

L.375, DC37, et. Al v. City, 36 OCB 10 (BOC 1985) [10-85 (Cert.)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF CERTIFICATION

----- x

In the Matter of

CIVIL SERVICE TECHNICAL GUILD,
LOCAL 375, DISTRICT COUNCIL 37,
AFSCME, AFL-CIO

DECISION NO. 10-85

-and-

DOCKET NO. RU-921-84

THE CITY OF NEW YORK

----- x

DECISION AND ORDER

On October 1, 1984, Civil Service Technical Guild, Local 375, District Council 37, AFSCME, AFL-CIO (hereinafter "Local 375" or "the Union") filed a petition (later amended) to add the title of Engineering Work Study Trainee to its Certification No. 26-78 (as amended). In letters dated October 29, 1984 and January 14, 1985, the City of New York, through its Office of Municipal Labor Relations (hereinafter "OMLR" or "the City"), opposed the petition on the grounds that students employed by the City, due to the nature of their employment relationship, are not covered by the NYCCBL and, therefore, are not eligible for representation. In a letter dated March 1, 1985, Local 375 responded to the City's opposition, and the City submitted a surreply by way of a letter dated March 29, 1985.

BACKGROUND

The title of Engineering Work Study Trainee was established on May 24, 1984, and classified on February 20, 1985, in the Non-Competitive Class, subject to Rule XI, for use in all City agencies. As of June 30, 1985, there were eight incumbents in the title employed in the Department of Environmental Protection.

The job specifications for the petitioned-for title are as follows:

ENGINEERING WORK STUDY TRAINEE

General Statement of Duties and Responsibilities

Under continuing guidance and supervision, receives training in and performs elementary engineering work in the field, office or laboratory; performs related work.

Examples of Typical Tasks

Receives training in and under close supervision may perform the following tasks:

Assists in one or more of the following engineering areas - development, design and/or drafting, construction, inspection, operations and maintenance.

Assists in research, investigation, studies, or examinations related to the engineering functions of a department or agency.

Qualification Requirements

Students must have completed 60 credits of study in an engineering program which is accredited by the Engineering Accreditation Commission and maintain a 2.5 overall grade point average (4.0 scale).

Lines of Promotion

This class of positions is classified in the Non-Competitive Class with a limited tenure of four years.

Incumbents who have completed the requirements for a baccalaureate degree in Engineering and who have 2 years of satisfactory service in this title will be eligible to participate in a promotion examination for the Competitive Class titles of Engineering Intern (Air Pollution, Chemical, Civil, Electrical or Mechanical).

The rate of compensation (\$13,200-\$17,000) as well as the terms and conditions for Engineering Work Study Trainees are set forth in Personnel Order No. 85/7, dated May 15, 1.985, which provides in pertinent part:

2. Terms and Conditions

- a. To be eligible for this position, candidates must be enrolled as full-time matriculated students in an accredited college and shall have completed 60 credits in a program leading to a baccalaureate degree in engineering.
- b. The provisions of paragraph 11.1.1 of the Career and Salary Pay Plan do not apply to this class of positions. Notwithstanding its classification in the Non-Competitive Class, the terms of Rule 5.8.1 are deemed to be applicable to this class of positions.

- c. The maximum tenure in this position is not to exceed four years.
 - d. After each 1100 hours of paid employment, incumbents in this title shall be reviewed, based on performance, for retention in the program. At that time and also based on performance, the employing agency may provide no adjustment or may increase the incumbent's salary by 1-7%. All increases shall be subject to the approval of the agency head.
 - e. Incumbents in this position will be entitled to regularly scheduled holidays that occur only during their regularly scheduled work period.
- 3. The class of positions listed in paragraph 1 above be included under the Alternative Career and Salary Pay Plan Regulations, as set forth in Labor Relations Order No. 81/1, dated August 12, 1980.
 - 4. Compensation for this class of positions is predicated upon a 35-hour work week.

* * *

POSITIONS OF THE PARTIES

The Union

It is the position of Local 375 that "students who are employed as Engineering Work Study Trainees are primarily employees and as such are eligible for collective bargaining." In support of this contention, the Union cites decisions of the OCB Board of Certification, the New York State Labor Relations Board, the Supreme Court of Michigan and the National Labor Relations Board.

The Union maintains that Board of Certification Decision No. 31-73 "sanction[s] the concept of student/employee as appropriate bargaining unit members under the NYCCBL." Local 375 argues that Decision No. 31-73, in which the Board approved the collective bargaining status of, among others, hospital interns and residents, "established the propriety of student/employee eligibility for collective bargaining."

