40 OCB 11 (BOC 1987) [DECISION NO. 11-87]
OFFICE OF COLLECTIVE BARGAINING
BOARD OF CERTIFICATION

In the Matter of the Petition of UNITED FEDERATION OF LAW ENFORCEMENT OFFICERS, -and- THE CITY OF NEW YORK, -and- DISTRICT COUNCIL 37, AFSCME, AFL-CIO.	DECISION NO. 11-87 DOCKET NO. RU-982-87

INTERIM DECISION AND ORDER

On January 21, 1987, the United Federation of Law Enforcement Officers (hereinafter "UFLEO" or "petitioner") filed a petition seeking certification as the exclusive collective bargaining representative of a unit consisting of approximately 165 employees in the title Urban Park Ranger. This title is currently part of a bargaining unit composed of approximately 5000 employees serving in thirty-three non-supervisory custodial, maintenance and related titles represented by District Council 37, AFSCME, AFL-CIO (hereinafter "D.C. 37"). A collective bargaining agreement covering this unit is due to expire on June 30, 1987.

D.C. 37, by letter dated February 18, 1987, moved to intervene in the proceeding and requested permission

to file, within three weeks, a written memorandum in support of its application to intervene and in opposition to the UFLEO's petition for certification.

By letter dated March 5, 1987, the City of New York, by its Office of Municipal Labor Relations (hereinafter "the City" or "OMLR"), advised the Office of Collective Bargaining ("OCB") that it opposed the petition on the ground that the change in certification sought by the UFLEO would result *in* the fragmentation of a pre-existing bargaining unit.

On March 11, 1987, D.C. 37 submitted a detailed letter brief in which it argued that (1) as the incumbent certified representative of Urban Park Rangers it is a necessary party to these proceedings and should be permitted to intervene, and (2) the petition should be summarily dismissed without further proceedings because:

(a) the UFLEO is not a bona fide labor organization;

(b) the showing of interest supplied by petitioner is inadequate;

(c) the appropriate bargaining unit is the present unit for which D.C. 37 is the certified representative; and

(d) the UFLEO has not asserted any basis for challenging the appropriateness of the present unit.

On March 23, 1987, petitioner responded to the respective positions of D.C. 37 and OMLR and requested that the Board immediately direct an evidentiary hearing on the question of the appropriate bargaining unit for urban Park Rangers.

The Motion to Intervene

We note that neither the petitioner nor the City opposes the application to intervene. Accordingly, and for the additional reason that D.C. 37 is the incumbent certified representative of employees subject to the petition, the motion to intervene shall be granted.[1]

The Motion for Summary Dismissal

(a) Labor organization status of the petitioner

An organization which does not qualify as a labor organization within the meaning of the NYCCBL is not entitled to represent public employees or to have a certification petition processed by this Board.[2] However, the test of bona fide labor organization status is not a demanding one. Section 1l73-3.0j of the New York City Collective Bargaining Law ("NYCCBL") provides that

1/ Decision No. 33-82. See, Decision Nos. 5-78; 4-78;27-72; 7-72; 53-71.

2/ Decision No. 21-76.

> the term "public employee organization" shall mean any municipal employee organization and any other organization or association of public employees, a primary purpose of which *is* to represent public employees concerning wages, hours, and working conditions.

Boards which rule on representation *issues,* including this Board, generally employ such "identifiable indices" of bona fide labor organization status as a constitution and by-laws, recorded membership meetings, election of officers, collection of dues, and maintenance of financial records and bank accounts.[3] In each case,.however, the Board must examine all of the evidence submitted by a union whose status *is* at *issue* and resolve any questions that may be raised by its investigation or by opposing parties. There are no hard and fast rules as to what constitutes a bona fide labor organization. Rather, this *is* a question of fact which must be decided on a case-by-case basis.[4]

In the instant matter, D.C. 37 asserts that petitioner has failed to offer any evidence of its labor organization status "such as constitution, by-laws, a certificate of incorporation, certification of representation of other employees, or an affirmation of no strikes". However,

3/ Id.; 24-76.

4/ Decision No. 21-76.

while petitioner did not submit the aforementioned evidence at the outset, its March 23, 1987 response to D.C. 37's position is accompanied by copies of a constitution and by-laws, a certificate of incorporation which has been filed with the New York State Department of Labor, and a no-strike affirmation. (The latter was initially submitted to the Board together with the petition on January 21, 1987.)

