

L. 237, CSBA v. City & Dep't of Finance, 60 OCB 6 (BOC 1997) [6-97 (Cert Interim)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF CERTIFICATION

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Civil Service Bar Association, Local 237,
International Brotherhood of Teamsters.

Petitioner.

And

City of New York and New York City Department
Of Finance,

Decision No. 6-97
Docket No. RU-1172-95

Respondent.

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INTERIM DECISION AND ORDER

On February 28, 1995. Local 237 of the International Brotherhood of Teamsters and its affiliate, the Civil Service Bar Association ("Union"), filed a petition seeking certification of a bargaining unit composed of what it characterized as 330 Administrative Law Judges employed by the Parking Violations Bureau ("PVB") of the Department of Finance ("Department"), along with the requisite showing of interest.¹ By letter dated April 17, 1995, the Union asked that the petition be amended by changing the name of the title in question to "Hearing Officer - PVB".²

¹On the same day, the Union filed a separate petition seeking to represent Administrative Law Judges in other City agencies (Docket No. RU-1174-95). A hearing in that matter will begin in November, 1997.

²In their pleadings and in conferences, the parties have used interchangeably the titles Hearing Officer - Per Session. Administrative Law Judge and Hearing Officer - PVB. We note that the title Hearing Officer - PVB is the title with which we are concerned here. Furthermore, the parties have sometimes referred to Senior Hearing Officers and Supervisory Hearing Officers, but we believe these are merely in-house titles assigned to persons in the Attorney title who perform those functions and are already represented by the Union. Finally, despite some assertions by the parties to the contrary, the titles mentioned here are not all included in the same title code.

On September 12, 1997, the City filed a motion to dismiss the Union's petition. The Union filed

an answer on September 26, 1997 and the City filed a reply on October 10, 1997.

Background

Pursuant to section 236 of the New York State Vehicle and Traffic Law ("VTL"), the City of New York created the PVB within the Department, and the PVB appointed attorneys in the title Hearing Officer - PVB to preside over administrative hearings. Section 236(2)(d) of the New York State Vehicle and Traffic Law provides that "[s]uch hearing examiners shall not be considered employees of the city in which the administrative tribunal has been established"

The employment status of PVB Hearing Officers has been challenged in other forums. In a 1996 case, a PVB Hearing Officer claimed that he was eligible for membership in the New York City Employee Retirement System. The court upheld a determination by the Retirement System, under CPLR Article 78, that the Hearing Officer was not a City employee because of the language of VTL Section 236(2)(d).³ The court reasoned that eligibility for membership was dependent on "city service" and, pursuant to the VTL, the petitioner was not an employee of the City, so the Retirement System did not act arbitrarily or capriciously in denying him membership.

In 1991, the Internal Revenue Service ("IRS") ruled on whether PVB Hearing Officers are City employees for tax purposes. After holding an evidentiary hearing, the IRS found that the City's policies concerning persons in that title include making contributions and withhold-

³Scheurer v. New York City Employees' Retirement System, 636 N.Y.S.2d 291 (1st Dept. 1996).

ings pursuant to the Federal Insurance Contribution Act, withholding taxes from paychecks; paying Hearing Officers by the hour and requiring them to sign in and out of work, setting working hours for Hearing Officers, including lunch breaks; providing paid training to Hearing Officers on how to perform their duties, and expecting them to follow City and Department guidelines; monitoring, evaluating and reviewing Hearing Officers and terminating those whose work is deemed to be unacceptable, requiring Hearing Officers to perform services personally, without substitution: paying Hearing Officers with bi-weekly paychecks from the City and Department, as they do their other employees, with the option of electronic deposit of their paychecks; and considering Hearing Officers to be employees for purposes of General Municipal Law Section 50-k, which requires the representation and indemnification of all employees under that statute who are sued by third parties for acts taken by employees in the scope of their employment. The City argued that section 236(2)(d) of the VTL compelled a finding in its favor, but the IRS found that PVB Hearing Officers were City employees for its purposes because of the factors listed above. It said, "if the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial."

Hearing Officers are also considered to be City employees under General Municipal Law Section 50-k, pursuant to a 1992 letter opinion by the chief legal counsel of the New York City Law Department, who found that a PVB Hearing Officer "is not an independent contractor, but is an appointee of the Commissioner of Transportation." The opinion stated that "although PVB administrative law judges are not 'employees' of the City ... the term 'employee' for the purposes

of [section 50-k] is defined broadly to include persons who are elected, appointed, employed 'in the service of any agency' or volunteer to serve the City."

