Committee of Interns and Residents,24 OCB 14 (BOC 1979) [Decision No. 14-79], aff'd, Committee of Interns and Residents v. Office of Collective Bargaining, No. 11542/79 (Sup. Ct. N.Y. Co. Apr. 3, 1980), aff'd, 84 A.D.2d 694, 445 N.Y.S.2d 351 (1st Dep't 1981).

OFFICE OF COLLECTIVE BARGAINING
BOARD OF CERTIFICATION
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Committee of Interns and Residents

Petitioner Decisions No. 14-79

-and- Docket No. RU-691-78

Health and Hospitals Corporation

Respondent
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Appearances:

Irwin Geller, Esq.
for the Union

Alan I. Friess, Esq
Office of Municipal Labor Relations
by: Michael Hitsman, Esq.
for the Corporation

DECISION AND ORDER

The Committee of Interns and Residents filed its petition in this case on December 7, 1978, requesting the inclusion of Podiatric Residents in the existing unit of Residents employed by the Health and Hospitals Corporation.

On January 16, 1979, the Corporation, represented by the Office of Municipal Labor Relations, stated its position that Podiatric Residents are unsalaried and are not employees of the Health and Hospitals Corporation.

Hearings were held on March 2 and March 14, 1979, before Eleanor MacDonald, Esq. Both parties submitted memoranda on April 27, 1979.

While there is disagreement concerning certain minor factual details in the record, the parties agree as to the material facts presented at the hearing.

The Podiatric Residency program at Coney Island Hospital was extablished approximately 8 years ago by Dr. Robert Rakow, a licensed podiatrist who is Director of the Program. Dr.Rakow testified that his reasons for establishing the Program were to provide a service to the community in the form of a hospital based podiatric clinic and to provide post graduate training to podiatrists.

When the program for Podiatric Residents was begun, the Podiatric Association of the State of New York provided $12,000 in three successive years for stipends for the residents. In the first year, the fund was divided between two residents. As the program was expanded and more residents were added, all received an equal share of the stipend fund. After the initial three years, however, no stipend fund was provided and the residents were not paid at all.

Podiatric Residents receive no salary or wages, but are given meals, housing facilities and uniforms by Coney Island Hospital on the days they are present at the Hospital. The Hospital also provides malpractice insurance. The parties agree that no promises of salary or remuneration were ever made to the Residents involved in this proceeding; it is clear that all applicants for the Residency Program were informed that it was unpaid.

Podiatric Residents have completed a course of study at a four-year school of podiatric medicine which includes two years of basic science and two years of clinical study. Graduation from a school of podiatric medicine is sufficient for licensure in New York State. In certain other states such as New Jersey, however, the license to practice podiatry is not granted until completion of an approved one-year post-graduate podiatric residency. As a practical matter, although the Podiatric Residents are able to practice in New York State, the residency provides additional benefits which are important to the advancement of a career in podiatry, such as additional education and experience, the possibility of a future teaching appointment and the ability to obtain a hospital staff appointment.

Podiatry Residents rotate through various services at Coney Island Hospital including orthopedic surgery, general surgery, anesthesia, podiatry, and through clinics including diabetes, peripheral vascular diseases, arthritis and dermatology.

In addition to performing services in the areas of their rotation, the Podiatry Residents staff the podiatry clinic, performing such types of treatment as debridement of long nails, corns and callouses, the care of diabetic patients and out-patient surgery. Each Podiatry Resident is on duty in

the emergency room about once every fourth night, assisting orthopedists and providing emergency foot care.

Podiatry Residents are required to spend 17 hours per week in the podiatry clinic for 26 weeks per year. However, when this time is calculated together with rotations throughout other hospital services and attendance at lectures, the resulting commitment of time may amount to 60 hours per week or even more in the case of a Resident who is particularly dedicated.

Podiatric Residents wear the same identification badges as are worn by other residents in the hospital; they fill out and sign forms used for admissions of patients, Medicaid reimbursement, pre-operative tests, and the like.

At the completion of their residency, Podiatric Residents receive a certificate issued by the Health and Hospitals Corporation attesting to their completion of one year of performance as a "first year Resident Podiatric Medicine and Surgery."

Positions of the Parties

The CIR contends that Podiatry Residents should be included in the unit of house staff officers which it represents. It argues that Podiatry Residents render substantial and necessary services to Coney Island Hospital, in the Podiatric Clinic, in the Emergency Room and in the other clinics in which the Residents serve on rotation. It points out that Podiatry Residents perform tasks necessary to the admission of patients, the performance of laboratory tests and the dispensing of drugs. The Union argues that if Podiatry Residents did not perform these services, the Hospital would have to secure the services of other doctors to render the patient care.

The CIR asserts that the fact that Podiatry Residents were on notice that their positions were unpaid does not affect the collective bargaining rights of these Residents under the statute. The Union argues that a "private deal" between the Hospital and the Residents to the effect that the Residents would not be paid is a "fiat" of the Hospital and of no force and effect in the determination of an appropriate unit for collective bargaining. Similarly, the CIR asserts that it is irrelevant to the instant proceeding whether or not Podiatry Residents occupy an officially classified title within the Health and Hospitals Corporation.

The Union contends that Podiatry Residents have the same incidents of employment and have a community of interests with other residents of the Corporation and should therefore be included in the unit. In this connection, the Union cites Board of Education, City of New York and UFT, Local 2, 6 PERB 4031 (1973),, where paid psychologists-in-training were found to be includable in a unit of psychologists and social workers.

The CIR asserts that Coney Island Hospital regards Podiatry Residents as "full-fledged employees of the Hospital for all purposes save compensation." It concludes that the absence of a salary "has nothing to do with the issue of whether or not they are employees under the Taylor Law or the NYCCBL."

The CIR argues that NYCCBL S1173-3.Oe

> "was apparently meant to distinguish between persons on the city payroll ...and those paid from some other

> source when a question arose as to the identity of the employer .... The NYCCBL hardly intended to declare any employees non-employees as a result of the City's arbitraty refusal to pay them."

The position of the Health and Hospitals Corporation is that "persons enrolled in the Podiatry Resident Program at Coney Island Hospital are not employees of the Health and Hospitals Corporation or any other public employer."

The Corporation asserts that the statute requires that public employees be paid in whole or in part from the City treasury. The Corporation stresses the fact that Podiatry Residents are informed that no salary or stipend will be paid, and that applicants for the residency are told not to accept a position if they cannot afford one year without pay. The Corporation argues that these facts show that an employment relationship was not contemplated or agreed to.

The Corporation further contends that it has never officially created the title of Podiatry Resident, and it urges that these residents participate in a program which exists primarily for the purpose of furthering an educational goal."

Discussion

Although the valuable contributions rendered by Podiatric Residents to the health care of the community cannot be doubted, it is not clear that their status of public employees within the meaning of the New York City Collective Bargaining Law.

The Union has cited no case to the Board, nor has research disclosed the existence of any case, where persons who give unpaid services have been found to be employees for labor relations purposes.

The NYCCBL does not address itself specifically to this question. However, we find that the language of the Law indicates an assumption that "employees" shall be paid wages or salaries from some governmental source.

NYCCBL S1173-4.1 grants to "public employees" the right to organize and bargain with public employers. Section 1173-3.Oh defines "public employees" as employees of"municipal agencies" and employees of "other public employers." Municipal agencies are those established by law "whose employees are paid in whole or in part from the city treasury, other than agencies [such as the health and hospitals corporation, the boards of education, the off-track betting corporation, and the district attorneys.]" NYCCBL S1173-3.0d. Public employers, as defined in NYCCBL 51173-3.0q, include municipal agencies (whose personnel are paid from the City Treasury), certain public authorities whose activities are conducted in the City, public benefit corporations whose employees are paid in whole or in part from the City treasury, and the Health and Hospitals Corporation, the boards of education, the Off-Track Betting Corporation and the district attorneys.

The purpose of differentiating between municipal employers and other public employers is to indicate that municipal agency employers are automatically subject to the NYCCBL while other public employers must either elect to come under the NYCCBL or be made subject thereto by State Law. NYCCBL §1173-4.0. The definition of a "municipal agency" would have applied to the Health and Hospitals Corporation but for the provision in §1173-3.0d specifically indicating that the Corporation was to be considered a public employer and thus not automatically subject to the NYCCBL. [1] The use of the phrase "whose employees are paid in whole or in part from the city treasury" was intended to distinguish employees of municipal employers from employees of other public employers, whose salaries might be paid from sources other than the City Treasury. The Statute clearly assumes that salaries are paid to public employees from some source or other. Contrary to the contentions of CIR, the NYCCBL does not contemplate the existence of public employees who are unsalaried and not subject to remuneration.

Our finding that Podiatric Residents are not employees is based upon the fact that where no remuneration was contemplated and where the residents are so clearly not hired, no employment relationship can be said ever to have been established. This is not a case where, having established an

[1]The state statute establishing the HHC provides that it shall be subject to NYCCBL jurisdiction. Unconsolidated Laws §7390.5.

employer-employee relationship, the employer later wrongfully refuses to keep its part of the bargain and pay the employees. Thus, it is meaningless to speak of an employment contract or a "private deal" made with individual Residents.

Our research has disclosed no precedents applicable to this case. The PERB has never been called upon to issuee decision under the Taylor Law whether persons who render unpaid services may be considered employees for labor relations purposes. However, an Opinion of Counsel, published at 8 PERB 5009 (1975), discusses the status of members of the New Rochelle Auxiliary Police who are not paid but are "covered by New York State Workmen's Compensation while on duty, ...perform four hours duty per week, ...pass a mandatory twelve - week training course ... and are supplied uniforms and equipment...." The Opinion states that "the requirement of compensation is an integral part and essential element of the employee status," and concludes that members of the auxiliary police "are not 'public employees' within the meaning and intent of the Taylor Law."

The Fifth Circuit Court of Appeals has found that "when congress passed the labor Act it intended the word 'employee' to mean someone who works for another for hire". NLRB v. Steinberg, 26 LRRM 2271, 2274 (1950). This case involved fur trappers who were found to be independent contractors. Further, the common meaning of the word "employee" is

"one who is hired by another ... to work for wages or salary." Webster's New Universal Dictionary, Unabridged (Publisher's Guild, New York, 1970).

To sum up, our decision is based only on the fact that Podiatry Residents are unpaid, that they are unpaid because the relationship between them and the Health and Hospitals Corporation is not based upon hiring, and that they are therefore not employees under the NYCCBL.

O R D E R

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 herein be, and the same hereby is, dismissed.

DATED: New York, New York
May 22, 1979

ARVID ANDERSON
Chairman

WALTER L.EISENBERG
Member

ERIC J. SCHMERTZ
Member