***NYC DIA*, 6 OCB2d 20 (BCB 2013)**
(Docket No. BCB 2922-11)

Summary of Decision*:** Pursuant to NYCCBL §12-309(a)(1), the Union sought a declaration that the District Attorneys of the Bronx, Kings, Queens, Richmond, and New York Counties, and the Office of the Special Narcotics Prosecutor (collectively "DA Offices") are joint employers of Detective Investigators with the City of New York. The City denied the existence of a joint employer relationship or that it is an employer of the Detective Investigators, and asserted that it had merely acted as bargaining agent for these employers. The DA Offices filed cross-petitions also seeking a finding that the DA Offices were joint employers with the City, and an order that the City continue as their bargaining representative. The Board found that the City and each of the DA Offices are not joint employers within the meaning of the NYCCBL. Further, it found no basis to conclude that the City must continue to be the collective bargaining agent for those employers. ***(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Request for Declaratory Ruling

-between-

NEW YORK CITY DETECTIVE INVESTIGATORS ASSOCIATION, DISTRICT ATTORNEYS OFFICE NEW YORK CITY,

Petitioners,

-and-

THE CITY OF NEW YORK; THE DISTRICT ATTORNEYS' OFFICES OF THE BRONX, KINGS, NEW YORK, QUEENS, AND RICHMOND COUNTIES; and THE OFFICE OF THE SPECIAL NARCOTICS PROSECUTOR,[1]

Respondents.

DECISION AND ORDER

[1] The petition named the five individual District Attorneys and the Special Prosecutor as individual respondents. We have amended the caption *nunc pro tunc* because the New York City Collective Bargaining Law is only applicable to public employers who, by definition, do not include individuals. City of New York Administrative Code, Title 12, Chapter 3, §12-304.

On January 10, 2011, the New York City Detective Investigators Association ("DIA" or "Union") filed a petition pursuant to § 12-309(a)(1) of the New York City Collective Bargaining Law (City of New York Administrative Code, Title 12, Chapter 3) ("NYCCBL")[2] seeking a declaration that the City of New York ("City") and the District Attorneys of the Bronx, Kings, Queens, Richmond, and New York Counties, and the Office of the Special Narcotics Prosecutor ("OSNP")[3] are joint employers under the NYCCBL and are obligated to bargain with the DIA. The City denies that it is the employer and the existence of a joint employer relationship, and asserts that it has merely acted as bargaining agent for these employers. The DA Offices filed cross-petitions also seeking a finding that the DA Offices were joint employers with the City, and an order that the City continue as their bargaining representative. The Board finds that the City and the DA Offices are not joint employers of the Detective Investigators ("DIs") within the meaning of the NYCCBL. Further, we find no basis to conclude that the City must continue to be the collective bargaining agent for the DA Offices.[4]

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[2] This section, entitled, "Powers and duties of board of collective bargaining; board of certification" states:

> The board of collective bargaining, . . . shall have the power and duty: (1) on the request of a public employer or public employee organization which is a party to a disagreement concerning the interpretation or application of the provisions of this chapter, to consider such disagreement and report its conclusion to the parties and the public; …

[3] Except where specifically noted to indicate distinctions between individual offices, the five District Attorneys' offices and the OSNP are referred to collectively as the "DA Offices."

[4] Prior to the start of the hearing in this matter, the DAs by motion dated July 7, 2011, moved to disqualify counsel for the City on the grounds that the firm had previously represented both the DAs and the City in prior matters. This motion was denied by the Board in *New York City Detective Investigators Association, District Attorneys Office, New York City*, 4 OCB2d 59

BACKGROUND

The City is a municipal corporation organized under the laws of the State of New York. The Office of Labor Relations ("OLR") is a municipal agency which represents the Mayor in the conduct of all labor relations between the City and labor organizations that represent City employees. Pursuant to Executive Order No. 13 of July 24, 1990, the New York City Commissioner of Labor Relations is authorized to represent the Mayor in the conduct of all labor relations between covered organizations which elect to come under the provisions of the NYCCBL, and the labor unions representing the employees of the covered organizations. With respect to such covered organizations, Executive Order No. 13 provides that the Commissioner has the duty and authority to negotiate, prepare, and sign labor contracts with the unions representing employees of the covered organizations.

It is undisputed that the DA Offices are "public employers" within the meaning of § 12-303(g)(2) of the NYCCBL and are the employers of the employees represented by the DIA who work at their respective offices.[5] The individual District Attorneys of each County are elected by the voters of the County in which they serve and can only be removed by the Governor in accordance with applicable law. OSNP was created pursuant to § 177-c of the State Judiciary Law in 1972. The enabling legislation directs the five County DAs to appoint a Special Narcotics Prosecutor ("SNP") with jurisdiction to investigate and prosecute major drug trafficking crimes in the five counties of New York City. OSNP is staffed by Assistant District

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(2011). The record in this matter was closed on January 21, 2013, and the parties submitted post-hearing briefs on or before February 25, 2013.

[5] The civil service titles represented by the DIA are: Rackets Investigator, Senior Rackets Investigator, Supervising Rackets Investigator, Rackets Investigator (Special Narcotics Court), Senior Rackets Investigator (Special Narcotics Court), County Detective, Detective Investigator, Senior Detective Investigator. These titles are herein collectively referred to as DIs ("DIs").

Attorneys ("ADAs") from all five counties but directly hires employees in the titles represented by the DIA. Neither the DA Offices nor OSNP have any taxing authority. The DIA is a "public employee organization" within the meaning of the NYCCBL. As of June 21, 2012, there were 263 DIs in the bargaining unit that the DIA represents.

Pursuant to NYCCBL § 12-304(c), the DA Offices have elected to make the NYCCBL applicable to them, their employees, and the public employee organizations representing the employees. The elections of coverage under the NYCCBL were most recently reaffirmed by the DA Offices in letters submitted to the Mayor in 1992 and 1993. By letter dated April 26, 1993, the Mayor approved the DA Offices' election of NYCCBL coverage in accordance with the authority vested in him by § 12-304(c) of the NYCCBL. In the same letter, the Mayor accepted the DA Offices' authorization of OLR as their exclusive representative in all matters related to labor relations and collective bargaining, subject to the DA Offices' approval on non-economic issues. The DA Offices have not withdrawn such authorizations. OLR has served as the DA Offices' representative in this regard at least since 1993.

1. Procedural History

The most recent collective bargaining agreement ("CBA") covering the DIs was entered into on March 24, 2008, and was for the period of April 13, 2003 through January 15, 2010. James Hanley, the Commissioner of the Office of Labor Relations ("OLR Commissioner") signed that CBA on behalf of both the City and the DA Offices.[6] The parties met on various

[6] The preamble to the CBA states:

> ***AGREEMENT*** ENTERED INTO THIS 24TH DAY OF March, 2008 by and between the City of New York and related public employers pursuant to and limited to their respective elections or statutory requirement to be covered by the New York City Collective Bargaining Law and their respective authorizations to the City to bargain on their behalf (hereinafter referred to jointly as

dates through March 19, 2010, in an unsuccessful attempt to negotiate a successor agreement. Consequently, the DIA filed a Declaration of Impasse with the New York State Public Employment Relations Board ("PERB") and a Petition for Compulsory Interest Arbitration. [7]

Sometime shortly after the request for impasse was filed, the OLR Commissioner notified the DA Offices that in light of a Taylor Law amendment that grants PERB jurisdiction over an impasse for the DIs bargaining unit, the City no longer wished to be the DA Offices' bargaining representative. On June 21, 21010, the DIA filed a Petition for Interest Arbitration with PERB which named the City and DAs as employer. On June 25, 2010, the OLR Commissioner sent a letter to PERB, asserting that the City is not an employer of the employees represented by the DIA, and stated that OLR had ceased representing the DA Offices with respect to any impasse proceeding arising under the Taylor Law.[8] In response, the DIA asserted that the City is a joint employer with the DA Offices. By letter dated July 1, 2010, to PERB's Director of Conciliation, the City reiterated its position that it is not a joint employer with the DA Offices. In response, the Director of Conciliation advised that PERB would not process the DIA's Petition before mediation had occurred.

