DC37 v. City,28 OCB 21 (BOC 1981) [21-81 (Cert.)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF CERTIFICATION
- X
In the Matter of

DISTRICT COUNCIL 37,
AFSCME, AFL-CIO,

Petitioner, DECISION NO. 21-81

- and-

THE CITY OF NEW YORK AND DOCKET NO. RU-760-80
RELATED PUBLIC EMPLOYERS,

Respondent.
- X

MOTION TO DISMISS
DECISION AND ORDER

On April 29, 1980, District Council 37, AFSCME, AFL-CIO (the "Union") filed a petition with the Board of Certification (the "Board") seeking to accrete "certain titles of the PWP program" into existing units for which it holds bargaining certificates. The individuals sought to be accreted are New York City participants in the New York State Public Works Project ("PWP") program.

By letter dated July 21, 1980, the City of New York (the "City") by its Office of Municipal Labor Relations opposed the requested accretion.

On May 13, 1981, at a hearing scheduled by the Board before Trial Examiner Catherine Nathan, the City moved to dismiss the Union's petition on the ground that as a matter of law PWP participants are not entitled to Union representation. The Union opposed the City's motion.

QUESTION PRESENTED

Persons who currently participate in the New York State PWP program, a program funded 50% by New York State and 50% by New York City,. are welfare recipients pursuant to one of two State welfare programs, either Home Relief (established under Social Services Law ("SSL") §164) or Aid to Dependent Children (SSL §343). Under both programs, participants who are able to work are required to participate in PWP as a condition of receipt of their welfare grant. The issue presented in the Union's petition is whether these PWP participants who work in New York City are "public employees" under the New York City Collective Bargaining Law ("NYCCBL") and hence entitled to union representation.

It is the stated policy under the NYCCBL to "encourage the right of municipal employees to organize and be represented...." NYCCBL §1173-2.0. The right to self-organization and union representation is specifically granted in 51173-4.1 which provides in relevant part as follows:

> "Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities."

"Public employees" is defined to mean "municipal (employees and employees of other public employers." NYCCBL 51173-3.0(h). "Municipal employees" means "persons employed by municipal agencies whose salary is paid in whole or in part from the City treasury." NYCCBL §1173-3.0(e).

The precise question raised by the City's motion and the one for our determination herein is whether New York City PWP participants are excluded from union representation under the NYCCBL because, as a matter of law, they are neither municipal nor public "employees."

Before addressing this question directly, a description of the home relief welfare program and a summary of the derivation of the PWP program are in order.

BACKGROUND OF HOME RELIEF AND PWP PROGRAMS

Home Relief

The State's Home Relief and public assistance programs have been established pursuant to Constitutional mandate. Article 17, Section 1 of the New York State Constitution provides as follows:

> "The aid, care and support of the needy are public concerns and shall be provided by the State and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine."

The legislature has determined that for the "purpose of administration of public assistance and care the state shall be divided into county and city public welfare districts." SSL §61. New York City is a single social services district. SSL §61(1).

Social Service Law §2(20) defines "public assistance and care" to include "home relief." Home relief in turn is defined in relevant part in SSL §157(1) to mean,

> "allowances ... for all support, maintenance and need, and costs of suitable training in a trade to enable a person to become self-supporting, furnished eligible needy persons ... by a [county or city], or a town ... to persons or their dependents in their abode...."

The Social Services Law and the state regulations adopted thereunder delineate the process by which a local social services district must ascertain whether a particular applicant is eligible for assistance and, if so, the method of calculating the amount of the grant.[1] The Social Services Law also provides that home relief is funded 50% by the state funds and 50% by the city. SSL §153(1)(d).

[1] See generally, SSL §131 et seq; 18 N.Y.C.R.R. Parts 552, 370.

PWP Program

In 1942, the New York State Legislature established the first state work relief program which provided that recipients of home relief participate in local public work projects. (Ch. 926, L. 1942). The intent of the legislature in passing this legislation was stated in the act itself.

