SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: SPECIAL TERM, PART I

In Matter of the Application of

CIVIL SERVICE TECHNICAL GUILD
LOCAL 375, DC.37, A.F.S.C.M.E.,
AFL-CIO,

Petitioner,

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

-against-

ARVID ANDERSON, Chairman the Board of Certification, WALTER L. EISENBERG, and ERIC J. SCHMERTZ , Members of the Board of Certification, THE BOARD OF CERTIFICATION of the Of Collective Bargaining, THE OFFICE OF COLLECTIVE BARGAINING of the City of New York, THE CITY OF NEW YORK, THE NEW YORK CITY HEALTH and HOSPITALS CORPORATION, THE BOARD OF HIGHER EDUCATION OF THE CITY OF NEW YORK and the NEW YORK CITY HOUSING AUTHORITY,

Respondents.

Index No.
17275/73

Greenfield, J.:

In this Article 78 proceeding, in which an order is sought annulling the determination of respondent Board issued August 22, 1978, respondents have (cross)moved to dismiss the proceeding on the grounds that it was not brought within 30 days of the order sought to be reviewed.

There is no dispute as to the fact that the order was served on Murray Klein, Esq. more than 30 days before this

proceeding was commenced; however, petitioner contends that service on Murray Klein, Esq., rather than Adam Ira Klein, Esq., was improper. The court disagrees, Murray Klein, not Adam Ira Klein, was the attorney of record. Murray Klein filed the motion to intervene and also filed other papers in the proceedings. Although he was absent from certain of the hearings when he was ill, there is nothing in the record that would indicate that Adam Ira Klein was or should have been considered by respondent Board to the attorney of record. Although petitioner contends that it had retained Adam Ira Klein as outside counsel in connection with these proceedings, it is clear from the documents submitted that the President of the local, as well as Murray Klein continued to make applications and submit papers. Petitioner's reliance on the fact that the supplemental order was served within 30 days of commencement of this proceeding is misplaced. That order merely clarified a portion of the prior order and its issuance did not extend the time commence proceeding.

Thus, insofar as petitioner seeks to annul the determination, on the grounds that it was arbitrary, the claim is untimely. However, insofar as the petition is based on the contention that the order is void due to failure to follow statutory procedure, the 30 day statute does not bar the claims. See Matter of Foy v. Schecter, 1 NY 2d 604, 614, and cases cited therein at p. 615.

Accordingly, the petition is dismissed except to the extend it is based on a claim that respondents acted without jurisdiction, i.e. that the order is void for failure to follow the statutory procedure, which claim is severed and continued.

Settle order and judgement.

Dated: January 10, 1979

Present: Hon. EDWARD GREENFIELD

In the matter of the application of

CIVIL SERVICE TECHNICAL GUILD etc.

-against-

ARVID ANDERSON etc.

Upon the foregoing papers this motion for resettlement of this court's order dated January 31, 1979 is denied. Petitioners seek resettlement on the grounds that Court order does not conform to the court's decision which granted respondent's motion to dismiss the petition, except insofar as petitioners challenged the determination of the grounds of failure to follow statutory procedure, which claim(s) were not barred by the 30 day statute of limitations.

On the instant motion, petitioners contend that their third and fourth causes of action allege a failure to follow statutory procedure and accordingly the prior order, to the extent it dismissed these two causes of action, in addition to the fifth cause of action, did not conform to the court's decision. The court has again reviewed the claim alleged in the third and fourth causes of action and find that they are not based on a failure to follow, statutory procedure. Rather, they based on the contention that respondent improperly considered certain evidence and discounted other evidence.

DATED: March 15, 1979

Justice Riccobono

MATTER OF CIVIL SERVICE TECHNICAL GUILD, LOCAL, 375 DC 37, A.F.S.C.M.E.,AFL-CIO (Anderson)- Motions under calendar numbers 77 and 78 of July 11, 1979, are consolidated for disposition.

