

OFFICE OF COLLECTIVE BARGAINING
BOARD OF CERTIFICATION

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In the Matter of the Application
of the CITY OF NEW YORK,

Petitioner,

For an Order declaring the following
positions in the Department of
Consumer Affairs managerial and/or
confidential pursuant to Section
2.20 of the Revised Consolidated
Rules of the office of Collective
Bargaining: Assistant Director of
Enforcement; Deputy Director of
Personnel; Deputy Director of
License Issuance; Deputy Director
of Complaints; Director of Public
Information; Deputy Director of
Adjudication; Attorneys; Secretary
to the Deputy Commissioner; Secretary
to the Director of Budget and
Administration; and Secretary to the
Director of Personnel,

DECISION NO. 4-88

DOCKET NO. RE-159-87

-and-

LOCAL 1180, COMMUNICATIONS WORKERS
OF AMERICA; LOCAL 1549, DISTRICT
COUNCIL 37, AFL-CIO; LOCAL 237,
INTERNATIONAL BROTHERHOOD OF TEAM-
STERS, CHAUFFEURS, WAREHOUSEMEN AND
HELPERS OF AMERICA; LOCAL 371,
SOCIAL SERVICES EMPLOYEES UNION,
DISTRICT COUNCIL 37, AFL-CIO,

Respondents.

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INTERIM DECISION AND ORDER

On January 30, 1987, the City of New York ("City"),
appearing by its Office of Municipal Labor Relations,
filed a petition pursuant to Section 2.20 of the Revised

Consolidated Rules of the office of Collective Bargaining ("OCB Rules") seeking a determination that certain positions in the Department of Consumer Affairs are managerial and/or confidential within the meaning of Section 12-305 of the New York City Collective Bargaining Law ("NYCCBL"). By letter dated February 10, 1987, the City amended its petition which, as amended, affects employees serving in the following civil service titles:

Principal Consumer Affairs Inspector (2)
Office Associate (1)
Principal Administrative Associate (5)¹
Attorney (1)

On April 14, 1987, Local 237, International Brotherhood of Teamsters ("Local 237") which, together with its affiliate, Civil Service Bar Association ("CSBA"), is the certified bargaining representative for employees in the title of Attorney (Certification No. CWR-44/67, as amended) filed an answer and cross-motion to dismiss the City's petition. Local 237 contends that the petition, on its face, fails to state a claim of manageriality and/or confidentiality because it is "devoid of any

¹ A sixth Principal Administrative Associate position (Secretary to the Deputy commissioner) was vacant when this petition was filed. In accordance with longstanding Board policy, we shall make no determination as to the manageriality and/or confidentiality of the vacant position unless, prior to the commencement of hearings in this matter, the City supplies evidence that the position has been filled. E.g., Decision Nos. 28-80; 45-78.; 25-76; 19-75.

factual allegations as to what duties are actually performed by the employees for whom managerial and/or confidential status is sought," and because it is "devoid of any statement showing a nexus between any duties performed by these employees and the Petitioner's claims of manageriality and/or confidentiality." Local 237 further contends that the petition is untimely as it was served upon the union less than five months before the expiration of the applicable collective bargaining agreement (OCB Rules §2.20b(1)).

On April 14, 1987, CSBA filed a separate motion to dismiss the City's petition on the grounds that (a) in contravention of Section 2.20a(9) of the OCB Rules, the City failed to serve notice of the filing of its petition on CSBA, the "jointly certified" collective bargaining agent for employees of the petitioner in the title of Attorney and a necessary party to this proceeding, or to provide proof of such service to the Board; (b) the petition is untimely as CSBA has not yet been served with notice of the petition; and (c) the petition, on its face, fails to state a claim of manageriality and/or confidentiality.