The Union relies on two New York State Labor Relations Board decisions in which part-time employees, who were students, were found eligible for inclusion in a bargaining unit by virtue of their status as regular part-time employees.¹ The Union also calls attention to Regents of the University of Michigan v. Michigan Employment Relations Board² in which a group of hospital interns, residents and post-doctoral fellows were found to be employees within the meaning of the Michigan Public Employees Relations Act and as such had the right to organize and bargain collectively

¹ Peter Pan Juvenile Center, Inc., 23 SLRB 669 (1960); Men's Faculty Club of Columbia University, Inc., 31 SLRB 268 (1968). It should be noted that with reference to the latter case, upon the joint request and agreement of the parties, the Decision was amended so as to exclude students from the bargaining unit. SLRB Administrative Decision No. 12143 (1968).

² 389 Mich. 96, 204 N.W. 2d 218 (1973).

with the University.

Lastly, the Union cites a number of NLRB decisions³ and requests the Board to take administrative notice of their persuasive authority. The NLRB cases relied upon by the Union involve instances where appropriate unit composition was at issue; five of the cases concern the collective bargaining status of student/employees. The Union contends that the cases reflect an NLRB policy of including students in a bargaining unit when they are employed on a regular part-time basis and share a community of interest with non-student employees.

The Union notes that it represents other employees who work less than twenty hours per week and are not entitled to health benefits, as well as the fact that the City employs other college students on a part-time basis, and concludes that Engineering Work Study Trainees are "primarily employees developing and exercising professional skills with wages and working conditions comparable to other City employees."

³ Farmers Insurance Group, 53 LRRM 1291, 143 NLRB 240 (1963); Fairfax Family Fund, Inc., Subsidiary of Spiegel Inc., 79 LRRM 1418, 195 NLRB 306 (1972); Hearst Corporation, et al., 90 LRRM 1468, 221 NLRB 324 (1975); Six Flags Over Georgia, Inc., et al., 88 LRRM 1057, 215 NLRB 809 (1974); Sandy's Stores Inc., 65 LRRM 1034, 163 NLRB 728 (1967); Display Sign Service Inc., 72 LRRM 1577, 180 NLRB 49 (1969); Delight Bakery Inc., 55 LRRM 1076, 145 NLRB 893 (1964).

The City

The City opposes certification of the petitioned-for title arguing that due to "the nature of their employment relationship, students who work for the City are not covered by the NYCCBL and are, therefore, not subject to representation by any certified unit of employees."

The City contends that in Decision No. 7-74,⁴ the Board of Certification enunciated a policy of excluding student/employees "where an employment relationship exists solely for the purpose of furthering an educational or correctional goal." The City further maintains that Saga Dining Halls,⁵ which was discussed in Decision No. 7-74, "is dispositive of the issues raised in the instant case" since in Saga Dining Halls the employment of excluded students was contingent upon their student status and scheduled so as not to interfere with their classes.

The City distinguishes the NLRB cases cited by the Union on the grounds that those cases involved the issue of whether part-time employees should be excluded from a bargaining unit rather than the issue of whether students whose employment furthers an educational goal should be included in a bargaining unit. The City also

⁴ The City University of New York.

⁵ 29 SLRB 178 (1966).

cites a number of cases in which hospital interns, residents and clinical fellows were found not to be employees under the LMRA due to their educational relationship with teaching hospitals.⁶ The City maintains that just as the NLRB excluded hospital interns, this Board should exclude the instant trainees. However, the City also asserts that Engineering Work Study Trainees should not be compared to medical and dental interns due to differences in

⁶ Cedars-Sinai Medical Center, Los Angeles, Calif. and Cedars-Sinai Housestaff Association, 91 L.R.R.M. 1398, 223 N.L.R.B. No. 57 (1976); St. Christopher's Hospital for Children, Philadelphia, Pa. and St. Christopher Hospital Staff Association, 91 L.R.R.M. 1417, 223 N.L.R.B. No. 58 (1976); Buffalo General Hospital, Buffalo, N.Y. and Buffalo House Staff Association, 92 L.R.R.M. 1197, f24 N.L.R.B. No. 17 (1976); Barnes Hospital, St. Louis, Mo. and Barnes House Staff Association, 92 L.R.R.M. 1366 ' 224 N.L.R.B. No. 83 (1976); Kansas City General Hospital and Medical Center Incorporated and Hospital Hill Health Services Corporation and The House Staff Association of Kansas City General Hospital and Medical Center, 92 L.R.R.M. 1379, 225 N.L.R.B. No. 14 (1976); Aff'd, 93 L.R.R.M. 1362, 225 N.L.R.B. No. 14A (1976); The Clark County Mental Health Center d/b/a the Mental Health and Family Services Center, Vancouver, Wash. and Office and Professional Employees, Local 11 AFL-CIO, 92 L.R.R.M. 1545, 225 N.L.R.B. No. 105 (1976); Deacones Hospital of Buffalo, New York, Buffalo, N.Y. and Buffalo Housestaff Association, 93 L.R.R.M. 1511 226 N.L.R.B. No. 164 (1976); Samaritan Health Services, Inc., Phoenix, Ariz. and National Economic Council of Scientists, 99 L.R.R.M. 1551, 238 N.L.R.B. No. 56 (1978).

professional status, educational qualifications and other criteria indicated on the job specification."

