City v. L.1070, DC37, 25 OCB 25 (BCB 1980) [Decision No. B-25-80 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of	DECISION NO. B-25-80
THE CITY OF NEW YORK, Petitioner,	DOCKET NO. BCB-337-79 (A-885-79)
-and-	DOCKET NO. BCB-399-90 (A-998-79)
LOCAL 1070, DISTRICT COUNCIL 37, AFSCME, AFL-CIO, Respondents	

DETERMINATION AND ORDER

District Council 37 (D.C. 37 or the Union) submitted requests for arbitration, dated July 17, 1979 and February 22, 1980, of a grievance concerning the failure of the City of New York to permit per diem grand jury stenographers to accrue annual and sick leave credits and other fringe benefits. The Union alleges that this denial of benefits violates the City-Wide collective bargaining agreement and the 1978-1980 Clerical and Related Titles unit contract to which the City and Union are parties. The City, through its Office of Municipal Labor Relations (OMLR), challenges arbitrability on the ground that grievants are not represented by D.C. 37 and are not covered by the City-Wide contract or by the unit agreement under which the claims are brought.

Grievants are grand jury stenographers appointed by a district attorney pursuant to the New York Judiciary Law

§§321 and 328, to take and transcribe testimony in grand jury proceedings in New York (BCB-337-79) and Queens (BCB-399-80) Counties. The cases were consolidated by the Board of Collective Bargaining pursuant to section 13.12 of the Revised Consolidated Rules of the Office of Collective Bargaining on March 21, 1980 because the issues of fact and law raised by each petition are identical. On April 17, 1980 a hearing was held on the consolidated matters, at which time testimony was give on the question of whether grievants had standing under the City-Wide contract or under any existing unit contract to assert their claims.

NATURE OF THE GRIEVANCE

Under the City-Wide contract,[1] D.C. 37 is recognized as "the sole and exclusive collective bargaining representative on City-Wide matters which must be uniform for the following employees:

[1] The Union does not specify under which City-Wide contract the grievance was brought. We assume that in BCB-337-79, it relies upon the 1976-1978 contract, as the current Agreement was not signed until June, 8 1979 three months after the grievance was initiated at Step 1. The grievance in BCB-399-80 seems to have been filed under the 1978-1980 City-Wide contract. However, we need not resolve the ambiguity created by the Union's failure to specify which contract it relied upon since the provisions relevant to the instant disputes are substantially the same.

> ...d. Employees of Comptroller, District Attorneys, Board of Higher Education (non-instructional personnel), Borough Presidents, Public Administrators, Queensborough Public Library, who are subject to the Career and Salary Plan, pursuant to and limited to the terms of their respective elections to be covered by the N.Y.C.C.B.L., ... " (Emphasis supplied)

Under the 1978-1980 Clerical and Related Titles unit contract, D.C. 37 is recognized as "the sole and exclusive bargaining representative for the bargaining unit ... consisting of employees of the Employer wherever employed, whether full-time, part-time, per-annum, hourly or per diem, in the below listed title(s) ...:

... Grand Jury Stenographer."

In order for this Board to determine whether the Union's request for arbitration should be granted, two fundamental and preliminary questions must be answered: (1) Are grievants "Employees of ... District Attorneys ... who are subject to the Career and Salary Plan" so as to be entitled to bring a grievance under the City-Wide contract?(2) Are grievants "employees of the Employer" in the title Grand Jury Stenographer so as to be covered by the unit contract?

Both of these questions require the Board to address the issue of the status of the grievants: whether they are indeed "employees", or, as the City claims, independent contractors not entitled to rights under the City-Wide or unit

agreements.

If we find that both of the questions raised above are answered in the negative, we must dismiss the request for arbitration and grant the City's petition. However, if either or both questions are answered affirmatively, we shall conclude that the request for arbitration be granted under the appropriate contract(s).