Article 2, Section 3 of the UFLEO Constitution states that the purpose of the organization is "to negotiate wages, hours, working conditions and other economic advantages through organization and collective bargaining ..... Although this statement alone meets the requirements of our statute and of the New York State Public Employees' Fair Employment Act ("Taylor Law"),[5] it is also relevant for our determination of labor organization status that petitioner has a constitution and by-laws.

5/ Section 201.5 of the Taylor Law provides, in relevant part, that "[t]he term 'employee organization' means an organization of any kind having as its primary purpose the improvement of terms and conditions of employment of public employees •••• " It is interesting to note that, in the private sector, pursuant to section 2(5) of the Labor Management Relations Act, an organization need only exist "for the purpose, in whole or in part," of representing employees in collective bargaining, while under the NYCCBL and the Taylor Law, the collective bargaining function must be "a primary purpose" of a public employee organization.

These documents, inter alia, contemplate membership meetings, maintenance of bank accounts and collection of dues. We note further that the UFLEO has elected officers (its petition *in* the instant matter was signed by the vice-president of the organization and the reply papers bear the signature of the organization's president). Therefore, we find that, by submitting the evidence of bona fide already *in* the record *in* this matter, petitioner has made a prima facie showing that it *is* a "public employee organization" within the meaning of section 1173-3.0j of the NYCCBL and section 201.5 of the Taylor Law.

Additionally, we note that petitioner complied with the condition precedent to certification prescribed by section 2.17 of the Revised Consolidated Rules of the Office of Collective Bargaining ("OCB Rules"), *in* that it filed a no-strike affirmation at the commencement of the proceedings herein.[6] D.C. 37's contentions with respect to the required filing of a no-strike affirmation therefore are without merit.

6 Section 2.17 of the OCB Rules provides, *in* relevant part:

> b. No public employee organization shall be certified as an exclusive bargaining representative unless it has filed with the Board a no-strike affirmation as required by the New York State Public Employees Fair Employment Act.

(b) Sufficiency of showing of interest

Section 2.3b(l} of the OCB Rules provides that a petition for certification must be accompanied by "evidence that at least thirty (30) percent of the employees in the appropriate unit, or in each appropriate unit, desire petitioner to represent them for purposes of collective bargaining." The purpose of this requirement is to demonstrate that a substantial number of interested employees support a proposed change in representation.[7] It should be emphasized, however, that the proof of interest requirement does not demand a showing of representative interest; it is an election which ultimately decides this substantive question. Rather, the requirement of a showing of interest serves the limited purpose of enabling the Board to determine whether the surrounding circumstances justify further proceedings on a petition and to screen out petitions which are obviously frivolous.

Courts have uniformly held that the validity of the showing of interest is for administrative determination and may not be litigated by the parties.[8] This principle

7/ Decision No. 50-74.
8/ Intertype Co. v. NLRB, 401 F. 2d 4, 69 LRRM 2067 (4th Cir. 1968), cert. denied, 393 U.S. 1049 (1969); NLRB v. Air Control Products, 335 F. 2d 245, 56 LRRM 2904 (5th Cir. 1964); NLRB v. Swift & Co., 294 F. 2d 285, 48 LRRM 2699 (3rd *Cir.* 1961); Kearney & Trecker Corp. v. NLRB, 209 F. 2d 782, 33 LRRM 2151 (7th Cir. 1953); NLRB v. J.I. Case Co., 201 F. 2d 597, 33 LRRM 2339 (9th Cir. 1953).

also is expressed in section 2.3 of the OCB Rules. Nevertheless, we wish to comment on D. C. 37's objection in the instant matter that the dues checkoff authorization cards submitted by the UFLEO are not a legally sufficient demonstration of interest.

Specifically, it is alleged that section 2.6 of our Rules requires that a showing of interest be made in the form of "designation and authorization cards" and that the UFLEO's submission of dues checkoff cards fails to comply with this requirement because dues checkoff cards "do not authorize the UFLEO to act as the signer's exclusive collective bargaining representative.[9] Petitioner counters, however, that the dues checkoff card is the official application for membership in the UFLEO and, pursuant to Article 3 of the organization's constitution and by-laws, constitutes a designation of the UFLEO as an applicant's "sole and exclusive collective bargaining agent".