> the "**Employer**") and **the Detective Investigator Association of the District Attorney's Offices, City of New York Inc.** (hereinafter referred to as the "Union") for the **seventy-four month and three day period from April 13, 2003 to January 15, 2010.** (emphasis in original).

[7] An amendment to the Taylor Law permits the DIA to utilize the impasse resolution processes administered by PERB. Previously, impasse for this unit was under the jurisdiction of the NYCCBL.

[8] OLR still serves as the bargaining agent of the DA Offices with respect to employees in citywide titles, such as clerical employees.

A mediation session was scheduled by PERB for September 2l, 2010. By substantially identical letters dated September 20, 2010, the DA Offices notified PERB that they did not serve as the collective bargaining agents and would not attend or participate in the scheduled mediation. Additionally, no representative of OLR appeared at the scheduled mediation.[9]

The DIA filed the instant petition against the City and the DA Offices on January 10, 2011, seeking a declaration and issuance of a report that the City and the DA Offices are joint employers under the NYCCBL and are obligated to bargain with the DIA. The DA Offices each filed separate answers to the petition and filed cross-petitions against the City. In their cross-petitions, the DA Offices allege that employees represented by the DIA are employees of the City; that OLR has long served as the exclusive representative for the respondents for labor relations and collective bargaining; that the City is a joint employer of the DIs; and that the designation of OLR as the exclusive bargaining representative of the DA Offices is still effective.

The City filed an answer to the DIA's petition and cross-petitions, denying the material allegations, alleging that the DA Offices are the sole employers of the DIs, and asserting that OLR has served as bargaining representative of the DA Offices upon mutual consent of the City and the DA Offices. As affirmative defenses, the City asserted that the DIA and the DA Offices should be estopped from claiming that the City is a joint employer; that the City has stopped being the bargaining representative for the DA Offices, and this Board does not have the

[9] The DIA also filed an Improper Practice Charge and a Petition for Declaratory Ruling and with PERB. The City filed an action in Supreme Court seeking a declaration that this Board, and not PERB, had jurisdiction to decide the allegations set forth in the Improper Practice Charge and Petition for Declaratory Ruling. Thereafter, the DIA withdrew its Improper Practice Charge and a Petition for Declaratory Ruling. The City withdrew its State Supreme Court action. (Stipulation of Facts, ¶¶ 23, 27-29).

authority to compel the City to represent the DA Offices for labor relations purposes; and that there are no grounds for the Board to issue a report under § 12-309(a)(1).

In its replies to the City's and DA Offices' pleadings, the DIA admitted and denied certain allegations and affirmatively stated that under NYCCBL § 12-309(a)(1), it is entitled to a report as to whether the City and the DA Offices are a joint employer. It also argued that it is appropriate to hold an evidentiary hearing to resolve the petition.

At the parties' request, a hearing was held to afford them the opportunity to present evidence in support of their respective positions on whether the City and the DA Offices are joint employers under the NYCCBL. The Trial Examiner conducted a hearing, compiling an extensive record, which included stipulations of fact, and found that the totality of the record established the following facts.

2. Collective Bargaining History

The record establishes that at least since 1994, bargaining sessions for the DIs were held at OLR, at which OLR representatives acted as spokespersons for the DAs. Representatives for the DIA, DA Offices and the Mayor's budget office were also present. During formal negotiations concerning economic proposals, issues such as discipline and the operation of the DA Offices were generally not discussed. If such non-economic topics were raised, representatives from the DA Offices would respond.

Witnesses for the DA Offices testified that they had no input into the economic proposals made by OLR, and their role at the sessions was more in the nature of an observer. For example, during the current round of bargaining, the City advised that due to economic conditions, it was withdrawing its wage offer and was not offering an economic proposal at that time. The DA Offices did not have input into either the initial offer or the decision to withdraw it.

Additionally, during the last round of bargaining, the DA Offices supported the DIA being offered the uniform services wage pattern, while OLR insisted that they continue to receive the civilian pattern that has been applied to the unit since 1971.

The evidence further demonstrates that since January 1, 2010, wages in the form of lump sum payments or merit pay were made to 42 DIs in the Bronx, 58 in Kings, 19 in the OSPN, 4 in the Queens and New York County offices, and 5 in the Richmond County office. Many of the same individuals in the Bronx and OSNP offices received more than one such payment. Representatives from the DA Offices testified that these lump sum payments and/or merit bonuses were paid from monies held in office accounts. These payments were made without prior consultation with OLR or the Office of Management and Budget ("OMB"). In this regard, the parties stipulated that at least one DA office has granted, and determined the amount of, discretionary lump sum payments and/or discretionary wage increases to particular DIs, without the City's participation in such decision.[10]

3. Funding for the DA Offices

OMB is responsible for preparing the City budget in accordance with the four-year financial and ten-year capital plans that are mandated by State law. The City budget process begins in January, when a preliminary budget is presented and is subject to extensive hearings in the City Council. The Mayor proposes the executive budget in late April, which is subject to approval by the City Council in June. The adopted budget is effective July 1, and sets forth the

[10] The OLR Commissioner testified that historically, the DAs have given merit increases and bonuses to the DIs. He also stated that the minimum and maximum salary range in the CBAs is meaningless when applied to DIs because they are hired at supervisory rates, a practice not followed elsewhere in the City, and that there are more DIs holding supervisory titles than non-supervisory. These hiring decisions are made by the DA Offices.

amount of funding each recipient is expected to receive for that fiscal year.[11] Over one hundred agencies receive funding from the City, including agencies which report directly to the Mayor, those that have elected officials, and many non-profit and cultural institutions. Most of the elected officials, such as the Borough Presidents, the Comptroller and the Public Advocate, the Board of Elections, and many non-profit organizations, receive most of their agency funding from the City. For example, the City pays pension and health costs for non-mayoral institutions such as the Metropolitan Transportation Authority ("MTA"), not-for-profit organizations that do business with the City, and the library system.

Mark Page, the Director of OMB, testified that the funding level for the DA Offices is determined by discussions between the DAs, the City Council, and the Mayor, and is dependent upon the amount of revenue available. City tax levy dollars that are anticipated to go to the DA Offices are included in the City's financial plan and OMB tracks expenses, spending and revenue that are transmitted through its office. During the course of the fiscal year, as the City's financial condition changes and in order to maintain a balanced budget, the adopted budget may be modified. All budget modifications must be approved by OMB. In the event of a budget reduction, OMB, on behalf of the Mayor's office, may put in effect a program to eliminate the gap (PEG) with which agencies must comply. If entities that receive City funding, like the DA Offices, do not reduce their spending, OMB may take a variety of actions. For example, OMB might attempt to influence the awarding of a grant to obtain additional funding, or reduce the entity's Other Than Personnel Services ("OTPS") budget. Any overspending of the Personnel

[11] The adopted budget consists of monies that are available and known to the agency at the time.

Services ("PS") budget would be funded by the City, but the entity would be suspended in the future from spending City tax levy funds.[12]

At least 90% of the adopted budgets for each of the DA Offices is derived from City tax levy funds. More specifically, and as testified by the DAs' witnesses, in the DA Offices fiscal year 2011 adopted budgets, the portion of funding from the City tax levy was as follows: 90% for New York County, 90 to 93% for each Bronx and Kings Counties, 97% for each Queens and Richmond County, and 92% for OSNP.[13] Collectively bargained wage increases are reflected in the City's financial plan and funded automatically by the City. The DA Offices are advised when a new CBA is reached and the funds are then allocated by OMB.[14]

In addition to tax levy funds, the DA Offices receive grants from state and federal criminal justice agencies, and through state and federal forfeiture programs. The monies

[12] The DA Offices are subject to the same budget reduction process as other entities that receive City funding. OMB requests a spending reduction plan and may unilaterally implement one if the entity does not comply. The City Council must also approve budget reductions. Further, moving an amount in excess of five percent of the appropriation from PS to OTPS requires a budget modification and City Council approval. The Mayor has a veto, subject to a two-thirds override by the Council.

[13] In their briefs, the DA Offices calculate that the City's tax levy funds for all the offices combined were at least 92% for fiscal year 2011, and 93% for fiscal years 2009 and 2010. DA Offices' Brief pp. 13-14.

