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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. PETER H. MOULTON

PRESENT: _____ J.S.C.
Justice

PART 50

Index Number : 100180/2014
CITY EMPLOYEES UNION LOCAL 237
vs.
NYC OFF. OF COLLECTIVE
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

Is decided in accordance with the writ decision of today's date

FILED
JUL 28 2015
COUNTY CLERK'S OFFICE
NEW YORK

RECEIVED
JUN 15 2015
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 6/15/15

_____, J.S.C.
HON. PETER H. MOULTON

1. CHECK ONE: ..... ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

Supreme Court of the State of New York
New York County: Part 50

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In the Matter of the Application of
City Employees Union Local 237,
International Brotherhood of Teamsters,
Petitioners,

-against

New York City Office of Collective
Bargaining, Board of Certification; Index No. 100180/2014
The City of New York; Law Enforcement
Employees Benevolent Association;
District Council 37, AFSCME, AFL_CIO, and
its Affiliated Locals; Organization of
Staff Analysts; United Federation of
Teachers; Communications Workers of America
Local 1181; Communications Workers of
America Local 1182; and New York City
Sheriffs Association;
Respondents.

----------X

In the Matter of the Application of
The City of New York, The New York City
Office of Labor Relations, and Robert Linn,
Commissioner of Labor Relations,
Petitioners,

-against- Index No. 400199/2014

New York City Board of Certification;
District Council 37; Organization
of Staff Analysts; United Federation of
Teachers; Communications Workers of
America; International Brotherhood of
Teamsters, Local 237; New York City
Deputy Sheriff's Association; and Law
Enforcement Employees Benevolent
Association;
Respondents.

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

----------X

Peter H. Moulton, J.S.C.

These two Article 78 proceedings were consolidated before me by order dated July 7, 2014.

Both proceedings challenge discrete portions of a decision dated January 10, 2014, issued by respondent New York City Board of Certification. As discussed at greater length below, the Board of Certification is a constituent Board of the Office of Collective Bargaining, and is charged with resolving certain questions concerning representation of public employees by unions in collective bargaining. In the January 10th decision the Board of Certification rearranged the collective bargaining units of numerous public employee titles in response to the mandate of Local Law 56, which amended the City's Charter.

Petitioners herein attack portions of the January 10th order that placed in a single bargaining unit: 1) Taxi and Limousine Inspectors and Associate Taxi and Limousine Inspectors (collectively "TLC Inspectors") and 2) certain Special Officer titles. Petitioners also object to that portion of the order that allowed respondent Law Enforcement Employees Benevolent Association to inform the Board within 30 days if it had in interest in representing that bargaining unit.

The Board of Certification now seeks to dismiss both petitions.

DISCUSSION

Local Law 56, enacted by the New York City Council in 2005, amended the New York City Collective Bargaining Law (12 N.Y.C. Admin Code, ch 3, referred to herein as "NYCCBL"). Prior to the enactment of Local Law 56, NYCCBL provided for two levels of bargaining: Citywide and uniformed. Local Law 56 amended NYCCBL § 12-307(a)(4) to create a new level of bargaining, known as "similar to uniformed," and to add certain titles previously in the Citywide level of bargaining to either the uniformed or similar to uniformed levels of bargaining. Local Law 56 broke out 39 titles and placed them in one of these two categories. NYCCBL provides that all employees subject to the Citywide level of bargaining must negotiate together as one group for certain non-economic terms such as overtime and time and leave rules. In contrast, the uniformed and similar to uniformed levels of bargaining permit the designated employees to bargain all terms and conditions of employment on the unit level. Therefore, the practical effect of Local Law 56's new categorization was that the unions certified to represent those titles have the right to bargain independently and would no longer be required to accept certain terms and conditions of employment contained in the Citywide Agreement.

The City challenged Local Law 56 in court, but that lawsuit was subsequently withdrawn after the New York Court of Appeals upheld the validity of Local Laws 18 and 19 of 2001, which also

expanded titles to the uniformed level of bargaining. (Mayor of City of New York v Council of the City of New York, 9 NY23d 23.)

Following the enactment of Local Law 56, five petitions were filed with respondent Board of Certification ("BOC"). The Office of Collective Bargaining, and its constituent Boards, the Board of Collective Bargaining ("BCB") and the BOC, are creatures of the City Charter that regulate the conduct of labor relations between the City and its employees. As noted above, the January 10, 2014 decision challenged herein (the "January 10th decision") was made by BOC.

