***Independent Laborers Union of New York City*,72 OCB 5 (BOC 2003) [Decision No. 5-2003, *aff'd*, *Independent Laborers Union of New York City v. Office of Collective Bargaining,* No. 118937/03 (Sup. Ct. N.Y. Co. Apr. 13, 2004).]**

OFFICE OF COLLECTIVE BARGAINING
BOARD OF CERTIFICATION
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In the Matter of

THE INDEPENDENT LABORERS UNION
OF NEW YORK CITY,

Petitioner,

Decision No. 5-2003
Docket No. RU-1245-02

-and-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO
and THE CITY OF NEW YORK,

Respondents.
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DECISION AND ORDER

On January 28, 2002, the Independent Laborers Union of New York City ("ILU" or "Petitioner") filed a petition to represent Construction Laborers (Title Code No. 90756) and Apprentice Construction Laborers (Title Code No. 90748) employed by the City of New York ("City"). These employees are currently represented by District Council 37, AFSCME ("DC 37") in separate bargaining units. DC 37 argues that the current unit placements of the titles are appropriate and that placing these two titles into the petitioned-for unit would be contrary to Board policy. The City contends that the proposed unit is inappropriate and that removal of these titles would result in the fragmentation of pre-existing bargaining units, contrary to Board policy. We find that the Construction Laborer and Apprentice Construction Laborer titles should remain in their current certified bargaining units. Accordingly, we deny the petition.

BACKGROUND

Employees in the titles Construction Laborer and Apprentice Construction Laborer are responsible for the repair and maintenance of Water Supply Distribution Systems and Sewer Systems in the City of New York. DC 37 is the certified employee organization currently representing both titles.

Construction Laborers are subject to § 220 of the New York State Labor Law ("§ 220"). On March 9, 1982, the Construction Laborer title was accreted to the Laborer unit (Certification CWR-17/67) pursuant to the Board's decision in *District Council 37,* Decision No. 7-82. The Laborer unit contains only three titles: Construction Laborer, City Laborer and Laborer. Under § 220, Construction Laborers are covered by the New York City Comptroller's Consent Determination which expired on March 31, 2000, [1] and a collective bargaining agreement

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[1] DC 37 filed a complaint pursuant to § 220.8(d) of the New York State Labor Law with the Comptroller regarding the prevailing rate of wages and supplemental benefits of Construction Laborers. The terms agreed to by DC 37 and the Office of Labor Relations were encapsulated in a Consent Determination on August 19, 1997.

Section 220.5-a of the New York State Labor Law provides, in part:

> The prevailing rate of wage shall be annually determined in accordance herewith by the fiscal officer no later than thirty days prior to July first of each year, and the prevailing rate of wage for the period commencing July first of such year through June thirtieth, inclusive, of the following year shall be the rate of wage set forth in such collective bargaining agreements for the period commencing July first through June thirtieth, including those increases for such period which are directly ascertainable from such collective bargaining agreements by the fiscal officer in his annual determination.

Section 220.8-d provides, in part:

> . . . [I]n a city of one million more, where a majority of laborers, workmen or mechanics in a particular civil service title are members of an employee organization which has been certified or recognized to represent them pursuant to the provisions of article fourteen of the civil service law or a local law enacted thereunder, the public employer and such

("CBA") for non-economic issues which expired on March 31, 2000.

The Apprentice Construction Laborer title is a non-competitive class title. On April 23, 1987, the title was accreted to the Blue Collar unit (Certification No. 38B-78) pursuant to the Board's decision in *District Council 37,* Decision No. 8-87. The Blue Collar unit contains approximately 39 titles in addition to the Apprentice Construction Laborer title, such as Assistant Highway Repairer and Watershed Maintainer. Collective bargaining negotiations for the Apprentice Construction Laborer title are governed by the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"). Apprentice Construction Laborers are currently covered by the 1995-2000 Blue Collar Agreement, which expired on June 30, 2002, and is in status quo.

On January 28, 2002, the ILU filed the instant petition, with a sufficient showing of interest, seeking to remove the two titles from their existing units and to represent the two titles in a new, separate bargaining unit. The Director of Representation, by letter dated April 23, 2002, held the case in abeyance, at the request of the parties, pending the outcome of an internal AFL-CIO jurisdictional dispute process invoked by AFSCME.