[14] DA Offices' Ex. 13**.** Additionally, Page testified that if a legally enforceable interest arbitration award was issued, he would expect that the City would be responsible for liability arising thereunder. The manner and circumstances under which it would be paid, however, would vary dependent upon the circumstances at that time. New York County DA Office Director Karen Sheehan testified that to her knowledge there is no legal impediment to prevent a DA from paying a wage increase that was either negotiated or awarded in interest arbitration. Since OMB has discretion not to pay, the agency would have to find alternate funding within its existing allocation or other sources of unrestricted funding.

received from these sources vary from year to year. Federal forfeiture monies are received from either the Departments of Justice ("DOJ") or Treasury. As a general rule, forfeiture funds cannot be used to pay salaries and benefits, or wage increases, of law enforcement personnel. For example, DOJ guidelines dictate that appropriate use of these monies is for investigatory equipment and services. There are a number of exceptions to the general rule prohibiting use of forfeiture monies for payroll, the primary one being when there is an express statutory exception authorizing payment. Additionally, if an employee is assigned to a multi-jurisdictional task force, the position can be backfilled by federal forfeiture funds. There are comparable limits on the use of state forfeiture funds. Those funds can be used only for the direct investigation or prosecution of the penal code, which encompasses expenditures for items such as expert witnesses and surveillance equipment. The witnesses also detailed the various grants their offices receive, such as those form the New York State Crime Victims Compensation Board and the Aid to Prosecution program.

Representatives from each office also testified about other funding sources which may vary year to year. For example, Sheehan, a Director for the New York County DA's Office, testified that her office receives funds as a result of fines imposed in a deferral of prosecution agreement. Her office also receives funds pursuant to cost of prosecution agreements in which, pursuant to a plea agreement, the offending party will agree to pay the costs of the prosecution. Michael Poretsky, the Chief Fiscal Officer for the Kings County DA's Office, testified that his office also receives funds from cost of prosecution agreements, and tax restitution funds paid pursuant to revenue sharing agreements with the City.

Chris Standora, the Chief Financial Officer for the Bronx DA's Office, occasionally receives cost of prosecution monies. This office does not receive any monies from deferred

prosecution or revenue sharing agreements, or bail forfeiture monies. Sean Brannigan, the Chief Financial Officer for the Richmond County DA's Office, stated that his office receives money from tax revenue sharing agreements and has received stimulus monies that was used to hire new or retain existing staff. The office does not receive funds from deferred prosecution agreements or cost of prosecution agreements. John Maglione, Director of Fiscal Services and Budget for the Queens County DA's Office, testified that his office receives monies from tax restitution agreements and is reimbursed by the State for the cost of prosecuting capital crimes. The office also has an account for bail bond forfeitures but does not have access to that money. The office does not use or collect revenue from deferral or cost of prosecution agreements.

Lei Yuan, Financial Director for OSNP, oversees that office's financial operations. She testified that the office also receives state and federal forfeiture funds, receives various grant monies, overtime reimbursement funds, and on rare occasions, out-of-state forfeiture funds. The office does not utilize or collect revenues from deferral of prosecution, cost of prosecution, or tax revenue sharing agreements.

Representatives from the DA Offices also testified that they are subject to audits by the City Comptroller's office. The audits are conducted to determine compliance with certain procedures, such as time-keeping, pay rates, or leave usage and retention. For example, one audit showed that an office was not paying employees in accordance with the negotiated contract rates. Thereafter, the office developed a system to ensure compliance with those rates of pay. Remedies for procedural errors are reviewed and approved by the Comptroller's office. [15]

[15] The record shows that by the end of that budget year, the percentage of the tax levy funding for each office was: 93% Bronx County, 94% Kings County, 90% for Queens County, 92% for OSPN and 88%- 90% for Richmond County. (T. 1115, 1053, 1013; DAs' Exhibits 10, 11, and 12)

4. DA Offices – Personnel Administration and Employee Benefits

The DA Offices presented witnesses and stipulated to facts concerning the personnel policies regarding DIs and their role in administering employee benefits. They also stipulated that if called to testify, witnesses from the Bronx, Richmond, Kings and OSNP offices would testify in a similar manner to the testimony given by witnesses from the Queens and New York County offices as set forth below.

The New York State Constitution provides the framework for the New York State civil service system. The State Civil Service Commission administers civil service requirements in a general sense while local administration is performed by local municipal civil service commissions. Pursuant to the New York City Charter and the New York State Civil Service Law, the New York City Department of Citywide Administrative Services ("DCAS") is the municipal civil service commission for the City of New York. It has promulgated and enforces the Personnel Rules and Regulations of the City of New York. Rule 2.5 thereof provides that these provisions "shall apply to all offices and positions in the classified service of the city including. . . the offices of all district attorneys and all public administrators within the City of New York." (Stipulation of Facts, ¶ 101) DCAS provides these services for all mayoral agencies, and for entities such as the NYCTA and Triborough Bridge and Tunnel Authority.

Until 1967, employment in the DA Offices was overseen by the New York State Civil Service Commission. As part of a larger State reorganization, the legislature transferred responsibility of overseeing the DA Offices to DCAS. Positions classified as competitive, noncompetitive, and the labor classes of the classified service are covered by the Career and

Salary Plan.[16] Positions which are not covered are those that are paid at the prevailing rate as defined in Section 220 of the New York State Labor Law, and those in the police, fire, sanitation and correction services.

The DIs were covered by the Career and Salary plan when the titles were originally transferred from the State Civil Service system to the City in 1967. In 1989, the NYCCBL was amended to allow DIs to negotiate terms and conditions of employment separate from the Citywide Agreement. Thereafter, the pay plan and the pay regulation components of the career and salary plan were phased out and replaced with an alternate career and salary plan. Many of the provisions have been incorporated into the collective bargaining agreements of those unions representing covered titles.

Marianne Fernandez-LaGuer, the Director of Personnel and Payroll Services for the Queens District Attorney's office, testified concerning her office's hiring processes, the interrelationship between her office, the DIs and City procedures, and the benefits DIs receive. Her office complies with the hiring procedures required by the City of New York. Specifically, she testified that she enters information on a variety of forms which are inputted to the City's computer system ("NYCAPS"). The City also requires employees to complete certain documents and forms, such as a background information form stating that the City is an equal opportunity employer, a comprehensive personnel document, a City authorization for release of information, and a form permitting the transfer of a personnel folder from one City agency to another. It requires employees to acknowledge that the City computer policy applies to the Queens DA's Office, receipt of chapter 68 of the New York City Charter, and a document entitled Conflicts of Interest Board ("COIB"), Ethics Guide for Public Servants. Employees are

[16] Rule 11 of DCAS' rules covers the titles in the Career and Salary plan, and virtually all others are covered by Rule 10.

eligible for direct deposit through the Office of Payroll Administration ("OPA"), and the City of New York is identified as the payor on paychecks. Portions of these materials refer to the individuals completing them as City employees.

A City generated form is required to be completed in order for an employee to be paid. In the event that a person who previously worked for the City is hired by her office, the NYCAPS personnel transfer this person to her agency. The DIs are also on CityTime, the computer based method by which City employees record their time and attendance.

Fernandez-LaGuer participates in human resources meetings with other City agencies at which benefit and testing issues are discussed, has been at training sessions, and receives emails that are sent to other City agencies. She testified that when a union receives a raise, OPA issues a payroll services order that her office should pay any moneys due retroactively and any negotiated raises. Employees from the New York City Housing Authority ("NYCHA"), New York City School Construction Authority ("NYCSCA"), and the New York City Department of Education ("DOE") are also paid through OPA. Additionally, Fernandez-LaGuer receives directives from COIB, and the City concerning benefit changes. She processes decisions made by her office regarding hiring, firing, resignations, merit increases, promotions.

The DIs are also eligible for and participate in a number of benefit programs offered by the City and administered by OLR. Fernandez-LaGuer's office merely transmits information to employees and does not develop the forms, review the applications, or administer the programs. The DIs submit applications to participate in these programs to OLR in accordance with terms established by the City. The available benefits and programs include the following: health insurance, prescription drug, flexible spending account and tax favored spending, deferred compensation, death benefit, Individual Retirement Accounts, the New York City Employees

Retirement System ("NYCERS"), workers' compensation, and commuter benefits. These benefits and programs are available to City employees. Fernandez-LaGuer testified that eligibility determinations related to workers' compensation issues are not made by her office but by the City Law Department.[17] DOE, the City University of New York ("CUNY"), NYCHA, NYSCA, New York City Municipal Water Finance Authority, the New York City Teacher's Retirement System, and NYCERS are other employers who also participate in the deferred compensation program.