On April 23, 1987, District Council 37 ("D.C. 37") filed an answer and motion to dismiss the petition on behalf of itself and its Local 1549, the certified bar-

gaining representative for employees in the title of Office Associate (Certification No. 46C-75, as amended) and its Local 1759, the certified bargaining representative for employees in the title of Principal Consumer Affairs Inspector (Certification No. 37-78, as amended).²

D.C. 37 contends that the petition, dated and served on January 29, 1987, is untimely under Section 2.7 of the OCB Rules which provides, inter alia, that a petition which raises a question or controversy concerning representation "may not be filed after the expiration of a contract." According to D.C. 37, the last collective bargaining agreement covering employees in the title of office Associate expired on June 30, 1982, the last agreement covering employees in the title of Principal Consumer Affairs Inspector expired on June 30, 1984, and successor agreements have not been concluded for either group.

D.C. 37 argues further that the petition should be dismissed for failing to state a cause of action under Section 201.7(a) of the Civil Service Law and under Section 2.20a(7) of the OCB Rules. Section 201.7(a) of the

² We note that the City named "Local 371, Social Service Employees Union., District Council 37# AFL-CIO" as the certified bargaining representative for employees in the title Principal Consumer Affairs Inspector, while D.C. 37 identifies Local 1759 as the certified representative of these employees. In fact, the certified representative of the unit in which these employees are included is designated as "District Council 37, AFSCME, AFL-CIO and/or its affiliated locals. See, Decision No. 37-78. In any event, it does not appear that Local 371 has any interest in this matter.

Civil Service Law prescribes the criteria for designation of employees as managerial or confidential:

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 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 judgement. Employees may be designated as confidential only if they are persons who assist and act in a confidential capacity to managerial employees describe6 in clause (ii).

Section 2.20a(7) of the OCB Rules requires that a petition alleging that employees are managerial or confidential contain "a statement of the basis of the allegation that the titles and employees affected by the petition [should be so designated]." According to D.C. 37 the City's petition "merely alleges in a conclusory fashion that the duties of the positions described in the petition fit the description set forth in the statute for manageriality and confidential," without alleging facts to support this conclusion and without stating it which of the statutorily-defined managerial or confidential duties each petitioned-for employee performs."

The City did not respond to the above-described motions.

Timeliness and Service

The arguments advanced in support of the respective motions to dismiss the petition as untimely are similar to arguments raised in two other cases filed concurrently with the instant one.³ To this extent, our rulings in Decision Nos. 16-87 and 18-87 dictate the result in the instant case.

Section 2.20b(1) of the OCB Rules provides that a petition seeking to have employees designated as managerial or confidential may be filed:

1. Not less than five (5) or more than six (6) months before the expiration date of the contract covering the employees sought to be designated managerial or confidential;

D.C. 37 and the City assert that the last collective bargaining agreement covering employees in the title of Office Associate (the "clerical contract") expired on June 30, 1982. However, the latest clerical contract on file with the Office of Collective Bargaining, signed and dated May 6, 1987, covers the term from July 1, 1982 to June 30, 1984. Similarly, the latest agreement covering employees in the title Principal Consumer Affairs Inspector

³ Docket Nos. RE-157-87 (Decision No. 18-87) and RE-158-87 (Decision No. 16-87).

on file with the OCB is for the period July 1, 1982 to June 30, 1984. Clearly, both of those agreements have now expired. D.C. 37 argues that, under these circumstances, the City's petition must be dismissed because Section 2.7 of the OCB Rules provides that:

no petition for certification, decertification or investigation of a Question or controversy concerning representation contract.

We note, however, that the filing of a petition for designation of persons as managerial or confidential employees is not expressly covered by the prohibition of Section 2.7 but, rather, is covered by a separate section of the §2.20, which contains separate filing provisions. That section does not prohibit the filing of a petition after the expiration of a contract. However, Section 2.20b(1) does presuppose the existence of a contract with a definite termination date at the time the petition is filed. Here there was no contract in existence in January 1987 and the rule prescribing the time period within which a petition for managerial and confidential designations may be filed can not be strictly applied. Under Section 2.20b(3), however, the Board may, in its discretion, permit the filing of such a petition "where unusual circumstances are involved." For the reasons set forth below,

we have determined that this is an appropriate case for the exercise of that discretion.

