L. 237, IBT v. City & Dep't of Finance, 64 OCB 1 (BOC 1999) [1-99 (Cert)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF CERTIFICATION

Civil Service Bar Association and Local 237, International Brotherhood of Teamsters,	:	
Petitioners,	:	
	:	Decision No. 1-1999
And	:	Docket No. RU-1174-95
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 Administrative Law Judges employed by the Environmental Control Board ("ECB"), 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 - Per Session." On November 8, 1995, the City of New York ("City") filed a statement of its position opposing certification.

The Union amended its petition on August 27, 1997, requesting that the title be accreted to its existing unit, Certificate #CWR-44/67 and, in addition, seeking to represent Hearing Officers at ECB, the Department of Health ("DOH") and the Taxi and Limousine Commission

[1]On the same day, the Union filed a separate petition seeking to represent Administrative Law Judges in the Parking Violations Bureau (Docket No. RU-1172-95). In Decision No. 1-98, we dismissed the petition on the grounds that, pursuant to a provision of the New York State Vehicle and Traffic Law, the affected individuals are not employees of New York City.

("TLC"). The existing certificate includes attorney titles. The City filed a statement of opposition on December 22, 1997. A hearing was held on February 19, 1998 and March 23, 1998. Testimony was taken from Todd Rubinstein, grievance director for the Union; Marilyn Rock, a per-session hearing officer at the TLC; Anne McCarthy, Executive Director of the ECB; Rena Bryant, Director of the Administrative Tribunal for the Department of Health ("DOH"); and Matthew Daus, Deputy Commissioner for Legal Affairs and General Counsel at the TLC.

BACKGROUND

The Civil Service Bar Association represents attorneys who work for the City at many agencies. The bargaining unit includes full-time hearing officers at the affected agencies, some of whom do the same work as individuals in the disputed title.

At the Department of Health, one full-time and 11 part-time hearing officers work each day. The ECB employs 13 attorneys full-time as hearing officers, four of whom are supervisors. On an average day at the ECB, about a dozen per-diem ALJ's hear cases and another dozen work in the appeals unit. The DOH Administrative Tribunal employs two full-time hearing officers. One of these two is the Acting Deputy Director and the other conducts hearings. The DOH has approximately 30 per-session ALJ's on its roster. The TLC only employs part-time hearing officers. They hold hearings and decide whether TLC rules and regulations have been violated. The supervising attorneys at the TLC are per-diem employees.

Article II of the citywide collective bargaining agreement sets forth a "normal work week for employees." City employees who work more than 17.5 hours a week are entitled to welfare

fund benefits, vacation and sick leave, and those who work more than 20 hours a week are entitled to health insurance. Per-session attorneys are limited to 17.5 hours of work each week, or about 1,000 hours each year, at all of the agencies in question here.

According to several witnesses, about half of the per-session ALJ's work less than 500 hours each year because they have other commitments. Per-session hearing officers preside over all cases at the TLC, 90% of the cases at DOH, and 80% of the cases at ECB.

At the ECB, hearing officers are asked to commit to work a specific period of time each week and at least one day each week. That agency is not concerned with whether its per-diem hearing officers exceed 1,000 hours each year by working as part-time hearing officers at other agencies. If an attorney worked more than 1,000 hours in a year at the DOH, he or she would not be given any more work in that year.

At the TLC, the titles of Assistant Chief ALJ, Chief ALJ and Chief Appeals ALJ are held by per-diem employees. These individuals may occasionally work more than 1,000 hours each year because they perform enhanced responsibilities, such as supervision. Otherwise, ALJ's at the TLC may not work more than 1,000 hours each year. Part-time ALJ's at the TLC work an average of one day each week.

At the ECB and the TLC, per-session hearing officers schedule their hours by giving a supervisor their availability for dates each month and receiving confirmation of those assignments. At DOH, part-time ALJ's are hired to work one or two days each week and may fill in on other days when the agency requires it. They can request specific days of the week, but the days actually worked each week depend on the need of the agency. The reason for scheduling in this

manner is to provide the agencies with flexibility for their fluctuating workload of hearings. In addition, DOH does not have enough money budgeted to hire full-time hearing officers, who would receive health and other benefits as full-time employees.

