***District Council 37*,74 OCB 4 (BOC 2004) [Decision No. 4-2004, *aff'd*, *City of New York v. Office of Collective Bargaining*, No. 402745/04 (Sup. Ct. N.Y. Co. Jan. 27, 2005).]**

OFFICE OF COLLECTIVE BARGAINING
BOARD OF CERTIFICATION
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In the Matter of the Petition of

DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

Petitioner,

Decision No. 4-2004
Docket No. AC-9-2003

-and-

THE CITY OF NEW YORK and NEW YORK CITY OFFICE OF LABOR RELATIONS,

Respondents.
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DECISION AND ORDER

On April 15, 2003, District Council 37 ("Union") filed a representation petition seeking to accrete the title of Job Training Participant, Per Diem ("JTP") to the Blue Collar Unit, Certificate No. 38B-78, which includes the title City Park Worker ("CPW").[1] The Union argues that the approximate 800 JTP workers are eligible for collective bargaining because § 336-e(4) of the Social Services Law ("SSL") so mandates and because they are "public employees" within the meaning of the New York City Collective Bargaining Law (City of New York Administrative Code, Title 12, Chapter 3) ("NYCCBL"). The Union further contends that the Blue Collar Unit is appropriate for JTP workers, whose duties are similar to those of CPW employees. The City of New York and the Office of Labor Relations ("City") oppose the petition on the grounds that JTP workers are not employees under the NYCCBL because they are welfare recipients required

[1] The Blue Collar Unit includes over 40 titles, with employees working in a variety of agencies. Within this unit, some titles are used in more than one agency.

to participate in a short term work activity program mandated by federal and state law. The City also argues that external law should not control the question whether the JTP title is eligible for collective bargaining. After a hearing and due deliberation of all the parties' submissions, we find that the City appointed JTP workers pursuant to SSL § 336-e(4), and the plain language of this statute requires that they be deemed employees for purposes of the applicable collective bargaining law, namely, the NYCCBL. Moreover, we find the record demonstrates that the JTP title shares a community of interest with the CPW title and that JTP workers are appropriately placed in the Blue Collar Unit. Accordingly, we grant the Union's petition.

BACKGROUND

A. Federal and State Statutory Framework

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("Reconciliation Act") ended Aid to Families With Dependent Children, the previous program for providing assistance to needy families, and authorized a new and time-limited program, Temporary Assistance to Needy Families ("TANF"). 42 U.S.C. §§ 601-679(b). The purpose of TANF is to increase the flexibility of states in operating a program designed to, *inter alia*, "end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage." 42 U.S.C § 601(a). As a condition of receiving TANF grants, states must ensure that a certain percentage of families participate in work activities, which may include subsidized public sector employment. 42 U.S.C. § 607(a) and (d).

In 1997, New York State implemented the Reconciliation Act through Chapter 55 of the SSL, which directs local social services districts to establish Work Experience Programs

("WEP") for public assistance recipients in federal, state, and local agencies. SSL § 336-c. New York social services districts may require recipients of public assistance to have "work experience in the public sector." SSL § 336(1)(d).

B. The City's Program

The Human Resources Administration ("HRA") implements WEP for the City. HRA's goal is to move eligible welfare recipients who are reaching their five year maximum on public assistance to self-sufficiency through work training. HRA assesses the abilities of these individuals and, if appropriate, refers them to a City agency. An agency may reject an individual for cause only. At this time, all WEP workers are hired by the Department of Parks and Recreation ("Parks").

In Spring 2001, the City implemented the Parks Opportunity Program ("POP") under which welfare recipients were referred to Parks to work for six months, or, after September 11, 2001, up to 12 months. POP workers were placed in the title of City Seasonal Aide ("CSA"). POP workers performed the following duties: general maintenance of Parks' facilities including cleaning comfort stations; maintaining lawns and gardens; repairing buildings; removing snow and ice; and basic painting and carpentry. They worked with and performed similar duties to those performed by workers in Parks' CSA and CPW titles.[2]

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[2] According to the City's Job Specification for CSA, the title was designed for use by any City agency in which employees are needed on a seasonal basis to perform duties for no more than six months. A CSA worker works under close supervision and typical duties include: light repair, general maintenance and cleaning of public buildings and grounds; removal of litter, snow, ice, and leaves; sidewalk and road depression repair work; routine patrols and issuance of verbal warnings to public concerning matters of loud radio playing and graffiti; and assistance to the general public in person or over the telephone. There are no formal education or experience requirements and no lines for promotion.