Lastly, the City proffers the following five factors for the Board to consider in resolving the instant matter:

- a) the employment relationship is dependent on the individual's being a student in an engineering college accredited by the Engineering Accreditation Commission and maintaining a 2.5 overall grade point average (4.0 scale). Continued employment is conditioned on academic performance, which distinguishes these individuals from other employees and makes them akin to interns;
- b) The Engineering Work Study Trainee program is like a cooperative program. This program was established in part to give students extensive practical experience in order to develop their engineering skills clinically, and to allow them to receive training under close supervision (thereby carrying out the learning process;)
- c) Their work is scheduled so as not to conflict with their class schedule and, therefore, is subordinate to the primary consideration which is education. The student has great flexibility in scheduling the work hours and he/she can choose to work from 16 to 35 hours in a week, or work alternating weeks, etc.;

- d) This is not a tenured position and the student may be terminated at any time. Employment in this position is terminated when the person is no longer a student, after a maximum of 3 years, or if their overall grade point average falls below 2.5 (4.0 scale).
- e) Students who perform less than 20 hours per week are not entitled to health insurance benefits.

DISCUSSION

Municipal employees are defined in Section 1173-3.0(e) of the NYCCBL as "persons employed by municipal agencies whose salary is paid in whole or in part from the city treasury." While the source of the compensation paid to Engineering Work Study Trainees is not in dispute, the parties have raised a number of questions concerning the fundamental nature of the relationship between the City and persons who attend school while they are in the City's employ.

The City asserts that this Board's policy regarding

Union representation of student employees was established in Decision No. 7-74. In that case, we found student aides and College Work Study Program ("CWSP") students employed by the City University not to be "public employees" within the meaning and intent of the NYCCBL because their employment relationship was far subordinate to the primary educational purpose of their relationship with the City University.⁷ Decision No. 7-74, however, is distinguishable from the instant matter on several grounds. In Decision No. 7-74, the employment of students by the City University was clearly a form of financial aid. The CWSP students, for example, were employed pursuant to a federal program which, in addition to regulating the number of hours each student was permitted to work, provided 80% of the funding. Similarly, in Saga Dining Halls, students employed by the company were excluded from the bargaining unit because, among other reasons:

The employment of these students, on their academic campus, is wholly incidental to their basic purpose there - the acquisition of a college education The distinction between the [student and non-student employees] is emphasized by the University's role as guardian-protector of the student employees - an aegis not shared by the non-student employees.⁸ (emphasis added)

⁷ Decision No. 7-74 at 6.

⁸ 29 SLRB 178 at 187.

Also, it should be noted that in Saga Dining Halls, students were hired through the school's placement office and the employment was described by the University's Dean as "a function of financial aid."⁹

In the instant matter, students holding the title of Engineering Work Study Trainee are not employed on their academic campuses, are not compensated based on their financial need, and there is no evidence that their colleges, or any other body, presently represent them in the role of "guardian-protector."

Turning to the NLRB cases relied upon by the parties, we observe instances where student employees have been included in bargaining units and instances where they have been excluded. In Six Flags Over Georgia,¹⁰ for example, college students employed by the amusement park on the basis of their "particular type of background"¹¹ were included in the bargaining unit because although "relatively inexperienced, they are nonetheless regularly performing duties which one associates with the stage

⁹ Id. at 186.

¹⁰ 88 LRRM 1057, 215 NLRB 809 (1974).

¹¹ 88 LRRM 1057 at 1058.

technician classification."¹² On the other hand, in Evergreen Legal Services,¹³ two law students employed under a work study program were excluded from a bargaining unit because, inter alia, their relationship with the employer was the result of a contract between the employer and the students' law schools.

With reference to Cedars-Sinai¹⁴ cited by the City in support of its contention that students in the petitioned-for title are primarily students having an educational rather than an employment relationship with the City, we conclude that reliance on these cases is misplaced. In Cedars-Sinai, the NLRB noted that:

An internship is a requirement for the examination for licensing. And residency and fellowship programs are necessary to qualify for certification in specialties and sub-specialties.¹⁵ (emphasis added)

The NLRB also stressed that:

The activities of interns, residents and clinical fellows ... are prescribed by accrediting bodies and specialty boards which govern graduate medical education.¹⁶

¹² Id.

¹³ 103 LRRM 1028, 246 NLRB No. 146 (1979).

