SUPREME COURT STATE OF NEW YORK
COUNTY OF NEW YORK : I.A.S. PART 25

In the Matter of the	:	
	:	
INDEPENDENT LABORER UNION OF NEW YORK CITY	:	
	:	Index No.:
Petitioner,	:	113973/01
	:	
For the Judgment pursuant to Article 78	:	
of the Civil Practice Law and Rule	:	Call No.:
	:	59 of 12/7/01
-against-	:	
	:	
OFFICE OF COLLECTIVE BARGAINING, BOARD OF CERTIFICATION, DISTRICT COUNSEL 37, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, THE CITY OF NEW YORK, OFFICE OF LABOR RELATIONS,	:	
	:	
Respondents.	:	

DeGRASSE, J.:

Motion sequence numbers 01 and 02 are consolidated for disposition.

Petitioner in this Article 78 petition seeks an order annulling a decision issued by respondent Office of Collective Bargaining, Board of Certification ("OCB") dated June 14, 2001 (the "June 14th decision"). The June 14th decision denied petitioner's application to be certified as a "Certified Public Employee Organization", as defined in the New York City Collective Bargaining Law. Petitioner sought this certification in order to negotiate directly on its members' behalf with the City, rather than under the aegis of respondent District Council 37 ("DC37").

FACTS

OCB is authorized by the New York City Collective Bargaining Law to resolve questions of representation, establish appropriate bargaining units, certify and decertify employee organizations, and regulate aspects of the organization of such employee organizations. (NYCCBL § 12-309 [Administrative Code of the City of New York, tit 12, ch 3].)

Petitioner Independent Laborers Union of New York City ("ILU") alleges that it is a Municipal Employee Organization and a Public Employee Organization within the meaning of NYCCBL § 12303(i)(j). Its members consist workers known as Construction Workers and Watershed Maintainers. These individuals, who are all employed by the City of New York, are responsible for the repair and maintenance of New York City's water supply distribution systems and sewer systems.

The members of ILU are presently associated with New York City, New York Laborers Local 376 of the American Federation of State, County and Municipal Employees, AFL-CIO ("Local 376"). Local 376, in turn, is affiliated with respondent DC 37. DC 37 is an association of approximately 56 local unions which represent approximately 125,000 Municipal and Public Employees.

It is the responsibility of DC 37 to negotiate on behalf of all of its constituent union members with respondent Office of Labor Relations, the City Agency responsible for labor negotiations. The terms of the relationship between the members of the unions associated with DC 37 and the City are governed by a labor agreement known as a consent determination which was entered into in 1995 and was to expire on March 31, 2000 ("Consent Determination"). At the time the petition in this action was filed, DC 37 and the City had not yet entered into a successor consent determination, and so the 1995 -2000 Consent Determination still governed the City's relationship with the membership of unions associated with DC 37.

On November 24, 1999, ILU filed a petition with OCB to represent its Construction Laborer members as a bargaining unit, and to negotiate with the City on its own behalf, rather than continue to be represented by DC 37. On December 10, 1999, ILU filed an amended petition that included its Watershed Maintainer members. These two categories of workers are currently represented by DC 37 in negotiations with the City.

In its petition, ILU cited the corruption scandals involving the leadership of DC 37 that came to light in 1998. This corruption allegedly included election fraud arising from the membership ratification of the Consent Determination. ILU asserts herein that it included "numerous examples" in its petition before OCB of corruption on the part of DC 37's leadership.

As ILU admitted in the petition, it failed to file the petition within one of two window periods allowed by the relevant OCB rule, commonly known as "the Contract Bar Rule." The Contract Bar Rule provides the a representation petition "shall be filed not less than 150 or more than 180 days before the expiration of the contract or, if the contract is for a term of more than three years, before the third anniversary date thereof". (OCB Rule § 1-02[g], RCNY tit 61, § 1-02 [g].) To have been timely under the Contract Bar Rule, ILU's petition had to have been filed either during the month of October 1997 or during the month of October 1999. As the initial petition was filed on November 24, 1999, it was untimely.

ILU argued before OCB that the Contract Bar Rule should not bar its petition. ILU averred that a schism had developed between it and DC 37 because of the pervasive corruption

that had been uncovered at the District Council. ILU cited the NLRB case of Hershey Chocolate Corporation (121 NLRB 901), which found an exception to a similar contract bar rule because of the irreparable division that had developed between the unions in the case. ILU also argued that equitable principles should bar application of the Contract Bar Rule because the Consent Determination had been ratified in an election marred by fraud. Finally, it argued that the Consent Determination was voidable under the law of contracts because it had been obtained by fraud.