George Argyros is the director of human resources for the New York County DA's Office. He testified that the human resources processes in his office are very similar to those in the Queens DA's Office. The employees in his office, including the DIs, are subject to the same regulations, fill out the same forms and have the same benefits as those in the Queens DA's Office. For example, his office receives documents from OPA and implements the information received to adjust salaries in accordance with negotiated agreements. When his office makes a new appointment, he inputs the information into the City system. Argyros also testified that his office has 65 DIs, about one third of whom receive 211 waivers. These waivers, which are submitted by the DA Offices to DCAS for its approval, allow an employee who is receiving a pension from the City of New York to be employed by a DA's office at the negotiated salary rate.

Union President John Fleming, a Senior Rackets Investigator, also testified about the terms and conditions of employment for unit members. They are subject to the alternate career and salary pay plan and the City Personnel Rules and Regulations, and are covered by Rule 11 of

[17] The Municipal Labor Committee ("MLC") negotiates with the City concerning health benefits and co-payments, and the City then negotiates with the insurance companies themselves.

the Classified Service of the City of New York. Their salaries are paid by OPA, as are increases, advancement increases, longevity, shift differential, holiday premium, welfare fund payments, annuity payments (made through DA Offices), overtime, and car allowances. DIs receive worker's compensation benefits through the worker's compensation division of the City's Law New York, and OPA pays the DIA directly for its civil legal defense fund. The City deducts union dues and remits such monies to the DIA.

5. Personnel Administration

As indicated below, the parties stipulated to a number of the following facts regarding the DA Offices' role as an employer of the DIs:

i. Supervision

The DIs perform all of their job duties and responsibilities solely at the direction of and under the supervision of the DAs, who exercise day-to-day control over their job duties and responsibilities. The DAs, not the City, determine in their sole and exclusive judgment which manuals, memos, directives, and other materials are used to guide and direct DIs in performing their work. The City does not exercise any supervision, direction or daily control over the day-to-day job duties and responsibilities of the DIs. The manuals issued by the DAs are comprehensive in coverage and address issues such as conduct and behavior, ethics, equal opportunity, and time and leave regulations. (City Exhibits 22-26)

Performance reviews of DIs are conducted solely and exclusively by the DAs. The DAs determine DIs' assignments, when they work overtime or standby time, and whether to make an involuntarily assignment, subject to the legal requirement that the City approve overtime pay. Subject to the parties' CBA, the DAs determine which requests by members of the DIA for particular days of leave, including annual and sick leave, to approve. Also, subject to the parties'

CBA, the DAs determine when compensatory time will be used by members of the DIA. (Stipulation of Facts, ¶¶ 36, 37, 48-53, 113-14)

ii. Hiring and Promotions

Two hundred and forty seven bargaining unit members are in non-competitive title positions. Of the remaining members, one is in the competitive title of Detective Investigator, six are in the competitive title of Senior Detective Investigator, and nine are in the competitive title of County Detective. The DAs determine the process by which they recruit and select DIs for initial hire and promotion for the non-competitive titles of Rackets Investigator, Senior Rackets Investigator, and Supervising Rackets Investigator. The City does not recruit or select persons for these non-competitive positions.

For competitive class DI positions, DCAS administers a written examination, scores the examination, and creates an eligible list based on the candidates' performance on the written examination. For the titles of DI, Senior Detective Investigator, and County Detective, the DAs determine whom to hire from the eligible list prepared by DCAS subject to the "1 in 3 rule". DCAS provides the same service for a promotion to competitive Senior Detective Investigator positions. (Stipulation of Facts ¶ 38- 43)

Barbara Carnivale, the Director of Classification and Compensation for DCAS, testified that the majority of the unit holds non-competitive titles. DCAS is not involved in the hiring of those persons, but does approve the job title and specifications. She further testified that DCAS and the agency involved submit a recommendation to the State Civil Service Commission for its approval as to whether a newly created position should be classified as non-competitive. (Stipulation of Facts, ¶¶ 38-41, 43 and 44-47)

The DAs determine how much each member of the DIA is paid within the applicable collectively-bargained minimum and maximum salary ranges. They have the contractual right to hire at a salary within the range for each title, as indicated in the parties' CBA. DAs have placed a new hire directly in the Senior Rackets Investigator and Supervising Rackets Investigator titles. Other than the initial training for new hires, the DAs are responsible for and determine training for members of the DIA and select the manuals, memos and any other materials used in the training of members of the DIA.

iii. Discipline

Most members of the DIA are in non-competitive and confidential titles under the Civil Service Law. As such, they may be disciplined and/or discharged in the sole and exclusive discretion of the DAs. The City does not participate in disciplinary matters relating to members of the DIA in the titles of Rackets Investigator, Senior Rackets Investigator, Supervising Rackets Investigator, Rackets Investigator (Special Narcotics Court), Senior Rackets Investigator (Special Narcotics Court), and Supervising Rackets Investigator (Special Narcotics Court). The City does not participate in the initiation or prosecution of disciplinary matters relating to members of the DIA in the titles of Detective Investigator, Senior Detective Investigator, and County Detective. These titles are classified as competitive. (Stipulation of Facts, ¶¶ 54-56; 109, 115)

DIA members are entitled to legal representation by the City's Corporation Counsel and indemnification by the City for acts within the scope of their duties pursuant section 50-k of the General Municipal Law, in accordance with section 7-110 of the Administrative Code. (Stipulation of Facts, ¶¶ 116) An employee can grieve an order of the employer, but not one involving the City's Personnel Rules and Regulations. The DIA has the same grievance

procedures as police unions at the NYPD. Many matters are resolved at Step 1, but matters that proceed to Step 3 of the grievance procedure are heard by OLR. Discipline, however, is handled differently in each office and each office controls its own disciplinary policy.

Medical practitioners acting on behalf of the City's Health Service have made recommendations that employees in positions represented by the DIA be relieved from duty. The Workers Compensation Division of the City's Law Department has determined and advised the DAs whether an injury sustained by a DI is compensable under the Worker's Compensation Law. (Stipulation of Facts, ¶¶ 54-56, 77-79; 107-109, 114-116)

6. Employee Benefits which are Paid For or Administered by the City

The City budget includes funds for the operation of the DA Offices including Personnel Services costs ("PS") associated with the members of the DIA as well as Other Than Personal Services costs ("OTPS"). Representatives from the DA Offices testified that the City pays for the cost of employee benefit which amounts to approximately 50% of the PS costs of the DA Offices. The PS costs are funded through a different City budget line.

The City contributes directly to the NYCERS on behalf of DIs and the Health Benefits Program. The City also contributes on behalf of each active and retired DIs to the New York City Detective Endowment Association Health and Welfare Fund and pays for Workers' Compensation and Unemployment Insurance coverage. DIs may participate in the Deferred Compensation Plan, the IRA program, and in a Flexible Spending Accounts program pursuant to Section 125 of the Internal Revenue Code.

OPA withholds all payroll taxes due, including but not limited to social security payroll taxes, Medicare taxes, and income taxes, and remits such taxes withheld to the appropriate taxing authority. It also withholds voluntary contributions to benefit programs, such as the Flexible

Spending, Deferred Compensation, and 401 and 457b savings accounts. (Stipulations of Facts ¶¶ 65-76) The DIs receive their paychecks through OPA signed by the NYC Comptroller, as do employees who work for NYCHA, the DOE, the Borough Presidents' offices, the Comptroller's office, and CUNY Junior Colleges.

In addition to the DA Offices, employees in offices of elected officials and other non-mayoral agencies participate in city-run benefits and programs. Employees in citywide titles that are covered by the Citywide Agreement also work for New York City Health and Hospitals Corporation ("HHC"), NYCHA, cultural institutions, the Borough Presidents' offices, OTB when it was in existence, and the Comptroller's office. These employers, as well as the New York City Transit Authority and CUNY Junior Colleges (non-pedagogues only), participate in the NYCERS.

