Civil Bar Association and Local 237,62 OCB 1 (BOC 1998) [Decision No. 1-98. aff'd, Levitt v. Board of Certification of the Office of Collective Bargaining, No. 104693/98 (Sup. Ct. N.Y. Co. Apr. 7, 1999), aff'd, 273 A.D.2d 104, 710 N.Y.S.2d 324 (1st Dep't 2000).]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF CERTIFICATION

Civil Bar Association and Local 237, International Brotherhood of Teamsters,	:	
Petitioners,	:	Decision No. 1-98
	:	Docket No. RU-1172-95
and	:	
City of New York and New York City Department of Finance	:	
Respondents.	:	

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"), 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." It then amended its petition on August 27, 1997, to request that the title be accreted to its existing unit. Certificate #CWR-44/67 which includes attorney titles. On September 12, 1997, the City of New York ("City") and the Department of Finance ("Department") filed a motion to dismiss the Union's petition, on the grounds that PVB Hearing Officers are not employees of the City. The Union filed an answer on

[1] On 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 after this decision is issued.

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

In Interim Decision No. 6-97, we found that we have jurisdiction to decide whether persons in the title Hearing Officer - PVB ("Hearing Officer" or "ALJ") are public employees within the meaning of the Article 14 of the New York State Civil Service Law ("Taylor Law") and the New York City Collective Bargaining Law ("NYCCLB") and ordered the parties to produce evidence relevant to the criteria used by this Board to make such a determination. To that end, a hearing was held on November 17, 1997, November 24, 1997 and December 17, 1997.

BACKGROUND

In 1967, the New York State Legislature enacted the Taylor Law to promote harmonious relationships between government and its employees[2]. Recognizing that the City is a unique labor relations environment, the statute permitted enactment of the NYCCBL and established the Office of Collective Bargaining to administer it[3]. The public policy inherent in the stated purpose of the NYCCBL 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.[4]

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[2] Civil Service Law, Article 14 §200 ("Statement of policy")

[3] Civil Service Law, Article 14 § 212 ("Local government procedures")

[4] New York City Administrative Code. Ch. 54. § 12-302

The purpose of the NYCCBL are effected by two adjudicative bodies. One of these, the Board of Certification hears and decides matters concerning representation of City employees[5]. Pursuant to § 212 of the Taylor Law, the provision of § 201 of the Taylor Act are applicable to proceedings under the NYCCBL.

Both Section 201.7 of the Taylor Law and § 12-303 (h) of the NYCCBL define public employment. According to the NYCCBL, a municipal employee is a person employed by a municipal agency whose salary is paid in whole or in part from the City treasury, while the Taylor Law defines a public employee as "any person holding a position by appointment or employment in the service of a public employer."[6]

In 1972 the state Legislature amended the New York State Vehicle and Traffic Law ("VTL") to add provisions for adjudication of parking infractions. The legislative history of the statute shows that the purpose of the bill was to insure "basic elements of due process" to defendants in hearings conducted by the Parking Violations Bureau. Pursuant to § 236 of the VTL, as amended the City created the PVB, which appointed attorneys in the title Hearing Officer to preside over administrative hearings. Section 236(2) of the New York State Vehicle

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[5] Representation proceedings are governed by § 12-309 of the NYCCBL and § 1-02 of the Rules of the Office of Collective Bargaining.

[6] This provision of the Taylor Law exempts from the definition of "public employee" judges and justices of the unified court system, persons in the organized state militia and those who have been designated as "managerial or confidential" employees. Employees may be designated as managerial only if they formulate policy or perform a role in conducting or administering collective bargaining. In addition § 201.8 provides that "assistant attorneys general, assistant district attorneys and law school graduates employed in titles which promote to assistant district attorney . . . shall be designated managerial employees, and confidential investigators employed in the department of law shall be designated confidential employees." We note that the City has not claimed that the title in dispute here should be designated as managerial or confidential.

and Traffic Law provides that "[PVB] hearing examiner shall not be considered employees of the city in which the administrative tribunal has been established . . . ." Because of this provision, the City challenges the Union's petition to accrete PVB Hearing Officers into an existing bargaining unit.

In 1996, a PVB Hearing Officer claimed that he was eligible for membership in the New York City Employee Retirement System ("NYCERS"). The State Supreme Court found that a determination by NYCERS. under CPLR Article 78 that the Hearing Officer was not a City employee because of the language of VTL Section 236(2)(d) was not arbitrary or capricious[7] and the Appellate Division upheld the ruling[8]. The courts reasoned that eligibility for membership was dependent on City service and pursuant to the VTL, the petitioner was not an employee of the City.