This is an application by the petitioner Civil Service Technical Guild, Local 375 DC 37, A.F.S.C.M.E., AFL-CIO (the "union" for a judgement pursuant to article 78 of The Civil Practice Law and Rules ("CPLR") annulling the determination in Decision number 45-78, issued Aug. 22, 1978, as amended by Decision number 15A-78, issued Aug. 29, 1978, of the respondent Board of Certification of the Office of Collective Bargaining of the City of New York (the "Board") on the grounds that it is void due to the Board's failure to follow the statutory procedure established in article 14 of the Civil Service Law ("CSL"), known as the Public Employees Fair Employment Act ("FEA") or "Taylor Law".

This matter has been restored to the calendar, pursuant to the order of this court (Greenfield, J.) dated July 2, 1979, upon the motion of the respondent Board and pursuant to the prior order of this court (Greenfield, J.) dated Jan. 31, 1979, upon the application of petitioner and the cross motion of respondents which order dismissed the third, fourth and fifth causes of action of the petition as barred by the thirty-day statute of limitations (CSL action 213), and which severed and continued the first and second causes action.

Upon restoration, the petition is granted for the reasons stated below, and the challenged determination is reversed and annulled and the matter demanded the Board for proceedings not inconsistent with this decision.

The Board's determination was issued after a consolidated administrative hearing on petitions by the respondent City of New York (the "City"), seeking to have forty job titles, covering over 500 municipal employees, declared to be "managerial" or "confidential" and thereby excluded from the collective bargaining process (see CSL sections 201[7] and 214: see also chapter 54 of the Administrative ode of the City of New York New York City Collective Bargaining Law ["NYCCBL"] section 1173-4-1; and on the union's filed objections filed objections to those petitions, as well as on the union's petitions, requesting certification as the exclusive representative for the employees in the specific titles and related relief.

Under the Board's determination, a majority of the affected titles were designated managerial and or confidential, eight of the titles were certified for collective bargaining as not managerial or confidential, and certain remaining titles and petitions were dismissed or reserved from the proceeding.

In its first cause of action the union alleges that the Board's determination is illegal in that the Board failed to limit itself to the objective statutory criteria under the Taylor

Law for determining managerial status, but acted arbitrarily, capriciously, unreasonably and abused its discretion in utilizing different criteria which were not authorizes by statute. In the second cause of action, it is alleged that the Board acted arbitrarily and capriciously in creating and applying a "presumption of manageriality" and that, consequently, the Board's determination is invalid. It is alleged that this "presumption of manageriality" is contrary to the standards and criteria established in CSL section 201(7) and contrary to the legislature's desired intent that the designations of employees as managerial or confidential under CSL section 201(7) reflect public employer collective bargaining functions father than be utilized to destroy or interfere with the exercise of rights of organization and representation of these public employees who do not have a significant role in employee relations.

It is undisputed that the Board employed informal criteria, including a "presumption of manageriality", which were different from the criteria specifically established in CBL section 201(7). It is admitted that, although the Board has the authority to make determinations as to whether certain employees are to be classified as managerial or confidential, the Taylor Law criteria were intended to have a preemptive effect. However, in its determination the Board dismisses the union's objection to the Board's refusal to apply the statutory criteria by questioning the union's "perception." The Board fails to explain any legal basis for not applying the criteria. In opposition to the petition, it is asserted by the Board that its standards are in substantial conformity with the statutory criteria and allegedly directed towards the same goals. However, this has not been shown. In addition, the other arguments raised by respondents are similarly without merit.

The Board, at page 12 of its determination, describes its presumption of manageriality as "rebuttable" and provides that the presumption is established "upon presentation by the City of job specifications for a title which included clear authorization for the assignment of managerial duties and proof that the title was included in the Managerial Pay Plan."Under this definition, it is not required that the employees in such titles be currently paid under the Management Pay Plan. Further, contrary to the explanation of this "rule" which appears in the joint answer of respondents Arvin Anderson, Chairman of the Board, and the Board, the definition applied in the Board's determination did not require that persons in that title be actually assigned "managerial" duties. The definition also fails to define "managerial", the key term in dispute. The court notes that a lessor standard was applied was applied regarding currently vacant titles to which a presumption of manageriality was held to be applicable effective when the titles "are subsequently filled." based on those titles being in the "Management and Executive Pay Plans", although the Board paradoxically stated that it was issuing "no determination at this time" while the titles were vacant (see page 47 of the determination).