9/ Section 2.6 of the OCB Rules provides:

> Proof of Interest-Current. Designation and authorization cards and petitions, submitted as proof of interest under Sections 2.3b, 2.Sb or 2.12 of these rules, must be dated and signed by the employees not more than seven (7) months prior to the commencement of the proceeding before the Board. Proof of interest shall be based on the payroll immediately preceding the date of filing of the petition, unless the Board deems such period to be unrepresentative. •

Dues deduction authorizations routinely are accepted as a form of proof of interest both by this Board and by the New York State Public Employment Relations Board ("PERB").[10] Of course, in the instant case, the signing of a dues checkoff card is not an effective authorization for the deduction of monies from an employee's paycheck because the incumbent certified bargaining representative, D.C. 37, continues to receive the checkoff, or its equivalent in agency fees, by virtue of the existing certification. Nevertheless, petitioner's constitution and by-laws make clear that the act of applying for membership in the UFLEO by completion of "the standard dues checkoff card" constitutes a designation of that organization as "the sole and exclusive representative in all matters of collective bargaining and ••. matters relating to the terms and conditions of employment, once certification has been granted by the appropriate governing body." Furthermore, as the

10/ Section 201.4 of PERB's Rules and Regulations proVIdes, in relevant part:

> (b) in determining whether the evidence submitted to establish a showing of interest is timely, the Director will accept evidence of dues deduction authorizations which have not been revoked, evidence of current membership, original designation cards or petitions which were signed and dated within six months of the submission, or a combination of the three. Designation cards shall be submitted in alphabetical order.

UFLEO submitted simultaneously with its petition dues deduction authorizations, dated and signed less than seven months before the petition was filed, on behalf of a number of Urban Park Rangers substantially in excess of thirty per cent of the employees in the petitioned for unit, it fully complied with the requirements of sections 2.3 and 2.6 of the OCB Rules. For these reasons, we deem the showing of interest supplied by petitioner to be sufficient and shall dismiss D.C. 37's objections thereto.

(c) Appropriate unit placement

Section 1173-S.0b(1) of the NYCCBL provides that this Board shall have the power and duty inter alia:

> to make final determinations 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 hereunder and under executive orders, consistent with the efficient operation of the public service, and sound labor relations ••••

Section 2.10 of the OCB Rules, which is designed to implement NYCCBL Section 1173-S.0b(1), provides that, in determining appropriate bargaining units, the Board will consider, among other factors, the following:

> a. Which unit will assure public employees the fullest freedom in the exercise of the rights granted under the statute and the applicable executive order;
>
> b. The community of interest of the employees;
>
> c. The history of collective bargaining in the unit, among other employees of the public employer, and in similar public employment;
>
> d. The effect of the unit on the efficient operation of the public service and sound labor relations;
> 11.
>
> e. 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;
>
> f. Whether the unit is consistent with the decisions and policies of the Board.

We note that the present certification covering Urban Park Rangers reflects an agreement between the City and D.C. 37, in 1982, to add that title, by accretion, to a large existing unit already certified to D.C. 37.[11] No challenge to the proposed unit placement having been raised at that time, the Board rendered its determination

11/ Certification No. 38B-78, as amended.

without taking evidence at a hearing. In the instant matter, however, there is a dispute as to the appropriate unit for Urban Park Rangers which requires further investigation by the Board.

In its motion for summary dismissal,' D.C. 37 asserts several threshold objections to any further proceedings on the petition. We disagree with each of these arguments. Neither the NYCCBL nor the OCB Rules require that a labor organization seeking a unit different from an existing one must assert in its petition a basis for challenging the appropriateness of the existing unit, or demonstrate that the present unit is not appropriate, or establish that there has been a change in circumstances which would justify a change in unit structure.[12] A determination that a

12/ The Board has required a petitioner to assert a change in circumstances when seeking a different unit in at least two cases. However, both of these cases involved repeated attempts to obtain a result that had been rejected previously by the Board. LOcal 1, International Union of Elevator Constructors and City of New York, Decision No. 12-83; Police Benevolent Association, Long Island Railroad Police, Inc. and City of New York, Decision No. 29-82. See also, OCB Rules §2.20(f) (a petition seeking to have the Board consider anew whether employees are managerial or confidential "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"). In the instant case, there has been no prior Board decision concerning the merits of a separate • bargaining unit for Urban Park Rangers.

particular unit structure is appropriate for collective bargaining is not a finding that such unit is the only appropriate unit. Rather, it is the Board's function, after carefully weighing all of the evidence in the record and considering the criteria prescribed in the Rules, to certify a union to represent employees in an appropriate unit. Our usual procedures permit a petitioner to demonstrate the basis for its challenge to an existing unit at a hearing.