¹⁴ 91 LRRM 1398, 223 NLRB No. 57 (1976).

¹⁵ 91 LRRM 1398 at 1400.

¹⁶ Id. at 1399. Cf. Beecher Ancillary Services, 92 LRRM 1456, 225 NLRB No.83 (1976). (Technologist student-trainees included in bargaining unit when found to be "more akin to apprentices than ... to students.")

In the instant matter, the City has not argued that candidates for a baccalaureate degree in engineering are in any way mandated to secure positions such as the petitioned-for title. Nor has the City alleged that the activities of Engineering Work Study Trainees are determined by any outside governing body. Indeed, the City itself sets the terms and conditions for the title in the job specifications and Personnel Order No. 85/7.

It is of interest to note that Section 2(b) of Personnel Order No. 85/7 provides that "[n]otwithstanding its classification in the Non-Competitive Class, the terms of Rule 5.8.1 are deemed to be applicable to this class of positions." Turning to Personnel Director's Rule 5.8.1 we observe:

SECTION VIII - TRAINEE OR AIDE APPOINTMENTS

5.8.1. Trainee or Aide Appointments Authorized: Conditions

The city personnel director may require that permanent appointments to designated positions in the competitive class shall be conditioned upon the satisfactory completion of a period of service as a trainee or aide in an appropriate lower, trainee or aide position in such class and/or where required, the completion of specified formal courses of training.

(a) The period of such trainee or aide service shall be prescribed and set forth in the announcement of examination.

(b) Upon the satisfactory completion of such trainee or aide service and/or of specified formal courses of training, as the case may be, an appointee shall attain permanent status in the designated position.

(c) Any trainee or aide appointment shall be subject to such probationary term as is Prescribed in the rules.

(d) The employment of such trainee or aide may be terminated at the end of the period of the trainee or aide service, or at any time within such period, if the trainee's or aide's conduct, capacity or fitness is not satisfactory or if such person fails to pursue or to continue satisfactorily such formal courses as may be required, provided, however, that the announcement of examination shall set forth appropriate information relative to such termination. (emphasis added)

While it is not clear exactly what "designated position" Engineering Work Study Trainees "shall attain permanent status in" following completion of the requirements for a baccalaureate degree in Engineering, Rule 5.8.1(b) does explicitly guarantee incumbents in the petitioned-for title continued permanent employment with the City. As a result, the City's contention that Engineering Work Study Trainees should be excluded from the bargaining unit on the grounds that "a career as a New York City employee can only be accomplished by successful completion of a civil service examination" is without merit.

The requirement that "[t]he employment relationship is dependent on the individual's being a student in an engineering college accredited by the Engineering Accreditation Commission and maintaining a 2.5 overall grade point average (4.0 scale)" is clearly a condition of employment promulgated by the City rather than a condition of education. In addition, the adaptability of Engineering Work Study Trainees' work schedules so as not to conflict with class schedules serves to show that the City, which requires that the Trainees be full-time students, recognizes the obvious need for flexibility in scheduling. Finally, the fact that trainees are "under continuing guidance and supervision" is not determinative of the City's position. A review of the job specifications for hospital interns, dental interns and the assorted engineering intern titles shows that employees in those titles are also "under direct supervision" and "receive training" in their particular profession.

In conclusion, we find that the salary of Engineering Work Study trainees is paid from the City treasury and that their employment is not a form of financial aid provided to "supplement the students' financial resources so that they may continue in school."¹⁷ Employment as

¹⁷ Decision No. 7-74 at 6.

a Trainee is not a requirement of an outside governing body such as Engineers' Council for Professional Development or the Engineering Accreditation Commission; rather, the evidence shows that all terms and conditions of employment are determined by the City. Finally, the guarantee of permanent status provided for in Personnel Director's Rule 5.8.1(b) illustrates the primary relationship between the City and the Trainees to be employment-oriented rather than educational in nature. In light of the above, we find that Engineering Work Study Trainees are "public employees" within the meaning and intent of the NYCCBL and are therefore eligible to be represented for collective bargaining purposes. We also find that Certification No. 26-78 (as amended), covering various engineering, scientific, and related titles, is the appropriate unit placement for these employees.

O R D E R

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

ORDERED, that Certification No. 26-78 (as amended) be, and the same hereby is, further-amended to include the title Engineering Work Study Trainee, subject to existing contracts, if any.

DATED: New York, N.Y.
September 11, 1985

ARVID ANDERSON
CHAIRMAN

MILTON FRIEDMAN
MEMBER

DANIEL G. COLLINS
MEMBER

DECISION NO. 10-85
DOCKET NO. RU-921-84

19

The title and title code number of the employees affected by this decision are as follows:

Engineering Work Study Trainee	20100
--------------------------------	-------