SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 49

In the Matter of the Application of

CIVIL SERVICE TECHNICAL GUILD, LOCAL 375, DISTRICT COUNCIL 37, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, and LOUIS G. ALBANO, in his capacity as PRESIDENT of CIVIL SERVICE TECHNICAL GUILD, LOCAL 375, DISTRICT COUNCIL 37, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES AFL-CIO,

Petitioners,

For a Judgment under Article 78 of the Civil Practice Law and Rules,

Index No. 116355/95

-against-

MALCOLM D. MACDONALD, in his capacity as Chairman of the Board of Certification, GEORGE NICOLAU and DANIEL G. COLLINS, in their capacity as Members of the Board of Certification, THE BOARD OF CERTIFICATION of the Office of Collective Bargaining, THE OFFICE OF COLLECTIVE BARGAINING of the and City of New York, THE CITY OF NEW YORK and DISTRICT COUNCIL 37, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, VICTOR GUADALUPE, in his capacity as PRESIDENT of DISTRICT COUNCIL 37, AMERICAN FEDERATION OF STATE, COUNTY AND/MUNICIPAL EMPLOYEES, AFL-CIO, and ROBERT F. MYERS, JR., in his capacity as TREASURER OF DISTRICT COUNCIL 37, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO,

Respondents.

HERMAN CAHN, J.:

In this Article 78 proceeding, the petitioner, a local union of city workers, seeks an order annulling and setting aside a May 10, 1995 determination of the Board of Certification (the "Board")

of the New York City Office of Collective Bargaining ("OCB") which denied petitioner's request to set aside a prior decision and certification by the Board dated July 27, 1988. This earlier decision had awarded the titles Telecommunications Specialist and Associate, Levels I and II, in the City of New York, to another local union rather than petitioner.

FACTS

The Parties

The petitioner is Civil Service Technical Guild, Local 375, District Council 37, American Federation of State, County and Municipal Employees, AFL-CIO (petitioner or "Local 375"). Petitioner is a constituent member local of respondent District Council 37, American Federation of State, County and Municipal Employees, AFL-CIO ("DC 371"). Petitioner represents approximately 7,000 scientific, technical and inspectorial employees employed by the City of New York.

OCB is a neutral labor relations agency established pursuant to Chapter 54 of the New York City Charter, and is comprised of two adjudicative boards, the respondent Board and the Board of Collective Bargaining. The Board is charged with the responsibility of determining the units appropriate for collective bargaining with the City of New York and its agencies. Unlike the vast majority of DC 37-affiliated locals, petitioner is authorized by the Board to itself bargain collectively with the City of New York on behalf of its members.

Like the petitioner, Local 2627, District Council 37, American

Federation of State, County and Municipal Employees, AFL-CIO ("Local 2627") is also a constituent member local of DC 37. Local 2627 represents electronic data processing employees, including certain computer programmers, employed by the City of New York and its agencies. Unlike petitioner, Local 2627 is not authorized by the Board to itself bargain collectively with the City of New York on behalf of its members. Stated another way, Local 2627 is not the certified collective bargaining representative of any unit of employees. Rather, DC 37 holds the bargaining certificate--Certificate 46D-75, as amended--and is the certified bargaining representative of titles represented by Local 2627 for purposes other than collective bargaining.

The Initial OCB Proceeding (RU-972-86)

On July 8, 1986, the Communications Workers of American Local 1180 ("CWA Local 1180"), another union representing employees in the City of New York, initiated a representation proceeding before the Board, docket number RU-972-86. At issue was the proper unit placement of the titles Telecommunications Specialist and Associate, Levels I and II, in City of New York agencies. Petitioner and Local 2627 each claimed that the persons holding these titles should be members of their locals. DC 37 conducted an investigation and concluded that the titles shared a community of interest with the titles represented by petitioner. On August 7, 1986, DC 37 intervened on petitioner's behalf.