One of the petitions was filed by the Law Enforcement Employees Benevolent Association ("LEEBA"), which sought to represent TLC Inspectors. The TLC Inspectors were part of a bargaining unit represented by petitioner City Employees Union Local 237 ("Local 237"). The City opposed LEEBA's petition, and asserted in its own petition that all Local Law 56 Titles should be consolidated in a single Public Health, Safety and Enforcement Unit. Local 237 objected to LEEBA's petition on various grounds, and brought its own petition advocating its own position with respect to the organization of the Local Law 56 titles.

On April 22, 2009, BOC issued an interim decision that, inter alia, ordered a hearing on specified issues that would determine the appropriate bargaining unit placements of employees within the Local Law 56 titles. BOC rejected the argument that the City's

petition was prohibited by the "contract bar rule," which provides that petitions regarding union representation must be brought within the window period set forth in § 1-02(g) of the Rules of the Office of Collective Bargaining. Citing BOC precedent, BOC held that enactment of Local Law 56 gave rise to "unusual and extraordinary circumstances that warrant processing [the City's] petition even though it would otherwise be barred by the contract bar rule."[1] The decision also allowed LEEBA to intervene in the City's consolidation petition.

The hearing went forward on numerous dates between June 2009 and April 2011. BOC resolved the outstanding issues raised in its interim decision in the January 10th decision. In the January 10th decision the BOC found that certain titles granted uniformed and similar to uniformed status were no longer appropriately placed in bargaining units that also contained titles that participate in Citywide bargaining. BOC added some of these titles to existing ~~titles~~ units and created new bargaining units for other titles.

In the January 10th decision, the BOC explained that it configured the new units to harmonize the factors set forth in its Rule 1-02(k) with its "long-standing policy against the proliferation of bargaining units."[2] Rule 1-02(k) states:

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[1]Interim Decision at 24. The Interim decision is attached as Exhibit C to the City's petition.

[2]January 10th decision at 70. The decision is attached to Local 237's petition as exhibit 1.)

> **Appropriate units - determination.** In determining appropriate bargaining units, the Board will consider, among other factors:
>
> (1) Which unit will assure public employees the fullest freedom in their 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 the 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.

Among other actions, BOC removed the similar-to-uniform titles of TLC inspectors and certain Special Officers ("SOs")[3] from Local 237's Bargaining unit, and placed them together in a newly formed unit. In doing so, it rejected LEEBA's argument that a single unit

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[3]Only those SOs employed at the Administration for Children's Services, the Department of Health and Mental Hygiene, the Department of Homeless Services, the Department of Juvenile Justice and the Human Resources Administration are covered by Local Law 56. The SO titles at the Health and Hospitals Corporation, and other City agencies, remain in the Citywide level of bargaining.

was appropriate for TLC Inspectors. According to BOC it followed its own precedent in allowing LEEBA to inform the Board within 30 days if it had an interest in representing the larger bargaining unit. BOC asserts that since LEEBA had filed a timely petition showing that 30% of the TLC Inspectors had expressed an interest in being represented by LEEBA, LEEBA should be given the opportunity to show that 30% of the larger bargaining unit, comprised of TLC inspectors and certain SOs, would also like to have LEEBA represent the unit. On March 25, 2014 LEEBA submitted a sufficient showing of interest in the new, larger, bargaining unit.

Thereafter two Article 78 petitions were filed seeking modification of the January 10th decision. The first was by the Local 237 and the second by The City of New York, The New York City Office of Labor Relations, and Robert Linn, as Commissioner of the Labor Relations (collectively referred to herein as "the City"). Petitioners seek to modify two aspects of the January 10th decision that 1) placed TLC and certain Special Officer titles in a single bargaining unit, and 2) allowed LEEBA to express an interest in representing this bargaining unit.

DISCUSSION

BOC first asserts that the City does not have standing to challenge the January 10th decision. BOC argues that the City has not articulated a right that would be affected by the January 10th

order, as it is employees, not the City, who determine which union, if any represents them.