> "In view of the continuing relief problem due to unemployment and the number of needy employable persons receiving home relief who cannot be given employment through the work projects administration either because they are ineligible under the law or the rules governing employment on projects of the works projects administration or because of lack of available jobs on such projects, the legislature hereby declares that in its judgment it is advantageous to the public welfare that local authorities be authorized to provide home relief in the form of wages for work relief on projects administered by local units of government." (Ch. 926, L. 1942).

The law also provided for the development of work relief projects undertaken in the public interest by public agencies on the condition that work relief employees were not to be used "to replace regular employees" of any public department or agency. (Ch. 926, L. 1942).

Between 1948 and 1950, the work relief statute (Section 164 of the New York State Social Services Law) was

revised to provide that that participants in the work relief program,

> ... will not be used to replace, or to perform any work ordinarily performed by, regular employees of any department..." (Ch. 435, L. 1950).

In addition, the 1950 amendments eliminated references to "work relief wages" and instead provided the following:

> "The number of days of work to be given each person shall be determined by the amount of the budget deficit of the recipient and his family computed on local home relief schedules." (Ch. 435, L. 1950).

In 1956, the legislature amended the law again to provide that PWP participants not replace, or perform work ordinarily done by workers in private employment. (Ch. 596, L. 1956).

In 1959, a requirement was added to §164 that all employable recipients of assistance call or register with the nearest local employment agency of the Department of Labor. (Ch. 714, L. 1959).

In 1962, Section 164 was amended to allow for the assignment of home relief recipients to state agencies. (Ch. 673, L. 1962).

From 1942 through 1971, establishment of a PWP program remained discretionary on the part of the local

political subdivision or state welfare district. However, once a PWP program was established, eligible recipients had no choice but to participate in it. In 1971, the law was amended to make the PWP program mandatory statewide. (Ch. 101, L. 1971). In addition, PWP participants were "not to be used to replace, or perform any work ordinarily and actually performed by, regular employees."

In 1971, the Legislature also amended §131 of the Social Services Law to provide a specific definition of employable persons. The amendment provided that participants in PWP programs were deemed to be "employable but not employed" and delineated the circumstances under which a recipient of home relief would not be considered "employable" and, hence, would not be required to participate in a PWP program as a condition of receipt of a home relief check. (Ch. 102, L. 1971).

> "Every employable recipient of public assistance, including a person who Is participating in an approved program of vocational training or rehabilitation shall receive his public assistance grants and allowances in person from the Division of Employment of the State Labor Department." (McKinney's Session Laws 1971, Vol. II at 2354).

Between 1973 and 1976, the PWP program was suspended in New York City and replaced with the Work Relief Employment

Program ("WREP"). (Ch. 603, L. 1973). The WREP program was designed to substitute home relief grants to program recipients with a salary check from the agency to which a program participant was assigned to work. Mayor Lindsay in a memorandum to Governor Rockefeller in support of the WREP Legislation articulated the rationale behind the change to the WREP approach:

> "Under current [PWP] legislation, persons assigned to public work projects receive a level of assistance based on financial need regardless of their work attendance and performance. Demonstration projects which would be authorized by this bill would directly relate the payment a person received to the amount of time he actually works thereby creating a job and pay setting which is much closer to the real work situation."

Home Relief funds were transferred by the Human Resources Administration ("HRA"), as administrator of the WREP program, to the employers of the WREP participants. These monies were used to fund the salary checks for these workers and to pay fringe benefits. (Ch. 603(3), L. 1972). The fringe benefits included workmen's Compensation, annual leave, sick leave and, for those WREP employees who worked more than 20 hours a week, coverage under one of the City's health insurance plans. Income taxes were also withheld from WREP worker's pay checks.

Significantly, the HRA Manual establishing the WREP program specifically provided that,

> "WREP employees will be permitted to join a union for representation and collective bargaining purposes, pursuant to State and City law, and subject to the same rules and regulations, and conditions as other city employees." [2]

In May, 1976, the enabling legislation for the WREP program expired. The City reinstituted the original PWP program in 1976.

POSITIONS OF THE PARTIES

City's Position

The City presents a four-pronged argument in support of its position that as a matter of law PWP participants are neither "employed" by nor are they "employees" of New York City.