On or about October 27, 1987, Local 2627 moved to intervene in the same proceeding before the Board, claiming that the new titles

should be accreted to "Certificate 46D-75 (as amended) ." Local 2627 retained private counsel in connection with its motion to intervene. In a letter to the parties, dated November 6, 1987, Local 2627's motion to intervene was granted.

Additional hearings were thereafter held on November 24, 1987 and January 22, 1988. Briefs were submitted in May of 1988. On July 27, 1988, the Board rendered Decision 9-88 finding that the workers under the new titles have a greater community of interest with the workers in Local 2627 than with the workers in Local 375. The Board thereupon ordered that Certification No. 46D-75 9 (as previously amended) be amended by adding to it the new titles.

Once accreted to its units, DC 37 assigned the titles to Local 2627 for purposes other than collective bargaining. In or about September 1988, petitioner retained private counsel and initiated an Article 78 proceeding to review the Board's determination in RU-972-86. However, the Article 78 proceeding was aborted when the parties filed a stipulation of discontinuance with prejudice on October 19, 1988.

The PERB Proceeding

Back in July of 1988, Local 375 petitioned the Public Employment Relations Board (“PERB”), Case No. CP-164, seeking to have the recently created telecommunications titles at the Board of Education of the City of New York accreted to its bargaining unit there. CWA Local 1180 and Local 2627 were named as employee organizations which may be affected by this petition. CWA Local 1180 declined any interest in the petition. Thereafter, a petition

for intervention was filed on behalf of Local 2627.

Petitioner claims that on March 16, 1993, the final day of testimony, the last witness to testify on behalf of Local 2627 revealed that Local 2627 was not certified as the bargaining representative of any unit at the Board of Education and that DC 37 bargained on behalf of its members with the Board. Petitioner filed a motion to deny intervenor status to Local 2627 based on Local 2627's alleged lack of standing to participate in the proceeding since it did not have its own bargaining certificate issued by OCB.

On July 20, 1993, DC 37 submitted a letter to PERB stating the following:

> Please be advised that despite the occasional confusion in nomenclature, the intervention in this case was and continues to be that of District Council 37, the certified collective bargaining agent for a bargaining unit including a variety of titles which have been assigned to six different DC 37 locals at the Board of Education. DC 37 identified Local 2627 in its original intervention since that is the local to which the sub-group of computer-related titles in the Board-wide unit has been assigned. If DC 37 is successful in this litigation, the telecommunications titles which are the subject of this proceeding will be accreted to a DC 37 unit as they have been in City agencies.

(Thaler Affirm., Ex. 8, subex. 6).

In October of 1993, the Director of Public Employment Practices and Representation at PERB issued a decision in favor of the position asserted by DC 37/Local 2627. The PERB Director found that petitioner's argument that Local 2627 was not a

> "recognized or certified public employee organization" within the meaning of 201.2(b) of this Board's Rules of Procedure (Rules) H ignores the fact that <u>L. 2627 bargains in conjunction with District Council 37</u> with the

> Board of Education for the unit of employees which it already represents. It is also clear that L. 2627, being a collective bargaining representative for employees of the Board of Education and mayoral agencies throughout the City of New York, is a recognized public employee organization within the meaning of this Rule.

(Thaler Affirm., Ex. 3, subex. G at pp. 3-4, fn., 2; emphasis added).

The 1993 OCB Proceeding or the §1-02(r) Petition

On September 28, 1993, petitioner filed a petition under §1-02(r) of Chapter 1 of the Rules of the City of New York, Practice and Procedure of the OCB, to "set aside or terminate" the Board's July 27, 1988 decision and certification in the first OCB proceeding on the grounds of "unusual or extraordinary circumstances." Petitioner argued that Local 2627 had lacked standing to intervene in that proceeding since the real party in interest was DC 37 which held the bargaining certificate. Petitioner also claimed that it was denied due process because it was represented in that proceeding by DC 37's attorney who had a fundamental and irreconcilable conflict of interest. This petition shall hereinafter be referred to as the "the Petition."