Under NYCCBL § 12-308(a)(1) an "aggrieved party" may bring an Article 78 petition challenging a board decision. Here the City does has an interest in the number or unions with which it must bargain. The City argues that it was arbitrary for BOC to divide various SO titles into different bargaining units. One of the factors that BOC must weigh in determining bargaining units recognizes this interest. As quoted above, BOC rule 1-02(k) provides that BOC must consider "[t]he effect of the unit on the efficient operation of the public service and sound labor relations." The City vigorously advanced this position before BOC and it is unclear why, at this late date, the City's voice should be silenced. "A party who has received an unfavorable decision in an underlying administrative proceeding may be presumed to be an 'aggrieved party.'" (See Patrolmen's Benevolent Assn. Ov the City of New York v New York City Office of Collective Bargaining, 31 Misc3d 1244(A).) BOC offers no persuasive reason that the City petitioners are not aggrieved by the January 10th decision.

Turning to the merits, BOC has demonstrated that the challenged decisions were within its discretion and not arbitrary and capricious.

Under Article 78 the court must affirm an administrative decision that is consistent with lawful procedures, and not

arbitrary and capricious or an unreasonable exercise of discretion. (See Mahinda v Board of Collective Bargaining, 91 AD3d 564, 565.) The reviewing court may not substitute its judgment for that of the agency's, and the decision will be upheld if it is supported by any rational basis. (Matter of Pell v Board of Educ., 34 NY2d 222, 231 [1974].)

BOC had a rational basis for its decision to place TLC inspectors and SOs in the same bargaining unit. NYCCBL § 12-309(b)(1) empowers the BOC to make final determinations of the units appropriate for collective bargaining. The challenged decision is adequately supported by BOC's interpretation of its own unit consolidation policies and OCB Rule 1-02(k). An agency charged with implementing and enforcing provisions of a statutory scheme, such as the NYCCBL here, is entitled to deference. (Eg Chenango Forks Cent. School Dist. v New York State Public Employment Rel. Bd., 21 NY3d 255, 265.)

It was also not arbitrary and capricious for BOC to afford LEEBA an opportunity to submit a showing of interest for the larger unit. The decision comports with BOC's own precedent including U.A. Plumbers (18 OCB 23), which is cited in the January 10th decision. Defendants complain that BOC violated its own contract bar rule by allowing LEEBA to make a showing of interest. However, the contract bar rule applies to existing bargaining units. Here, BOC created a new bargaining unit. LEEBA could not have had the

opportunity to file a petition for the new unit until the unit was created.

The petitioners also state that their due process rights were violated by BOC's decision to allow LEEBA to provide a showing of interest for the new unit. They do not identify a constitutionally protected interest that would fall within the protection of the due process clause. (See Town of Castle Rock v Gonzales, 545 US 748, 756.) BOC's decision to allow LEEBA to demonstrate a showing of interest concerns a right of employees to determine which union will represent them. Neither the City nor Local 237 have a property or liberty interest affected by that aspect of BOC's January 10th decision. (See Matter of Daxor Corp v New York State Dep't of Health, 90 NY2d 89, 98, cert denied, 523 US 1074.) The decision merely required Local 237 to compete with another union to represent the employees in question. Competition between unions seeking to represent a unit serves the purpose of NYCCBL.

Petitioners also argue that LEEBA is barred from representing the new unit because it currently represents Environmental Police Officers ("EPOs"). NYCCBL § 12-314(b) provides that no union can represent "members of the police force of the police department" and also represent other units composed of employees that are not members of the police force. Petitioners argue that EPOs are "members of the police force of the police department" citing the various law enforcement duties have in protecting the City's water

system, and the fact that a provision of Criminal Procedure Law describes EPOs as "police officers." (See CPL § 1.20.34(o).) The duties of EPOs, and the fact that the criminal procedure law includes them in a broad definition of police officers, does not mean that they are policemen that fall within the ambit of NYCCBL § 12-414(b). That section speaks of "the" police department - not plural police departments. The command structures of the NYPD and the City's Department of Environmental Protection are separate. The EPO title is not included in the uniformed level of bargaining. Accordingly, this argument is without merit.

CONCLUSION

For the reasons stated, the motion to dismiss the petitions is granted. The proceeding is dismissed. Any stays of the court are lifted. This constitutes the decision and judgment of the court.

Date: June 15, 2015

J.S.C.

HON. PETER H. MOULTON
J.S.C.

FILED
JUL 28 2015
COUNTY CLERK'S OFFICE
NEW YORK

CLERK

Index No. 100180/14

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

City Employees Union Local 237, et al

Plaintiff,

-against-

NYC office of Collective Bargaining, et al

Defendants.

Judgment

NYC Office of Collective Bargaining
100 Gold Street 4th floor
(212) 306-7160
For Respondent

FILED
JUL 28 2015
1:18 P M
AT
N.Y., CO. CLK'S OFFICE