

46 OCB 2 (BOC 1990) [DECISION NO. 2-90]  
OFFICE OF COLLECTIVE BARGAINING  
BOARD OF CERTIFICATION

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In the Matter of :  
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DISTRICT COUNCIL 37, AFSCME, :  
AFL-CIO, and LOCAL 237, IBT, and :  
LOCAL 144, SEIU; Jointly, : DECISION NO. 2-90  
 :  
Petitioners, : DOCKET NO. RU-999-88  
 :  
-and- :  
 :  
THE CITY OF NEW YORK and :  
THE NEW YORK CITY HEALTH AND :  
HOSPITALS CORPORATION; Jointly, :  
 :  
Respondents. :  
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**DECISION AND ORDER**

On February 26, 1988, District Council 37, AFSCME, AFL-CIO ("DC 37" or "the Union") filed a petition, together with Local 237, IBT, and Local 144, SEIU, the other joint representatives of the unit, seeking to accrete the "titles" of Emergency Medical Technician Trainee (Cadet) and Emergency Medical Service Specialist Trainee (Cadet),<sup>1</sup> of the New York City Health and Hospitals Corporation ("HHC"), to certification Number 62-D-75 (as amended).

By letter dated March 30, 1988, the City of New York, through its Office of Municipal Labor Relations ("the City"), in

1 These designations were incorporated in the Union's petition for certification .They are, however, unofficial titles and they were never adopted by the Corporation or classified as civil service titles.

its own behalf and on behalf of the HHC, opposed the petition and asked that it be dismissed, on the ground that the Cadets are not employees within the meaning of the New York City Collective Bargaining Law ("NYCCBL"), and, therefore, they are not eligible for representation. By letter dated April 13, 1988, DC 37 responded to the City's opposition and requested a hearing to resolve the outstanding factual and legal issues.

By letter brief dated May 3, 1988, the city supported its position with legal argument and reiterated its request for dismissal. DC 37 opposed the City's position and outlined its legal argument by letter dated May 6, 1988. The City submitted a sur-reply, by letter dated June 8, 1988, to which DC 37 responded by letter dated June 13, 1988.

Thereafter, the Board of certification directed that a hearing be held in order to permit the resolution of factual questions related to the issue. Accordingly, a hearing was held which began on September 22, 1988, was continued on November 3, 1988; January 12, 1989; January 19, 1989; January 26, 1989; January 31, 1989; February 27, 1989; April 19, 1989; and April 25, 1989, and was concluded on May 15, 1989. witnesses were sequestered. Local 237, IBT, and Local 144, SEIU did not participate.

On August 16, 1989, DC 37 and the HHC submitted post-hearing briefs. On September 15, 1989, these same parties filed reply briefs. Thereupon, the record was closed.

### **Facts**

In 1986, the Emergency Medical Service ("EMS") of the Health and Hospitals Corporation encountered a significant increase in its volume of calls for emergency responses, and found it necessary to increase the number of Emergency Medical Technicians ("EMTs") assigned to its ambulance service. When conventional recruiting methods proved insufficient to meet the increased demand for staff, the Corporation, in 1987, created what became known as the "Cadet program."

Regular EMS recruits are required to be high school graduates, and they must hold current EMT certifications and valid New York State driver's licenses. Under the Cadet program, however, persons who do not possess the EMT certification receive special training in order to prepare them to pass the EMT examination administered by the State of New York.

Cadet trainees attend the EMS academy at Fort Totten, Queens, on a full-time basis during this pre-EMT examination phase of training, which is commonly referred to as "Part A." Upon successful completion of Part A, cadets progress into the

"Part B" phase, which is designed to familiarize them with EMS procedures and vehicle operation. The full training cycle lasts for approximately three months. Upon graduation, cadets are offered full time employment by the HHC as Emergency Medical Service Specialist, Level I (EMSS-I).<sup>2</sup>

As cadets are accepted into the training program, they are required to complete an HHC employment application, fill out various other forms,<sup>3</sup>and sign a forgivable loan agreement, under which cadets receive a "Scholarship Incentive Award" or "stipend" in the amount of \$162.50 per week.<sup>4</sup>While at the academy, cadets (- are required to purchase and wear an EMS uniform and wear an EMS

2 Effective May 2, 1989, the HHC changed the title of "Emergency Medical Service Specialist-I" to the new title of "Emergency Medical Specialist-EMT." For the purpose of consistency with the hearing record and the post-hearing briefs, however, we shall continue to refer to persons holding this title as "Emergency Medical Service Specialist - Level I" or "EMSS-I."

3 These forms include an employment eligibility verification form, a W-4 income tax withholding form, a declaration of New York residence, a document containing the terms and conditions for certification and/or appointment, and a medical assessment/physical test consent form.

4 The agreement provides that in consideration of their training stipend, the cadets will remain in EMS service for eighteen (18) months. The agreement also provides that when a cadet becomes a Specialist Trainee, he or she will receive a weekly salary of \$412.43 for the balance of the training, and that "[upon EMS receiving written notification of my passing the EMT-1 examination, I will be appointed as a Specialist Trainee by EMS," and that "[u]pon successful completion of the Specialist Trainee training a provisional appointment as an EMSS-I will be offered to me by EMS at the same salary as Specialist Trainee."

identification badge provided by the Service.

During training, cadets are periodically tested. They may be separated from the Service if they fail to maintain a 75% average score on their examinations. Likewise, cadets who do not pass the state EMT examination also may be terminated from the program.

Upon completion of the EMT examination, cadets begin the Part B phase of their training. A large component of the Part B phase consists of an ambulance rotation, during which cadets are assigned to an ambulance station and ride with ambulance crews. This phase also consists of learning the EMS Operating Guide, attending lectures on workplace safety laws and the Taylor Law, and listening to a Union orientation presentation. In addition, the cadets must learn how to drive an ambulance by successfully completing the Emergency Vehicle Operating Course (EVOC).

Cadet Part B training and the Training Orientation Program (T.O.P.) given to regular EMS recruits who already possess the EMT certification and who are hired at the EMSS-I level (referred to as "STOPS" or "TOPS") is nearly identical. Both types of recruits must purchase and wear EMS uniforms, both are taught by academy instructors and are subject to the same rules and regulations concerning the academy's academic policies, and members of both groups may be terminated for failing to maintain

a 75% academic average. TOPS training, which lasts approximately six weeks, includes instruction in the EMS Operating Guide, EVOC training and an ambulance rotation during which TOPS recruits also ride with members of ambulance crews. Additionally, TOPS recruits must complete a "comprehensive review of the didactic and practical information" required for state EMT certification, which is an abbreviated version of the instruction given to cadets during Part A of their training.

The Union's Evidence

Fifteen former EMS cadets testified, describing the nature and requirements of the Cadet program, and recounting the duties that they had to perform during the time that they participated in it. All agreed that Part A of the program consisted exclusively of class work and home work, and was intended to enable the cadets to pass the state EMT examination. The witnesses said that they were frequently tested, and most stated that the staff had discouraged them from engaging in outside employment while they were attending the academy because the program required a full-time commitment.

Much of the testimony provided by these witnesses focused on their experiences during the ambulance rotations in Part B of the program. The rotations lasted an average of two weeks, although

one witness said that he spent approximately three weeks riding on ambulances (Cadet Barrow), and two other witnesses said that they spent only about one week on the rotations (Cadets Thompson and Gainey). The cadets' testimony varied as they described the "hands on" work that they performed during the ambulance rotations, but most testified that they became involved in patient treatment to some degree, despite their awareness of the official EMS policy which limited them to being observers.

Cadet Soto testified that had been told by an academy instructor that "there will be times a third hand is needed" and he said that he helped immobilize a motorcycle accident patient. Cadet Gallagher stated that he took vital signs and performed basic first aid. Cadet Swike said that he took pulses and blood pressures, and did "more or less what the technician does." Cadet Koenigsman testified that he took vital signs, did light bandaging, and said that he did "virtually what you would be doing out on the street." Cadet Genovese stated that she took vital signs and performed splinting, bandaging and extrication. Cadet Barrow testified that she did bandaging, performed CPR, and put oxygen masks on people. Cadet Murphy said that he performed bandaging and immobilization, and that he helped carry people down stairs. Cadet Thompson testified that he took vital signs and assisted with bandaging. Cadet Ricketts said that she took

blood pressures, put on oxygen masks, performed CPR, and helped deliver babies. She stated that she knew that she was supposed to be an observer, but that she had been told in class to "get your hands dirty as much as possible." Cadet Gainey testified that he took blood pressures and pulses, and assisted carrying patients. Cadet Millis stated that he assisted lifting and moving patients, and that he tied a splint on a patient's leg and immobilized people. He said that he had been told to be an observer, but that he also had been told that he "would be expected to lend a hand" by his instructors.

For comparison, a witness who entered the service already in possession of the EMT certification was then called upon to testify. Emergency Medical Service Specialist-I Houston described his first weeks of employment with EMS, which consisted of eight weeks of TOPS training at the academy. The witness testified that the first four or five weeks were spent refreshing medical training, learning EMS procedures and protocols, and attending EVOC training. He stated that he too had been told to be an observer during the ambulance rotation, but that he also assisted the crew whenever they asked for help.

Cadet Velez explained that she had the unique experience of being personally involved both with cadet training and with TOPS training. She began the cadet program, was separated during Part



B of the training two weeks after the EMT examination for having a low academic average, and reentered the academy with the EMT certification as a TOPS candidate five weeks later. She testified that there was no difference between the instruction that she received during Part B of the cadet program and the TOPS training, except that she was paid \$864.46 every two weeks as a TOPS candidate, rather than \$325.10 bi-weekly that she had received as a cadet.

Two EMS instructors described academy pedagogy in detail. Instructor Lester testified that he has taught students both in the Cadet program and in the TOPS program, and he said that TOPS students receive basically the same training as cadets, except that they "get the highlighted version" of the EMT program because they already hold the certification. Instructor Hillgardner had no experience teaching cadets, but she stated that TOPS candidates can be terminated for failure to maintain a passing grade average of 75%, or for failure to successfully complete the skills testing portion of the course.

Finally, Supervising Emergency Medical Service Specialist Caple, a tour supervisor at the Woodhull station, testified as to the manner in which he instructs Cadets and TOPS students who are assigned to his station. Lieutenant Caple said that he makes no distinction between the instructions that he gives to cadets and

TOPS recruits, and he stated that he tells them both that they are to be observers and not to handle patients while on ambulance duty.

### **The Corporation's Evidence**

The HHC presented two witnesses in its behalf. Gary Calnek, EMS Director of Human Resources, presented a comprehensive history of the development of the Cadet Program, from its inception to the present. He explained that Part A was designed to prepare cadets for the New York State EMT examination, and he said that the academy staff was required to fashion its own curriculum in order to accomplish this goal. Mr. Calnek said that Part B of the program was intended to familiarize students who successfully completed Part A with EMS operating procedures, vehicle operation and other areas that were required for employment. He testified that since the program began, it has remained largely unchanged, except that a study skills component has been added in order to help adults discipline themselves to be students again.

Walter Nelson, Coordinator of the Basic Life Support training at the EMS academy, said that he has taught in both the Cadet Program and the TOPS program. He gave detailed testimony about the curricula in both programs. Mr. Nelson said that the

training in cadet Part B and TOPS is basically the same, except that TOPS examinations include EMT questions, and that cadet test questions generally tend to be more difficult. He was of the opinion that many cadets keep outside jobs while attending the academy, and that some TOPS recruits do as well, depending upon the type of work that they do. Mr. Nelson conceded that the main distinction between the TOPS program and the Cadet program lies in the cadet's EMT training portion.

### **Positions of the Parties**

#### **DC 37's position**

DC 37 maintains that the EMS cadet trainees are employees, not students, within the meaning of the New York City Collective Bargaining Law ("NYCCBL"). The Union supports its contention by pointing out that this Board previously has permitted accretion of trainee titles to a bargaining unit when they share a community of interest with other workers in the unit,<sup>5</sup> and it argues that the long standing policy of the NYCCBL and the Board of Certification is to encourage the right of municipal employees to organize and be represented.

The Union notes that cadets are paid with Health and

5 DC 37 cites Decision Nos. 34-76 (CETA college counselors); 52-75 (student legal assistants); 86-70 (cultural program trainees); and 35-69 (pharmacist trainees) in support of its position.

Hospitals Corporation funds; that they have precisely the same working conditions as do other workers currently in the bargaining unit; and that, upon graduation, cadets have a reasonable expectation of continued employment with the Emergency Medical Service. The Union contends that the Corporation's characterization of the \$162.50 per week paid to cadets as a "stipend" or a "scholarship incentive award" is inaccurate. Although it concedes that no taxes or FICA are withheld from their checks, the Union points out that several cadets who testified said that they were docked money for being late or when they were absent. Additionally, the Union argues that cadets are required to complete the same HHC absence or leave request form that is used by other EMS employees if they miss a day of training. Thus, these monies assertedly do not represent a fixed scholarship award, but, rather, are a payment of wages, the quid pro quo for which is contingent upon the cadets' work in the service.

The Union also disputes the Corporation's contention that it is legally impossible for cadets to work rendering patient care because they do not have their EMT certificates. It points out that some duties, such as carrying equipment, require no special certification, and that other duties, such as performing CPR, require a separate certification that the cadets already possess.

The Union further points out that cadets in more recent classes have not been sent into the field on the ambulance rotation until after the EMS received unofficial notification from the state that they had passed the EMT examination and were certified.

The Union then argues that cadets have a reasonable expectation of continued employment with EMS, based upon a number of assurances, both orally and in writing, that they are given. In its view, the terms of the forgivable loan agreement obligate the Corporation to pay cadets a weekly salary of \$412.43 as EMSS-I appointees upon completion of their training. In return (- for this alleged wage offer and offer of continuing employment, cadets must agree to stay in the employ of HHC for a period of 18 months. Moreover, the Union points out, one witness testified that his class was informed that its members would receive the EMSS-I salary when they began Part B of the program not only by its instructors, but by the former Director of the EMS as well, who allegedly promised that class members would be paid the EMSS-I salary retroactively to the date they began Part B of their training.<sup>6</sup>

According to DC 37, these assurances and the provisions of the forgivable loan agreement are "most telling" because they demonstrate that the Corporation and the EMS view cadets, not as

6 Tr. 299-304.

a separate unit of students which it keeps under its protection, but as employees hired to provide emergency medical service.

Cadets assertedly enter the program and receive training, not to gain experience in order to fulfill the prerequisites for a professional degree, but in order to become qualified to work on the EMS ambulance service. Therefore, the Union argues, because the basic purpose behind the cadet program is to fill existing EMS job vacancies, cadets are not "students" and they should not be excluded from coverage of the Collective Bargaining Law.

Finally, the Union stresses that the EMS is not an educational institution. As a division of a public benefit corporation which has among its purposes the duty to provide emergency ambulance service, the EMS does not operate an EMT school to train, graduate, and then send individual workers elsewhere into the workforce. Rather, the Union argues, the EMS trains its own recruits in its own training academy to render emergency medical care so that the Service can reach adequate manning levels in order to fulfill its statutory mandate.

#### **Health and Hospitals Corporation'S Position**

The Corporation maintains that cadets are not employees because allegedly they perform no services, a criterion which, it asserts, is a primary indicia of employment under the civil

Service Law. According to the HHC, cadets are involved in educational training rather than employment, and the payment of a stipend simply serves as a recruitment incentive and is a form of financial aid rather than a salary.

The Corporation points out that section 201(7) (a) of the Taylor Law defines the term "public employee" in pertinent part, as "any person holding a position by appointment or employment in the service of a public employer." It argues that the clear meaning of this section requires that to be an employee, one must perform work or render services for his or her employer. The HHC also points out that Section 12-303 of the NYCCBL states that municipal and public employees' salaries are paid in whole or in part from the city treasury. When both statutes are read together, the HHC argues, the performance of work and the receipt of salary or wages are both necessary elements that must be present before an employment relationship can exist.<sup>7</sup>

The Corporation maintains that, while there is no case law squarely on point with the issue of this case, CWA /Graduate Students Employees Union (supra, note 7) and Cedars-Sinai Medical Center<sup>8</sup> support its position. In the Graduate Students case, a

7 The Corporation cites Committee of Interns and Residents v. OCB, 13 PERB !7522 (1980); and cwA/Graduate Student Employees (SUNY), 20 PERB !4063 (1987), in support of its position.

8 Cedars-Sinai Medical Center, 91 LRRM 1398 (1976).

PERB hearing officer determined that SUNY graduate assistants and teaching assistants were primarily students and, therefore, ineligible for representation. In Cedars-Sinai, the NLRB found that members of a medical center's housestaff made up of interns, residents and clinical fellows were not employees within the meaning of the National Labor Relations Act because they were engaged primarily in graduate educational training and because they were primarily students who had an educational rather than an employment relationship with the center.

Using these statutory provisions and cases as a benchmark, the Corporation argues that cadets do not work for salary or wages. Rather, it maintains, cadets are students in a classroom and in a learning setting. The HHC contends that, unlike the employees of the EMS, cadets do not render patient care, drive ambulances, or complete ambulance call reports. It underscores the similarity between cadets' training and the education provided in Graduate Students, and it stresses that even though the graduate students were found actually to have performed services for the university, the primary purpose of their services was for educational training, which is why they were found ineligible for representation. The HHC asserts that, in this case, cadets perform no service for the EMS during any part of their training, and it contends that the entire course of



study is educational in nature.

The Corporation denies that the ambulance rotation during Part B of the Cadet program constitutes a service for the EMS, maintaining that, until they graduate, cadets are not permitted to perform any health care or patient care duties. Rather, it asserts that cadets are engaged in learning the means and manner of performing EMT duties until such time as they have successfully completed both parts of the training program. The HHC goes on to argue that, even if the ambulance rotation was deemed to be a service, such a relatively minor part of the program "could not tip the scales in favor of employment over student status."

Although the Corporation does not deny that when cadets fail to attend a day of classes their stipend is reduced, it argues that this does not mean that the stipend should be equated with salary. The HHC explains that, in its view, students should not be entitled to "receive payment for commutation" for days when they are not attending classes. Maintaining that the stipend is not a salary paid for services performed, the Corporation further points out that students do not receive additional stipend monies if they have occasion to spend extra time at the academy, and it notes that neither taxes nor social security deductions are taken from the stipend checks. To the contrary, the HHC stresses that

the stipend is for educational purposes only, and that, "by virtue of its minimal amount," it cannot be regarded as salary.

Distinguishing TOPS recruits from cadets, the Corporation points out the differences between the method of recruitment and hiring of the two groups. Cadets, it notes, are tested at LaGuardia Community College before being processed, TOPS recruits are not; cadets complete their application and other forms at Fort Totten, TOPS recruits do not; and cadets allegedly have no connection with the normal hiring procedure until the end of Part B of their training program, whereas TOPS recruits are considered employees from the moment that they first enter the program.

The HHC explains that TOPS recruits receive a full salary during their training allegedly because they have given up fulltime employment as EMTs in private industry, whereas cadets receive a stipend because they are serving a training period and allegedly they need not give up full-time employment. The Corporation also contends that TOPS testing is less challenging than cadet testing because the EMS assumes that TOPS recruits are competent. The HHC further points out that TOPS recruits participate in approximately one-half of the number of ambulance rotations that cadets do, because the EMS allegedly has determined that TOPS recruits are fully familiar with ambulances.

The Corporation goes on to distinguish TOPS recruits from cadets by arguing that, under the New York State Health Code, individuals who have not satisfactorily completed an EMT course and who do not possess an EMT certification card are not allowed to care for or treat any patient on an ambulance. The HHC claims that cadets generally do not receive their certification cards until near the end of the Part B training, whereas TOPS recruits already possess the card before their training commences. Therefore, according to the Corporation, TOPS recruits are legally entitled to render patient care during their ambulance rotations, whereas cadets are not.

Concerning the forgivable loan agreement, the corporation maintains that its terms provide no guarantee of employment with the EMS, although the HHC acknowledges that the agreement, together with the stipend, provides a useful recruiting tool. The Corporation also accounts for the fact that the forms filled out by cadets upon their acceptance into the program and those used for full time positions are the same because of the "expedited time frame" involved in setting up the Cadet program. It asserts that the forms were necessary merely to compile important statistical and personal data of the cadets.

Finally, the corporation contends that, at best, cadets enjoy a casual relationship with the HHC akin to seasonal

employment. Citing a number of PERB cases,<sup>9</sup> it argues that cadets should be governed by the same certification standards that seasonal, per diem and part-time employees are subject to. According to the HHC, the application of these standards would show that cadets have no collective bargaining rights.

### Discussion

Section 12-303e. of the New York City Collective Bargaining Law defines municipal employees as "persons employed by municipal agencies whose salary is paid in whole or in part from the city treasury." In this case, the parties do not dispute that the stipend monies paid to cadet trainees are funded by the Health and Hospitals Corporation. They do, however, raise a number of questions concerning the fundamental relationship between the City and persons attending its training facilities while they are acquiring vocational skills.

This Board first addressed the question of union representation of student work study trainees in Decision No. 7-74. In that case, we found that, although student aides and students participating in the College Work study Program, were "employed" by The City University, they were not public employees

<sup>9</sup> state of New York v. N.Y. state Employees Council 50. AFSCME, 5 PERB !3022 (1972); East Ramapo Central School District, 6 PERB !4059 (1973); Pearl River Library, 7 PERB !4034; Merrick Union Free School District; 19 PERB 3058 (1986).

within the meaning and intent of the NYCCBL because their employment relationship was clearly a form of financial aid that was far subordinate to the primary educational purpose behind their relationship with the university. The record showed that the students performed in a variety of clerical and office jobs often unrelated to their courses of study. The number of hours per semester that they worked was calculated to permit them to "earn" the full amount of a pre-determined sum of money, and was a form of financial aid paid to permit students to continue with their studies according to each individual's financial need. We found that the program thus fulfilled an educational purpose, not an employment one, and that the individuals lacked a community of interest with the full time workers of the various college facilities.

In Decision No. 10-85, however, we found that there was a difference between college work study students and Engineering Work study Trainees. In the Engineering Trainees case, we said that the trainees were eligible to be represented for collective bargaining because they were not "employed on their academic campuses, [were] not compensated based on their financial need, and there [was] no evidence that their colleges, or any other body [represented] them in the role of 'guardian-protector'." In ordering the title added to the Union's bargaining certificate,

we said:

[W]e 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. Employment as a trainee is not a requirement of an outside governing body ••• 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 the case presently before us, we find that {the structure of the EMS cadet program and the circumstances of employment of the cadets closely resemble those of the Engineering Work Study Trainees and satisfy the elements outlined in Decision No. 10-85. Cadets are paid the fixed sum of \$162.50 per week from HHC funds; payment is not based on an individual's financial need, but is paid uniformly to all cadets; their terms and conditions of participation in the program are determined by the EMS; cadets perform under the same working conditions as newly hired TOPS recruits, and thus they share a community of interests with "permanent" employees; and cadets have an expectation, if not a guarantee, of permanent employment status once their training is complete. We conclude, therefore, that the primary purpose of

the EMS cadet program is not for education -- it is for the benefit of the HHC, and it is designed to produce fully trained and qualified EMS employees.

Our conclusion is supported by the testimony of the fifteen former cadets who described the nature and requirements of the Cadet program, by the testimony of several academy instructors who were familiar with both cadet training and TOPS training, and by the testimony of both the EMS Director of Human Resources and the Coordinator of Basic Life Support training.

Accepting the accuracy of the Corporation's contentions that cadets perform no services other than during the ambulance rotation, which plays a relatively minor role in their overall curriculum; that neither taxes nor social security are withheld from their pay; that the methods of recruitment for cadets is different from that of TOPS candidates; and that TOPS hold the EMT certification while cadets do not, we find that these distinctions are insufficient to prove that cadets are involved in educational training rather than employment.

We distinguish Cedars-Sinai (supra note 8) because in that case, the NLRB found that hospital residents, interns and clinical fellows were not employees because internships or residencies were an integral part of a total educational

program which led not to a job but to an advanced, scholarly degree. Similarly, in CWA Graduate Students (supra note 7) the PERB noted that graduate and teaching assistants must be students in the institutions which employ them in order for them to receive an assistantship. Employing the "primary purpose" test, PERB found that the assistants' employment was an incident of their academic enrollment, and subordinate to the student relationship, thus exempting them from coverage of the Taylor Law.

In contrast to the academic interests of hospital housestaff members and graduate students, the testimony of the cadets demonstrated that their individual interests were economic. They entered the program in order to obtain employment with the EMS, not to receive an education that could be put to use elsewhere. Thus, the analogy of cadets to hospital housestaff members is inapposite.

We also find that cadets hold more than a mere casual relationship with the EMS akin to seasonal employment. The PERB has established a test to determine whether persons employed in seasonal occupations are employees within the meaning of the Taylor Law or hold a casual employment relationship that enjoys no collective bargaining rights<sup>10</sup>. In order to be deemed public

<sup>10</sup> State of New York v. N.Y.S. Employees Council, S PERB ,3022 (1972) and Suffolk County BOCES v. BOCES Teachers Association, 20 PERB !3007 (1987).



employees, three criteria must be met:

- 1) the employees must be employed at least six weeks a year;
- 2) they must work at least 20 hours a week; and
- 3) at least 60 percent of the employees must return for at least two successive years.

This test was further developed in subsequent cases when inquiry was made as to whether there is a "sporadic or irregular pattern of employment" which would render employees casual,<sup>11</sup> or whether the employees have a reasonable assurance of continued employment.<sup>12</sup> Thus, in Hadley-Luzerne, a PERB hearing officer held that the employer's letters to substitute teachers, its 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 continued employment.

The Cadets program satisfies each of these elements. The program lasts for approximately thirteen weeks; cadets attend classes on a full-time basis; and there is an expectation by both the cadets and the EMS, reflected by appointment documents, representations made by EMS staff, and the forgivable loan

<sup>11</sup> Weedsport Central School District, 11 PERB !4064 (1978).

<sup>12</sup> Hadley-Luzerne Central School District 20 PERB !4052 (1987).

agreement, that successful candidates will become permanent EMS employees. It would make little sense for cadets to sign the loan agreement unless they could anticipate an on-going commitment to an employment relationship.

Finally, we take notice of two recent u.s. Court of Appeals decisions which further support our determination. In NLRB v. Chinatown Planning council,<sup>13</sup> decided May 19, 1989, the Second Circuit ruled that a Chinese nonprofit organization which provided recent immigrants to New York city with training in skilled labor was subject to the jurisdiction of the NLRB. The Court held that the training was analogous to on-the-job training in a trade occupation, and that the trainees qualified as employees under the NLRA.

In McLaughlin v. Ensley,<sup>14</sup> a Fair Labor Standards Act case decided June 20, 1989, the Fourth Circuit held that prospective employees of a food distributor who were required to participate in a orientation program during which they performed tasks similar to those that they would be expected to assume upon completion of the program should have been paid for the time spent in training. Reasoning that the primary beneficiary of the trainees' labor was the employer, not the participants in the

13 875 F.2d 395 (1989).

14 877 F.2d 1207 (1989).

program, the court held that the trainees were employees entitled to coverage under the Act.

In conclusion, we find that monies paid to EMS cadet trainees are funded by the Health and Hospitals Corporation 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."<sup>15</sup> Cadet training is not a requirement of an outside accreditation body; rather, the evidence shows that the curriculum is determined independently by the Corporation. Finally, the preparation for and expectation of employment illustrates the primary relationship between the EMS and the cadets to be employment-oriented rather than educational in nature.

Based upon all of the foregoing reasons, we find that EMS cadet 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 Number 62-D-75 (as amended), covering various medical, hospital and laboratory technician titles, is the appropriate unit placement for these employees.

<sup>15</sup> Decision Nos. 10-85 and 7-74.

Decision No. 2-90  
Docket No. RU-999-88

ORDER

Pursuant to the powers vested in the Board of certification by the New York City Collective Bargaining Law, it is hereby ORDERED, that certification No. 62-0-75 (as amended) be, and the same hereby is, further amended to include EMS cadet trainees subject to existing contracts, if any.

DATED: New York, N.Y.  
January 22, 1990

MALCOLM D. MacDONALD  
CHAIRMAN

DANIEL G. COLLINS  
MEMBER