First, this Board is cognizant that the bargaining process between the City and its various unions often has involved, as it has in this case, an extended period of time, reaching well beyond the expiration date of a contract.⁴ This practice may make it difficult, or impossible, to calculate the filing period prescribed in Rule 2.20b (1) until after that period has passed. In this case, however, we can fairly conclude that the successor agreements currently being negotiated by the parties will have terminal dates of June 30, 1987. This conclusion derives from the fact that the 1984-87 Municipal Coalition Economic Agreement ("MCEA"), to which D.C. 37 and the City were parties, and which prescribed economic terms and conditions of employment for all non-uniformed municipal employees during the period July 1, 1984 to June 30, 1987, contemplated the incorporation of its terms into separate unit agreements, each of which was to have as its term a period of three years from the

⁴ The provision in Rule 2.7 which precludes petitions filed after the expiration of a contract was inserted in recognition of the lengthy delays that often occur in the negotiation and execution of collective bargaining agreements with the City. See, Decision No. 68-68, n.2.

termination date of the prior separate unit agreement. Based upon the language of the MCEA, it is apparent that each of the uni-L agreements involved in the present matter, when concluded, will have expired on June 30, 1987. It is reasonable, we believe, to take cognizance of the realities of the parties' bargaining processes and to permit the filing of" the instant petition during the period which clearly would have been in conformity with the Rules had the parties completed their bargaining in timely fashion. Accordingly, pursuant to our authority under Section 2.20b(3) of the OCB Rules, we shall find that the City's petition, filed on January 30, 1987, was timely.

Local 237 and CSBA contend that the petition was untimely served on Local 237 because:

[a]llowing 3 days for mailing pursuant to O.C.B. Rule Section 13.5, the Petition is deemed to have been served on the first business day after the expiration of 3 days from the date of mailing, or in this case, Monday, February 2, 1987.⁵

⁵ Section 13.5 of the OCB Rules provides that "[w]here a period of time is measured from the service of a paper, and service is by mail, three (3) days shall be added to the prescribed period."

However, Section 2.20 prescribes the time during which a petition seeking managerial or confidential designations must be filed with the Board. The date of service upon the union is not a relevant consideration for determining whether a petition is timely.⁶

CSBA also alleges that the petition should be dismissed because the City failed to serve notice of the petition on CSBA or to submit proof of such service to the Board as required by Section 2.20a(9) of the Rules. In Decision No. 18-87, we rejected this argument, noting that:

- 1) CSBA conceded that it received notice of the pendency of the City's petition from its affiliate, Local 237 at an early stage of the proceedings, before the Board commenced its investigation of the matter; and
- 2) it did not appear that either the union or employees were prejudiced by the failure to serve notice of the petition on CSBA.

The same considerations apply in the present matter.

⁶ See Decision No. 16-87 at pages 3-4 for additional considerations relating to the issue of timeliness.

We note, however, that there is an additional basis for rejecting CSBA's contention. In Decision No. 11-74, the Board granted a motion filed by that union to amend the certification covering the citywide attorney bargaining unit to change the name of the certified representative from "Civil Service Bar Association" to "Local 237, I.B.T. And its affiliate, Civil Service Bar Association." In an affidavit supporting the motion, Edward Lieberman, then President of the Association, stated that CSBA wished "to insure that Local 237, I.B.T. may participate in all matters involving the Association." The affidavit indicated further that collective bargaining would continue to be conducted separately from other titles in Local 237 "albeit with the assistance of the local." Under the terms of the affiliation, CSBA was to function as a separate chapter of Local 237.