Testimony and exhibits produced at the hearing in this dispute established facts concerning the job duties and working conditions of PVB Hearing Officers. They include the following:

PVB Hearing Officers are paid with bi-weekly paychecks generated by the City, which deducts FICA and other taxes. Their rate of pay is the same as for Hearing Officers at other agencies. If ALJ's work for other agencies as well as the PVB, the City consolidates their pay for work at all agencies into one paycheck.

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[7] *Scheurer v. New York City Employees Retirement System and the City of New York*, Index No. 130269/93 (N.Y. Sup. Ct.(Oct. 19, 1994).

[8] *Scheurer v. New York City Employees Retirement System*, 636 N.Y.S.2d 291 (1st Dept. 1996).

Some Hearing Officers after a period of service, are assigned the rank of Senior Hearing Officer. In that capacity, they supervise other ALJs and review their work using agency evaluation forms. Senior ALJs may discipline ALJs who do not follow agency policies. They also adjourn and grant extensions in cases sign ALJs' time sheets and occasionally assign their lunch schedules. A small differential between the hourly rates for ALJs and Senior ALJs is applied when Senior ALJs are performing the special duties associated with that title.

The City provides mandatory, paid classroom training for newly-appointed Hearing Officers and ongoing training after certification as an ALJ in the form of training manuals and memos which the ALJs are required to follow and bring to each hearing.

The agency reviews ALJs' performance, both during and after the probationary period. Although Senior ALJs are not allowed to change a finding, they may void a decision before its release and assign another ALJ to decide the case.

The agency controls AU schedules. It sends each ALJ a list of possible assignments for the month which often, but not always, corresponds to those requested. ALJs may decline proposed dates but may not change them. After an ALJ accepts an assignment, the City may change it without consulting the Hearing Officer. Each Hearing Officer is required to work, on average, at least one day a week and may be orally reprimanded or lose master calendar dates for declining assignments too often. A Hearing Officer must provide an explanation each time he or she declines an assignment. Hearing Officers are required to sign time sheets to verify their whereabouts at all times and the agency decides when an ALJ will take a one-hour lunch break. Hearing Officers are not allowed to leave early or adjourn cases without permission from a Senior ALJ.

In the past the agency offered PVB ALJs the opportunity to enroll in the 457(k) deferred compensation plan administered for City employees, and some ALJs participated in the plan. The City's witnesses testified, however, that this had been a mistake which the City plans to correct by taking PVB Hearing Officers out of the 457(k) plan.

The parties introduced into evidence two rulings concerning the employment status of Hearing Officers. In 1991 the Internal Revenue Service ("IRS") held an evidentiary hearing and found that PVB Hearing Officers are City employees for tax purposes [9] although the City relied on § 236(2)(d) of the VTL. In 1992, the New York City Corporation Counsel's office found PVB Hearing Officers to be City employees for purposes of General Municipal Law § 50-k[10].

POSITIONS OF THE PARTIES

Union's Position

The Union maintains that Hearing Officers are constrained to decide cases according to

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[9] The IRS found the following employer policies concerning PVB Hearing Officers to be dispositive; making contributions and withholding 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 guideliness: 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 employees, with the option of electronic deposit of their paychecks; and considering Hearing Officers to be employees for purpose of General Municipal Law § 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.

[10] It ruled that a PVB Hearing Officer "is not an independent contractor, but is an appointee of the Commissioner of Transportation" explaining that "although PVB administrative law judges are not 'employees' of the City... the term 'employee' for the purpose 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."

formulae issued by the agency, Department and City, and that the agency will remove any Hearing Officer who fails to do so. Nevertheless, it argues, the City is incorrect in assuming that, in order to create an employment relationship within the meaning of the NYCCBL, it must exercise total control over every aspect of the employee s work. It points to the Hearing Officers at other agencies who, it says, have more independence than PVB Hearing Officers but are considered employees of the City and are represented in collective bargaining.

The Union cites the NYCCBL and previous Board decisions for the proposition that Hearing Officers are employees because the City pays them with standard City paychecks from which it makes tax deductions[11] and because of their rate of pay[12]. Here, the Union argues, the Hearing Officers clearly do not have an entrepreneurial relationship with the agency. They cannot negotiate their rate of pay, nor is their pay tied to productivity since they are paid by the hour rather than by the decision.

The Union also argues that the agency treats Hearing Officers as employees in the way that their work is scheduled and monitored and by the training they receive. It maintains that if the employer not only establishes the ends to be achieved by the Hearing Officer but also

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[11] NYCCBL § 12-303(e); Decision No. 9-72 (Park Workers are employees within the meaning of the NYCCBL because they are on a regular City payroll and paid by regular City check); Decision No. 23-75 (titles were protected under NYCCBL where income taxes were withheld from paychecks).