The number of notices of violation issued by ECB is increasing, while the number of hours worked by per-diem hearing officers at the ECB increased from 89,000 in 1996 to 96,000 in 1997 and is projected to be 96,000 in 1998. The number of hearings at DOH is increasing and is not expected to decrease in the near future, while the number of hours worked by per-session ALJ's at the TLC was 25,584 in 1996 and 37,299 in 1997. The average amount of hours worked by each ALJ at a particular agency was 491 in 1996 and 567 in 1997. More than 80% of the per-diem ALJ's worked at least one day each week.

Qualifications for employment as a hearing officer at the ECB, TLC and DOH include three years of practice after admission to the bar and, at ECB, experience in litigation or with administrative tribunals. The ECB has a two-day training program for its per-diem ALJ's, and then assigns them to mentors, starting in its simpler areas of jurisdiction. Mentoring continues as the attorney works on increasingly complex cases. Training at the DOH is done by other attorneys, both part-time and full-time.

Full-time attorneys at the ECB choose areas of expertise and are consulted about those subjects by other hearing officers but, otherwise, the work of the full-time and part-time hearing officers is essentially the same. The one full-time attorney at DOH who conducts hearings also does some supervisory and administrative work, but the work of conducting hearings is the same as for part-time employees.

POSITIONS OF THE PARTIES

The City's Position

The City maintains that, although there is a presumption that all public employees are eligible for collective bargaining unless it proves otherwise, per diem ALJ's are not eligible because they are not public employees. It cites New York City Charter § 1046(c)(2) (1990), which provides that "[e]xcept as otherwise provided for by state or local law, the party commencing the adjudication shall have the burden of proof," for its contention that the Union bears the burden because it filed the instant petition seeking accretion of the title.

In arguing that per session hearing officers are casual employees, the City relies on a 1972 PERB decision[2] setting forth what the City characterizes as a test for determining the employment status of persons in less than full-time positions, and which it says was adopted by this Board in Decision No. 2-90.[3] According to the City, the PERB test finds that an employment relationship is casual if the employee works for less than six weeks each year, the employee is required to work less than 20 hours each week, and fewer than 60% of the employees return for at least two successive years. It contends that, if we apply this test, we will find that per session Hearing Officers are casual employees and, thus, ineligible for bargaining. This remains true even if some individuals in the title satisfy the test, it claims, because the standards must be

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[2]*State of New York*, 5 PERB 3022.

[3]*Dist. Council 37, AFSCME, AFL-CIO and L. 237, Int'l Bhd. Of Teamsters and l. 144, Service Employees Int'l Union and New York City Health and Hospitals Corp.*

applied to the occupational title, not the individual employees.[4] The City also maintains that the varying volume of their work load makes per session Hearing Officers seasonal employees.

The City argues that per session Hearing Officers are also casual employees according to a test set forth in Decision No. 1-77.[5] According to the City, we found in that case a need for objective standards when analyzing a casual employment relationship. Therefore, the City says, we found that an individual is a casual employee if she was not in a paid employment status for at least one half of the regularly scheduled hours of work in each of the two immediately preceding twelve-month periods or was not in a paid employment status for all of the regularly scheduled hours of work in the immediately preceding twelve-month period.

In Decision No. 1-77, the City maintains, we divided all employees into the two categories of casual employees and public employees The City contends that, by these standards, the employees in question must be considered casual employees because they work less than 1,000 hours each year. Further, it asserts, it is the City's right under the statute to so limit the hours worked.[6]

The Union's Position

The Union argues that City employees are presumed to be eligible for collective bargain-

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[4]The City cites *State of New York*, 5 PERB ¶ 3039 (1972); *N. Syracuse Cent. Sch. Dist..,* 18 PERB ¶ 4063 (1985).

[5]*Communications Workers of America and New York City Board of Elections.*

[6]The City cites NYCCBL § 12-307b.

ing unless proven otherwise by the City.[7] Therefore, it maintains, the City has the burden of showing that per-diem hearing officers are ineligible for bargaining and has failed to meet its burden.