FACTUAL BACKGROUND

In its requests for arbitration, D.C. 37 alleges that the City violated the provisions of the City-Wide contract, set forth at Article V, Section 19, when it denied annual and sick leave credits to grievants. Article V, section 19 provides, in pertinent part:

> Effective January 1, 1974 all part time per annum, hourly, per diem, per session and seasonal employees who work at least one half the regular hours of full time employees in the same title shall accrue leave Credits as follow.
>
> Annual leave: One (1) hour of leave for every eleven (11) hours actually worked to a maximum accrual of two hundred-ten (210) hours.
>
> Sick leave: One (1) hour of leave for twenty (20) hours actually worked with no maximum accrual.

The Union alleges further that the City violated Article III, Sections 3 and 4 of the unit contract for Clerical and Related titles by denying grievants cost of living allowances - COLAs (Section 3) and non-pensionable cash payments (Section 4)

which are provided for other employees. The language alleged to have been violated is as follows:

> An employee who is a part time, hourly, per diem, per session or seasonal employee or whose normal work year is less than a full calendar year shall be deemed eligible under Section 4a and 4b above, provided, however, that such an employee shall have the non-pensionable cash payment hereunder pro-rated on the basis of computations heretofore utilized by the parties. (Emphasis supplied)

At a Step III Conference in BCB-337-79, the Manhattan District Attorney offered evidence[2] that grievants were not employees of the City and, therefore, were not the per diem employees referred to in the City-Wide and unit contracts. OMLR's Review Officer agreed and concluded that grievants had "no standing to grieve under the City-Wide Contract or any existing Unit Contract".

It should be noted that both New York and Queens County District Attorneys' offices elected coverage under the Career and Salary Plan as authorized by the Career and Salary Plan Resolution adopted by the New York City Board of Estimate on July 9, 1954. However, the Resolution permits such election only with respect to positions in the competitive or non-

[2] The evidence offered by the District Attorney at the Step III Conference in support of its position that grievants are not employees is the same as that offered by the City in its petition challenging arbitrability and subsequent pleadings. The details will be set forth under the section of this decision entitled City Position.

competitive classes of the classified service of counties within the City. The narrow issue presented therefore is whether grievant per diem grand jury stenographers hold positions in the competitive or non-competitive classes of City service so as to come within the scope of their respective District Attorney's election.

POSITIONS OF THE PARTIES

City's Position

The City's main contention is that grievants are not employees of the District Attorney's office subject to the Career and Salary Plan, and are, in fact, not "employees" at all. To support this conclusion OMLR notes the following factors which distinguish grievants from persons who come within the title Grand Jury Stenographer and for whom D.C. 37 is the exclusive bargaining representative:

1. Grievants were not hired pursuant to an open competitive exam, nor by interview; they are appointed on the basis of their ability to take dictation at 200 words per minute and to transcribe accurately their notes;
2. grievants are not processed or investigated by the New York City Department of Personnel; rather, they are appointed directly by the District Attorney pursuant to Judiciary Law §328(2)
3. grievants signed letters of appointment for a stated period when hired and their appointments are reviewed monthly by court order;

4. grievants are not paid via the Comptroller's office as are employees on the City payroll; rather, they are paid by means of vouchers which they submit to the District Attorney's timekeeping personnel;
5. grievants are paid a flat rate ($35.00 per appearance in the grand jury plus $1.00 per page of typed transcript) which is set by the Board of Estimate pursuant to Judiciary Law §328(3); they do not receive an annual salary specified in a collective bargaining agreement as do regular grand jury stenographers; further, no deductions are made for medical coverage, union dues or taxes;
6. grievants do not receive holiday pay nor are they eligible to join the pension system;
7. grievants are not required to work every day; they may accept or reject assignments (although they must be available for the duration of the grand jury term for which they are appointed);
8. grievants are (theoretically) free to assign the transcription of their notes and use the time saved to take other assignments; in practice, however, grand jury stenographers cannot assign the transcription of their notes as this would violate the secrecy of grand jury proceedings.

From the above, the City concludes that grievants are independent contractors and not employees represented by D.C. 37 or any other union. Since they are not employees in a title certified for collective bargaining, they are not covered by the City-Wide or any unit contract, according to the City.