Positions of the Parties

City's Position

The City claims that the Board of Certification ("Board") lacks jurisdiction in this matter and that affected employees are not eligible for collective bargaining because, pursuant to the VTL. PVB Hearing Officers are not employees of the City. It maintains that, if the language of the statute is clear and unambiguous, there is no reason to look beyond the statute to determine its meaning. Since the cited provision of the VTL is clear on its face, the City argues, legislative intent is irrelevant and PVB Hearing Officers may not be considered to be municipal employees. This position, the City claims, is supported by the decision in the Scheurer case that a PVB Hearing Officer was not a City employee and, therefore, was ineligible for membership in the New York City Employees' Retirement System.

Union's Position

The Union asserts that the City and the Department have historically treated PVB Hearing Officers as employees and that Hearing Officers fall within the definition of City employees under the New York City Collective Bargaining Law ("NYCCBL") because their

salaries are paid "in whole or in part from the city treasury."⁴ It is evidence that the City and the Department treat PVB Hearing Officers as employees, the Union contends, because of the same factors cited by the IRS in its 1991 ruling.

The Union asserts that the IRS ruling is consistent with previous rulings of this Board. It cites our decisions for the proposition that PVB Hearing Officers must be considered to be City employees because the City has treated them as such.⁵ The Union argues that its contention that PVB Hearing Officers are City employees is supported by the fact that PVB Supervisory Hearing Officers are already represented by the Union. In addition to the Supervisory Hearing Officers, it maintains, it currently represents hearing officers at other City agencies, including the Department's tax tribunal.

The Union asks us to examine the legislative intent of VTL Section 236, since, it claims, we have long held that we must make such an evaluation when deciding whether individuals fall within the protection of the NYCCBL.⁶ In this case, it maintains, the legislative intent of VTL

⁴Section 12-303 of the NYCCBL provides, in relevant part:

e. The term "municipal employees" shall mean persons employed by municipal agencies whose salary is paid in whole or in part from the city treasury.

* * *

h. The term "public employees" shall mean municipal employees and employees of other public employers.

⁵Decision No. 9-72 (Park Workers were entitled to the protection of the NYCCBL because the title was "on a regular city payroll ... paid by regular City check"); Decision No. 23-75 (various titles within the New York City Work Relief Employment Project were protected by the NYCCBL because income tax was withheld from the paychecks of the affected employees).

⁶Decision No. 34-76 (analyzing the legislative intent of the federal Comprehensive Employment and Training Act to conclude the College Counselors are employees within the

Section 236 was to ensure that Hearing Officers exercise their judgment independent of the City. It also notes that the language of the section of the City Administrative Code under which the PVB was established parallels the language of VTL Section 236, except that it does not contain a provision stating that Hearing Officers are not City employees.

According to the Union, the Scheurer court merely held that, under the standard of review of Article 78, it was neither arbitrary nor capricious for the City to conclude that a Hearing Officer was ineligible for a pension. It adds that, despite the court's ruling in Scheurer, any ruling by this Board as to whether the language of the VTL applies in the instant case must be made in the context of the broad definition of "employee" under the NYCCBL.

meaning of the NYCCBL); Decision No. 9-72 (concluding, based on the legislative intent of the federal Emergency Employment of 1971, that Park Workers were entitled to the protection of the NYCCBL); Decision No. 23-75 (analyzing the legislative intent of the New York City Work Relief Employment Project to conclude that various titles were protected by the statute).

Discussion

The threshold question here concerns our jurisdiction. Either this Board can exercise its jurisdiction under the NYCCBL to determine whether persons in the title Hearing Officer - PVB are public or municipal employees within the meaning of our statute and the Taylor Law,⁷ or it is precluded from doing so because another statute addresses their employment status. By citing the VTL as authority for its contention that PVB Hearing Officers are not public employees, the City asserts that the VTL takes precedence over the NYCCBL and the Taylor Law for the

⁷Civil Service Law, Article 14.

purpose of determining who is a city employee. We disagree.