No rational or reasonable explanation has been presented to

relate the "presumption of manageriality" employed by the Board to the statutory criteria or to the expresses public policy in the Taylor Act (see CSL section 200). In addition, the so-called "general guidelines" which were employed by the Board in its determination as "indicia of management status" and which were adopted from certain of the Board's prior rulings are also improper. The prior rulings in question were admittedly formulated with the Board being merely "aided by reference to section 201.7 of the "Taylor Law" (see pp. 2-3 of the determination), rather than in accordance with the statute, and were admittedly applied by the Board to "significantly different" circumstances (see p. 14 of the determination). An analysis of those standards discloses that many of the factors selected as indicative of managerial status vary substantially from the statutory criteria. Further, the "guidelines" as a whole are confusing and unworkable and do not constitute clear standards upon which to base an administrative determination. The Board's practice of considering certain such factors to constitute a "prima facie" showing of manageriality conflicts with the expressed mandate of the Taylor Law favoring collective bargaining, and it improperly shifts the burden of proof from the City to the Union. This administrative practice may not be used to "thwart a statute, the purposes of which are as clear as those here involved." (Hines v. LaGuardia, 293 N.Y. 207)

Under the Taylor Law only employees clearly exercising managerial or confidential responsibilities are permitted to be excluded from Taylor Law coverage and the statutory criteria were intended to e applied conservatively in order to preserve existing negotiation units and to foster the collective bargaining process, with uncertainties "resolved in favor of Taylor Law coverage" (see CSL Section 200; Matter of State of New York, 5 PERB 3001).

CSL section 200 states that the public policy of the State and the purpose of the Taylor Act is "to promote harmonious and cooperative relations between the government and its employees and to protect the public... by (a) granting to public employees the right of organization and representation..." CSL section 201(7), excludes from the definition of "public employees", and from the collective bargaining provided by the Taylor Act, those persons "who may reasonably be designated... as managerial or confidential upon application of the public employment to the appropriate board in accordance with procedures... of this article..." Section 201(7)(a) continues by establishing as managerial or confidential:

"Employees may be designate as managerial only if they are persons (i) who formulate policy or (d) 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)."

Section 212 of the CSL authorizes local governments within the state, acting through their "legisiative" bodies, to adopt by "local law, ordinance or procedures in place of certain section of the Taylor Law, provided such provisions and procedures are "substantially equivalent" to the provisions set froth in the Taylor Law. However, section 212 specifically exempts section 201 and certain other sections from this provision.

Under the language in section 212, the argument on behalf of respondents that their informal criteria could be substituted for the statutory criteria is without merit. Further, the City admittedly never adopted procedural standards or substitute criteria through its "legislative body" with respect to the relevant provision in CSL section 201(7)(a). Nor did the City agencies (the Office of Collective Bargaining ["OCB"] and its Boards of Collective Bargaining and of Certification) which were established under Chapter 54 of the New York City Chapter promulgate standards or procedures to be utilized in defining and designating managerial or confidential employees. However, the City, in NYC-CBL section 1173.2.0, states that its policy is to "favor and encourage the right of municipal employees to organize and be represented...."

Even assuming arguendo that the informal criteria employed by the Board are "substatially equivalent" to the statutory criteria and otherwise consistent with the Taylor Law, which they are not, those criteria were not adopted pursuant to NUCCBL section 1173-6.0, which established a formal procedure for the adoption of administrative rules:

"Prior to the adoption of any rule by the board of collective bargaining or the board of collective bargaining or the board of certification, the proposed text of such rule shall be published in the City Record, and a public hearing shall be conducted upon at least ten days notice at which interested parties may state their views concerning such rules."

Neither the respondent OCB nor the Board were granted the power to administrative adopt substantive law (see Matter of Picone v. Commissioner of Licenses of the City of New York, 241 N.Y. 157, 162; NYCCBL section 1173-1.0 at seq.)

Upon all the facts and circumstances presented, the Board in applying the challenged "guidelines" and presumption has acted in excess of its authority and contrary to the prescribed standards expressed in the Taylor Law. Accordingly, the Board's determination is arbirtraty capricious, and contrary to law, it is for the legislature to set standards and it is for the legislature, not an administrative board or its officers to vary or establish additional standards (see Matter of Barry v O'Connell, 303 N.Y. 46).Settle judgment.