Citing various sections of the Social Services Law and regulations which speak in terms of "recipients who have been unable to secure employment," "participant," "assign [work]," "employable but not employed," and the obligation to allow participants "to look for employment," the City asserts that the legislature "never intended that PWP workers be considered employees." To buttress this argument, the City points out that PWP workers receive a

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[2] In 1974, D.C. 37 filed a motion to accrete certain WREP employees into already existing bargaining units represented by D.C. 37. A group entitled the United WREP Workers filed a motion to intervene. The City did not oppose D.C. 37's petition. On May 7, 1975, the Board in Decision No. 23-75 granted D.C. 37's motion to accrete.

welfare check, not a pay check; they cannot "earn" more than their grant; they may not be assigned to work "ordinarily and actually performed by regular employees;" and they receive no fringe benefits other than Workmen's Compensation. Also, PWP participants are required to continue to look for employment and must be given time off to do so. In this regard, the City asserts:

> "This requirement is contrary to an employment relationship and is a clear and vivid manifestation of the legislative intent that participation in a PWP program by a temporary and transitional step leading to regular paid employment. "

The City next argues that the Social Services Law and regulations curtails its right of control over the PWP program and participants, an essential requirement of the employment relationship. The responsibility and authority for establishing and supervising public assistance lies with the State, not the City which, as a local social service district, is mandated by the State to establish a PWP program. The City must place all employable home relief recipients in the program "without regard to [its] need or desire for the recipient's service or the recipient's merit and fitness." The amount of the "grant" is determined by the State and, should the recipient fail to participate, the State, not the City, determines "sanctions."

In short were the PWP participants certified to a unit for collective bargaining purposes, the City, having no control over what it considers to be bargainable subjects, would be unable to bargain in good faith as mandated by the NYCCBL.

Citing Matter of Prisons Labor Union at Bedford Hills, 5 PERB 4040 (1972); aff'd, 6 PERB 3033 (1973); aff'd sub-nom, Matter of Prisoners Labor Union at Bedford Hills, 44 A.D. 2d 707, 354 N.Y.S. 2d 694 (2d Dept. 1974) (the "Green Haven" case), the City also maintains that the mandated PWP program lacks the element of volition, a prerequisite to a finding of employee status. The City claims that the PWP program lacks the "bargained-for exchange of the normal marketplace."

Finally, the City asserts that PWP participants do not receive compensation for services rendered which, according to the City, is another element of the employment relationship. PWP participants for whom no work is available as well as home relief participants who are not "employable" receive their grant as well as actual PWP workers. The amount of the grant, according to the City, "is determined by the recipient's need rather than on the value of services performed." Union's Position

Like the City, the Union bases its position in large measure on the element of "control" of the working environment. "he Union, however, asserts that the evidence

will show that the City in fact controls the working conditions of the PWP participants since it determines job titles and descriptions, interviews, hires and terminates, establishes hours, assigns work, trains and supervises, and provides equipment and supplies. The fact that the City does not establish either the criteria for participation in the PWP program or the level of "compensation" for the work performed should not, according to the Union, "deprive the participants of the designation of employee status."

The Union maintains that the PWP workers are compensated for services rendered since the amount of time spent working is computed on the basis of the amount of the PWP grant divided by the salary level assigned to the job. "As the amount of time has value, hence, the service performed has value; therefore, these workers are compensated for the work they perform."

The Union also challenges the City's assertions that the PWP program is a "temporary" program as well as being a "training program." In addition, the Union counters the City's argument that the program is "involuntary," arguing that loss of payments due to non-participation in a "mandated" program is no different from the loss of salary for "regular employees" for refusing to perform their jobs.

The Union next argues that there is "little or no connection between the language of the Social Service statute ... and the right of union representation or 'employee' status." The Union attaches no great significance to the phrase "employable but not employed" as used in the Social Service law; according to the Union, that phrase applies solely to eligibility for the "work-relief program" and was "not intended to affect in any manner the employment relationship." The Social Service law is not, nor was it ever intended to regulate labor relations, unlike the Taylor Law. The purpose of the statute was designed to provide persons judged to be "needy" with subsistence payments in exchange for work performed. The Union maintains that only the Taylor Law regulates State employment relationships and that although another statute may "place limitations on the breadth of what can be bargained for," it cannot serve "to rob" workers of their employee status, a status which the Union argues is clear under the Taylor Law and hence under the NYCCBL.