> employee organization shall in good faith negotiate and enter into a written agreement with respect to the wages and supplements of the laborers, workmen or mechanics in the title. If the parties fail to achieve an agreement, only the employee organization shall be authorized to file a single verified complaint pursuant to subdivision seven herein, on behalf of the laborers, workmen or mechanics so represented. Such employee organization shall be the sole and exclusive representative of such laborers, workmen or mechanics at any hearing pursuant to subdivision eight herein, and shall be the sole complainant in the proceeding for all purposes therein, including review pursuant to article seventy-eight of the civil practice law and rules. . . . Any order, compromise, or settlement determining the issues raised upon such a proceeding, which has not been taken up for review by the employee organization, shall be binding upon the laborers, workmen or mechanics represented by the employee organization. . . .

POSITIONS OF THE PARTIES

Petitioner's Position

Pursuant to § 1-02(c)(2) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules"), Petitioner has standing to make this application as it represents the requisite number of employees in the titles Construction Laborer and Apprentice Construction Laborer.[2] Petitioner seeks designation as the collective bargaining agent for these employees because DC 37 has failed to represent them adequately.

ILU asserts that DC 37 has had a long history of fraud and corruption. In fact, due to the widespread corruption and voter fraud in connection with the 1996 contract ratification, employees in the two titles indicated to DC 37 and the City that they did not want DC 37 to be their designated representative for the purposes of collective bargaining.

Further, the employees in these titles have suffered prejudice to their specific bargaining rights. These employees constitute a small minority of the employees currently represented by DC 37, and the special interests of these titles have been systematically submerged in favor of the interests of the larger and more prominent units contained within DC 37.

Petitioner asserts that the proposed unit is appropriate because: (1) it will ensure that the employees will have fullest freedom in the exercise of the rights granted under the NYCCBL and the N.Y. Civil Service Law Article 14 ("Taylor Law" or "CSL") § 209-a(2)(a) and (2)(c); (2) the

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[2] Section 1-02(c)(2) provides in part:

> Simultaneously with the filing of the petition petitioner shall:
> (i) In the case of a petition for certification, submit to the board 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 the purposes of collective bargaining . . . .

employees share a community of interest because they perform identical tasks, one title being the apprentice of the other; and (3) the change will benefit sound labor relations and not affect the efficient operation of the public service because the employees' interests would no longer be submerged by larger bargaining units and would become more productive workers than they are now.

The Respondents' argument that prevailing rate employees and non-prevailing rate employees should not be combined in the same unit is without merit. DC 37 does not negotiate separate contracts on behalf of its constituent titles but rather on behalf of large groups. All non-economic issues for both titles would continue to be negotiated between the City and ILU. Only the determination of wages would have to be negotiated separately; however, no real negotiations actually take place on behalf of the Construction Laborer title because the Comptroller sets all prevailing rates. Thus, the efficient operation of government will not be affected by placing these titles in the same unit.

In fact, DC 37 already divides various titles into Blue Collar workers (not covered by the prevailing rate) and Laborers (prevailing rate employees) for purposes of collective bargaining. ILU could create the same distinction if necessary, and the titles would comprise separate bargaining units. ILU would bargain separately on behalf of the titles for economic terms. However, should this issue of combining prevailing rate employees with non-prevailing rate employees become outcome determinative, the ILU would consider allowing the Petition to proceed as to the Construction Laborer title only.

Finally, Petitioner argues that the proposed unit is consistent with the decisions and policies of the Board. Although the Board generally disfavors fragmentation, every factor set

forth in § 1-02(k) of the OCB Rules favors allowing the Petition to proceed.[3]

DC 37's Position

DC 37 asserts that the current unit placements of the Construction Laborer and Apprentice Construction Laborer titles are appropriate, and Petitioner presents no compelling evidence to the contrary. The petition is insufficient as a matter of law because it relies upon vague allegations of inadequate representation. No evidence suggests that the current unit placement of the titles inherently prejudices the collective bargaining rights of employees to warrant creation of a separate bargaining unit. Nor is there evidence that there are conflicting interests between the Apprentice Construction Laborer title and other titles in the Blue Collar unit to warrant the title's removal.

Petitioner's proposed unit is inappropriate because: (1) it would lead to a proliferation of bargaining units and would violate the Board's policy favoring consolidation of bargaining units; (2) it is in derogation of both the public interest and the legislative intent of the drafters of the NYCCBL; (3) it would unduly disrupt the long history of collective bargaining in the existing

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[3] § 1-02(k) of the OCB Rules states that 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 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.

appropriate units; and (4) it would disrupt the efficient operation of the public service and sound labor relations.