By Decision No. 6-95, dated May 10, 1995, the Board denied the Petition. The Board found that it was time-barred because it was brought after DC 37's initial certification year had expired and because of OCB's contract bar rules. OCB, further ruled that there had been no showing of unusual or extraordinary circumstances by virtue of the purported conflict of interest in the original proceeding and also that Local 2627 had standing to intervene in that proceeding.

Petitioner commenced the current- Article 78 proceeding on June 30, 199-5 contending that the Board's dismissal of its §1-02 Petition was an inexplicable departure from prior OCB rulings and is arbitrary and capricious and an abuse of discretion in the extreme.

The Internal Union Proceedings

In 1993, DC 37 established a committee to look into the jurisdictional dispute between petitioner and Local 2627. This committee concluded that the telecommunications titles were properly assigned to Local 2627. The committee's report was adopted by the Executive Board of DC 37 on May 11, 1994. Following receipt of the committee's report, petitioner repeated its request to the International President of the American Federation of State County Municipal Employees ("AFSCME") to award it jurisdiction over the telecommunications titles pursuant to Article V, Section 6 of the AFSCME International Constitution which vests the final authority on all matters relating to jurisdiction of subordinate bodies with the President. In addition,_ petitioner sought a declaration that DC 37 was in violation of its own constitution as well as that of AFSCME. By letter dated February 14, 1996, the International President rendered his decision on the jurisdictional issue finding that the titles were properly awarded to Local 2627.

DISCUSSION

Judicial inquiry into the propriety of an administrative agency's actions is limited to an analysis of whether the agency's actions are arbitrary and capricious, or are a reasonable exercise

of discretion. The Court will not substitute its judgment for that of the agency if the determination has a rational basis. (Levitt v. Board of Collective Bargaining, 79 NY2d 120; Board of Education v. Public Employees Relations Board, 75 NY2d 660; Rosen v. Public Employees Relations Board, 72 NY2d 48).

The Board is expressly authorized by Section 12-309(b) of the New York City Collective Bargaining Law ("NYCCBL") to resolve questions of representation, to establish appropriate bargaining units, to certify and decertify employee organizations, to determine the length of time during which such certifications should remain in effect and free from challenge or attack and to insure the continued majority of certified employee organizations. The courts have judicially sanctioned "a presumption that OCB and its Board have developed an expertise on such matters." (Civil Service Technical Guild v. Anderson, 79 AD2d 541, 543 [Dissenting Opn], revd 55 NY2d 618 for reasons stated by dissent).

Petitioner first challenges the Board's ruling that its §1-02(r) Petition was untimely because it was not filed within the initial certification year. Section 1-02(r) of OCB's rules provides in pertinent part:

> (r) Certification; designation--life; modification. When a representative has been certified by the Board, such certification shall remain in effect for one year from the date thereof and until such time thereafter as it shall be made to appear to the Board, through a secret ballot election conducted in a proceeding under H 1-02 (c), (d) or (e) of these rules, that the certified employee organization no longer represents a majority of the employees in the appropriate unit . . . In any case where unusual or extraordinary circumstances require, the board may modify or suspend, or may shorten or extend the life of the certification or designation. . . . .

(Emphasis added).

The Board's interpretation of this rule as permitting a challenge to a union's certification based upon "unusual or extraordinary circumstances" only during the initial certification year appears to be rationally based. Petitioner's interpretation of the text of the rule ignores the first sentence which requires any challenges after the initial certification year be made in a proceeding under §1-02 (c), (d), or (e) of OCB's rules. As the Board noted, §1-02 (r) should not be utilized by a union as a substitute for representation petitions which are required to be supported by a showing of majority support for the petitioning organization (OCB Rules §§1-02 [c][2] 1-02 [e][2]).