Based upon the foregoing, we conclude that CSBA is not the "jointly certified" collective bargaining agent for employees in the attorney title, as it claims,⁷ but, rather, is an affiliate of Local 237, and, as such, has no

⁷ In Decision No. 18-87, we characterized the certification of the attorney bargaining unit as a "joint certification." That assumption on our part was incorrect and our determination to grant CSBA's motion to intervene as a separate party in that case is reversed for the reasons stated here.

valid basis for asserting that it should receive separate notice of the City's Petition.⁸

Sufficiency of the Petition

The moving parties herein also contend that the City's petition is insufficient on its face and must be dismissed because it fails to state the basis for the allegation that employees subject to the petition are managerial and/or confidential, as required by Section 2.20a(7) of the OCB Rules.

In determining whether there has been compliance with Section 2.20a(7), we have stated that:

[t]he primary purpose of the petition is to put all parties and this Board on notice as to which employees are alleged to be managerial and/or confidential, and which of the statutory criteria are claimed to be relevant to the functions of the designated employees so as to render them managerial and/or confidential.⁹

⁸ On April 10, 1987, Local 237 filed with the Office of Collective Bargaining a bargaining notice (Form OCB-1) to open negotiations for the attorney unit. It therefore appears that the practice of the parties is not inconsistent with the legal conclusion we have reached here.

⁹ Decision Nos. 3-81; 16-87; 18-87. The referenced "statutory criteria" are those set forth in Section 201.7(a) of the Civil Service Law (Taylor Law).

Contrary to the moving parties' contention, we do not require the petitioner to enumerate the duties actually performed by the employees for whom managerial and/or confidential status is sought, or to show a nexus between duties actually performed and the claimed managerial and/or confidential status of the employees, in order to initiate the Board's investigation. The assertion at paragraph 12 of the petition that

[t]he duties of the positions involved... include inter alia: participation in the formulation and effectuation of policy; participation in personnel administration and employee discipline; assisting or acting in a confidential capacity to managerial employees; and the exercise of wide discretion and independent judgement in all of the previously mentioned activities.

satisfies the City's burden under Section 21.20a(7) because it cuts all parties and the Board on notice of the basis for the City's claim that positions covered by the petition should be excluded from collective bargaining as managerial and/or confidential. For this reason, we shall deny the motions to dismiss founded on the alleged insufficiency of the petition.

This is not to say, however, that such an abbreviated statement of the basis for petitioner's claim is sufficient to warrant our proceeding to a hearing on the petition. We have previously placed the City on notice that:

further clarification and substantiation of the petitioner's claim [of managerial and/or confidential status] will be required, as part of the Board's investigatory process, before a determination can be made that a hearing is necessary;

and that

petitioner's failure timely to submit such clarification and substantiation, when requested by the Board, may result in dismissal of the petition.¹⁰

In the present case, we note that the City has supplied the name, civil service title and office title for each position covered by its petition. In order to assist the Board to determine whether a hearing shall be held and to frame the issues to be considered at any such hearing, we shall require that petitioner provide the following additional information:

(a) as to each employee or category of employee alleged to be managerial and/or confidential, a statement of whether said employees are claimed to be managerial, confidential or managerial and confidential;

(b) as to each employee or category of employee alleged to be managerial and/or confidential, a statement as to whether it is contended that the services rendered or functions performed by the affected employees involve:

¹⁰ Decision No. 3-81 at 9. See, Decision No. 29-81 (City's petition dismissed for failure timely to prosecute its claim of managerial/confidential status)

- (i) formulation of policy
 - (ii) direct assistance in the preparation for and conduct of collective negotiations;
 - (iii) a major role in the administration of collective bargaining agreements;
 - (iv) a major role in personnel administration;
 - (v) assistance or action in a confidential capacity to managerial employees whose function is described in (ii) , (iii) and/or (iv) above;
- (c) as to each employees alleged to be confidential, the name, title and position of the managerial employee with whom a confidential relationship is alleged to exist, or other basis for the allegation that such employee is confidential.