Furthermore, the proposed unit inappropriately seeks to combine the Construction Laborer title with the Apprentice Construction Laborer title in contravention of the Board's policy not to include non-prevailing rate employees in the same bargaining unit with § 220 employees.

City's Position

The City argues that granting the current petition would contravene Board policy against the fragmentation of pre-existing bargaining units. The proposed unit is inappropriate because it would include only these two titles, one being a prevailing rate title required to negotiate only non-economic terms, and the other being a non-prevailing rate title required to negotiate under the NYCCBL, for both economic and non-economic purposes. The Board has previously held that in the absence of unusual circumstances, prevailing rate employees shall not be placed in a bargaining unit that contains non-prevailing rate employees.

Furthermore, placing these two titles in the same bargaining unit would be unduly burdensome for the City. In addition to bargaining over non-economic issues with both titles, the City will be forced to negotiate economic issues separately for each title. Even though the bargaining units that currently represent these titles may contain a combination of prevailing rate and non-prevailing rate employees, the Board's policy would be frustrated by creation of a new bargaining unit that contains only two titles and combines prevailing rate and non-prevailing rate employees.

Finally, the showing of interest indicating that the employees in the titles in question

support a new bargaining unit should not outweigh the Board's policy of non-fragmentation .

DISCUSSION

In this case, Petitioner seeks to represent two titles in a new bargaining unit and, in essence, carve out those two titles from two separate pre-existing bargaining units. The issue here is whether the pre-existing bargaining units in which these employees are situated are no longer appropriate.

Section 12-309(b)(1) of the NYCCBL provides that this Board shall have the power and duty:

> 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 pubic service, and sound labor relations. . . .

Section 1-02(k) of the OCB Rules, which is designed to implement NYCCBL §12-309(b)(1), sets forth criteria that we apply in making determinations of appropriate unit placement of employees. These criteria are substantially equivalent to the provisions of § 207(1) of the Taylor Law, governing unit determinations made by the New York State Public Employment Relations Board.

We have established a policy that favors consolidation of bargaining units and discourages fragmentation whenever possible. *Municipal Police Benevolent Ass'n*, Decision No. 4-95 at 5; *Municipal Elevator Workers Ass'n*, Decision No. 1-92; *New York City Water Supply Police Benevolent Association*, Decision No. 12-91. Further, we have stated that we are

unwilling to disrupt a longstanding bargaining unit unless convincing proof of changed circumstances demonstrates that the pre-existing unit is no longer appropriate. *Municipal Police Benevolent Ass'n,* Decision No. 4-95 at 10.

When a petitioner seeks to remove titles from a previously certified unit and place them in a new bargaining unit, we determine whether a sufficient basis exists for a finding that it is no longer appropriate for the titles to be included in their current bargaining unit. *Municipal Police Benevolent Ass'n*, Decision No. 4-95 at 5. Dissatisfaction with current representation is considered only when it can be shown that the alleged inadequate representation is a consequence of conflicting interests within the unit. *Municipal Elevators Workers Ass'n*, Decision No. 1-92 at 10; *New York City Water Supply Police Benevolent Ass'n*, Decision No. 12-91 at 8. If we find that the current unit placement continues to be appropriate, then the petition must be dismissed. *Id.* If we find that the current unit is no longer appropriate, then we determine whether the petitioned-for unit or another pre-existing unit is appropriate. *Id.*

In *Police Benevolent Ass'n,* Decision No. 29-82, the petitioner argued that a recent enactment of law, which granted peace officer status to certain Special Officer titles and required new training, was a change in circumstance which justified fragmenting the existing unit to establish a new unit for these employees. Petitioner also argued that the employees had unique interests and goals which differentiated them from other titles within the unit and which were not adequately pursued by the current bargaining representative. The Board held that the effect of the law did not warrant a change in unit placement and that although the petitioner established a community of interest among Special Officers, the evidence did not demonstrate that these employees' special interests were inconsistent with the interests of the other titles in the unit.

Because the case did not call for an initial unit placement, the Board was unwilling to disrupt a structure that had functioned effectively for many years unless the interests of the petitioned-for employees had been sacrificed or submerged. The Board concluded that "the mere fact that many of . . . [the Special Officers'] goals have not yet been achieved is not sufficient proof that those goals have been sacrificed to the interests of the remainder of the unit." *Id.* at 26.