Union Position

D.C. 37 contends that, since it is the certified collective bargaining representative of persons employed in the title of grand jury stenographer and is a party to a contract with the City and other public employers, including the District Attorneys' offices, it does represent the grievants herein and is entitled to demand arbitration of the asserted grievance.

The Union contends that there is no reason to differentiate between "per diem" and "regular" grand jury stenographers. The bargaining certificates of Local 1070 of D.C. 37 include the title grand jury stenographer and do not distinguish employee who work part-time from those who work full-time, or provisional from permanent employees. D.C. 37 notes that both "regular" and "per diem" stenographers are appointed pursuant to the Judiciary Law, "regular" in accordance with §321 and "Per diems" in accordance with §328. The Judiciary Law also provides for the setting of compensation rates for all grand jury stenographers. This responsibility is entrusted to local legislative bodies, in New York, the Board of Estimate, which by the Career and Salary Plan Resolution delegated this responsibility to the Career and Salary Plans. The District Attorneys of New York and Queens

Counties elected coverage under the Career and Salary Plan pursuant to the Resolution (section IV, para.2) and duly obtained Board of Estimate approval for their election. The Union argues that per diems, like regular grand jury stenographers, are covered by the Career and Salary Plan as they are "in no resolution or election" excluded from coverage.

D.C. 37 argues that grievants are employees and not independent contractors, as the City maintains. The Union cites the test adopted by the NLRB for determining whether an employer-employee or independent contractor relationship exists: if the person for whom services are to be performed reserves the right to control not only the end to be achieved but the means to be used in reaching such result, an employment relationship exists.[3] The Union also cites a decision of the New York Court of Appeals[4] which upheld the determination of the State Unemployment Insurance Appeals Board that stenographers who worked for a stenotype service were employees where they were assigned to take minutes outside of the office of the employer, transcribed their own minutes and were paid per page of typewritten transcript,

[3] NLRB v. United Insurance Co., 390 U.S. 254, 67 LRRM 649(1968).

[4] Matter of England, 38 N.Y. 2d 829, 362 N.Y.S. 2d 46, 345 N.E. 2d 589(1976).

and were not engaged on a regular basis.

In further support of its request for arbitration, the Union asserts that the fact that grievants are paid by vouchers issued by the District Attorney rather than via the Comptroller's Office is irrelevant since checks issued to grievants are drawn upon City funds. D.C. 37 also emphasizes that, although grievants were hired on a per diem basis, their service has been nearly continuous and full-time. Julius Wachs, one of the Union's witnesses at the hearing held in this matter testified that he worked five days a week, fifty weeks a year, each year that he was a per diem grand jury stenographer (Tr. 7-8). Mr. Wachs testified further that all per diem grand jury stenographers worked between forty-eight and fifty weeks a year (Tr. 8).

D.C. 37 offered other evidence at the hearing tending to show that grievants were treated by the employer in all respects like grand jury stenographers who are covered by the Career and Salary Plan pursuant to the New York and Queens District Attorneys' election. Grievants:

> 1. received all Personnel Policy and Procedure order, including one which its terms applies to City employees who are subject to "Leave Regulations for Employees who are under

the Career and Salary Plan".[5]

2. were assigned office space for transcribing their tapes in the same way as regular stenographers;

3. were paid as long as they were there regardless of whether they worked or not;

4. attended meetings called by the District Attorney along with regular grand jury stenographers;

5. were asked to test applicants and train new grand jury stenographers, both per diem and those with provisional civil service status;

6. received Labor Relations Orders issued by the City and information concerning changes in the law in the same way regular grand jury stenographers do.

In light of the above, D.C. 37 seeks retroactive accrual of all annual leave, sick leave, cost of living allowances and non-pensionable cash payments to which they allege, the affected individuals are entitled.

[5] Personnel Policy and Procedure No.650-80 concerning "Time and Leave Policies in the event of a N.Y.C. Transit Work Stoppage" (March 14, 1980).