Approximately 3000 POP workers were employed in the CSA title which is represented by the Union in the Seasonal Unit, Certificate No. 25-80. POP workers were paid $9.38 an hour, worked 40 hours a week, and got prescription and dental benefits as well as Medicaid. Once a POP worker was appointed to the CSA title, the individual was removed from the City's welfare rolls and HRA closed the case on that person.

According to the City, POP was difficult to manage, and HRA was unsuccessful in moving individual welfare recipients to self-sufficiency. POP workers were unprepared for the workplace and many did not participate in optional job training. Moreover, POP workers were reluctant to accept entry level positions that paid less than $9.38 an hour. As a result, many never found work and instead applied for unemployment benefits. The State had concerns about POP and informed the City that it was in jeopardy of losing its funding. Therefore, POP was discontinued in November 2002.

In Spring 2003, the City created the JTP program to replace POP. The JTP program is intended to be an enhanced six month employment program in which eligible welfare recipients receive mandatory job training and assistance in finding permanent employment. The JTP Job Specification sets forth a class of positions "for use by city agencies to employ workers on a short term basis for the purpose of providing work experience, jobs and wages for unemployed individuals being sent for training in the skills needed to obtain and performs jobs in other

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According to the City's Job Specification, a CPW worker works under close supervision and assists in the cleaning, general maintenance, gardening and forestry functions and in the repair of Parks' facilities, buildings, and equipment. Typical duties include: lawn mowing, seeding, sweeping and raking litter; emptying receptacles; cleaning comfort stations; minor plumbing, electrical, painting and carpentry work; collecting fees; moving furniture; watering and feeding mammals and birds; and driving. There are no formal education or experience requirements and no lines for promotion.

employment." Like the CSA and CPW titles, the JTP title has no formal education or experience requirements and no lines for promotion.

Appointments to the JTP title are made pursuant to SSL § 336-e. JTP workers work a 40 hour work week. Initially, JTP workers were told that they would receive $9.38 per hour but that rate was reduced to $7.50 in order to make the rate closer to minimum wage. JTP workers do not receive any annual or sick leave, holiday pay, or insurance. However, JTP workers' welfare cases remain open, and they are eligible for benefits such as food stamps, child care benefits, and Medicaid, depending on the family's income and size. Funding for the JTP program, which comes from the State, is considered by the City to be a grant diversion whereby public assistance money is used to subsidize employment of the individual by paycheck rather than as a welfare subsidy to the individual directly.

According to testimony, Parks utilizes JTP workers in a manner similar to that in which it utilizes CPW and prior POP workers. JTP workers constitute a significant portion of Parks's maintenance staff. Like CPW workers, JTP workers work in mobile crews or at fixed posts under close supervision of a Parks supervisor. Sometimes JTP workers work with CPW workers and they may report to the same supervisor. JTP assignments include: assisting in general maintenance and repair; sweeping, raking, and picking up litter; cleaning buildings and comfort stations; painting over graffiti; removing snow and ice; and providing assistance in recreation services and security. Some JTP workers, who are capable, may drive and use mechanized equipment such as lawn mowers and weed whackers.

