

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

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In the Matter of the Application  
of

Index No. 11542/79

COMMITTEE OF INTERNS AND RESIDENTS, et al.,

Petitioners

For a Judgment under Article 78, CPLR

-against-

NEW YORK CITY OFFICE OF COLLECTIVE  
BARGAINING, et al.,

Respondents

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DONTZIN, J:

This is an Article 78 proceeding, by which the petitioner, the Committee of Interns and Residents (hereinafter referred to as CIR), seeks to annul a determination of the Board of Certification of the Office of Collective Bargaining, (hereinafter referred to as the "Board") denying podiatry residents the status of employees so as to include them in a collective bargaining unit. The respondent herein moves to dismiss, reserving its right to answer in the event its motion to dismiss is denied. By stipulation of the parties, the Health and Hospitals Corporation has been permitted to intervene.

This case presents the unique, and to this court's knowledge, judicially unanswered question as to whether an unsalaried person who renders services may be considered an employee for labor relations purposes.

On December 7, 1978 the petitioner, an unincorporated employee organization, filed a petition with the respondent "Board" to have house staff officers known as podiatry residents included in the existing bargaining unit of house staff officers.

The intervenor, Health and Hospitals Corporation. took the position that inasmuch as podiatry residents are unsalaried they cannot be considered employees, and therefore may not be certified to a particular collective bargaining unit.

Hearings were held in March of 1979 and briefs were submitted to the respondent "Board". In May of 1979 the "Board" rendered an Opinion which held that no employer-employee relationship existed because the respondents were unsalaried and that therefore these people were not employees within the meaning of the New York City Collective-Bargaining Law (NYCCBL Sec. 1173-1.0 et seq.).

The "Board's" opinion was predicated on an Opinion of Counsel, in an unrelated matter, (8 PERB 5009) which concluded that the "requirement of compensation is an integral part and essential element of the employee status". The "Board" also relied on a case called NLRB v. Steinberg, 26 LRRM 2271, 2274 (1950) and most importantly on the definition of "employee"

as contained in NYCCBL Sec. 1173-3.0 e, g and h. The "Board" held

that the New York City Collective Bargaining Law does not contemplate the existence of public employees who are unsalaried, and not subject to remuneration.

Respondent raises a procedural issue in that it contends that many of the legal arguments and issues of fact submitted to this court were not argued before the Board (Affidavit of Arvid Anderson, Respondent's Reply Brief).

The Court does not have to consider that issue here, although it is well established that contentions not advanced before an administrative agency cannot be raised for the first time before a court sitting in review of an administrative agency's actions.

What is dispositive here is that it is well settled that a court must give deference to the actions of an administrative agency whose responsibility it is to administer a particular statute, where any fair argument can be made in support of the administrative agency's actions. (Matter of Werzberger v. Watson 305 NY 507, 513; Callahan v. Ward 87 Misc 2d 39). The Agency has established this fair argument theory on the record before this court.

Petition dismissed, Settle judgement.

Dated: April 3rd, 1980