Petitioner also alleges that Decision No. 6-95 is arbitrary and capricious because §1-029 (g) confirms that a §1-02 (r) petition can be brought after the certification year has expired. Section 1-02 (g) states in full:

> (g) Petitions--Contract Bar Rule; time and file. A valid contract between a public employer and a public employee organization shall bar the filing of a petition for certification, designation, decertification or revocation of designation during a contract term not exceeding three (3) years. Any such petition shall be filed not less than five (5) or more than three [sic] six months before the expiration date of the contract, or, if the contract is for a term of more than three (3) years, before the third anniversary date thereof. Subject to the provisions of §1-02 (r) of these rules, no petition for certification, decertification, or investigation of a question or controversy concerning representation may be filed after the expiration of a contract. (Emphasis added).

Petitioner contends that, according to this rule, since §1-02 (r) petitions can be brought after the expiration of a contract, they

can also necessarily be brought after a union's "certification year". This follows, according to petitioner, because contracts are never of a duration of less than a year, and because they are never concluded the day the union is certified. Even assuming that the poorly, worded phrase "Subject to the provisions of §1-02 (r) these rules" means that §1-02 (r) petitions are exempt from the stated rule, this seemingly inconsistent rule does not render the Board's determination arbitrary or capricious since the Board has articulated a valid and persuasive reason for interpreting §1-02 (r) as it did and because, as discussed below, the Board concluded that petitioner had failed to demonstrate unusual or extraordinary circumstances sufficient to warrant relief under §1-02 (r).

Moreover, even if the Board's ruling is a recent departure from some older rulings (i.e., Decision 64-70 [citing unusual or extraordinary circumstances, OCB terminated a certification that was more than three years old]; Decision 29-74 [OCB terminated a certification under Rule 1-02 (r) that was more than six years old]), as petitioner suggests[1], this fact alone does not necessarily render the Board's current pronouncement arbitrary or capricious.

The Board also ruled that the Petition was barred by the contract bar rule contained in §1-02 (g), cited above. Briefly stated, this rule bars the filing of a petition challenging a

[1]Since neither petitioner nor respondent has provided the Court with copies of the Board decisions upon which they rely, and these decisions are not publicly available, the Court can hardly judge the validity of petitioner's claim of inconsistent rulings. (See CPLR 7804 [d], [e], 2214 [c]).

union's certification during the terms of a valid contract of reasonable duration except for the brief window period provided by the statute. The collective bargaining agreement between the City of New York and DC 37 on behalf of the telecommunications titles (the "unit agreement"), on its face, expired on December 31, 1991, but continued in effect at the time the Petition was filed in September of 1993 pursuant to the status quo provisions of NYCCBL §12-311(d). A successor unit agreement was not concluded until November 11, 1994. Therefore, the Board correctly ruled that the Petition was not timely filed.

Even assuming the Board erred in its interpretation of the §§1-02 (g) and (r) or abused its discretion is applying the contract bar rule, the Board chose not to rely solely on these procedural grounds in denying the Petition. It went further and ruled that petitioner's complaints did not constitute "unusual or extraordinary circumstances" which would permit the shortening of a certification under OCB's rules.

Petitioner had contended before the Board that Local 2627 was allowed to intervene in the initial OCB proceeding despite DC 37's initial determination that the telecommunications titles shared a community of interest with petitioner. Even though Local 2627 purported to be the intervenor before the OCB, the unit to which the titles would be accreted should it succeed was DC 37's unit because Local 2627 was not (and is not) the certified or recognized collective bargaining agent of its member employees. Therefore, petitioner contends that Local 2627 lacked standing to intervene in

the proceeding. When Local 2627 moved to intervene in the OCB proceeding DC 37 should have but did not move to discipline Local 2627 and/or demand that it withdraw its improper intervention. Nor did DC 37's Office of General Counsel, serving as petitioner's legal representative, ever advise petitioner of the conflict of interest. Petitioner further contends that DC 37's Office of General Counsel switched sides and represented Local 2627 in the first Article 78 proceeding.