DISCUSSION

As stated above, in order for this Board to decide whether the Union's requests for arbitration should be granted two fundamental questions must be answered: 1) Are grievants "Employees of ... District Attorneys ... subject to the Career and Salary Plan" so as to be to bring a grievance under the City-Wide contract? 2) Are grievants "employees of the Employer" in the title Grand Jury Stenographer so as to be covered by the unit contract? However, prior to any determination of whether the grievants are actually covered by the City-Wide and/or unit contract, it is necessary to establish that these per diem Grand Jury Stenographers are indeed "employees" of the City of New York and therefore are entitled to rights under the New York City Collective Bargaining Law.

According to section 1173-3.0(e), municipal employees are defined as "persons employed by municipal agencies whose salary is paid in whole or in part from the City Treasury". Although these per them Grand Jury Stenographers were hired pursuant to the Judiciary Law of 1971 (sections 321 dnd 328), they are appointed by the District Attorney, and they are compensated entirely by the City of New York. The grievants therefore appear, prima facie, to be municipal employees.

The City, however, argues that the grievants are not municipal employees. Citing a number of factors which distinguish the per them Grand Jury Stenographers from their conventional counterparts, OMLR asserts that the grievants should be classified as independent contractors. This position seems to be based on the view that since the per diem Grand Jury Stenographers are, among other things, hired and paid differently than "regular" Grand Jury Stenographers, they are not employees of the City of New York. In light of the legal definitions of "employees" and "independent contractors", the Board is constrained to reject this particular claim.

The National Labor Relation Board has clearly decided that the determinant of independent contractor status is the right to control the manner, means and result of the work. In A. Paladin, the NLRB described this determinant as follows:

> "Where the person for whom the services are performed retains the right to control the manner and means by which the result is to be accomplished, the relationship is one of employment. On the other hand, where control is reserved only as to the result sought, the relationship is that of an independent contractor. The resolution of this determination depends on the facts of each case, and no one factor is dispositive."[6]

[6] A. Paladin, 67 LRRM 1022,(1968).

This "right of control" test of the NLRB has been unequivocally upheld by the courts,[7] and, in the context of this case, it is also important to note that the Board of Collective Bargaining has construed the NYCCBL, in terms of the definition of employees, so as to be consistent with Supreme Court rulings.[8]

Specific criteria for determining the existence of an employment relationship have been established in a series of rulings by New York State Courts regarding the traditional common law rules of master-servant relations. In Bach v. Velzy, the Court of Appeals concluded that an independent contractor is one who agrees to do a specific piece of work for a lump sum, who has control of himself and his helpers as to when, within a reasonable time, he shall begin and finish the work, as to method of accomplishing it, and who is not subject to discharge because he does work as to method and detail in one way rather than another. The Court continued that, in the relation of employer and employee, the employer has control and direction not only of the work as to its

[7] NLRB v. United Insurance Co., 390 U.S. 254, 67 LRRM 2649 (1968); NLRB v. Steinberg & Co., 26 LRRM 2271(1950).

[8] District Council 37, AFSCME, AFL-CIO v. Office of Labor Relations, The City of New York, Decision No. B-21-72, Docket No. BCB-78-70 (regarding the issue of the status of retired employees).

result, but as to details and methods, and may discharge the employee for disobeying such control and direction.[9] In Manning v. Whalen, the Appellate Division of the Supreme Court reiterated these factors, emphasizing that an independent contractor does the work without supervision, that he is not bound by regular hours or subject to discharge, and that he receives a lump sum agreed upon in advance rather than pay by the day or hour.[10] Employment, as distinguished from independent contractor status, can often be established on the basis of one of these factors above.[11]

An examination of the nature of the work of the per diem Grand Jury Stenographers, within the framework of these determinants, clearly establishes that they are employees of the City of New York. The evidence shows that the grievants were required to sign a time sheet or punch a clock (Tr. 9), to take lunch within a certain period (Tr.9), and were expected to give advanced notice if they were to be absent from work (Tr.59). Apparently they did not have control over their hours of work. The grievants worked a normal work day and were paid for each day of work. Above all, an examination of the nature of their work

---

[9] Beach v. Velzy, 238 N.Y. 100, 143 N.E. 805 (1924).

[10] Manning v. Whalen, 259 App. Div. 490, 20 N.Y.S. 2d 364 (Third Dept. 1940).