The further processing of this matter shall be contingent upon receipt of the aforementioned information, and failure to provide same to the Board and to all parties in interest¹¹ will constitute a basis for a motion to dismiss the petition in due course for failure of prosecution. In view of the statutory policy favoring collective bargaining,¹² we emphasize that the City's con-

¹¹ One copy should be served on each respondent, and the original and three copies, with proof of service, should be filed with the Board. Cf. OCB Rules §2.20a.

¹² NYCCBL §1173-2.0. Civil Service Law §200.

tention that certain positions should be removed from collective bargaining must be supported by specific evidence of the applicability to each of them of the Taylor Law criteria of managerial and/or confidential status. As we have previously stated,

[i]t is this Board's function to determine the merit of the City's claim [of manageriality and/or confidentiality), not the very nature of that claim. The Board, and the intervenor union[s], are entitled to be informed by the City of the specific nature of its claim of managerial and/or confidential status, within the context of the applicable Taylor Law criteria, before proceeding to an evidentiary hearing on the merits of that claim.¹³

Finally, with respect to the two Principal Consumer Affairs Inspector positions that are covered by the instant petition, the City must, as a further precondition to our processing the petition, submit a statement indicating that there has been a material change in circumstances that would warrant a different determination as to the managerial status-of that title from-that made in Deci-

¹³

Decision No. 29-81 at 17-18.

sion No. 7-77. In Decision No. 7-77 we found that four incumbents in the title at that time were not managerial employees.¹⁴ In a subsequent petition (Docket No. RE-109-80), the City sought to have employees in this title, inter alia, removed from collective bargaining. However, before any action was taken on its application, and without complying with the board's order¹⁵ that it file a statement indicating that a change in circumstances had taken place since the previous determination, the City withdrew its application and we approved the withdrawal.¹⁶ The purpose of Section 2.20(f) of the OCB Rules, which requires a showing of changed circumstances in a case such as this one, is to avoid the relitigation of issues that have previously been determined by the Board. We have not required such a statement in cases where the prior determination of status was a decision of the Department of Labor or where manageriability/confidentiality was stipulated by the parties. However, where, as here,

¹⁴ For the prior history of the bargaining status of this title, see Decision Nos. 70-71 (election ordered); 81-71 (title certified to Civil Service Forum, Local 300, SEIU); and 8-72 (title deleted from certification as managerial).

¹⁵ Decision No. 28-80.

¹⁶ Decision No. 34-81.

neither of these exceptions applies, the Board will not process the petition unless a statement of a material change in circumstances is supplied.

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 motions filed herein by Local 237, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; by the Civil Service Bar Association; and by District Council 37, AFL-CIO to dismiss the petition be, and the same hereby are, denied; and it is further

ORDERED, that as a precondition to the processing of its petition, the City shall serve on all parties and file with the Board the additional information specified at pages..14-15 of our opinion herein; and it is hereby

DIRECTED, that the City of New York be informed that the records of the Office of Collective Bargaining indicate that the Principal Administrative Associate position bearing the office title of Secretary to the Deputy Commissioner is vacant and that the petition to have the employee in that title declared managerial and/or confi-

dential will be dismissed unless the City informs the Office of Collective Bargaining that there is an incumbent in the title; and it is further

DIRECTED, that the City of New York be informed that the Board of Certification has previously found employees in the title Principal Consumer Affairs inspector to be eligible for collective bargaining (Decision No. 7-77) and will adhere to this decision unless the City files with the Office of Collective Bargaining, a statement indicating a change in circumstances since the Board issued its prior decision sufficient to warrant a different determination.

DATED: New York, N.Y.
May 19, 1958

MALCOLM D. MacDONALD
C H A I R M A N

DANIEL G. COLLINS
M E M B E R

GEORGE NICOLAU
M E M B E R

LINS

Principal Consumer Affairs (Decision No. 7-77) and will adhere to this decision