Turning first to the allegedly fundamental conflict of interest which tainted the original OCB proceeding, the Court notes that, in 1986, after DC 37 agreed to support petitioner's efforts to have the telecommunications titles accreted to Local 375, petitioner's President requested that an attorney be assigned to represent his local in the OCB proceeding. The attorney that was requested was Assistant General Counsel Mary Moriarty. This attorney had a special relationship with petitioner. Pursuant to a pre-existing agreement, DC 37 had agreed to hire an attorney to represent petitioner in labor relations matters, with the understanding that petitioner would pay 50% of the attorney's salary. This agreement culminated in the hiring of Attorney Moriarty to represent petitioner on a regular basis. Attorney Moriarty did in fact represent petitioner in OCB Case No. RU-972-86. There is absolutely nothing in the record which suggests that Attorney Moriarty did not zealously represent petitioner in the original OCB proceeding or that the fact that 50% of her salary was paid by DC 37 created a conflict of interest. As noted by the

Board in its decision (at pp. 4, 19), Local 2627 was represented by private counsel in the initial OCB proceeding and not by DC 37's General Counsel. Moreover, although DC 37 had initially supported petitioner in its efforts to represent the telecommunications titles based on a recommendation of Dc 37's research department, once the Board ruled, Dc 37 acted administratively to assign those titles to Local 2627 in accordance with the Board's ruling. In short, Local 375 has failed to demonstrate that the theoretical conflict of interest tainted the Board's fact finding or substantially prejudiced Local 375.

The International President of the AFSCME, dealt with the allegation that DC 37 has a conflict of interest, in the following way:

> suggests a fundamental misunderstanding on [petitioner's] part of the relationship that should exist between AFSCME affiliates. A basic premise of those relationships is that we are all on the same side, and not in competition, with each other. Our common objective should be to bring these employees under the AFSCME umbrella, and that was accomplished when OCB denied the accretion sought by CWA Local 1180 and granted that of Local 2627. Not only has Local 375 continued to contest the decision to award these titles to a sister AFSCME local, but it has now gone well beyond that by asking a court to take these titles away from an AFSCME local and give them to a local of the CWA.

(Letter dated February 26, 1996 from AFSCME International President Gerald W. McEntee). The Board further determined that there was no confusion over the certification status of Local 2627 in RU-972-86 or its standing to intervene in that proceeding. The certification to which Local 2627 sought to add the titles was Certification No. 46D-75, which as all parties agree, was and is held by DC 37, not

by Local 2627. For a public employee organization to be certified as an exclusive bargaining representative, the NYCCBL requires only that it can be an organization having as its primary purpose the representation of public employees with respect to the matters concerning wages, hours, and working conditions. (NYCCBL §12-303 (j); see also, New York State Civil Service Law §201 [5]). The Board properly held that Local 2627 satisfied the test as did its parent, DC 37, consistent with the decision by PERB on this very issue.

Further, this argument should have been raised in 1987 when Local 2627 first sought intervention in RU-972-86. It is undisputed that there are only three local affiliated with DC 37 which hold bargaining certificates listing only their local: (1) petitioner, Local 375 (2) Local 372, representing Board of Education employees, and (3) Local 1320, representing a blue collar unit of Sewage Treatment Workers. DC 37's General Counsel averred before the Board that Louis G. Albano, who has been the President of Local 375 since 1983, was well aware of this fact and that Local 2627 did not have its own bargaining certificate. (Perez Wilson 2/24/94 Sur-Reply Affirm. ¶¶14-18). Mr. Albano has not denied this statement in his affidavit filed in this proceeding. Local 375's failure to raise a challenge to Local 2627's intervention constitutes a waiver and precludes it from now raising a challenge to the validity of the Board's underlying decision. (Consolidated Edison Co. Of New York v. Public Service Commission, 98 AD2d 377, affd as modified on other grounds 63 NY2d 424; Freer v. State Tax

Commission, 98 AD2d 834).

The court agrees with the Board's ultimate conclusion that petitioner's §1-02 (r) Petition was nothing more than an improper collateral attack n OCB's underlying certification issued back on July 27, 1988. For the reasons cited above, it is hereby

ORDERED AND ADJUDGED that the petition is denied and dismissed.

DATED: January 18, 1997

ENTER:

J. S. C.