[11] Grigoli v. Nito, 11 A.D. 2d 581, 200 N.Y.S. 2d 511,(Third Dept. 1960)

shows that the per diem Grand Jury Stenographers were supervised and did not possess the right of control over the manner and means of their work. For example, the grievants have administered tests for new applicants when asked by the Bureau Chief or head reporter (Tr.15-16), they have been expected to participate in staff meetings (Tr.14,17) and they have been instructed in the performance of their job (Tr.16). The City's claim that the grievants are independent contractors is simply without sufficient factual support.

Although the per diem Grand Jury Stenographers can be classified as employees of the City of New York, the Board can not grant the Union's request for arbitration until it is proven that the grievants are included in the City-Wide and/or unit contracts. Since the coverage of the City-Wide contract is different than that of the unit contract, the two fundamental questions presented above must be addressed separately.

In addition to covering different groups of employees, the two contracts must also be considered separately because of the nature of their respective substances. The City-Wide collective bargaining agreement deals with fringe benefits that must be uniform for all Career and Salary Plan and other covered employees. The Union's demands for arbitration regarding the accrual of annual and sick leave fall within the subject matter of this contract. The unit agreement, however, is primarily concerned

with wages and other matters which do not have to be uniform, and it is within the context of this contract that the issues of cost of living allowances and non-pensionable cash payments must be examined.

According to Article I of the 1976-1978 City-Wide collective bargaining agreement, "the Employer recognizes the Union as the sole and exclusive collective bargaining representative of City-Wide matters which must be uniform for the following employees:

> d. Employees of Comptroller, District Attorneys, Board of Higher Education (non-instructional personnel), Borough Presidents, Public Administrators, Queensborough Public Library, who are subject to the Career and Salary Plan, pursuant to and limited to the terms of their respective elections to be covered by the N.Y.C.C.B.L...." (emphasis added)

The Board of Collective Bargaining interprets this provision of the agreement to mean that only those employees of the District Attorney who are subject to the Career and Salary Plan are covered by the contract. Therefore, in order for the per diem Grand Jury Stenographers to have rights under the City Wide collective bargaining agreement, they must be included in the plan.

Coverage under the Career and Salary Plan is a complicated process involving the heads of the County offices, the State Civil Service Commission, the Personnel Director, the Board of Estimate,

and the Office of the Mayor. With regard to employees of the District Attorney, eligibility is established as follows:

> "The head of any County Office included within the City of New York may, with respect to positions in the competitive or non-competitive classes, as the case may be, elect, with the due approval of the State Civil Service Commission upon a prescribed form, filed with the Director of the Budget and Personnel Director, to conform with the provisions of this resolution with the approval of the Board of Estimate upon recommendation of the Mayor."[12]

Although the process involves an election by the County office, the final decision regarding which employees are to be included in the Career and Salary Plan is within the realm of unilateral authority of the City of New York. The Personnel Director is responsible for the administration of the plan.[13]

It is clear that the general job title of Grand Jury Stenographer, through the use of this process, has been brought under the coverage of the Career and Salary Plan. Accordingly, the union claims that the per them Grand Jury Stenographers have already been incorporated in the plan because there is no language in any of the pertinent resolutions and elections which would lead to the conclusion that per diems are to be excluded. The Board rejects this claim for a number of reasons.

---

[12] Career and Salary Plan Resolution Adopted on July 9, 1954 (Cal. No.1), Article IV, Section 2.

[13] Career and Salary Plan Resolution, Article III, Section 2 - "Administrative responsibility and authority for the development and maintenance of the position description, position classification, and reclassification, and salary allocation and reallocation system created by this resolution is hereby assigned to the Personnel Director subject to the limitation of the Civil Service Law, the charter and the provisions of this resolution."

First of all, there is specific language in the resolution excluding these per diems, as coverage is clearly limited to "... positions in the competitive or non-competitive classes..." Regular Grand Jury Stenographers, as part of the classified civil service, fall within this grouping. The grievants, however, are simply not part of the classified civil service, and therefore were not and could not be considered within the scope of their respective District Attorney's election.