Finally, the Union asserts that economic realities being what they are, it is unrealistic to expect PWP workers to gain employment in the "regular" economy and that they should not be penalized simply because they are forced by law to go through the motions of doing so.

Additionally, although the law prohibits PWP workers from replacing workers in the regular economy, the fact is that they do. They should, therefore, be given the same employee status as those workers.

DECISION

In ruling on the City's Motion to Dismiss we are mindful that the NYCCBL in large measure parallels the State's Taylor Law. Under both the Taylor Law and the NYCCBL the issue of "employee" status has been raised in prior cases although no case has been found which directly deals with the status of working welfare recipients. Both parties, herein, agree that the question of control of the working environment is significant to the resolution of the matter but the Union would have us make that issue the paramount one and deny the motion so that it could present its case on that question. The City, however, asserts that the legislated degree of State control of the PWP workers as specified in the Social Services Law is sufficient together with the legislative intent as expressed in the statute to show that PWP workers are not under City control and were never intended to be considered as "public employees" within the meaning of the NYCCBL.

After analyzing the record presented on this motion and construing the facts as alleged by the Union as true, as

we must on a motion such as this, we nevertheless find the City's arguments to be most persuasive. We do not believe that the State legislature ever intended for PWP participants to enjoy "employee" status and find that to rule otherwise would create a conflict between the State's mandated control over welfare recipients and the City's administration of the statutorily mandated PWP program for welfare recipients in the City of New York.

Taking the legislative history of the PWP program as a whole, we believe that the program was intended from its inception as a means of ensuring that eligible welfare recipients perform a useful service to society in return for their welfare checks. In addition, PWP participants hopefully would acquire skills that would enable them to enter the regular economy and forego welfare. The language of the State Constitution, quoted above at 5, speaks in terms of its being "advantageous to the public welfare" that persons on relief be given work through 'Local units of government. The prohibition in the PWP enabling legislation against PWP participants replacing or performing work ordinarily and actually performed by regular employees buttresses our belief that the legislature intended the PWP program to be both a training program and a means of providing the state with useful service in exchange for its public assistance dollars.

In this regard the Green Haven case is particularly instructive. There, prisoners were offered the opportunity to work during their incarceration pursuant to §171 of the New York State Correction Law. Through the program, prisoners were able to learn various crafts, trades and maintenance skills. They were paid up to $1.00 per day and were not to work more than eight hours a day excluding Sundays and holidays. For work in excess of this, they were paid at the rate of one and one-half times their regular compensation. The issue became whether these working prisoners were "employees" under the Taylor Law. In ruling that they were not "employees," PERB stated the following:

> "By tradition, an employment relationship requires a working commitment freely given, not one performed out of legal or moral compulsion .... The fact that prisoners may now choose to work or remain idle does not transform them into free agents, for all functions which they perform are still a consequence of their confinement. As later discussion will show, the work programs in which they participate have rehabilitation as their optimum goal. Thus, the service the State derives from the work is incidental to the service the State is performing for society and for the prisoners in advancing their rehabilitation." 5 PERB at 4073-74.

Although PWP workers obviously have legal status and rights quite different from those involved in the Green Haven case,

the "service" the City receives from the PWP workers similarly is incidental to the service the State is performing for society in ensuring that needy public assistance recipients gain useful skills and in addition in some measure repay society for its assistance. That the State only intended for PWP workers to participate in the program on a temporary, transitional basis is evident both from the requirement in the statute itself that participants be given time off to look for employment in the regular economy and from the fact that implicit in the Home Relief and PWP statutes is the State's commitment to reduce the welfare rolls and strive for full employment. In this context, we believe that if the State 'Legislature intended for PWP participants to be given "employee" status, it would have expressed this intent specifically. See, Green Haven, 6 PERB at 3069; Matter of Toomey v. New York State Legislature, 2 N.Y. 2d 446, 449 (1957); Board of Certification Dec. 9-72 at 4. This is especially so in view of the fact that participants in the experimental WREP program were afforded "employee" status expressly. When WREP was terminated and PWP reinstituted, had the legislature intended for such status to continue it could have so provided.