More recently, in *Municipal Elevators Workers Ass'n,* Decision No. 1-92, a petitioner, seeking to remove certain Elevator Mechanic titles from their existing unit, argued that the current bargaining representative had submerged their interests in favor of other titles in the unit and allowed the petitioned-for titles to receive wages and benefits at lower levels. The Board held that the petitioner did not show that any inadequacy was a consequence of conflicting interests within the unit sufficient to warrant deviating from the Board's policy against unit fragmentation. In dicta, the Board stated that Elevator Mechanics could pursue their concerns regarding inadequate representation by either filing an improper practice charge alleging a breach of the duty of fair representation or, if there was general dissatisfaction with the current bargaining representative within the entire unit, the employees could commence a decertification proceeding. *Municipal Elevators Workers Ass'n,* Decision No. 1-92 at 10-11.

In the present case, Petitioner has not alleged changed circumstances to warrant deviating from our established policy against unit fragmentation. No evidence demonstrates that Construction Laborers and Apprentice Construction Laborers have lost a community of interest with other titles in their existing bargaining units. For example, with respect to Construction Laborers, the unit contains only three titles, all of which perform some type of laborer functions. Petitioner has not asserted that Construction Laborers do not belong in a bargaining unit with

other laborers. Rather, Petitioner claimed only that the interests of Construction Laborers and Apprentice Construction Laborers have been submerged because DC 37 has larger and more prominent bargaining units to represent. Although Petitioner may be able to establish a community of interest among the petitioned-for titles, it has failed to present compelling evidence as to why the longstanding bargaining units are no longer effective.[4] *See Police Benevolent Association,* Decision No. 29-82 at 28.

In addition, we have examined whether the current bargaining units are appropriate by taking into consideration the history of collective bargaining in the pre-existing units and the efficient operation of the public service and sound labor relations. OCB Rule § 1-02(k). We find no evidence to contradict our conclusion that DC 37 has, in the past, consistently negotiated terms and conditions of employment and has enforced the rights of Construction Laborers and Apprentice Construction Laborers under the CBAs and the Consent Determination. We are reluctant to disrupt the current bargaining units, which have consistently functioned for many years, to create a new bargaining unit absent convincing proof that changed circumstances have inherently prejudiced the rights of these employees. *Id.* at 25. Thus, in our view, removing these titles from their current bargaining units would adversely affect the efficient operation of public service and sound labor relations and would be inconsistent with our policy against fragmentation.

Finally, Petitioner has failed to show that its allegations of corruption and fraud, if true, have affected terms and conditions of employment or otherwise affected DC 37's representation

[4] For these reasons, we also deny Petitioner's alternative request to create a unit consisting only of Construction Laborers.

of the Construction Laborer and Apprentice Construction Laborer titles with regard to their employment.[5] In addition, if these employees have concerns regarding DC 37's fulfillment of its legal responsibilities, they have proper legal recourse through the filing of a duty of fair representation charge under the Board's improper practice procedures[6] or, with sufficient support, by petitioning to decertify the entire bargaining unit.[7] *Municipal Elevators Workers Ass'n,* Decision No. 1-92 at 11. Because we find that the placement of the titles Construction Laborer and Apprentice Construction Laborer in their longstanding bargaining units remains appropriate, we need not reach the issue of whether the petitioned-for unit is appropriate. Accordingly, we deny the Petition in its entirety.

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[5] Claims regarding internal union matters are not within the jurisdiction of this Board unless it can be shown that they affect terms and conditions of employment or the nature of the representation accorded employees by a union with respect to employment. *New York City Water Supply Police Benevolent Ass'n*, Decision No. 12-91 at 9 n.7.

[6] Section 12-306(b) of the NYCCBL provides:

> It shall be an improper practice for a public employee organization or its agents:
> (3) to breach its duty of fair representation to public employees under this chapter.

[7] Section 1-02 of the OCB rules provides:

> (e) Decertification petition-contents; proof of interest. (1) A petition alleging that a certified or designated employee organization is no longer the representative of the public employees in an appropriate bargaining unit may be filed by a public employee or group of public employees, or their representative.

Decision No. 5-2003

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, Docket No. RU 1245-02, filed by the Independent Laborers Union be, and the same hereby is, denied.

DATED: September 25, 2003

MARLENE A. GOLD
CHAIR

CAROL A. WITTENBERG
MEMBER

GEORGE NICOLAU
MEMBER