It is our statutory mandate to administer and enforce the NYCCBL and applicable provisions of the Taylor Law. Therefore, when a union seeks to represent a title in collective bargaining, it is inherently within our jurisdiction to determine whether individuals in the title are public or municipal employees within the meaning of the statutes and, therefore, eligible for representation.⁸ Our case law of the past thirty years, largely unchallenged by the City, implicitly rests on the recognition that we have jurisdiction over such a determination.⁹

We have found no previous cases in which our jurisdiction over these matters was alleged to have been superceded. Moreover, the court in the Scheurer case, relied upon by the City, was not presented with this threshold question. Therefore, it had no opportunity to examine the question of our jurisdiction to determine the employment status of City workers.

The Union alleges, without contradiction, that the legislative intent behind passage of the cited provision of the VTL was only to ensure that Hearing Officers exercise their judgment independent of the City. On the other hand, the public policy inherent in the stated purpose of

⁸The term "Public employee" is defined in Section 201.7 of the Taylor Law and Section 12-303(h) of the NYCCBL. The provisions of Section 201 apply to proceedings under the NYCCBL pursuant to Section 212 of the Taylor Law. Representation proceedings are governed by Section 12-309 of the NYCCBL and Section 1-02 of the Rules of the Office of Collective Bargaining.

⁹See, e.g., Decision Nos. 51-68 (Case Aid Trainees are not employees of the City within the meaning of the NYCCBL); 20-71 (Chaplains are professional employees of the City); 9-72 (there is an employer-employee relationship between the City and employees hired by the City under the Federal Emergency Employment Act); 21-72 (retired City employees are not employees within the meaning of the NYCCBL); 1-77 (casual employees not meeting certain criteria are not employees within the meaning of the NYCCBL); 20-80 (employees in programs in the process of being converted to vendors are not employees).

the Office of Collective Bargaining is:

to favor and encourage the right of municipal employees to organize and be represented. written collective bargaining agreements on matters within the scope of collective bargaining, the use of impartial and independent tribunals to assist in resolving impasses in contract negotiations, and final, impartial arbitration of grievances between municipal agencies and certified employee organizations.¹⁰

Although these differing public policies resulted in differing statutory provisions, we can harmonize the provisions of the VTL and the NYCCBL by recognizing that each was promulgated for a different reason and that there is no real conflict between them.¹¹ For example, the legislature's desire for independent administrative judges does not conflict with our duty to investigate whether the City is treating PVB Hearing Officers as employees while relying on the VTL to deny them that status and its consequent rights.

Considering all of these factors, we conclude that the cited provision of the VTL was not intended to usurp this Board's right and mandate to determine employment status of City workers, pursuant to the powers vested in it by the NYCCBL in furtherance of its stated public policy. Therefore, we find that we have jurisdiction in this case to decide whether persons in the title Hearing Officer - PVB are employees of the City within the meaning of the NYCCBL and the Taylor Law.

In our body of decisions over the years, we have developed a list of factual criteria from

¹⁰New York City Administrative Code, Ch. 54, section 12-302.

¹¹See, e.g., Board of Collective Bargaining Decision No. B-1-75 (in interpreting different provisions of the Civil Service Law and the NYCCBL which seemed to conflict, the Board applied the well-settled rule that where laws for the furtherance of differing public policies conflict they should, if possible, be harmonized), citing Gotbaum. v. Sugarman, 358 N.Y.S.2d 635 (N.Y. Sup. Ct. 1974).

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which we may determine whether or not persons in a particular title are municipal employees. In the instant case, we will not decide whether PVB Hearing Officers are City employees without holding a hearing to elicit evidence relevant to these criteria and further consideration of the entire record.¹² Therefore, we direct that such a hearing be held concurrent with the hearing in Docket No. RU-1174-95. The Board will make its final determination after reviewing the entire record, including the transcript, pleadings, motion papers and relevant case law, statutes, and legislative history. Accordingly, the City's motion to dismiss is denied.

¹²See, e.g., Decision Nos. 51-68;20-71;1-77;20-80.

INTERIM ORDER

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

ORDERED, that the City's motion to dismiss in Docket No. RU-1172-95 be, and the same hereby is, denied; and it is further.

DIRECTED, that a hearing be held, concurrent with the hearing in Docket No. RU-1174-95, to elicit evidence as to whether persons in the title Hearing Officer - PVB are employees of the Department of Finance.

Dated: New York, New York
October 28, 1997

STEVEN C. DeCOSTA
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL COLLINS
MEMBER