.J.S. Labor Relations, Sec. 41, p. 654 and Sec. 182, p. 951).

However, assuming the principle of self-determination was applicable to both supervisory and professional employees, the need to fashion basic policy would still not compel us to accept a principle merely because it has been found salutary under the LMRA. The Labor Management Relations Act cannot be imported wholesale into the NYCCBL. There are many differences between the statutory schemes. (Railroad Trainmen v. Terminal Co., U.S.S.C. (1969), 70 LRRM 2961, 2966, pointing out the need to distinguish between the LMRA and Railway Act.)

We point also to the state-federal relationship in which the New York State Labor Relations Board has repeatedly emphasized that in matters of policy it is governed by the State Act and while it may, on occasions, follow precedents of the National Labor Relations Board and the Federal Courts, such precedents are neither controlling nor binding upon the State Board. "While it has been observed that opinions of the Federal Courts construing the National Labor Relations Act are entitled to great weight and should be considered [citing cases]; nevertheless in construing the State Act such decisions are not binding on our courts." (N.Y.S.L.R.B. v. Ward Shaving Corp., referred to in footnote 293, 29th Annual Analysis of Decisions. New York State Labor Relations Board (1965) p. 96; see also New York State Labor Relations Board v. Post Pharmacy, 208 Misc. 78, 142 N.Y.S. 2d 669, where court sustained the NYSLRB denying close relatives of employer to vote in representation election, pointing out that the State Board policy is contrary to the policy of the NLRB. Graegol Realty Co., 28 SLRB 460 (1965) where the SLRB refused to follow or adopt the policy of the NLRB with respect to the application of a 60 day "insultated period" as related to the contract-bar doctrine. Ferber Button & Novelty Co., Inc., 26 SLRB 120,

124, 125 where the State Board held that a single employee unit is appropriate though the policy of the NLRB is to refuse to certify a bargaining representative for a unit composed of a single employee (see Denver-Colorado Springs v. Pueblo Motor Way, N.L.R.B., 1961, 47 LRRM 1145). Metropolitan New York Nursing Home Association Inc., 28 SLRB 417, 420 affirming policy of SLRB to certify supervisory, managerial and confidential employees for bargaining purposes while the NLRB either by statute or policy does not certify such eMDloyees for bargaining purposes. American Cable and Radio Corp., - Supervisors - 42 LRRM 1322; Palace Laundry Dry Clearing Corp. - Managerial - 21 LRRM 1039; B. F. Goodrich - Confidential - 37 LRRM 1383). It is of further significance to note that the New York Court of Appeals has recognized differences between the Taylor Law and the State and Federal Labor Relations Acts. (Civil Service Employees Assn. v. Helsby, 21 N.Y. 2d 541, 289 N.Y.S. 2d 203, 206).

While, as noted, Local 237 urges a second self-determination election among the Supervisory employees, the City and D.C. 9, fox different reasons, oppose an election, the City contending that there is no showing of any desire among the supervisory employees for a self-determination election, and D.C. 9 contending that it "would neither be proper -- nor would it be legally permissible as a matter of substantive law, "citing W. T. Grant & Co., 179 NLRB 114.

For the reasons hereinafter set forth, it is our determination not to direct a second self-determination election among the supervisory employees.

If we were to establish the principle that self-determination elections in mixed units of supervisory and non-supervisory employees previously certified as appropriate, are automatically required to be held whenever the supervisory employees are involved in the choice of a new union, it would jeopardize the stability of the large number of mixed units which. the Board "inherited" from the old City Labor Department and which it has created in the past three years. This would hardly contribute to sound and stable labor relations, and would tend to abet the very fragmentation of units and the proliferation of small units which the Board, as a matter of policy, has seen fit to discourage. (See District Council 37, AFSCME, AFL-CIO, Dec. No. 44-68, for a statement of the Board's policy favoring the consolidation of occupationally related titles: "wherever it is possible to do so without severe dislocations or inequities.")

The New York City Collective Bargaining Law directs the Board of Certification "to make final determination 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 thereunder, and under executive orders, consistent with the efficient operation of the public service and sound labor relations" (our emphasis). (Section 1173-5.0 b (1)). The Board, in addition, is authorized to apportion whatever weight it deems wise to these criteria. (Rule 2.10 Appropriate Units - Determination, Consolidated Rules).

In all the circumstances of this case, therefore, and particularly considering the Board's policy to structure broad and comprehensive units and to prevent the proliferation of narrow units, we conclude that there is no compelling reason why, absent unusual circumstances, supervisory employees, having once been given an opportunity in a self-determination election to express their desires as to inclusion in the same unit as non-supervisor employees, should be polled repeatedly as to their wishes regarding such grouping whenever a representation election is sought and directed.

Accordingly, we shall not direct the holding of a self-determination election among the Foreman Painters and Foreman House Painters.

IV. The Election

We will, therefore, direct an election among the employees in the unit found appropriate in Section II, above, to determine their desires concerning representation for the purposes of collective bargaining.

ORDER AND DIRECTION OF ELECTION

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 of Local 246, S.E.I.U., AFL-CIO (Docket No. RU-246-70), be, and the same hereby is dismissed; and it is hereby further

DIRECTED, that as part of the investigation authorized by the Board, an election shall be conducted by the Board, or its agents, at a time, place, and during the hours to be fixed by the Board, among the Painters, House Painters, Foreman House Painters, Foreman Painters, Sign Painters, and Letterers employed by the City of New York and related public employers subject to the jurisdiction of the Board of Certification who were employed during the payroll period immediately preceding the date of this Direction of Election (other than those who have voluntarily quit or who have been discharged for cause before the date of election), to determine whether or not they desire to be represented for the purposes of collective bargaining by Local 2_17, I.B.T., District Council 9, B.P.D.B.P.H.A., AFL-CIO, or neither.

DATED: New York, N.Y.
August 16 , 1971.

ARVID ANDERSON
Chairman

WALTER L. EISENBERG
Member

ERIC J. SCHMERTZ
Member