Here, similar to the Green Haven case, there is no bargained-for exchange of work for compensation in the traditional sense. Participation in the PWP program by

eligible home relief recipients is made voluntary only to the extent of accepting work or not receiving a welfare check. Given the State's public policy of providing for the needy, eligible home relief recipients have no choice I but to participate in PWP on terms dictated by the State. Thus, there is a clear element of "legal or moral compulsion" to the relationship that negates the finding of an employment relationship in the traditional sense.We have impliedly recognized this fact in our prior decision on the certification to an appropriate unit of the WREP workers where, in referring to the PWP workers, we stated the following:

> "Recipients of welfare were required to work in exchange for their welfare check under [PWP]. WREP is an attempt to modify the PWP concept so as to transform the required work into a true employment experience, including the receipt of a salary check instead of a welfare check." Dec. No. 23-75.

In Gotbaum v. Sugarman, N.Y.L.J. Aug. 2, 1974, Justice Greenfield in ruling that the WREP program did not violate the New York State Constitution's mandate that state "employment," where possible, be on merit and fitness only, stated the following with respect to WREP participants:

> "There is no true employer-employee relationship with the agencies where they work. Their wages come not from budgetary allocations to the respective departments but from relief funds." See also, Green Haven, 6 PERB at 3069.

Such is equally, if not more, the case here, especially since, unlike the WREP program, the right to union representation has not been specifically provided to PWP participants.

The degree of State control that is mandated by statute also negates the Union's contention that the City controls the PWP participants. Even if the Union were able to prove under the traditional test of control, that the City has control over much of the working environment of PWP participants, nevertheless, by statute the State has given ultimate control of the PWP program to the State Department of Social Services. As stated by the Court of Appeals in Beaudoir v. Toia, 45 N.Y. 2d 343, 347 (1978):

> "In New York State, the social services program is a State program, administered through the 58 local social services [county and City public welfare] districts [of which New York City is one] under the general supervision of the State Department of Social Services and the State Commissioner of Social Services. The county commissioners are denominated by statute 'agents' of the State department. In the administration of public assistance, funds, whether they come from Federal, State or local sources, the authority and responsibility is that of the county commissioners of social service, not the counties; the local commissioners act on behalf of and as agents for the State." (Citations omitted; Emphasis added.)

As in the Case Aide Trainee case, Decision No. 51-68, where we found such workers not to be "employees" under the NYCCBL in part because they were paid by the Federal government and the "entire program" was "terminable at the discretion of the Federal government," the PWP program is a State program that is mandated by the State and terminable at State discretion. That New York City may have the right to establish and control certain parts of the working environment of the PWP program does not negate the fact that the State has the ultimate control, can modify the City's power at will, and can terminate the program altogether if it so chooses. Under such conditions, the City's "control" can only be characterized as derivative. The Union's reliance, therefore, on the Board of Collective Bargaining's decision in the Per Diem Grand Jury Stenographer case, B-25-80, is misplaced. In, that case there was no issue of State control; respondent union was able to show under the traditional test for control that the grievants were indeed City employees. The State's paramount control in this matter obviates the need to delve into the traditional test of control.

Finally, the fact that PWP workers cannot realistically find employment in the regular economy does not change our finding herein. Given the legislative mandate that PWP participants seek gainful employment, we cannot rule based on

economic considerations. Neither can we deny the City's motion simply because certain PWP workers have been alleged to have replaced regular employees in violation of the PWP statute.

Based on the foregoing, we find as a matter of law that New fork City participants in the State mandated PWP program are neither "municipal employees" nor "public employees" as those terms are used in the NYCCBL.

O R D E R

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

ORDERED, that the Motion to Dismiss filed herein by the City of New York be, and the same hereby is, granted; and it is further

ORDERED, that the Petition filed herein by District Council 37, AFSCME, AFL-CIO, be, and the same hereby is, dismissed.

DATED: New York, New York
June 30, 1981

ARVID ANDERSON
CHAIRMAN

WALTER L. EISENBERG
MEMBER

DANIEL G. C0LLINS
MEMBER