Secondly, the position of Grand Jury Stenographers was approved by the Board of Estimate in 1954, prior to the enactment of the Judiciary Law in 1971 and the subsequent creation of these per diem positions. It is unreasonable to expect that this Board of Estimate decision, to cover a group of employees, should also include positions not yet in existence. Contrary to Respondent's claim, the burden of proof is on the union to demonstrate that the grievants were explicitly meant to be included in the Career and Salary Plan.

Finally, an examination of the stipulated facts in this case verifies the City's assertion that the per diem Grand Jury Stenographers are not included in the Career and Salary Plan. Most significant among these is the method and amount of compensation. The purpose of the Career and Salary Plan resolution was to provide fair and comparable pay for

comparable work (Article I), yet the per diem Grand Jury Stenographers receive a different rate of pay than permanent or provisional Grand Jury Stenographers - $35.00 per day as opposed to a per annum salary. Also of relevance in determining whether these positions were meant to be covered is that, contrary to the practices for regular Grand Jury Stenographers, the grievants were not processed or investigated by the Department of Personnel and were not required to take an open-competitive examination. Based on the manner in which the per diem Grand Jury Stenographers were treated, it seems that they were never intended to be included in the Career and Salary Plan.

As there is no evidence of past inclusion, and there are factors that work directly to exclude these per diem Grand Jury Stenographers, such as the language of the resolution and the unilateral authority of the City in this area, the Board concludes that the grievants are not included in the Career and Salary Plan. Therefore, they do not have rights under the City-Wide collective bargaining agreement, and their request for arbitration must be dismissed.

The conclusion that the request for arbitration under the City-Wide contract must be dismissed does not in any way affect the determination of whether the per diem Grand Jury Stenographers are covered by the unit contract. As the

coverage of the two contracts is different, the Union's claims must be considered separately.

The Union contends that the grievants, employed in the title of Grand Jury Stenographer, are covered by the unit contract, and therefore are entitled to demand arbitration regarding the cost of living allowances and the non-pensionable cash payments. The City's case is based primarily on the previously decided issue of whether these grievants are "employees."

There is no question that the Union has been certified as the exclusive representative of Grand Jury Stenographers employed by the City of New York and related public employers (Board of Certification, Decision No. 75-72, Docket No. RB-18-72, December 21, 1972), and that these job titles were later consolidated into the broad-based clerical unit also represented by District Council 37 (Board of Certification, Decision No. 46-75, Docket No. RE-56-75, October 6, 1975). In addition, as the Union points out in its post-hearing statement, prior to any Board of Certification decision the Queens County District Attorney voluntarily recognized Local 1070 as the exclusive representative of employees in the Grand Jury Stenographers job title (Certificate of Exclusive Bargaining Status, January 20, 1967).

The key to the determination of whether the grievants are covered, however, is the language in the union recognition

clause of the clerical unit contract; District Council 37 is recognized as:

> "the sole and exclusive bargaining representative for the bargaining unit ... consisting of employees of the Employer wherever employed, whether full-time, part-time, hourly or per diem, in the below listed title (s)
> ... Grand Jury Stenographers ..." (emphasis added).[14]

Based on this unambiguous section, the Board is led to conclude that the per diem Grand Jury Stenographers are subject to the provisions of the unit contract, and therefore are entitled to bring a grievance under that contract.

The petition challenging arbitrability in BCB-337-79 is granted because there are factors establishing that the grievants are excluded from the City-Wide contract. With regard to BCB-399-80, there is nothing that works to exclude the per diem Grand Jury Stenographers from coverage under the unit contract. Accordingly, the request for arbitration must be granted.

0 R D E R

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

[14] 1978-1980 Clerical and Related Titles Unit Contract, Article I, section 1.

ORDERED, that the request for arbitration filed herein by District Council 37, AFSCME, AFL-CIO be, and the same hereby is, denied insofar as the request seeks arbitration under the City-Wide contract, and is granted insofar as the request seeks arbitration under the 1978-1980 unit agreement.