According to the Union, a group of employees must have a sufficiently stable and continuing relationship with the City to be considered to be more than casual employees and, thus, eligible for representation.[8] It contends that analysis of employee status in these circumstances should focus on the employee classification as a group, not individuals within a group.[9] Further, it argues, we have found that we must "fashion a standard appropriate to the facts of each case," rather than "a rigid application of standards adopted in a prior case."[10] More important than number of hours worked by employees, it maintains, is whether the disputed title is fully integrated into or essential to the employer's operation and whether the employees in question work year-round.[11]

The Union maintains that per-session ALJ's are essential to the operations of the affected

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[7]The Union cites *New York City Health & Hospitals Corp.,* Decision No. 5-87; *Ass't Deputy Wardens Ass'n*, Decision No. 11-95 at 20.

[8]The Union cites *Board of Elections*, Decision No. 1-77 at 7; *New York City Health & Hospitals Corp.,* Decision No. 2-90 at 25.

[9]The Union cites *Half-Hollow Hills Cent. School Dist.*, 28 PERB ¶ 4027 (1995); *Patchogue-Medford Library*, 22 PERB ¶ 4019 (1989).

[10]The Union cites *Board of Elections*, Decision No. 1-77 at 7; *Town of Brookhaven*, 30 PERB ¶ 3090 (1997); *Trump Taj Mahal Assocs.*, 306 NLRB 294 (1992).

[11]The Union cites *Patchogue-Medford Library, supra,* n. 6.; *Village of Dryden*, 22 PERB ¶ 3035; *Half Hollow* Hills, 28 PERB ¶ 4027 (1995); Village *of Northport*, 18 PERB ¶ 4079 (1985); *Plainview-Old Bethpage Public Library*, 15 PERB ¶ 4035 (1982); *Tri-State Transportation*, 289 NLRB 356 (1988).

agencies because, although each individual attorney's hours are limited, as a group they preside over a preponderance of the hearings conducted. It notes that the average number of hours worked by each ALJ has increased as the number of hearings increased. It contends, also, that the record shows regularity and continuity of employment because the average ALJ worked at least one day a week throughout the year.

According to the Union, the City's decision to staff the affected agencies with per diem hearing officers whose hours are capped at 1,000 per year allows it to attempt to disqualify them for collective bargaining. It argues that, although the City claims that it cannot hire full-time ALJ's because work levels fluctuate, the agencies' work loads would support more full-time hearing officers than are employed and the amount of work is increasing. The Union also contends that, despite the City's allegation that per diem hearing officers want to work fewer than 1,000 hours because of other commitments, 42 of the 242 per-session ALJ's worked more than 1,000 hours a year.

DISCUSSION

To address the preliminary issue of which party has the burden of proof, we must first consider the meaning of the term "public employee." We have been imprecise in using that term in previous decisions and, since the City bases its argument about the burden of proof on its meaning, we will define it at the outset.

In Decision No. 1-77, we made a distinction between "public employees" and "casual employees," giving the impression that an individual may not be considered to be a public

employee if she is found to be a casual employee who is ineligible for bargaining. We again made that distinction in Decision No. 2-90. The New York City Collective Bargaining Law, however, provides that "the term 'public employees' shall mean municipal employees and employees of other public employers" and "the term 'municipal employees' shall mean persons employed by municipal agencies whose salary is paid in whole or in part from the city treasury."[12] The statute does not distinguish public employees on the basis of whether or not they are eligible for bargaining, and neither will we. We find, therefore, that any employee who meets the criteria specified in the statute for public employment is a public employee.[13]

The City has neither argued nor shown that the employees in question are not employed and paid by municipal agencies, thus taking them out of the category of public employees. Rather, it concludes that per diem ALJ's are not public employees and then maintains that "extending the presumption [of eligibility for bargaining] to titles not yet found to be public employees would be inconsistent with the goals of the Taylor Act." Based on the provisions of the NYCCBL cited above, we find that per session hearing officers are public employees within the meaning of the statute.[14]

Along with the New York State Public Employment Relations Board ("PERB") and the

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[12]NYCCBL §§ 12-303(e) and (h).