In letters dated December 2, 1999 and December 4, 2000, OCB sought from the City, DC 37 and ILU their positions concerning whether ILU's representation petition was timely. In the December 2, 1999 letter, OCB declared the applicability of the Contract Bar Rule to be a "threshold issue." The resolution of this issue was delayed as ILU sought to obtain and enforce a subpoena to obtain certain documents relating to corruption at DC 37. The December 4, 2000 letter from the Deputy Director of OCB states in relevant part as follows:

> (W)hile the subpoenaed materials been alleged to provide the factual predicate for the application of the *Hershey* exception, there exist independently, as a threshold matter, the question of whether the exception asserted by petitioner can *be* recognized under the contract bar mile set forth in this agency's rules... Now that the court action [regarding the subpoena] has been decided, the Board wishes to move forward to determine this question.
>
> All parties should clearly understand that the threshold question is not whether the facts support the Petitioner's allegations concerning District Council 37.

> Rather, the threshold question is whether, assuming the existence of the fact alleged by the Petitioner, an exception, to the contract bar rule has been stated, within the meaning of Title 61 RCNY § 1-02(g).

The exception cited in the last quoted sentence of this letter is contained in OCB Rule 1-02 (t), which provides simply that only in "unusual or extraordinary circumstances" will OCB find an exception to the Contract Bar Rule. The parties subsequently offered submissions that addressed whether any exceptions existed to the Contract Bar Rule, and, if so, whether those exceptions were applicable to ILU's circumstances.

In its June 19, 2001 decision, OCB found that while there are exceptions to the Contract Bar Rule, the facts as alleged by ILU did not warrent the application of those exceptions. The OCB found that the Hershey exception was not applicable. Finally, given that the City and the union membership had given effect to the Consent Determination for four years, OCB declined to find that the Consent Determination was void under contract principles. OCB therefore dismissed ILU's petition as time-barred.

DISCUSSION

Some of the respondents first argue that the petition should be dismissed because two necessary parties, the City and DC 37, were not timely served within fifteen days after the filing of ILU's Article 78 petition. Service on all parties should have been effected by August 6, 2001. Instead, ILU served DC 37 and the City on August 23, 2001.

Pursuant to CPLR 306-b, dismissal on this ground may only be ordered "on motion." No party has made a motion to dismiss the petition on this (or any other) ground. Indeed, the City does not even mention the argument in its Answer. Even if the issue had been

raised by motion, petitioner's tardiness in serving the petition was slight and the prejudice to respondents nil. Accordingly, even if faced with a motion to dismiss, the court would extend the time for service nunc pro tunc "in the interests of justice." (CPLR 306-b; see Brooklyn Housing and Family Services v. Lynch, ___ Misc2d__; 2002 WL 377654.) For these reasons, the court declines to dismiss the petition for late service on two of the respondents.

With respect to the merits of the petition, ILU argues that OCB acted arbitrarily and capriciously in three respects.

First, ILU argues that OCB's decision does not honor the intent of State and City Collective Bargaining Laws to allow rank and file workers to choose the union that will bargain on their behalf. While this is certainly one of the principals that undergird these laws, it is balanced with the principle that underlines the Contract Bar Rule; the need to give continuity and stability to established ongoing bargaining relationships. While ILU argues that OCB did not correctly strike that balance, a court must give deference to an administrative body's interpretation of the laws and regulations it is charged with enforcing, so long as its interpretation is reasonable. (See Levitt v. Board of Collective Bargaining of the City of New York, Office of Collective Bargaining, 79 NY2d 120, 129-30; Golden v. Abate, 201 AD2d 256, iv denied 83 NY2d 757; Caruso v Anderson, 138 Misc2d 719, aff'd 145 AD2d 1004, appgal,denied 73 NY2d 709.) OCB's interpretation of its own rules and statutory mandate is reasonable.

OCB also gave due consideration to petitioner's argument that Hershey was applicable to the facts as alleged in the petition. OCB is entitled to consider the applicability of NLRB precedent so long as it does not treat it as binding. (See Saxatoga Springs City School District v. New York State Public Employment Relations Board, 68 AD2d 292, 208, appeal

denied 47 NY2d 711; Civil Service Employees Association, Inc. v Milowe, 66 AD2d 38, 43, modified on other grounds 46 NY2d 1005.) OCB's conclusion that Hershey is inapplicable is not arbitrary and capricious. (See Saratoga Springs, supra, 68 AD2d at 208-9.)

ILU's second argument is that OCB's decision exceeded the scope of its threshold inquiry as specified in its letter of December 4, 2000 to determine if there were exceptions to the Contract Bar Rule. This argument is without merit. The December 4, 2000 letter (quoted above) clearly states that the relevant inquiry would be whether the facts, as alleged by petitioner, warranted waiving the Contract Bar Rule. The OCB's inquiry was thus akin to a court's on a motion to dismiss in that it treats ILU's factual allegations as true. OCB's June 14th decision adheres to the framework set forth in the December 4, 2000 letter.

Finally, this court will not disturb OCB's rejection of petitioner's argument that the Consent Determination was void under contract and equitable principles. Given the length of time that the parties had operated under the Consent Determination, and petitioner's delay in challenging it, OCB's rejection of this claim was not arbitrary and capricious. (See Arfin v. Ambach, 111 AD2d 486, 487.)

CONCLUSION

For the foregoing reasons, this Article 78 petition is denied and the proceeding is dismissed. This constitutes the decision and judgment of the court.

DATE: April 3, 2002