In addition to a regular work assignment, each JTP worker is required to participate in job training one day a week, but some individuals go more often and some go less. The job training

component includes an evaluation by a job counselor and, if necessary, educational testing. Referrals may be provided for JTP workers to get basic education skills and English as a second language. In addition, all JTP workers receive training in resume preparation, interviewing, and job search skills. They are given access to computers, telephones, and job leads in order to set up interviews. Depending on their goals and abilities, JTP workers may receive additional training on computer use, driving, or skills to become a nurse's aide, a locksmith, a horticulturist, a custodian, a handyman, or a security guard. The City is actively looking to private companies to offer internships which may lead to permanent employment for JTP workers. For example, some JTP workers have worked at Kinkos for up to eight weeks. When JTP workers attend training, non-City employment, or a job interview, they attach a "pay letter" so that the time spent on the activity is compensated in their paycheck. Failure of an individual to participate in job training can result in termination from the program. However, first the JTP worker is counseled with the goal of instilling good work habits.

A welfare recipient may participate in the JTP program for up to six months. There is no expectation of City employment beyond that. When JTP workers leave the program, new workers replace them.

POSITIONS OF THE PARTIES

City's Position

First, the City argues that the provisions of SSL § 336-e do not bar the Board from exercising its jurisdiction over the question whether JTP workers are eligible for collective bargaining. But there is no collective bargaining law which is applicable to JTP workers because

they are not employees within the meaning of the NYCCBL. Moreover, JTP workers cannot be "deemed" subject to collective bargaining under § 336-e(4) unless they are similarly situated to existing City employees (that is, working a similar length of time and doing similar work).

Second, welfare recipients are not public employees within the meaning of the NYCCBL because they do not voluntarily participate in work activity programs. The City does not hire JTP workers, and they do not participate in the traditional job application process. In *Bruckhman v. Giuliani*, 94 N.Y.2d 387 (2000), the Court found that welfare recipients who participate in a work experience program are not City employees entitled to prevailing wage protection under the State Labor Law.

Moreover, based on Board case law, JTP workers are not public employees under the NYCCBL because the City does not have control over the terms and conditions of their activities and its role is *de minimus*. Since the State, in accordance with federal legislation, funds and controls the program, the City does not have the authority to bargain over terms and conditions of the JTP workers' employment. It was the State that raised concerns about POP, especially that the POP workers' wage of $9.38 an hour served as a disincentive to take lesser-paying jobs and that the training component was inadequate.

In addition, unlike POP workers, JTP workers have open welfare cases, and the wages they receive comprise only a part of their total welfare benefits package. The "paycheck" JTP workers receive is comprised in large part of TANF monies and is not a traditional salary. Because they are employed for a short time with no expectation of continued employment, JTP workers are more like casual employees, whom the Board has found to be ineligible for collective bargaining. *See Communications Workers of America*, Decision No. 1-77.

In its post-hearing brief, the City argues that JTP workers do not share a community of interest with employees in the Blue Collar Unit, particularly those workers in the CPW title. Nor is there a community of interest with workers in the CSA title which is in the Seasonal Unit. While JTP workers perform basic maintenance and recreational services, their primary duty is to learn how to perform entry level assignments so that they can obtain a job and become self-sufficient. Over a period of six months, JTP workers are required to attend training and educational activities as part of their 40 hour work week. CPW and CSA workers, on the other hand, are not required to do so, nor are they paid to work with outside vendors during the week.

Union's Position

First, the Union argues that JTP workers are employees for purposes of collective bargaining under SSL § 336-e(4) and New York Code Rules and Regulations ("NYCRR") § 1300.9 both of which provide that a public assistance recipient may be assigned to public sector employment "only if" the recipient is "deemed an employee for purposes of the applicable collective bargaining and labor laws." The insertion of "only if" in the language of both these provisions reveals that recipients of subsidized public sector employment, like JTP workers, were meant to be considered employees within the meaning of New York labor and collective bargaining laws.

Second, the NYCCBL provides that public employees have the right to join and form unions. Under NYCCBL § 12-303(h), the term "public employees" means "municipal employees and employees of other public employers." NYCCBL § 12-303(e) provides that the term "municipal employees" means "persons employed by municipal agencies whose salary is paid in whole or in part from the city treasury." Since JTP workers receive a salary from the

City, they are public employees. The amount of the City's financial contribution to a JTP worker's salary is irrelevant. Board case law demonstrates that welfare recipients in transitional job programs are eligible for collective bargaining. *See District Council 37*, Decision No. 23-75, *aff'd*, *Rios v. Anderson*, N.Y.L.J., Dec. 3, 1975, at 6 (Sup. Ct. N.Y. Co.).

In its post-hearing brief, the Union argues that JTP workers could be accreted into either the Blue Collar or the Seasonal Units because they share a community of interest with and perform duties similar to those performed by both CPW and CSA workers. Like the CPW and CSA titles, the JTP title has no formal education requirements and there are no lines of promotion. In addition, both CSA and JTP workers work under close supervision and may work at different City agencies performing not only maintenance but also informational, recreational, and security services. Finally, supervisors were told, and did in fact utilize, JTP workers in the same manner as they did CSA and CPW workers, and now the JTP title forms the backbone of Parks's maintenance staff. Applying such criteria as field of work, history of collective bargaining, skills and qualifications, seasonality, wage structure and job specification, the Board should accrete the JTP title to either the Blue Collar or Seasonal Units.

Finally, POP's failures such as the $9.38 wage rate and the inadequate training do not render the JTP title ineligible for collective bargaining. Because the JTP program is a successor program and is essentially the same as POP, it makes no sense that POP workers were eligible for collective bargaining but JTP workers would not be. As times change and new needs develop, programs must adapt. The collective bargaining process is a flexible one and the discussion of problems is a keystone to good labor relations. Issues concerning salary and training are precisely the types of subjects which lend themselves to resolution in the collective

bargaining process.

DISCUSSION

The issue in this case is whether JTP workers are eligible for collective bargaining, and, if so, which bargaining unit is the appropriate unit for them. For the reasons set forth below, we find that the City appointed JTP workers pursuant to SSL § 336-e(4), and the plain language of this statute requires that they be deemed employees for purposes of the applicable collective bargaining law, namely, the NYCCBL. Moreover, the record demonstrates that the JTP title shares a community of interest with the CPW title and that JTP workers are appropriately placed in the Blue Collar Unit.

The NYCCBL, which regulates the conduct of labor relations between the City and its employees, was enacted by the New York City Council in the exercise of a local option set forth in Article 14, § 212, of the New York State Civil Service Law, commonly known as the Taylor Law. 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. . . .

The Board has consistently held that the presumption that all public employees are eligible for collective bargaining must be overcome by the public employer. *Civil Service Bar Association and Local 237, International Brotherhood of Teamsters*, Decision No. 1-99 at 10. When a union

seeks to represent a title in collective bargaining, the Board has jurisdiction to determine whether individuals in the title are public employees within the meaning of the NYCCBL and, therefore, eligible for representation. *See, e.g., District Council 37*, Decision No. 2-90; *Social Service Employees Union,* Decision No. 51-68.

In certain circumstances, the Board's determination concerning eligibility for collective bargaining is affected by external law. In *Civil Bar Association and Local 237, International Brotherhood of Teamsters*, 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 (1st Dep't 2000), we found that while the record demonstrated that the petitioned-for employees qualified in all respects as public employees under the NYCCBL, the clear statutory language of the Vehicle and Traffic Law as interpreted by the First Department in *Scheurer v. New York City Employees Retirement System*, 223 A.D.2d 379 (1st Dep't 1996), required that the workers not be considered City employees even for the sole purpose of collective bargaining. The Appellate Division affirmed the Board's finding. Similarly, the Board of Collective Bargaining, in determining improper practice claims, has recognized that an otherwise mandatory subject of bargaining may not be bargainable because of an external statute.[3]

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[3] *See City of New York v. MacDonald*, 201 A.D.2d 258 (1st Dep't 1994) *leave denied,* 83 N.Y.2d 759 (New York City Charter § 434, Civil Service Law § 76(4), and Administrative Code § 14-115 conferred exclusive authority on the Police Commissioner to discipline police officers; court reversed Board's determination that union's demand to establish arbitral disciplinary procedures was a mandatory subject of bargaining); *Sergeants Benevolent Ass'n*, Decision No. B-22-98 (CSL § 76(4) and Admin. Code § 14-115, preclude bargaining over disciplinary procedures for members of the police force); *Uniformed Firefighters Ass'n of Greater New York*, Decision No B-45-92 at 43-44 (Retirement and Social Security Law precludes bargaining over pensionability of payment for unused leave); *Patrolmen's Benevolent Ass'n*, Decision No. 41-87, *aff'd, Caruso v. Anderson*, No. 25827/87 (Sup. Ct. N.Y. Co. Feb. 19, 1988), *aff'd,* 150 A.D.2d 994 (1st Dep't 1989) (Charter precludes bargaining over composition of Civil Complaint Review

In its answer, the City states that all appointments to the JTP title are made pursuant to SSL § 336-e. SSL § 336-e(4) is identical to 12 NYCRR §1300.9(f) and both provide:

> Subsidized public sector employment programs.
> 1. A social services district may establish subsidized public sector employment programs for public assistance recipients including, but not limited to, grant diversion programs, which may be supported wholly or in part with public assistance funds. Such programs shall be established through agreements between local districts and employers; provided, however, that, if appropriate, the department may act on behalf of one or more local districts in establishing such agreements.
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> 4. A recipient may be assigned to a subsidized public sector employment activity **only if**:
> (a) the conditions of employment including such factors as the type of work, geographical region and proficiency of the participant are appropriate and reasonable.
> (b) **the recipient is deemed an employee for purposes of the applicable collective bargaining and labor laws** and receives the same benefits and protections as existing employees similarly situated (working a similar length of time and doing similar work) receive pursuant to the provisions of law, and applicable collective bargaining agreement or otherwise as made available to the regular employees of the employer. . . .
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> * * *

SSL § 336-e(4) and § 12 NYCRR 1300.9(f) (emphasis added).

Here, it is undisputed that the City assigned welfare recipients to jobs in the JTP title so that they could work and participate in public sector employment activities pursuant to SSL § 336-e. The plain language of SSL § 336-e(4) requires that such a welfare recipient may be assigned to a public sector employment activity "only if" the recipient is "deemed an employee for purposes of the applicable collective bargaining" law. Given this express statutory prescription, we need not inquire whether JTP workers would otherwise qualify as public

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Board); *Patrolmen's Benevolent Ass'n*, Decision No. B-5-75 (N.Y. Unconsolidated Laws § 971 precludes bargaining over hours a patrolman may work).

employees under the NYCCBL; we are compelled to hold that they are employees and, thus, eligible for collective bargaining.

We reject the City's argument that JTP workers are not public employees because no collective bargaining law "applicable" to them is within the purview of SSL § 336-e(4). We find that since the JTP program is established and administered by the City, the "applicable" law is that which governs collective bargaining and labor relations between the City and its employees, namely, the NYCCBL. Furthermore, the City's argument concerning whether JTP workers must be "similarly situated" to existing City employees is inapposite to the matter we must determine. That issue, though possibly relevant to the question of the City's compliance with SSL § 336-e(4), does not involve a pre-condition to the statutory mandate that any welfare recipient assigned to participate in work experience in the public sector must be "deemed an employee for purposes of the applicable collective bargaining and labor laws."

Having found that the JTP title is eligible for collective bargaining under the NYCCBL, we now turn to the question whether the title should be accreted to the Blue Collar Unit. In *District Council 37*, Decision No. B-23-75 at 19, *aff'd*, *Rios v. Anderson*, N.Y.L.J., Dec. 3, 1975, at 6 (Sup. Ct. N.Y. Co.), we stated: "Accretion is, in substance, the inclusion in an existing unit of new positions or titles which, because of their similarity or close relationship to the unit titles, would have been included in the original unit if they had been in existence at that time." (Emphasis in original.) When making a determination of appropriate unit placement of employees under NYCCBL §12-309(b)(1), the Board considers the criteria set forth in § 1-02(k) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61,

Chapter 1) ("OCB Rules").[4] *Independent Laborers Union of New York City*, Decision No. 5-2003, *aff'd*, *Independent Laborers Union of New York City v. Office of Collective Bargaining*, No. 118937/03 (Sup. Ct. N.Y. Co. Apr. 13, 2004).

Of the factors set forth in OCB Rule § 1-02(k), the relevant testimony during the hearing focused on the "community of interest" factor. In determining community of interest, the Board has considered such things as: the job duties and responsibilities of the employees; their qualifications, skills and training; interchange and contact; wage rates; lines of promotion; and organization or supervision of the department, office or other subdivision. This list is not exclusive and none of the factors is necessarily controlling. We make determinations on a case-by-case basis. *New York State Nurses Ass'n*, Decision No. 5-2000 at 13.

We find the record demonstrates that JTP workers have a community of interest with

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[4] NYCCBL § 12-309(b) provides in pertinent part that:
The board of certification, in addition to such other powers and duties as it has under this chapter and as may be conferred upon it from time to time by law, shall have the power and duty:
(1) to make final determinations of the units appropriate for purposes of collective bargaining between public employers and public employee organizations. . . .

OCB Rule § 1-02(k) states that the Board will consider, among other factors:
(1) Which unit will assure public employees the fullest freedom in the exercise of the rights granted under the statute and the applicable executive order;
(2) The community of interest of the employees;
(3) The history of collective bargaining in the unit, among other employees of the public employer, and in similar public employment;
(4) The effect of the unit on the efficient operation of the public service and sound labor relations;
(5) Whether the officials of government at the level of the unit have power to agree or make effective recommendations to other administrative authority or the legislative body with respect to the terms and conditions of employment which are the subject of collective bargaining;
(6) Whether the unit is consistent with the decisions and policies of the board.

CPW workers. Both work under close supervision and together they make up the majority of Parks's maintenance staff. Moreover, JTP workers are organized in a similar manner as are CPW workers and they may work with each other under the same supervisors. While CPW workers have more duties than do JTP workers, both perform similar tasks such as cleaning comfort stations and Parks's facilities, removing debris, maintaining lawns and gardens, removing snow and ice, and painting and basic carpentry. Finally, there are no formal education or experience requirements and no lines of promotion for either title.

Here, the Union petitioned for accretion into the Blue Collar Unit, but noted in its post-hearing brief that JTP workers could also be placed in the Seasonal Unit. Although the City did not raise a bargaining unit objection in its answer, in its post-hearing brief it claims that neither the Blue Collar Unit nor the Seasonal Unit is appropriate. Essentially, the City argues that while JTP workers perform basic maintenance and recreational services, there is no community of interest with CPW or CSA workers because they may be assigned to agencies other than Parks. Moreover, the City claims that JTP workers are welfare recipients who do not earn a typical paycheck but rather are required to participate in short-term work-activity programs in order to gain outside employment. First, we note that there are many titles in the Blue Collar Unit some of which are assigned to work in agencies other than Parks. Second, while JTP workers are welfare recipients who receive a paycheck to learn job skills over a period of six months in order to obtain outside employment, we observe that this was also true for POP workers whom the City recognized by their appointment to the CSA title. The City has not demonstrated that the placement of the JTP title into the Blue Collar Unit would be inappropriate. Because we find that the Blue Collar Unit is appropriate for JTP workers, we do not consider whether the

Seasonal Unit would also be appropriate.

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. 38B-78 (as previously amended) be, and the same hereby is, further amended to add the title Job Training Participant, Per Diem subject to existing contracts, if any.

Dated: July 29, 2004
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

NOTICE OF AMENDED CERTIFICATION

This notice is to acknowledge that the Board of Certification has issued an Order amending certification as follows:

DATE: July 29, 2004 **DOCKET #:** AC-9-03

DECISION NUMBER: 4-2004

EMPLOYER: The City of New York, represented by the Office of Labor Relations, 40 Rector Street, New York, New York 10006.

CERTIFIED/RECOGNIZED BARGAINING REPRESENTATIVE: District Council 37, AFSCME, AFL-CIO, 125 Barclay Street, New York, NY 10007

AMENDMENT: Certification No. 38B-78 has been amended to add the following Title/Code:

Added: Job Training Participant, Per Diem
(Title Code 80633)