DATED: New York, N.Y.
July 23 , 1980

ARVID ANDERSON
CHAIRMAN

DANIEL G. COLLINS
MEMBER

WALTER L. EISENBERG
MEMBER

EDWARD SILVER
MEMBER

JOHN D. FERRICK
MEMBER

EDWARD F. GRAY
MEMBER

CAROLYN GENTILE
MEMBER

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of	MEMORANDUM OF
THE CITY OF NEW YORK,	CLARIFICATION
Petitioner,	DOCKET NO. BCB-337-79 (A-885-79)
-and-	
LOCAL 1070, DISTRICT COUNCIL 37, AFSCME, AFL-CIO,	DOCKET 140. BCB-399-80 (A-998-79)
Respondents.	

MEMORANDUM RE: Decision No. B-25-80

On July 23, 1980, we issued our Decision No. B-25-80 in the consolidated cases, Docket Nos. BCB-337-79 and BCB-399-80. These cases concerned the right of the union, District Council 37 (D.C. 37), to grieve the denial of certain benefits to persons working as per diem grand jury stenographers in the district attorneys' offices of New York and Queens Counties. In BCB-337-79, the union alleged that the grievants, per diem stenographers in the New York County District Attorney's Office, were denied annual leave and sick leave benefits in violation of the City-Wide contract. In BCB-399-80, the Union brought the same grievance on behalf of per diem stenographers in the Queens County District Attorney's Office and alleged, additionally, violation of the 1978-1980 unit contract covering Clerical and Related Titles in that grievants were denied COLAS and

non-pensionable cash payments provided for therein. We consolidated the cases for hearing and decision pursuant to section 13.12 of the Revised Consolidated Rules of the Office of Collective Bargaining because they involved identical issues of fact. The most significant common issue was whether the grievants were "employees" of the City of New York so as to have standing to assert claims under the City-Wide or any existing unit contract.

After considering testimony offered at a hearing on April 17, 1980, we determined that all of the grievant per diem grand jury stenographers were employees of the City. However, we held that those employed in the Manhattan District Attorney's Office, who asserted rights only under the City-Wide contract, were not entitled to benefits provided thereunder. Although those per diem stenographers were employees, we found that they were not included in the City's Career and Salary Plan. Coverage under the Plan, we concluded, is a prerequisite for coverage by the City--Wide contract.

With respect to the grievants employed in the District Attorney's Office of Queens County, we denied the request for arbitration to the extent that it sought arbitration under the City-Wide contract, but granted the request with respect to alleged violations of the 1978-1980

Clerical Unit contract. Inclusion in the Career and Salary Plan was not a prerequisite for coverage under the unit contract and the union recognition clause of that contract clearly included per diem employees in the title of grand jury stenographers in the covered bargaining unit, the Board found.

On October 23, 1980, proceedings commenced before Arbitrator Philip Feldblum. As a result of disagreements leading to the City's filing of the instant petition, the arbitration was adjourned until November 21, 1980 pending determination of the issues raised therein.

On October 30, 1980, the City through its Office of Municipal Labor Relations (OMLR), filed with this Office and served on the Union, a petition for clarification of Decision No. B-25-80. Specifically, the City seeks clarification of the following matters:

> "1. Does the Board's decision bar the Union from litigating the grievance of the New York County Stenographers (BCB-337-79)?
>
> 2. Does the Board's decision bar the Union from relitigating the entitlement of the grievants in both cases to benefits contained in the City-Wide contract?
>
> 3. Does the Board's decision bar the City from litigating the issue of the grievants' lack of standing because they are not <u>in the title</u> of Grand Jury Stenographers?"

On November 5, 1980, D.C. 37 filed an answer to the City's petition in which it takes the following positions concerning the issues raised by the petition:

1. Decision No. B-25-80 permits the Arbitrator to determine the grievance under the clerical unit contract as to both New York and Queens County per diem grand jury stenographers.

2. Decision No. B-25-80 holds that the unit contract covers both Queens and New York County stenographer. At issue is whether grievants, because they are covered by the unit contract, are eligible for certain benefits listed in the City-Wide contract and incorporated by reference in the unit contract. This is a matter of contract interpretation and is for the arbitrator to determine.

