DC37 v. City, 10 OCB 9 (BOC 1972) [Decision No. 9-72 (Cert.)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF CERTIFICATION
----------X

In the Matter of

DISTRICT COUNCIL 37, AFSCME, AFL-CIO — DECISION NO. 9-72

-and- — DOCKET NO. RU-291-71

THE CITY OF NEW YORK AND
RELATED PUBLIC EMPLOYERS
----------X

DECISION AND ORDER

On December 12, 1971, District Council 37, AFSCME, AFL-CIO (herein called Petitioner), filed its petition herein, requesting to add the title of Park Worker (E.E.A.) to Certification CWR-35-67, as amended by Decision No. 40-70, presently covering Attendants, Senior Attendants, and Curator of Jumel Mansion, the cited Certification being held by Petitioner. The City does not object to the petition.

Upon consideration of its investigation and after due deliberation, the Board of Certification issues the following decision:

I. Undisputed Matters

It is undisputed, and we find and conclude, that Petitioner is a public employee organization in fact and within the meaning of the New York City Collective Bargaining Law.

II.The Employer-Employee Relationship

This Board takes cognizance of the fact that there are many federal laws which involve the federal government in the sponsorship of many programs of a public character which include the participation of local governments. The employees involved in this case, who perform work in municipal parks, are part of such a program.

The common and usual goal of such programs is to reduce the impact of poverty conditions and unemployment. The means to accomplish these goals vary according to the emphasis it is felt necessary to attain the goals. Thus, federal programs exist to enhance, encourage, and improve educational, vocational and job training opportunities so that individuals may secure the skills, training, knowledge and experience necessary to cope with the demands of a modern economic society. The "Emergency Employment Act of 1971" (EEA) incorporates one of such programs and because the City is a participant (and is likely to be a participant in similar future programs), we deem it appropriate and necessary to articulate our views with respect to the status of persons who are recruited under the City's auspices.

Section 2 of the EEA sets forth the findings and declaration of purposes of Congress. In sum, those findings, in pertinent part, state that many persons who are underemployed or become unemployed as a result of technological changes "could usefully be employed in providing needed public services" and that during periods of high unemployment it is appropriate "to fill unmet needs for public services in such fields as * * * parks." (Emphasis ours)

The EEA defines "public service" as including "work in such fields as * * * maintenance of parks." (Emphasis ours) (Sec. 14 (a)]

Under the EEA, federal monies are made available to government applicants "not to exceed 90 per centum of the cost of carrying out the program," though this requirement may be waived because of special circumstances and, accordingly, the federal contribution may be higher (Sec. 3). Non-federal contributions may be in cash or in kind, fairly evaluated, including but not limited to plant, equipment or services (Sec. 8). It is significant to note that prior to obtaining federal financial assistance the local government applicant must give assurances that:

> ". . . all persons employed in public service jobs under this Act will be assured of workmen's compensation, health insurance, unemployment insurance , and other benefits at the same levels and to the same extent as other employees of the employer and to working conditions and promotional opportunities neither more nor less favorable than such other employees enjoy . . . ."[Sec. 12. (a) (4)]

The City has applied for and obtained federal funds to set up such a program. It is also of significance to note that where a labor organization represents employees who are engaged in similar work as that proposed to be performed under any program, such organization "shall be notified and afforded a reasonable period cf time in which to make comments to the applicant" and to the Secretary of Labor [Sec. 12. (c)]. The House and Senate Joint Conference Committee Report, commenting on the assurances necessary to be given as a condition to obtaining federal financial assistance, stated in pertinent part:

> "Applications must also provide assurances that hiring jurisdictions will . . . reevaluate civil service requirements and practices in order to provide upward mobility within public employment. . . ."

An analysis of the foregoing pertinent provisions of the EEA and a total reading of the Act support the conclusion that Congress gave full sway to the civil service commissions (or comparable agencies) of local governments to define the jobs to be filled, the major work to be performed, the specific eligibility criteria for the job, and to test applicants for the j obs to be filled (Sec . 7).

In compliance with the City's assurances, the City Civil Service Commission has created the title of "Park Worker (E.E.A.)" and, pursuant to authority contained in the Civil Service Law (§65) and Rules and Regulations (§V), controls the provisional appointment of persons who perform similar duties as Park Department employees (i.e., "Attendants"). Such similar duties include giving information to the public, acting as checkroom attendants and delivering messages. Though appointed provisionally, the Park Worker (E.E.A) receives the same benefits as other City employees, e.g., sick leave, annual leave, health insurance, and the right to join the City's retirement system. The employees herein are on a regular City payroll of a municipal agency and paid by regular City check.

As we read the EEA, we are persuaded that its provisions reflect the Congressional intent to establish an employer-employee status between a local government and a participant in the program. The status of those

persons appointed provisionally must, per force of the Civil Service Law, be City employees. No citation of authority is necessary to establish that a provisional employee is no less a City employee because of such provisional status. The significant distinction between an employee appointed permanently and one appointed provisionally is tenure. Provisional status does not affect the fundamental employer-employee relationship. The relationship, as we view it, exists more as a matter of statutory construction and, therefore, we are not presented with the kind of case which would make it necessary to marshal or sort out factual data in order to ascertain whether indicia exist upon which an employer employee relationship may be established.

III.Conclusion

It is our conclusion that there is an employer employee relationship between the City and the employees involved based upon the following factors:

1. The provisions of the federal act;
2. the direct jurisdiction of the Civil Service Commission over the provisional appointments of the participants in the EEA program; and
3. such participants are on a regular City payroll of a municipal agency, paid by regular City check (see §1173-3.0 NYCCBL defining the term "municipal employees" as meaning "persons employed by municipal agencies whose salary is paid in whole or in part from the City treasury.").

IV.Accretion-Disposition

Since Certification CWR-35/67, as amended, was issued in August 1967, and Park Worker (E.E.A.) was subs-sequently created in August 1971, it may properly be accreted to that unit. Accordingly, we shall accrete Park Worker (E.E.A.) to Certification CWR-35/67, as amended by Decision No. 40-70.

O R D E R

NOW, THEREFORE, pursuant to the Dowers vested in the Board of Certification by the New York City Collective Bargaining Law, it is hereby

ORDERED, that Certification CWR-35/67, as amended by Decision No. 40-70, be, and the same hereby is, amended to include the title of Park Worker (E.E.A.), and as amended, such unit shall be cited as "Decision No. 9-72" and shall consist of Park Workers (E.E.A.), Attendants, Senior Attendants, Curator of Jumel Mansion, and employees serving in restored Rule X titles equated thereto, employed by the City of New York and related public employers subject to the jurisdiction of the Board of Certification, and subject to existing contracts, if any.

DATED: New York, N.Y.
March 20 , 1972.

ARVID ANDERSON
C h a i r m a n

WALTER L. EISENBERG
M e m b e r

ERIC J. SCHMERTZ
M e m b e r

The titles and title code numbers or temporary title code numbers of the employees affected by this decision are as follows:

Park Worker (E.E.A.)	03303
Attendant	81710
Senior Attendant	81735
Curator of Jumel Mansion	81709