[13]In making those distinctions, we were classifying employees by bargaining eligibility. The individuals whom we termed in those decisions to be "public employees" are employees who are eligible for bargaining.

[14]The City argues that we have "never held that the burden of proving a casual employment relationship rests with the City," citing Decision Nos. 1-77 and 2-90. We note that the issue of burden of proof was not raised in those cases.

courts, we have consistently held that the Taylor Law creates a presumption that all public employees are eligible for collective bargaining, a presumption that must be overcome by the public employer.[15] Therefore, the burden of proof is the City's.

The question here is whether per-session hearing officers are ineligible for certification to the existing unit because they are casual or sporadic employees. We addressed the question of casual employees in Decision No. 1-77, where we found that casual employment is "brief, intermittent and non-continuous."[16] We reviewed PERB's case law on the subject, beginning with *State of New York,*[17] in which PERB announced a numerical test for distinguishing casual employment and added that the test should be applied to the occupational title, not individual

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[15]CSL § 203 provides:

Public employees shall have the right to be represented by employee organizations, to negotiate collectively with their public employers in the determination of their terms and conditions of employment, and the administration of grievances arising thereunder.

NYCCBL § 12-305 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 ... [P]ublic employees shall be presumed eligible for the rights set forth in this section, and no employee shall be deprived of these rights unless, as to such employee, a determination of managerial or confidential status has been rendered by the board of certification....

(This language was added to § 12-305 by an amendment, effective July 7, 1998. The legislative history shows that this was not intended to change the law but, rather, to codify the existing case law.)

See, *Communications Workers of America*, Decision No. 5-77 (the Taylor Law creates a presumption that all public employees are eligible for bargaining); *Civil Svc. Tech. Guild v. Anderson*, 434 N.Y.S.2d at 17 (1980) ("the burden is and was at all times on the City clearly to establish the status of a title to exempt it from certification").

[16]*Id.* at 9.

[17]5 PERB 3039 (1972).

employees. We noted *Town of Islip,*[18] in which PERB found lifeguards were eligible for bargaining as seasonal rather than casual employees, and *Pearl River Library,*[19] in which PERB declined to use its own mathematical test and decided that year-round library pages who worked less than 20 hours each week were eligible for bargaining because the "attempted application of [the test] to year-round employees is not appropriate."[20] We concluded:

> the Board must fashion a standard appropriate to the facts of each case when the issue concerns casual or temporary employees. A rigid application of standards adopted in a prior case will not resolve the issues fairly and adequately. Thus, we shall not apply the [numerical] standard urged by the City because the facts of the instant case require a different approach from that used by PERB ... [T]here can be no question that those employees who work long and continuous periods of time have rights that must be recognized under the NYCCBL.[21]

PERB addressed this issue a number of times in the ensuing years, each time refining its original numerical test and the definitions of casual and seasonal employees, and finding that the numerical test applied only to seasonal employees.[22] We next considered the issue in Decision

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[18]*Town of Islip and L. 237, Intl'l Bhd of Teamsters*, 8 PERB ¶ 4022 (1975).

[19]*Pearl River Library and Pearl River Public Library Page Ass'n and CSEA*, 7 PERB ¶ 4034 (1974).

[20]Decision 1-77 at 12.

[21]*Id*. at 17. In that case, we created specific numerical standards that applied only to Temporary Clerks at the Board of Elections.

[22]*See, e.g., Weedsport Cent. School Dist.,*11 PERB ¶ 4064 (the n

(continued...)

No. 2-90, in which a union sought to add Emergency Medical Service trainees to its bargaining certificate. We applied PERB's numerical test for seasonal employees to the trainees and found them eligible for bargaining.[23] In 1997, PERB decided that the third part of its numerical test for seasonal employees, the rate of return of individual employees in the title, was invalid because it could be manipulated through the hiring practices of the employer.[24]

As we said in Decision No. 1-77, we will not use rigid or mathematical tests to determine

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[22](...continued)
numerical test for seasonal employees is inapplicable to long-term substitute teachers because the employer had a continuing need for long-term substitutes and consistently hired several for all or a substantial part of the school year); *Plainview-Old Bethpage Public Library*, 15 PERB ¶ 4035 (1982) (rejects the employer's argument that employees who work less than 10 hours each week are casual employees and finds them eligible for bargaining because they have regular work schedules on a year-round basis and the same interest in protecting and upgrading their terms and conditions of employment as any other employees); *Hewlett-Woodmere Free School Dist.*, 19 PERB ¶ 4057 (1986) (teachers who work at least 8 hours each week for 8 months a year are eligible for bargaining because there is an apparent continuing need for these teachers, they are hired for a specific period of time determined in advance by their employer, and those periods are themselves of sufficient length to measure the necessary continuity of employment); *Village of Dryden,* 22 PERB ¶ 3035 (1989) (part-time police officers are eligible for bargaining because the employment characteristics of their year-round positions evidence regular and continuous employment, the numerical test does not apply because they are clearly not seasonal employees, the employer had minimal expectations as to number of hours worked, and the employer fully integrated its part-time and full-time employees to the point where the part-time officers were primarily responsible for delivery of the employer's police services); *Patchogue-Medford Library*, 22 PERB ¶ 4019 (1989) (distinguishes between casual and seasonal employees, finding that a numerical test applies to seasonal employees but not to library pages in year-round, part-time employment, who are eligible for bargaining because they have a regular and continuing employment relationship).

[23]*Id.* at 24-25. Among other cases, we cited *Hadley-Luzerne Cent. School Dist.,*20 PERB ¶ 4052 (1987), and noted that PERB found substitute teachers eligible for bargaining because the employer's "placement of those individuals on a list from which they were selected for employment, and its custom by which the substitutes could expect to be employed, demonstrated a reasonable assurance of employment." *Id.* at 25.

[24]*Town of Brookhaven*, 30 PERB ¶ 3040.

eligibility for bargaining. Instead, we must look at the evidence to decide whether employees in a contested title have regular and continuous, rather than sporadic and casual, employment. In doing that, we look at the title, not the individual employees.

We do not agree with the City that per session hearing officers are seasonal employees, but such a determination is irrelevant here. Both this Board and PERB have distinguished between seasonal employees, who may be eligible for bargaining despite their seasonal status, and casual employees who are not.[25]

Also irrelevant are the number of hours worked by an individual in the title and each individual's motivation for working more or fewer hours. As we said above, we must consider the job title, not the individuals in it. Whether or not the City caps an individual employee's hours at 1,000 per year, or some hearing officers have other commitments and work fewer hours than others, does not answer the essential question of whether the job title itself is in continuing and regular employment.

It is clear that the City has integrated the disputed title into the work of each agency so that part-time employees are primarily responsible for delivering the agency's services. At TLC there are no full-time hearing officers at all, and per session hearing officers work as managers. At the other agencies, per session employees in the disputed title do the majority of the work, consistently and on a year-round schedule. There is a reasonable assurance of employment, employees are hired on a regular schedule for a specific period of time determined in advance by their employer, and those periods of time are sufficient to determine continuity of employment.

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[25]Decision No. 1-77 at 11, quoting *Town of Islip*, 8 PERB ¶ 4022 (1975) ("lifeguards are seasonal rather than casual and therefore are [eligible for bargaining] under the Act.).

For these reasons, we conclude that the title Hearing Officer-Per Session is eligible for bargaining.

The Union already represents full-time attorneys doing the same or similar work as individuals in the disputed title and we see no reason not to add the title to its bargaining certificate. Accordingly, the Union's petition is granted.

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 of the Civil Service Bar Association, Local 237, International Brotherhood of Teamsters, docketed as RU-1174-95, be , and the same hereby is, granted, and it is further,

ORDERED, that Certificate #CWR-44/67 be amended to include employees in the title Hearing Officer - Per Session.

Dated: New York, New York
January 21, 1998

Steven C. DeCosta
CHAIRMAN

Daniel G. Collins
MEMBER

George A. Nicolau
MEMBER