3. The determination that grievants are covered by the unit contract and have a right to request arbitration thereunder is equivalent to determination that grievants are <u>in the title</u> of Grand Jury Stenographer. Were it not so, grievants would not be eligible to seek arbitration under the unit contract.

D.C. 37 seeks clarification of an additional issue: whether the grievants are included in the classified service of City employment. In Decision No. B-25-80, we answered this question in the negative and, on that ground, denied the request for arbitration under the City-Wide contract.

D.C. 37 requests that this finding be revised and presents the following argument:

> "1. The Board has ruled that per diem grand jury stenographers are employees of the City;
>
> 2. Pursuant to §2 of the Civil Service Law, ("CSL") the civil service includes all offices and positions in the service of the city except those in the military service;
>
> 3. Pursuant to §35 of the CSL, the civil service of the state is divided into the classified and unclassified service;
>
> 4. The unclassified service consists of offices and positions enumerated in §35 of CSL, none of which include per them grand jury stenographers; and
>
> 5. Pursuant to §40 of the CSL, the classified service comprises all offices and positions not included in the unclassified service. Thus, per them grand jury stenographers, as City employees who are not part of the unclassified service must be part of the classified service."

It was necessary to our Decision No. B-25-80 that it be determined whether per diem Grand Jury Stenographers are covered by the Career and Salary Plan. We found that they are not; this determination was based on a number of factors including the conclusion that these employees are

not in the classified Civil Service. We are not persuaded by D.C. 37's submission of November 5, 1980, that our decision in this respect was incorrect.

In finding that persons are employees of the City of New York we do not act as a Civil Service Commission but as a labor relations agency. our decision does not purport to grant or limit rights or to establish and confer status in contemplation of Civil Service Law. It is entirely possible that persons found to be employees in terms of well settled principles of labor law would not be accorded such status under Civil Service Law. In this respect D.C. 37 misreads our finding that, in a labor relations context, Grand Jury Stenographers are employees, and erroneously concludes that as such they are also employees in a Civil Service context, that as Civil Service employees they must be in either the Classified or the Unclassified Service and that, since they are not in the Unclassified they must be in the Classified Service. The initial error flaws the entire line of reasoning. We therefore perceive no basis for reconsidering or revising our conclusion that per diem Grand Jury Stenographers are not in the Classified Civil Service.

As to the three numbered issues raised by the City's petition, our Decision No. B-25-80 holds as follows:

1. Our decision bars arbitration of the Union's grievance on behalf of New York County per diem Grand Jury Stenographers under the City-Wide contract. It does not, however, bar the filing of an otherwise timely grievance on behalf of those employees under the unit contract.

2. Our decision bars any further claim that per diem Grand Jury Stenographers are covered by or may assert rights under the City-Wide contract.

3. Our decision establishes that per diem Grand Jury Stenographers are employees of the respective District Attorneys Offices in which they work, that their title is Grand Jury Stenographer and that they are covered by and may assert rights pursuant to the collective bargaining agreement covering employees in those offices. We have not held that they are in the Civil Service title Grand Jury Stenographer but that they are employees whose job is named or titled, Grand Jury Stenographer. That is sufficient to bring them within the coverage of a contract which, by its terms, relates, inter alia, to "employees ... wherever employed, whether full time, part time, hourly or per them in the ... title ... Grand Jury Stenographer." We would point out and stress that the contract does not speak of persons in the Civil Service title, Grand Jury Stenographer, or otherwise distinguish between Grand Jury Stenographers employed pursuant to Civil Service Law and procedures and

Grand Jury Stenographers, such as those involved here, who are recruited and hired through other channels.

DATED: New York, N.Y.
December 2, 1980

ARVID ANDERSON
CHAIRMAN

DANIEL G. COLLINS
MEMBER

WALTER L. EISENBERG
MEMBER

EDWARD SILVER
MEMBER

JOHN D. FEERICK
MEMBER

EDWARD J. CLEARY
MEMBER

EDWARD F. GRAY
MEMBER