These employers, the NYSCA, and 25 cultural institutions, such as the Brooklyn and New York Public Libraries, also participate in the NYC Health Benefits Program. Union officials in many of these same entities are on release time which is administered by OLR. (City Ex. 15)

DISCUSSION

We conclude that the City of New York and each of the DA Offices are not joint employers within the meaning of the NYCCBL. This conclusion is based upon the statutory framework of the NYCCBL which treats each County DA's office as a separate public employer, and application of the judicial and administrative decisions brought to our attention by the parties to the factual record before us.

Section 12-303(g) of the NYCCBL establishes four categories of public employers.[18] Section 12-303(g)(2) includes within the term "public employer" the "board of education, the New York city health and hospitals corporation, the New York city off-track betting corporation, the New York city board of elections, the public administrator and the district attorney of any county within the city of New York." As to these public employers, courts have authoritatively held that the NYC OTB and the board of education are not joint employers with the City. *See Roberts v. Patterson*, 19 N.Y.3d 524 (2012) (OTB and City not joint employers); *Matter of City of New York v. New York State Public Employment Relations Board*, 103 A.D.3d 145, 151 (3d Dept. 2012) (New York City Board of Education "separate public employer" from City).

For the reasons below, we do not find that the statute treats the DA Offices differently than these employers or that there is a statutory intent to establish a joint employer relationship between these Offices and the City. Moreover, apart from the statutory analysis under the NYCCBL, this result is consistent with those cases holding that funding alone does not establish an employer, or joint employer, relationship. On the record before us, we conclude that the traditional factors used to determine a whether public sector employer-employee relationship exists are not present. Those factors identify as the employer the entity that controls the hiring, discharge, promotion and supervision of daily and overall duties of their employees. Even in light of overwhelming financial dependence on the City, the absence of evidence that the City

[18] Section 12-303, entitled Definitions, states:

> As used in this chapter, unless the context clearly indicates otherwise, and subject to the limitation of section 12-304; … (g) The term "public employer" shall mean … (2) the board of education, the New York city health and hospitals corporation, the New York city off-track betting corporation, the New York city board of elections and the public administrator and the district attorney of any county within the city of New York; …"

exercises control in those areas defeats the claim that it is an employer of the DIs or a joint employer with the DAs under the NYCCBL.

1. Statutory Analysis

In analyzing the relevant portions of the NYCCBL, we begin with the premise that, even assuming an employment relationship, the City does not have a common law duty to bargain with the DIA. *Quill et al. v. Eisenhower et al*, 5 Misc. 2d 431 (1952); *Erie County Water Auth. v. Kramer*, 208 Misc. 292, (Sup. Co. Ct. Erie Co. 1955), *revd. on other grounds*, 4 A.D.2d 545 (4th Dept. 1957), *affd.* 5 N.Y.2d 954 (1958). Such a duty exists in this context only if created by the NYCCBL, the statute concededly applicable to these employees, as the DA Offices have all elected coverage under the NYCCBL. *See DIA*, 79 OCB 13, at 2 (BCB 2007); *see also DC 37*, 11 OCB 5, at 2-3 (BCB 1973). Accordingly, a finding of joint employer status under the NYCCBL, which would lead to a duty to bargain, can only be premised upon the terms of the NYCCBL and the relevant case law interpreting it.

NYCCBL § 12-303(g) establishes the following four categories of employees: § 12-303(g)(1) states that a "municipal agency" is a public employer. Municipal agencies are defined for the purposes of the NYCCBL by § 12-303(d), which states that a municipal agency is "… an administration, department, division, bureau, office, board, or commission, or other agency of the city established under the charter or any other law, the head of which has appointive powers, and whose employees are paid in whole or in part from the city treasury, other than the agencies

specified in paragraph two of subdivision g of this section." Pursuant to § 12-303(f)[19] and § 12-304, municipal agencies include mayoral agencies covered by the NYCCBL.[20]

Section 12-303(g)(2) defines the term "public employer" as "the board of education, the New York city health and hospitals corporation, the New York city off-track betting corporation, the New York city board of elections and the public administrator and the district attorney of any county within the city of New York."

Section 12-303(g)(3) is applicable to public authorities, other than a state public authority.[21] Section 12-303(g)(4) refers to entities such as public benefits corporations,

[19] Section 12-303(f) states: The term "mayoral agency" shall mean any municipal agency whose head is appointed by the mayor.

[20] Section 12-304, entitled Application of chapter, states that it is applicable to:

> (a) All municipal agencies and public employee organizations thereof; (b) any agency or public employer, and the public employees and public employee organizations thereof, which have been made subject to this chapter by state law; (c) any other public employer, and to the public employees and public employee organizations thereof, upon the election by the public employer or the head thereof by executive order of the chief executive officer to make this chapter applicable, subject to the approval by the mayor, provided, however, that any such election by the New York city board of education shall not include any teacher as defined in section 13-501 of the administrative code or any employee who works in that capacity or any paraprofessional with teaching functions; and (d) any public employer, and the public employees and the public employees organizations thereof, to whom the provisions of this chapter are made applicable pursuant to paragraph four of subdivision c of section 12-309 of this chapter.

[21] Section 12-303(g)(3) states in whole: "The term public employer shall mean …(3) any public authority other than a state public authority as defined in subdivision eight of section two hundred one of the civil service law, and whose activities are conducted in whole or in substantial part within the city;" …

museums, libraries, zoological gardens or similar cultural institutions.[22] The entities in § 12-303(g)(2), (3) and (4) are public employers which may elect, pursuant to § 12-304(c), to be covered by the NYCCBL.

This statutory framework demonstrates that municipal agencies have a distinct status from the employers in § 12-303(g)(2), (3) and (4), and, as significant here, the employers in § 12-303(g)(2). The DA Offices are specifically excluded from the definition of municipal agency. They are not mayoral agencies and are only subject to the NYCCBL because they exercised the election to be subject to this Board's jurisdiction pursuant to § 12-304(c) and such election was accepted by the City. Further, they have a distinctly unique legal identity. The District Attorneys in the City's Counties are constitutional officers, subject to removal only by the governor, and have attributes of both local and state office. New York Constitution Article XIII, s 13 subd. (a)); *see generally Matter of Soares v. Herrick*, 20 N.Y.3d 139, 144 (2012). They have been described as quasi-judicial officers acting on behalf of the State in criminal matters. *Manceri v. City of New York*, 12 A.D.2d 895 (1961); *Zimmerman v. City of New York*, 52 Misc. 2d 797 (1966). As explained in *Davis Construction Company v. Suffolk County*, 112 Misc.2d 652 (Sup. Ct. Suffolk Co. 1982), *affd.*, 95 A.D.2d 819 (2d Dept. 1983), though classified as a local officer under Public Officers Law § 2, District Attorneys still retain vestiges of the status of a State officer. *See* Judiciary Law § 183-a; County Law § 700.[23] OSNP also is distinct

[22] Section 12-303(g)(4) states: "… any public benefit corporation, or any museum, library, zoological garden or similar cultural institution, which is a public employer or government within the meaning of article fourteen of the civil service law, employing personnel whose salary is paid in whole or in part from the city treasury."

[23] The New York City board of elections and the public administrator also both have distinct attributes. The New York City board of elections, like other boards of election throughout the State was created by a State statute, New York Elections, § 3-100; § 3-200 et seq. *See also* § 1-104(26). The purpose of the election law was to create a bipartisan board to administer elections.

in the NYCCBL context in that the Special Narcotics Prosecutor's appointment is made by the DAs themselves.

This statutory structure and the above facts demonstrate that the DA Offices are excluded from the definition of a municipal agency and have unique characteristics distinct from those entities. *See DIA*, 79 OCB 13 (BCB 2007) ("The office of the five District Attorneys are 'public employers' but not municipal agencies within the meaning of NYCCBL § 12-303."). As the record also shows, however, they are virtually entirely dependent upon the City for funding. The combination of these factors led to a statutory scheme in which they have the right to elect to be subject to State or City jurisdiction. The DA Offices most recently elected coverage under the NYCCBL election and designated OLR as its bargaining representative in 1992 and 1993. Since that time, as stated in the DIA collective bargaining agreement, OLR has executed CBAs in this capacity and on behalf of the DA Offices. We believe that this designation most clearly demonstrates that OLR was acting as the bargaining agent on behalf of the DA Offices and

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See In re Kane, 144 AD 186, affd., 202 N.Y. 615 (1911). Pursuant to this statute, the State board is vested with certain powers, while the local boards have the primary responsibility to administer elections. *Green Party of the State of New York v. Weiner,* 216 F. Supp. 2d 176 (2000). Section 3-200(3) specifies that there shall be ten commissioners of the New York City board of elections, while other boards are required to be composed of a minimum of two commissioners. The City board of elections receives most of its funding from the City.

The public administrators for each of New York City's five counties, pursuant to the Surrogate's Court Procedures Act (SCPA) §1102, entitled *Appointment and removal; terms of office*, shall be appointed, and may be removed, by the judge or judges of the court in the respective county. The SCPA has statewide applicability, and governs Surrogate Court procedures in the New York State Unified Court System. The public administrator is required to file reports with the surrogate, mayor and comptroller setting forth a statement of the accounts closed or settled, every estate administered, and the annual audit which is required to be conducted. The court may appoint counsel to the office, who is compensated through the proceeds of the estates. The City is not required to include any expenses for this in its budget. *See* SCPA §1108; § 1109. *See also* NYS Finance §8.

conclude that this statutory scheme evidences an intent not to create a joint employer relationship between the City and the County DA Offices.

Notably, this conclusion is consistent with decisions finding two of the other employers encompassed within §12-303(g)(2) not to be joint employers with the City.[24] In *Roberts v. Patterson*, 19 N.Y.3d 524 (2012), the Court of Appeals held that the NYC OTB was not a joint employer with either the City or the State. In that case, the Court of Appeals affirmed lower court decisions which concluded that based upon constitutional and statutory provisions, the City and State were not liable for NYC OTB retirees' health insurance and welfare benefits from the City. The Court of Appeals, affirming on different grounds, stated that: "[A]s a public benefit corporation NYC OTB was never a department or agency of the City. The Court based its decision, in part on the "bedrock principle that a public benefit corporation, such as NYC OTB enjoys an existence separate and apart from the State, its agencies and political subdivisions." *Roberts*, 13 N.Y.3d at 532 (quoting *Bordeleau v. State of New York*, 18 N.Y.3d 305, 316 (2011)) (editing marks and internal quotation marks omitted). Indeed, "a prime purpose for creating such corporations [is] to separate their administrative and fiscal functions from the State and its subdivisions." *Collins v. Manhattan & Bronx Surface Tr. Operating Auth.*, 62 N.Y.2d 361, 367-68 (1984). Based upon this principle, the Court rejected several theories attempting to nullify or

[24] The DIA, in its brief, in support of its joint employer contention, points to clauses in the CBA between the DAs and the DIA, and asserts that a bargaining agent can also be a joint employer. We note, however, that the CBA states that the City was the bargaining agent, and that it was entered into between the DAs and the City. Further, while a bargaining agent may be a joint employer, that is not the situation in this matter.

circumvent NYC OTB's separate legal existence, including the argument that it was a joint or single employer with the City or State.[25]

This conclusion is relevant to another employer in § 12-306(g)(2), the New York City Health and Hospitals Corporation, which under the terms of Unconsolidated Laws of New York § 7384 (1), is a public benefit corporation. Its officers and employees explicitly are made subject to Article Fourteen of the Civil Service Law with the proviso, however, that the New York City Charter and Administrative Code apply to the corporation.[26] It has been held to be independent and not an agency of the City. *Brennan v. City of New York*, 59 N.Y.2d 791 (1983); *Hill v. City of New York*, 94 N.Y.2d 207 (1997).

Similarly, in *Matter of City of New York v. New York State Public Employment Relations Board*, 103 A.D.3d 145 (3d Dept. 2012), the Appellate Division affirmed a PERB decision finding that the Board of Education of the City School District of the City of New York (DOE) violated the Taylor Law when it unilaterally rescinded parking permits to employees pursuant to a Citywide mayoral initiative. In rejecting the contention that DOE was bound by an agreement the City entered into with the United Federation of Teachers, the Court stated that "[t]hat union represents employees of the Board (*See* Educ. Law § 2590-g[2]),[27] which is a separate public

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[25] A distinction between this case and *Roberts* is that, in *Roberts*, the Court of Appeals noted the uncontested assertion that NYC OTB employees had not been issued City paychecks and their OTB employment was not paid from the City treasury. The Court's conclusion, however, was not based upon a factual analysis of the record before it. Instead, the Court of Appeals affirmed the decision of the lower courts based primarily upon OTB's legal form.

[26] Unconsolidated Laws of New York §7390(5).

[27] That provision states:

> The city board shall advise the chancellor on matters of policy affecting the welfare of the city school district and its pupils. The board shall exercise no executive power and perform no executive

employer from the City (S*ee Perez v. City of New York*, 41 A.D.3d at 379), and the City has no employment relationship with UFT's members." *Id.*, 103 A.D.3d at 151. *See also Plumbers Local Union No. 1,* 1 OCB2d 28 (BCB 2008), *affd., Matter of Plumber's Local Union No. 1 v. Gold*, Index No. 112139/08 (Sup. Ct. N.Y. Co. Feb. 2, 2010) (finding that the New York City Board of Education is the employer and is not subject to OCB's jurisdiction).

In light of the above case law which finds two of the employers in § 12-303(g)(2) to not be a joint employer with the City, and emphasizes the independent status of a third, and for the reasons that follow, we conclude that, as argued by the City, the City is not an employer of the DIs for purposes of collective bargaining under the NYCCBL and that the NYCCBL does not create a joint employer relationship between the City and the DA Offices. The DIA's ability to proceed to impasse under the terms of the Taylor Law does not change, and is not relevant to, the identity of the DAs as the employer. We do not find that the NYCCBL contemplated that the City would be a joint employer with the DA Offices and also give them the option to be under the jurisdiction of PERB, a State agency. That result, together with the distinct nature of the City and the DAs, cautions against such a construction.

> or administrative functions. Nothing herein contained shall be construed to require or authorize the day-to-day supervision or the administration of the operations of any school within the city school district of the city of New York. The board shall have the power and duty to:
>
> 1. …
>
> 2. for all purposes, be the government or public employer of all persons appointed or assigned by the city board or the community districts; provided, however, that the chancellor shall have the authority to appoint staff pursuant to subdivision forty-one of section twenty-five hundred ninety-h of this article;

Further, the County DA Offices are headed by constitutional officers who are subject to gubernatorial control and possess State attributes. Their mission is to enforce the criminal laws of the State in a nonpartisan and independent manner. These factors demonstrate the unique nature of the DA Offices when compared to municipal agencies, whose heads are appointed by the Mayor. We find that the structure of the NYCCBL recognizes these distinctions, did not intend to establish a joint employer relationship between a DA Office and the City, and that the City is not an employer of the DIs for purposes of the NYCCBL.

2. The Evidence and the Case Law

While this is first occasion on which we have the opportunity to examine whether a joint employer relationship exists between the DA Offices and the City, the relevant case law is well established. Application of this precedent leads us to the conclusion that the City and DAs are not joint employers.

In *Matter of the New York Public Library v. Public Employment Relations Board,* 45 A.D.2d, 271 (1st Dept. 1974), *affd.*, 37 N.Y.2d 752 (1975), relied upon by the City, the Court of Appeals affirmed and with one clarification adopted the Appellate Division holding that the Library and the City were not joint employers. The Court also concluded that the Library was not a public employer and PERB erroneously asserted jurisdiction over the matter and found that a joint employer relationship existed. The Court held that funding alone is not a sufficient basis upon which to find a joint employer relationship. *Id.*, 45 A.D.2d at 280. Specifically, based upon the record developed by PERB, the Court stated that there was no evidence that the City interfered with, or had the power to, hire, fire, promote or supervise the daily or general duties of the Library employees. *Id.* (citing *Matter of State Labor Relations Bd. v. Hudson*, 293 N.Y. 671; *Matter of Sullivan Co.*, 289 N.Y. 110; *Matter of Morton*, 284 N.Y. 167; *Matter of Hardy v.*

Murphy, 29 A.D.2d 1038). Since these traditional criteria utilized to determine the existence of an employer-employee relationship between the City and library employees were not present by either "contract or practice," a joint employer relationship did not exist.

In reaching this conclusion, with the exception that the DAs, as opposed to the Library, are admittedly public employers, the Court relied upon a factual context very similar to this matter. The Court stated that the Library was created pursuant to a series of special Acts of the Legislature. These Acts were for the purpose of receiving gifts to establish and operate a library system, to consolidate then existing foundations and to allow for the building of more branches. The City and the Library entered into an agreement under which the Library is run by a self-perpetuating board of directors, which retain control over the direction and management of its affairs. The City funds 80% of the Library branch system and, as found by PERB, is virtually entirely dependent upon the City for its operations. It submits budgets as specified by the City for approval, which are then included in the mayor's budget. The number of employees is in effect determined by the City, and the Library has voluntarily agreed to be covered by the Career and Salary Plan. The extent of the Library's operations is determined by funding from the City, though the Library is free to obtain funding from other sources. It is not bound by City budget limitations and as a result has been able to undertake projects on its own initiative. Notwithstanding the financial dependence of the Library upon the City and that certain personnel matters, such as the Career and Salary Plan, were applicable, the City was found not to be an employer and no joint employer relationship existed.

This Board has applied the same criteria in *New York Public Library* in determining whether an employer-employee relationship exists. We have stated that such a relationship exists when an employer has the right to control the at-issue employees, direct the details of their

work and to discharge them. *Local 1070, DC 37*, 25 OCB 25 (BCB 1980). *See also Civil Service Bar Assn., L. 237*, 61 OCB 1 (BOC 1998); *Beach v. Velzy*, 238 N.Y. 100 (1924).[28] Further, in *Local 1070, DC 37*, 25 OCB 25 (1980), we found that in the context of a challenge to arbitrability, per diem stenographers were municipal employees and New York City employees, and not, as contended by the City, independent contractors. The basis of the holding in that case was application of the above traditional tests used to determine whether an employer-employee relationship exists. This standard is also consistent with *Zimmerman*, an analogous case examining many of these same factors in the context of determining whether the City could be deemed the employer of Assistant District Attorneys in the New York County DA's Office for tort liability purposes. In that case, the court stated:

> Surely, no one will be heard to argue that the City through any of its agents has the power to order the District Attorney about or to control the manner in which he is to perform his constitutional and statutory duties. Moreover, even if by statute the salary of the District Attorney and the budgetary requirements of his office are charged to his county and therefore to the defendant, the City of New York, this would not make the District Attorney (an elected public officer) a county officer, or employee in any such sense as would make the City liable for his wrongdoing.

52 Misc.2d at 801.

In support of their positions, the DA Offices and DIA cite to PERB case law involving primarily joint employer relationships which have been found to exist between counties and community colleges, and counties and elected sheriffs. They assert that the City is the employer of the DIs because it controls the economic and non-economic terms of their employment. In *Genesee Community College*, 24 PERB ¶ 3017, at 3034-35 (1991), PERB held that, in the context of a uniting determination under §207 of the Act, the College and County were joint employers. The Board concluded that a community college is an entity with a legal identity

separate from its county sponsor. It then cited approvingly to *Niagara County Community College*, 23 PERB ¶ 4052 (1990), and its own decision in *Dutchess Community College*, 17 PERB ¶ 3010 (1984) (subsequent history omitted), for the proposition that "a county-sponsored community college is a joint employer within the meaning of the Act with the sponsoring county of those employees hired by the community college." *Genesee Community College*, 24 PERB ¶ 3017, at 3035. The basis of this conclusion was that "control over their terms of the employees' employment relationship is divided between and shared by the community college and the sponsoring county as a matter of law." *Id.* at 3035; *see also County of Erie and Erie Community College*, 38 PERB ¶ 3035 (2005).

PERB has also held that an elected sheriff and a county are joint employers based upon the extent of county funding and exercising significant control over noneconomic terms and conditions of employment. *See County of Putnam*, 33 PERB ¶ 3001 (2000); *County of Erie*, 37 PERB ¶ 4004 (2004)). Further, the DAs and the DIA rely upon *City of Poughkeepsie*, 38 PERB ¶ 3017 (2005), in which PERB found a joint employer relationship between the City, Town, and jointly-funded water board.

Nothing in the record developed by the parties, however, demonstrates that the City either by "contract or practice" or other such action, exercises the control required to find that it is an employer of the DIs within the meaning of the NYCCBL. While these proceedings have been vigorously litigated, the essential facts in this matter are not in dispute. We find that the record demonstrates that the DAs hire, fire, and promote the employees represented by the DIA. Further, they supervise their activities, exercising day-to-day control over the performance of their duties. The DAs evaluate, direct, and assign the DIs, and approve leave requests. They determine the hiring and promotion process for employees holding non-competitive titles, and,

for those holding competitive titles, determine who to hire from an eligible list prepared by DCAS. Of the 263 members in the unit, 248 hold non-competitive titles and may be disciplined or discharged in the sole discretion of the DAs. Accordingly, application of *New York Public Library* leads to the conclusion that the City and DAs are not joint employers.

The DA Offices' and DIA's arguments in support of a joint employer relationship are based upon the assertion that the City has funded at least 90% of the DA Offices' budget, which is a greater amount of funding than in those situations in which PERB has found joint employer relationships, and that the City asserts more control over the employees than in those cases in which PERB has found a joint employer relationship. The DAs specifically argue that, with regard the community college line of cases, under Education Law §6304, a local sponsor is required to fund a community college at certain levels and that those funding levels are lower than the funding City provides for the DA Offices. They further argue that PERB has found a joint employer relationship in cases in which a county funded as little as nine per cent of the community college budget and when a county has exercised less control over employees than the City does over DIs.[29]

The record developed in this case demonstrates that the facts here are not materially different than those in *New York Public Library*. The parties litigated the nature and extent of this financial dependence in detail, but it is apparent that the salient fact is that, as was found to be the case with *New York Public Library*, the DA Offices are also virtually entirely dependent upon the City for funding. As stated above, the adopted budget for all offices constitutes at least

[29] *Niagara County Community College*, 23 PERB ¶ 4052. It is important to distinguish between the City's role in funding and its role as collective bargaining agent for the DA Offices. As PERB noted in *County of Jefferson*, 26 PERB ¶ 3010, the delegation of authority, or even acquiescence in control by another entity does not alter employer status, finding that "[i]t is the power of the college to assert the prerogatives of its status" which makes it an employer.

90% of their funding. Each office has access to grants, forfeiture moneys and other sources of revenue, but the cumulative amount of the funds each office receives is greatly exceeded by the amount received from the City. The City funds employee benefits for each office, regulates the method and manner by which employees can apply for and receive benefits such as retirement, workmen's' compensation, and deferred compensation. The DAs point to factors such as the City funding wage increases and benefits, employing a negotiating strategy to its benefit, being identified as the employer in the CBA, other documents, and by this Board's cases, and DCAS' role as municipal civil service commission. *New York Public Library* and decisions issued by this Board, when read in conjunction with the statutory framework of the NYCCBL, however, make it clear that an employer–employee relationship between the DIs and the City of New York for the purposes of collective bargaining has not been established.

We also find that there are material distinctions between the finding of a joint employer relationship between a county and community college, and a county and an elected sheriff, and this matter. The procedural context in which those cases arose is significant. There, various unions petitioned to fragment an existing group of county employees who worked at either the community colleges or the sheriffs' office. In none of those cases, unlike this matter, did the parties contest that the employees at issue were county employees for purposes of collective bargaining. These cases in effect start from a different premise from that at operation here; with the parties fully agreed that the counties are employers, the question before PERB in those matters was whether the community colleges or sheriffs at issue were joint employers of the employees who worked within them or their departments, respectively. In that sense, the PERB cases present the inverse situation to that presented here. In part as a result of this fact, PERB's

analysis is in some measure different from that under the *New York Public Library* decision and the Board's prior decisions following that case.

Further, the Taylor Law specifically states that a county is a public employer within the meaning of the Act.[30] The controlling precedent of *New York Public Library* was therefore never discussed by the Board in any of those cases since the only issues remaining were the extent of control the colleges or sheriffs exercised and whether those employers are public employers within the meaning of the Taylor Law. In contrast, in this matter, the City contests that it is an employer of the DIs, and the statute specifically defines the DA Offices as a public employer.

The joint employer relationship in the cases relied upon by the DAs and DIA is premised upon specific statutory provisions. In the community college context, the existence of the college is solely dependent upon a county or other sponsor taking action to create it. As noted in *Niagara County Community College*, *supra*, subsequently adopted by the PERB Board in *Genesee Community College*, *supra*, § 6301(2) of the Education Law[31] recognizes that a community college may be operated jointly with a county. The PERB Board then concluded that the joint employer relationship existed as a matter of law. With regard to the sheriff cases, under § 201.(6)(a)(vii) of the Taylor Law, when the office of sheriff is an elected position, the sheriff

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[30] Civil Service Law, Section § 201.6(a)(ii).

[31] That section defines a Community College as:

> Colleges established and operated pursuant to the provisions of this article, *either individually or jointly*, by counties, cities, intermediate school districts, school districts approved by the state university trustees, or individually by community college regions approved by the state university trustees, and providing two-year post-secondary programs pursuant to regulations prescribed by the state university trustees and receiving financial assistance from the state therefor. (*emphasis in original*)

and county are defined by statute as a joint employer. The Act was amended in 2000 to expressly recognize this joint employer relationship. The cases relied upon by the DAs in their brief predated this statutory amendment are no longer relevant.

We also do not find the DA Offices' and the DIA's reliance upon *City of Poughkeepsie*, *supra*, persuasive. In that matter, PERB found a joint employer relationship between the City, Town and jointly funded water board. PERB, however, did not find that the *New York Public Library* case was controlling. It found, instead, that based upon its own precedent, *Town of North Castle*, 19 PERB ¶3025 (1986), the water board was in effect a department of the Town and City. It did not make any specific findings concerning hiring, firing, supervising or discipline, the factual basis upon which the *New York Public Library* decision was decided. In contrast, the DAs are specifically not defined as a "department" under the NYCCBL, since such definition is reserved only for those entities defined as municipal agencies in §12-303(d).

We note, however, that even apart from the variation due to the very different procedural context, and, of course, the specific statutory schemes to be applied, PERB in fact weighs many of the same factors as did the Court in *New York Public Library* and as have we in determining employer status. Thus, in *Genesee Community College*, 24 PERB ¶ 3017, at 3034-35, PERB emphasized the status of the community college as "an entity with a legal identity separate from its sponsor" in finding it to be an employer. Moreover, in *City of Poughkeepsie*, 38 PERB ¶ 3017, PERB identified the power to appoint employees, control over terms and conditions of employment, in addition to control over the budget as factors determining employer status. Similarly, in *County of Erie*, 37 PERB ¶ 4004, a PERB Administrative Law Judge relied upon the Board's articulation of indicia of employer status that:

> The sheriff is responsible for appointing his deputies, and they serve at his pleasure. This power is derived from State Law and is not a delegation from the

> County. The same is true of the authority of the sheriff to assign job duties and other responsibilities to his deputies, promote them, lay them off, determine their work schedules, and approve time for vacation, holiday and overtime work. The Sheriff alone is responsible for the discipline and training of his deputies and has the sole authority to hear and resolve their grievances.

37 PERB ¶ 4004, at 4026 (quoting and citing cases). Accordingly, this language provides further support for our conclusion herein.

Nor do we find the remaining contentions of the DAs to be persuasive. We do not find that this Board's decisions, in which both the City and DA Offices were named as respondents, support the DAs' contention of joint employer status. Those cases, which involved various representation issues, did not make a factual finding that a joint employer relationship existed. There is no basis in those decisions to conclude that the joint employer status issue was ever considered by this Board, or that the City was appearing in anything other than a representative capacity.

Finally, there is no basis for a finding that OLR, over its objection, continues as the DA Offices' collective bargaining representative. There is nothing in the NYCCBL, and nothing argued by the DA Offices or the DIA, which provides support for such a conclusion. Absent a contractual or other legally recognized limitation, an agency relationship may be terminated by either party to the relationship.[32] Since OLR has advised the DA Offices that it no longer wishes to serve as its collective bargaining representative, there is no basis in the NYCCBL to compel it to do so under these circumstances.

The caution observed in *Gulino v. State Educ. Dept.*, 460 F.3d 361, 378 (2d Cir. 2006) *cert. denied*, 554 U.S. 917 (2008), quoted by the Court of Appeals in *Roberts v. Patterson*, *supra*,

[32] *Griffin & Evans Cosmetic Marketing, Inc., v. Madeleine Mono Ltd.*, 73 A.D.2d 957 (2d Dept. 1980).

that application of the joint employer doctrine "to cases involving the complex relationships between levels of government would be impractical and implicate … constitutional concerns" is particularly appropriate in this matter.[33] *Gulino*, 460 F.3d at 378. As the record demonstrates, the City has complex funding relationships with numerous entities that provide services to its residents and the public. For example, the City funds over a hundred entities, such as elected officials, and many non-profit organizations which receive most of their funding from the City. The City also pays pension and health costs for non-mayoral institutions such as the MTA, which falls under PERB's jurisdiction, and the various libraries, which fall under the jurisdiction of the National Labor Relations Act ("NLRA").[34] Additionally, the City through DCAS provides services for entities such as the NYCTA and the Triborough Bridge and Tunnel Authority. The extent of City funding and involvement with various entities is extensive and widespread. The finding of a joint employer relationship based primarily upon the level of City funding, be it in the private or public sector, is potentially disruptive to the well-established and stable labor relations in the New York metropolitan area and throughout the State. Applying a fact-specific

[33] In that case, the Second Circuit Court of Appeals reversed that portion of a District Court holding finding that the New York State Education Department and the New York City Board of Education were joint employers for purposes of liability under Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. §§ 2000e-2000e-17.

[34] In *Niagara Frontier Transportation Authority*, 13 PERB ¶ 3003 (1980), PERB, citing *New York Public Library*, dismissed a petition filed by a union seeking to represent a unit of peace officers who provided security at various facilities pursuant to a contract between the Authority, a public employer, and a private security firm. PERB stated that its jurisdiction extends to joint employers only when each employer to the relationship is a public employer, and did not reach the question of whether a joint employer relationship existed. The NLRB had previously dismissed a petition seeking to represent the same group of employees on the grounds that a joint employer relationship existed between the private company and the Authority. That petition was dismissed since the NLRA's jurisdiction does not extend to public employers, such as the Authority, as defined by that statute. *See also Council of School Supervisors and Administrators*, 4 OCB2d 32 (BCB 2011) (OCB's jurisdiction extends only to joint employers when all of the employers are public employers).

analysis to this inquiry could also theoretically lead to the unintended consequence that one DA Office is found to be a joint employer with the City, while another is found to be the sole employer of DIs. Finding a joint employer relationship in this matter would be contrary to the intent of the NYCCBL and inconsistent with the practical realities of the complex interrelationships of governmental and non-governmental entities in the City of New York.[35]

For the above reasons, we find that the statutory framework and controlling case law do not permit a finding that the City of New York and each of the DA Offices are joint employers, or that OLR remains the collective bargaining agent for the DA Offices.

THEREFORE, pursuant to §12-309(a)(1) of the NYCCBL, the Board of Collective Bargaining, hereby makes the following conclusions:

That the District Attorneys' Offices of the Bronx, Queens, Kings, Richmond and New York Counties and Office of the Special Narcotics Prosecutor are each not joint employers with the City of New York, which is not required to bargain with the DIA, within the meaning of the NYCCBL; and

That the New York City Office of Labor Relations does not continue to be the bargaining agent for the District Attorneys' Offices of the Bronx, Queens, Kings, Richmond and New York Counties and Office of the Special Narcotics Prosecutor.

Dated: July 10, 2013
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

[35] *See also Board of Education of the City School District of the City of New York*, 6 PERB ¶ 4035, at 4066 (1973) ("A finding of a joint employer status, because of the inherently complex ramifications which result therefrom, should be made only under compelling circumstances.").

PAMELA S. SILVERBLATT
MEMBER

PETER B. PEPPER
MEMBER

GWYNNE A. WILCOX
MEMBER