We take this opportunity to comment additionally upon several of petitioner's arguments relating to the unit question, even though this issue cannot ultimately be resolved until the Board has examined evidence that will be adduced at a hearing. First, petitioner has alleged that the existing bargaining unit is not appropriate because, in 1984, Urban Park Rangers were "reclassified" from classification number 05235 to 60421, allegedly as a result of a significant change in their duties, and no order was issued by the Board at that time "allowing" D. C. 37 to continue to represent these employees. It is clear from petitioner's papers, and the records of the OCB confirm, that the change referred to was not a reclassification (which might have required that we examine the duties of employees who were reclassified to determine

whether an existing certification should be altered) but merely a change *in* the title code number for Urban Park Ranger.[13] Such a ministerial change does not affect the certification of a union as the collective bargaining representative of a group of emp1oyees.[14] Similarly, and contrary to petitioner's contention, the alleged change *in* the civil service status of Urban Park Rangers from "provisional" to "civil service" *in* no way disturbs the certification issued by this Board. It should be noted that classification decisions, including the assignment of title code numbers, and the decision to hire employees from a civil service list rather than making non-competitive appointments are matters within the exclusive Jurisdiction of the New York City Department of Personnel. They are to be distinguished from the establishment of appropriate units for purposes of collective bargaining which *is* the responsibility of the Board of Certification.[15]

13/ In a letter dated March 4, 1984, OMLR advised the OCB that a permanent title code number (60421), replacing the temporary title code number (05235), should be added to the original certification for the title Urban Park Ranger.

14/ See, Decision Nos. 17-78; 27-77; 57-76; 18-76; 6-69.

15/ Decision No. 60-69. See, BCB Decision No. B-22-84 (Since classification and unit placement functions are separate and distinct, it was not possible for City to usurp Board's authority to determine appropriate bargaining units through the exercise of its reclassification powers).

Petitioner also argues that the unit certified to D.C. 37 is not an appropriate bargaining unit for Urban Park Rangers because of certain deficiencies in the representation of Rangers by D.C. 37. Thus, the UFLEO alleges that the incumbent is not skilled in areas of law enforcement which are essential to proper labor representation of employees who enjoy the status of "peace officers" under the New York State Criminal Procedure Law. Further, petitioner asserts that D.C. 37 has failed to hold meetings for or to make its representatives available to discuss the concerns of Urban Park Rangers, that it has failed to process their grievances and other "legitimate claims," and has failed to present items in bargaining that were sought to be achieved by this group. Petitioner concludes that D.C. 37 has deprived Urban Park Rangers of their rights to representation under Section 202 of the State Taylor Law.

These allegations amount to a claim that D.C. 37 has breached the duty of fair representation that it owes to the members of its bargaining unit. Such a claim, if proven to be true, might constitute an improper public employee organization practice within the meaning of Section l173-4.2b(1) of the NYCCBL. However, evidence that Urban Park Rangers are dissatisfied with their present repre-

sentation by D.C. 37 has no relevance to a determination of the unit placement issue before the Board *in* the instant matter. We wish to put the parties on notice that evidence concerning the adequacy of D.C. 37's representation will be received only to the extent that it may demonstrate that the interests and needs of Urban Park Rangers are different from those of other titles *in* the existing bargaining unit. As we stated *in* Police Benevolent Association, Long Island Railroad and City of New York:

> If [the employees who are the subject of the petition] believe that they have not been represented adequately *in* particular cases, they have proper legal recourse through the filing of a duty of fair representation charge under the Board of Collective Bargaining's improper practice procedures ••.• However, dissatisfaction with a unit representative's performance *is* not a valid reason to change the make-up of the unit unless it *is* shown that inadequate representation *is* a consequence of conflicting interests with the unit. *[Decision* No. 29-82 at 29].

As petitioner 's remaining contentions and arguments concern the question of unit placement, further discussion of the merits of such claims will be deferred until a final decision *is* rendered *in* this matter.

O R D E R

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

ORDERED, that the motion filed by District Council 37, AFSCME, AFL-CIO for permission to intervene in these proceedings be, and the same hereby is, granted; and it is further

ORDERED, that the motion filed by District Council 37, AFSCME, AFL-CIO seeking summary dismissal of the peti - tion be, and the same hereby is, denied; and it is ~hereby

DIRECTED, that a hearing be held at an early date before a Trial Examiner designated by this Board to take testimony and evidence on the question of appropriate unit placement for employees in the title Urban Park Ranger.

DATED: New York, N.Y.
May 21, 1987

ARVID ANDERSON
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER