DC 37, 6 OCB2d 32 (BOC 2013)

(Rep) (Docket No. AC-68-12).

***Summary of Decision*:** The Union petitioned to amend Certification No. 46D-75 to include the title of College Aide Levels II and III. The City argued that College Aides Levels II and III are not eligible for collective bargaining rights because the employees' employment relationship with the City was casual and sporadic. The Board amended the certification finding that College Aides Levels II and III are engaged in regular and continuous employment and, therefore, eligible for collective bargaining rights. **(*Official decision follows*.)**

OFFICE OF COLLECTIVE BARGAINING
BOARD OF CERTIFICATION

In the Matter of the Certification Proceeding

-between-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

Petitioner,

-and-

THE CITY OF NEW YORK,

Respondent.

ORDER AMENDING CERTIFICATION

On June 13, 2012, District Council 37, AFSCME, AFL-CIO ("Union") filed a petition seeking to add Levels II and III of the College Aide title ("CAs II and III") (Title Code No. 10209) to its Certification No. 46D-75, the Accounting and Electronic Data Processing unit, which includes titles such as Computer Program Analyst and Computer Program Analyst Trainee. The City of New York ("City") argued that CAs II and III are casual and sporadic employees and are not eligible for collective bargaining rights. This Board finds that CAs II and

III are engaged in regular and continuous employment and are eligible for collective bargaining. Therefore, the certification is amended.

BACKGROUND

Various agencies throughout the City employ College Aides. The title College Aide is subdivided into three assignment levels, with Levels II and III reserved for Information Technology employees. The job specification requires that CAs II and III be college students studying information technology, computer science, or management information systems and provides that they can remain in the title for up to six years.[1] The number of employees in the title fluctuates; the City hired as many as 91 employees into the title in 2001 and as few as 5 in 2009. As of August 21, 2012, the City employed 18 CAs II and III. *Id.* Additionally, a number of employees within the title only work during the summer months. During school vacations, CAs II and III may work 35 hours per week, but the job specification limits employment to 17 hours per week, half-time, while classes are in session.[2] The employees in the title do not receive annual or sick leave, but employees in the title may call out of work if they are unable to work that day.

The job specification describes the duties of CAs II and III. CAs II and III both perform non-clerical, beginning level information technology work under the supervision of information

[1] Employment as a CA II or III is conditioned on earning a specific number of credits in an "acceptable course of study." (Tr. 22)

[2] The employment data in the record, which list employees' monthly hours, implies that some employees within this title were not limited to 17 hour work weeks during the school year. Some employees worked monthly hours comparable to full-time employees. For example, Ricardo Jerome worked more than 140 hours (35 hours per week for four weeks) in eight different months from September to June of 2007 as a CA Level II with the Department of Youth and Community Development.

technology professionals. Level II employees perform information technology duties in a modern computer environment while Level III employees perform information technology project coordination duties in a variety of projects. CAs II and III may work for any City agency but must be supervised by an IT professional.

At the time of the hearing, the New York City Law Department employed seven of the 18 CAs II and III, which was more than any other agency. The Director of Human Resources at the Law Department ("HR Director") testified that the Law Department initially hires CAs as summer employees. The Law Department experiences an influx of new attorneys and interns during the summer months, which increases the Law Department's demand for IT services. The Law Department does not give CAs any assurance that their employment will continue beyond the summer when they are first hired. An employee may be invited to stay on through the fall if the CA is interested in continuing in the position and the Law Department determines there is sufficient need and funding to justify the position. The data shows that the Law Department often hires CAs at the beginning of the summer, but none of the Law Department's employees listed in Union Exhibit 6 worked for only the summer months. In fact, 12 of the 17 CAs II and III employed by the Law Department since 2006 worked for 12 or more months.

The HR Director confirmed that during the summer, or other school vacations, CAs typically work thirty-five hours per week but added that CAs may work additional hours during "nights and weekends" if a particular project requires additional time. (Tr. 59) Furthermore, CAs who work part-time during the school semester often keep inconsistent hours in order to accommodate academic obligations. However, the HR Director testified that these schedules are "negotiated based on what [the Law Department's] need would be and what hours [the CAs II and III] can give us." (Tr. 46) Total work hours often fluctuate month to month for many

employees. At the Law Department, CAs II and III are assigned a specific task each day based on the agency's needs. For example, CAs II and III change printer ink, connect PCs for new employees and interns, instruct new employees how to utilize the help desk, answer the phone at the help desk, and log help desk calls for IT professionals to address at a later time. The HR Director estimated that CAs perform between three and seven percent of the Law Department's IT work, but also noted that the IT department could function properly without employing CAs.

Facts regarding CAs II and III employed by the Law Department are generally representative of employees at other agencies. However, the record indicates that employees' duration of employment and work schedule vary widely within the title. Since 2001, 475 CAs II and III have been employed by 32 different agencies. Multiple employees remained within one of the levels at issue for only one month. Others remained for more than four years. Some employees worked very few hours per month while others recorded monthly hours comparable to full-time employees. Different agencies appear to have varying practices regarding the hiring and scheduling of CAs II and III. The Office of the Comptroller employed an overwhelming majority of its CAs II and III for only the summer months, while the CAs II and III employed by the Department of Youth and Community Development worked an average of 27 consecutive months.

The City has hired employees into the title each year since it was created, but no one agency has hired CAs II or III in every year. Many CAs II and III hired since 2006 have worked for more than six months. The City's brief states that 79 of the 173 CAs II and III (45.6%) worked for three months or fewer. However, 74 CAs II and III (42.7%) worked within the title for more than six months. Indeed, many CAs II and III worked for multiple years: since 2006, 23 employees worked for 24 months or more.

CA is a non-competitive title, so applicants for Levels II and III are not required to take a civil service exam. Instead, an applicant is subject to a "resume review" to ensure that he or she is qualified for the position. (Tr. 36-37) CAs II and III are permitted to take a promotional exam required to become a Computer Program Analyst.[3]

POSITIONS OF THE PARTIES

City's Position

The City argues that CAs II and III are not entitled to collective bargaining rights under § 12-305 of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") because their employment relationship is "casual and sporadic." The City acknowledges that the NYCCBL generally presumes all public employees are eligible for collective bargaining rights. However, this Board has previously stated that some employees do not have a sufficiently regular employment relationship with the City to create an interest in collective bargaining.

The City claims that data provided at the hearing proves the CAs II and III do not have a regular and continuous employment relationship with the City. No City agency has hired at least one CA II or III each year since the title's creation. In 2009, only five CAs II or III were hired Citywide. This data highlights an irregular and sporadic need for employees in this title, rather

[3] The Union notes that employees within a non-competitive title generally cannot sit for a promotional exam. CAs II and III are one exception to this general rule, along with various "apprentice" titles, police cadets, and others. Furthermore, provisional employees, as with most non-competitive titles, are only permitted to sit for open competitive exams. For example Computer Program Trainees, provisional employees within the same bargaining unit as Computer Program Analysts, are not eligible to sit for the promotional exam available to CAs II and III. The City also asserts that no CAs have successfully changed titles to Computer Program Analyst by taking this promotional exam.

than steady employment within the title because most CAs II and III work for a short, fixed period of time. Since 2006, 79 of the 173 CAs hired worked three months or less.

Additionally, CAs II and III do not have any reasonable assurance of continued employment. CAs are hired for a short period of time, generally the summer, and allegedly have no expectation that they will remain employed through subsequent semesters. At the Law Department, CAs II and III are only invited to remain in the title after making a specific request to management and the agency determines there is sufficient work and funding to justify continued employment. When CAs II and III work during the school year, they maintain irregular hours that fluctuate month to month. CAs must work around class schedules and often take time off to study for exams, participate in sporting events, or take vacations. CAs II and III do not have sick days or annual leave, but can take off work as needed. Consequently, the City claims to not have "real control" over the CAs' schedules during the academic year.

The City also distinguishes CAs II and III from other titles entitled to collective bargaining rights pursuant to prior OCB and PERB decisions. While agencies often hire CAs to work during their summer vacation, the City claims they are not seasonal employees. Unlike lifeguards, a title previously found to be sufficiently regular and continuous despite only working the summer months, the City does not have a recurring need for CAs each summer. Rather the City claims CAs are initially hired in the summer simply to accommodate their academic schedules. Lifeguards are solely responsible for delivering specialized services but, according to the HR Director, CAs II and III are only responsible for 3-7% of the Law Department's IT needs. The City also distinguishes part-time employees, such as Hearing Officers (Per Session), who are "essentially permanent employee[s]" with the City but work fewer hours per week than a full-

time employee. By contrast, the City asserts that CAs II and III are hired for a summer or semester, and their employment is reevaluated at the end of each time period.

Finally, the City argues that CAs ability to take a promotional exam is not evidence that they are regular employees. The City first argues that this opportunity is irrelevant to the question at hand. Furthermore, the City alleges that this opportunity has not led to any CAs becoming Computer Program Analysts.

Union's Position

First, the Union argues that NYCCBL § 12-302 and § 12-305 create a presumption that all municipal employees have the right to bargain collectively.[4] The City concedes that CAs II and III are municipal employees, and therefore the City bears the burden of proving the employees are not encompassed within that presumption. Furthermore, the Union notes that the City does not claim these employees are managerial employees, confidential employees, or that the employees are part of a work-study program. Instead, the City's only claim is that these employees fall within the narrow exception of "casual employees" who are excluded from collective bargaining rights. The Union asserts that the City has not met this burden.

The Union asserts that unlike other casual employees, CAs II and III do not work "short, non-continuous and infrequent periods." *CWA*, 20 OCB 1 at 19. The Union argues that the data submitted by the City shows CAs II and III working for extended periods of time. (Union Ex. 6) Also, the Union argues that many CAs must have worked in excess of 17 hours per week during the school year since the data shows numerous instances where CAs worked more than 68 hours (17 hours per week for four weeks per month) in non-summer months.

[4] NYCCBL § 12-302 provides, in part, that it is "the policy of the city to favor and encourage the right of municipal employees to organize and be represented.…"

Additionally, the Union contends that the Board looks to the job title rather than the individual when determining whether or not an employee is casual. Therefore employees' individual work schedules and outside commitments are irrelevant. Citing the data referenced above, the Union argues that the title, as a whole, is engaged in continuous employment that is not casual and not sporadic. The City has employed students as CAs II and III each year since the title was created. Also, the fluctuations in the number of CAs hired each year and the fact that individual agencies have not hired CAs every year is irrelevant when considering the title as a whole. Hiring fluctuates for many reasons. Many CAs worked multiple years and may have continued working for an agency when no new employees were hired. Furthermore, CAs II and III may work additional hours to compensate for an agency's decision not to hire additional employees.

The Union argues that the opportunity to take the promotional exam is evidence of the employees' regular and continuous employment relationship with the City. CAs II and III are entitled to take a promotional exam which, assuming the CA meets all other job requirements, would promote the applicant to the title of Computer Program Analyst. This exam, and other similar promotional exams, is traditionally reserved for non-provisional civil service employees in a competitive title. Finally, the Union argues that the City cannot claim the CAs have a casual and sporadic employment relationship in the context of collective bargaining and, at the same time, offer CAs the perquisites of a competitive civil service position.

DISCUSSION

Pursuant to NYCCBL § 12-305, all municipal employees are presumptively eligible to "bargain collectively through certified employee organizations of their own choosing."

However, this Board has held that some municipal employees are not eligible for collective bargaining because their employment relationship is too casual and sporadic. *See Local 237, IBT*, 64 OCB 1, at 10 (BOC 1999); *CWA*, 20 OCB 1, at 17 (BOC 1977). Where the employer opposes a petition on these grounds, it has the burden to prove that the employees are not eligible for collective bargaining. *See Local 237, IBT*, 64 OCB 1, at 10.

The Board has refused to create a rigid standard to determine whether employees are too casual to participate in collective bargaining. Rather, the Board will "fashion a standard appropriate to the facts of each case" because "standards adopted in a prior case will not resolve the issues fairly and adequately." *CWA*, 20 OCB 1, at 17. "The essential question [is] whether the job title itself is in continuing and regular employment." *Local 237, IBT*, 64 OCB 1, at 13 (finding that a title containing part-time, per session, hearing officers is engaged in regular and continuous employment and therefore eligible for collective bargaining where the employer controlled the terms and conditions of employment and the employees performed similar work as other full-time, represented employees). Therefore, the Board does not focus on the number of hours an individual in the title works or with an employees' motivation for working any particular schedule. *Id*. Casual employment is "brief, intermittent and non-continuous," while regular and continuous employment is found, in part, where "employees are hired on a regular schedule for a specific period of time determined in advance by their employer, and those periods of time are sufficient to determine continuity of employment." *Id.* at 10, 13.

Here, the Board finds CAs II and III eligible for collective bargaining. CAs II and III are not casual or sporadic employees; instead the title is engaged in regular and continuous employment. Employees have been hired into Levels II and III every year since 2001, when the levels were created. More than 40% of CAs employed since 2006 worked within the title for

more than six months. At the Law Department, 12 of the 17 CAs II and III employed since 2006 worked for one year or more.

CAs II and III also share similar working conditions and perform similar tasks as other IT employees in the bargaining unit. The HR Director testified that CAs II and III do not have specific job responsibilities, but perform approximately three to seven percent of the total IT work in her agency. The record indicates that CAs II and III currently perform work that would otherwise need to be done by IT professionals within the bargaining unit. For example, the HR Director states that they are engaged in "project driven" work which, at times, requires them to work additional hours, nights, or weekends, in order to meet the Law Department's IT needs.

The flexibility of the employees' work schedules does not dictate a contrary result. In *Local 237, IBT*, the Board found Hearing Officers (Per Session) were regular and continuous employees despite working part-time, flexible schedules. *Local 237, IBT*, 64 OCB 1, at 14. In addition, the Board's holding in this case is consistent with prior decisions in which the Board considered factually similar circumstances. For example, in *Local 375, DC 37*, 36 OCB 10 (BOC 1985), the Board found employees in the non-competitive title of Engineering Work Study Trainee ("Trainees") eligible for collective bargaining. Trainees were required to be full-time college students with 60 credits in an accredited engineering program and a specified grade point average. *Id.* at 3. Trainees performed "elementary engineering work" under close supervision and received on-the-job training. *Id.* at 2. The title's tenure was limited to four years but Trainees could be terminated at any time. *Id.* at 10. Additionally, Trainees' work was scheduled around their class schedule. A "student [had] great flexibility in scheduling the work hours and he/she [could] choose to work from 16 to 35 hours in a week or work alternating weeks, etc." *Id.* at 9. The City argued that Trainees were not eligible for collective bargaining because the

"nature of their employment relationship" with the City as students brought them outside the NYCCBL. *Id.* at 7. However, the Board found that the City set the terms and conditions for the title and recognized that requiring employees to be full-time students creates the "obvious need for flexibility in scheduling." *Id*. at 14, 16.

In conclusion, the facts here show that CAs II and III are engaged in regular and continuous, as opposed to casual and sporadic, employment. The City and its agencies control the terms and conditions of employment related to the title. CAs II and III are hired for specified periods, and work particular schedules, determined in advance by the hiring agency. In fact, the data reveals that many of the employees in the title work for consecutive months or even years. Considering the totality of the circumstances, the Board finds that CAs II and III are eligible for collective bargaining.

Furthermore, the Board is satisfied that no evidence was presented to rebut the Union's assertion that the employees have a sufficient community of interest with members of the Union's bargaining unit. Accordingly, Levels II and III of the CA title are appropriately added to the Union's bargaining unit.

ORDER

NOW, THEREFORE, pursuant to the powers vested in the Board of Certification by the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3), it is hereby

ORDERED that Certification No. 46D-75 be, and the same hereby is, amended to add Levels II and III of the College Aide title (Title Code No. 10209), subject to existing contracts, if any.

Dated: December 10, 2013
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

NOTICE OF AMENDED CERTIFICATION

This notice acknowledges that the Board of Certification has issued an Order Amending Certification as follows:

DATE: December 10, 2013 **DOCKET #:** AC-68-12

DECISION: **6 OCB2d 32 (BOC 2013)**

EMPLOYER: City of New York, represented by the Office of Labor Relations
40 Rector Street, 4th Floor
New York, NY 10006

CERTIFIED/RECOGNIZED BARGAINING REPRESENTATIVE:

District Council 37, AFSCME, AFL-CIO
125 Barclay St
New York, NY 10007

AMENDMENT: Certification No. 46D-75 has been amended as follows:

Added: **College Aide Levels II and III (Title Code No. 10209)**