[12] The Union cites *Roadway Package Systems, Inc*., 288 N.L.R.B. 196 (1988) (delivery drivers were employees because the employer controlled the number of packages and stops each driver serviced and therefore the driver's income, so necessary entrepreneurial traits for finding drivers to be independent contractors was missing); *Edward Blankenship, Inc*., 245 N.L.R.B. 951 (1979) (a clerk is an employee because her compensation was not conditioned on the amount of work performed); *Quebecor Group, Inc*., 258 NLRB 961, n.1 (1981) (sports columnist is an employee because he receives compensation on a regular basis, is frequently present at the office and uses its facilities.

reserves the right to control the manner and means used by the Hearing Officer to achieve those ends, then the Hearing Officer must be an employee[13]. The Union contends that the agency controls both the ends to be achieved by Hearing Officers an which the ends are achieved.

City's Position

According to the City, the State Legislature enacted VTL § 236(2)(d) to preserve the independent judgment of PVB Hearing Officers. Therefore, it argues in the context of the VTL provision, the term "employee" should be taken to mean that the City and PVB Hearing Officers shall not maintain an employment relationship. It argues that any determination that would establish an employment relationship in a way that infringes on the officers ndependent judgment manifestly frustrates the legislative intent behind VTL section 236 2)(d). Citing the *Scheurer* decision, it contends that PVB Hearing Officers, as a group, are not intended to enjoy employee status.

The City says that the term "employee" has differing meanings under the Internal Revenue code, GML § 50-k. the VTL and the NYCCBL which cannot be harmonized to create bargaining obligations. According to the City, this Board is not bound by those decisions and they do not affect the employment relationship between the parties.

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[13] The Union cites *NLRB v. United Insurance Co*, 390 U.S. 254 (1968); *Yellow Cab of Quincy, Inc*. 312 NLRB 142 (1993) (cab drivers are employees because the employer controlled which drivers worked each shift, even though the drivers retained the right to decline to work a particular shift).

Although the NYCCBL grants it certain management rights[14], the City says, it does not and cannot exercise such rights with regard to PVB Hearing Officers because the VTL precludes it from doing so. In fact, it maintains, even if this Board certifies PVB Hearing Officers to a bargaining unit, the City would still be bound by the VTL not to exercise its management rights.

The City maintains that it does not exercise meaningful control over PVB ALJs by its paid training sessions and that Hearing Officers are in complete control of their scheduled assignments. It maintains that Hearing Officers are neither suspended nor reprimanded by the agency, and that there are no grievance procedures in place. An employer who simply reviews work performed pursuant to the relationship, in order to ensure proper performance, it contends does not create an employment relationship where one would otherwise not exist[15]. However, the City adds, the agency performs only sporadic, cursory and limited reviews of its ALJs and, even so, these reviews have no consequences to the Hearing Officers.

The City says that the VTL establishes parking violations tribunals that preempt any local

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[14] Section 12-307b of the NYCCBL provides:

It is the right of the city, or any other public employer acting through its agencies to determine the standards of service to be offered by its agencies; determine the standards of selection for employment: direct its employees; take disciplinary action; relive its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of government operations; determine the methods means and personnel by which government operations are to be conducted: determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work. Decisions of the city or any other public employer on those matters are not within the scope of collective bargaining, but notwithstanding the above questions concerning the practical impact that decisions on the above matters have on employees such as questions of workload or manning, are within the scope of collective bargaining.

[15] The City cites *Moore v. Charles T. Wills Inc.*, 250 N.Y.426 165 N.E. 835 (1st Dep't. 1929).

laws[16]. It argues that the VTL thus preempts the NYCCBL, which it characterizes as a local law, and § 12-302 of the Administrative Code. The City also cites Decision No. 21-81 in which we found welfare recipients in a city-funded "workfare" program not to be employees under the City's control.

DISCUSSION

As we said in Interim Decision No. 6-97, it is our statutory mandate to administer and enforce the NYCCBL and applicable provisions of the Taylor Law[17]. 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[18]. Our consistent case law over the past thirty years implicitly rests on the recognition that we have jurisdiction over such a determina-

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[16] Section 235 of the VTL provides:
Notwithstanding any inconsistent provision of any general, special or local law or administrative code to the contrary, in any city which heretofore or hereafter is authorized to establish an administrative tribunal to hear and determine complaints of traffic infractions ... such tribunal and the rules and regulations pertaining thereto shall be constituted in substantial conformance with the following sections.

[17] The City argues that the VTL preempts local law, and thus the NYCCBL. As we noted above, the NYCCBL was authorized by the Taylor Act. Because the provisions of § 201 of that Act are applicable to proceedings under the NYCCBL, all persons appointed to service for a New York City agency are covered by, and subject to, the provisions of the Taylor Act. The VTL does not preempt the Taylor Act; both are acts passed by the state legislature and, as such, are accorded equal weight and deference.

[18] The 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.

tion[19], and we have found no previous cases in which our jurisdiction over these matters was alleged to have been superseded.

When the instant dispute first came before us we ordered, in Interim Decision No. 6-97, that a hearing be held to determine whether these workers are employees of the City. The record produced by that hearing shows that PVB Hearing Officers meet our criteria for public employment. Among these are whether the affected workers are "on a regular City payroll" and "paid by regular City check;"[20] whether the City withholds taxes from their paychecks[21]; and whether the terms and conditions of their employment are controlled by the City[22]. The record shows that PVB Hearing Officers are paid by regular City payroll check, from which the City withholds taxes and insurance and that the agency controls their hiring and discharge, as well as job . specifications, training and performance review.

The City says that it does not exercise its management rights under the NYCCBL with regard to PVB Hearing Officers. The record shows, however, that the agency determines the

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[19] *See, 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).

[20] Decision No. 9-72.

[21] Decision No. 23-75.

[22] Decision No. 20-80 (discussing the National Labor Relation Board's "right-of-control" test and finding that certain Home Attendants were not employees of the City because their terms and conditions of employment were within the control and discretion of the vendors with whom the City contracted for their services.)

standards of services performed by ALJ's; directs them by way of reviews, training, manuals and memos: relieves them from duty because of lack of work or for other legitimate reasons, such as an inability to deal with the public: asserts that it has a right to take these actions in order to maintain the efficiency of governmental operations; determines the methods. means and personnel by which PVB hearings are conducted; and exercises complete control and discretion over its organization and the technology of performing its work. All of these actions are management rights enumerated in § 12-307b of the NYCCBL.

We contrast this with the facts in Decision No. 20-80. There the vendors who supplied Home Attendants to the City controlled their hiring, supervision and assignments. They withheld taxes and FICA and controlled discipline and discharge, job specifications, job orientation maintenance of time and personnel records time and leave policy, payroll practices continuous training and performance review. Although in that case it was the vendors who were independent contractors, not the employees, we still find that the criteria set forth are relevant in determining whether an entity has established an employment relationship with its workers.

Section 203 of the Taylor Act provides that "[p]ublic employees shall have the right to negotiate collectively with their public employers in the determination of their terms and conditions of employment . . . ."[23] Both PERB and this Board have interpreted the respective statutes to mean that public employers may not unilaterally impose teens and conditions of employment upon public employees unless they have been found by this Board to be managerial

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[23] Section 12-305 of the NYCCBL provides, in relevant part:
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 . . . .

or confidential employees. The evidence here shows that the City has unilaterally imposed terms and conditions of employment upon persons whom it has treated as *de facto* employees.

Since the criteria are met under the law and we find nothing in the record to the contrary, we would find, under traditional and generally recognized indicia. that the City is the employer of PVB Hearing Officers. Such a finding would be consistent with the factual findings and ruling of the IRS, as well as the criteria established by the New York State Public Employment Relations Board, the National Labor Relations Board and the federal courts. We are constrained from reaching that conclusion, however, because of the First Department's holding in the *Scheurer* case that, because of the language of the VTL, a PVB Hearing Officer cannot be a City employee for purposes of pension system membership. Since both the Appellate Division and the court below were presented with the IRS ruling and evidence that income taxes were withheld by the City, we can only conclude that they did not consider this evidence to be indicia of employment. In fact the lower court decided and the Appellate Division agreed that in view of the language of the VTL these rulings were immaterial. We construe these decisions as mandating a holding that, because of the language of the VTL, PVB Hearing Officers cannot be considered to be City employees even for the sole purpose of collective bargaining. If the Appellate Division's decision is as sweeping as we interpret it to be, we cannot find that these Hearing Officers fall within the jurisdiction of the NYCCBL. Accordingly, we must deny the petition.

DECISION AND 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 petition docketed as RU- 1172-95 is hereby dismissed, and it is further

ORDERED, that this title not be included as a petitioned-for title in a hearing on the matter of accretion, to be held before this Board.

Dated: New York, New York
February 12, 1998

STEVEN C. DECOSTA
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL COLLINS
MEMBER