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Recommended Citation

O'Connell, Mary J. (1999) "Municipal Labor Perspectives on the Public Sector Welfare Workforce in New York City," *St. John's Law Review*: Vol. 73 : No. 3 , Article 8.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol73/iss3/8>

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MUNICIPAL LABOR PERSPECTIVES ON THE PUBLIC SECTOR WELFARE WORKFORCE IN NEW YORK CITY

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District Council 37 ("DC 37") is the major municipal union in New York City (the "City"). It represents approximately 120,000 municipal employees.¹ The majority of non-uniformed, non-pedagogical City workers are DC 37 members. This includes a wide range of people, from attorneys to zoologists. DC 37 also represents professional employees and several entry-level workers, who have entered the labor force for the first time and are first generation workers.

The first issue is that of organizing the welfare workforce. Initially it seemed that workfare workers or Work Experience Program ("WEP") participants could not organize, because they are not "employees."² Currently, workfare participants do not have the rights to organize and bargain collectively, but they may later. The New York City Office of Collective Bargaining has set some precedent in this area, but not much.

There are, however, a couple of decisions concerning the rights of workfare participants to organize and bargain collectively. In 1981, DC 37 filed a petition concerning those who were then called Public Work Project workers.³ The Board, in that case, found that these workers were ineligible to organize and bargain collectively because they were not employees under the

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¹ See Steven Greenhouse, *Giuliani and Union Postpone Layoffs at City Hospitals*, N.Y. TIMES, May 2, 1998, at A1; see also Steven Greenhouse, *After Scandals, New Union Leaders Turn More Aggressive*, N.Y. TIMES, Mar. 22, 1999, at B1.

² See New York City Collective Bargaining Law, N.Y. CITY ADMIN CODE § 12-305 (N.Y. Legal Publ'g Corp. Supp. 1998) ("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 such activities.")

³ See District Council 37, No. RU-760-80 (Bd. of Certification, N.Y. City Office of Collective Bargaining June 30, 1981).

New York City Collective Bargaining Law.⁴ This conclusion was based on the fact that their work was not volitional.⁵ In other words, there was not the traditional employer-employee relationship required by the Act, because the employees were not working of their own accord. The Board analogized the organizing rights of workfare workers to that of prisoners in a case decided by the State Public Employment Relations Board.⁶ The present state of the law has its foundation in this decision.

That case is distinguishable from an earlier one that was decided in 1974 concerning workers who were part of a separate employment project called the Work Relief Employment Project.⁷ In the earlier case, welfare grants were diverted from the social services side of the budget and sent directly to agencies to provide paid employment opportunities for workfare recipients.⁸ This literally created a job program. There were over 9,000 workers in that program,⁹ and they were able to organize and bargain collectively.¹⁰ This distinguishing precedent is currently on the books.

Some unions have attempted to get workfare workers into the bargaining unit by filing grievances under recognition clauses in the collective bargaining agreement. Such attempts do not seem to have been successful anywhere.

At any rate, workfare workers presently do not have the legal status to organize and bargain collectively. The discussions that the 1996 legislation has engendered and the initiatives by all types of labor groups do recognize that these program members are working. This might make a difference in future decisions.

The relevant inquiry is not what you are called, and not whether you are a workfare participant, but whether you work.

⁴ See *id.*, slip op. at 21.

⁵ See *id.* at 17-18.

⁶ See *id.* at 16-17 (discussing *Prisoners' Labor Union*, 5 N.Y. Pub. Emp. Rel. Bd. ¶ 5-4040 (Dir. Pub. Pr. 1972), *aff'd*, 6 N.Y. Pub. Emp. Rel. Bd. ¶ 6-3033 (1973), *aff'd sub nom.*, *Prisoners' Labor Union v. Helsby*, 354 N.Y.S.2d 694 (App. Div. 2d Dep't 1974)).

⁷ See District Council 37, No. RU-465-74 (Bd. of Certification, N.Y. City Office of Collective Bargaining May 7, 1975) (holding that the statute implementing the Work Relief Employment Program was constitutional because its participants did not acquire civil service status).

⁸ See *id.*, slip op. at 3-4.

⁹ See *id.* at 17.

¹⁰ See *id.* at 22.

Workfare workers have issues that lend themselves to collective bargaining. They are different issues, perhaps, than what have traditionally been considered, but the collective bargaining process is flexible enough to accommodate them.

The second important workfare issue concerns displacement. In this state—unlike other areas of the country—there are court decisions that concern displacement.¹¹ The old social services law, which was repealed when Governor Pataki signed the state reform act, provided for worker protections and contained anti-displacement language stating that workfare workers could not be used to displace regular employees or to perform work that was “ordinarily and actually” performed by them.¹² The courts interpreted that language to mean that an employer would have to have the *intention* of replacing a regular employee with a workfare participant in order to violate the statute. The standard was very difficult to overcome. Even in a layoff situation, some of the cases brought by DC 37 years ago demonstrated that as long as there was not an intent to replace, a public employer could utilize a workfare participant to perform the work that had traditionally been performed by regular employees.

When New York State passed the Welfare Reform Act, it did not reach as far as it should have to protect the regular employees who might be affected by the influx of workfare workers. The one bright spot, however, seemed to be the anti-displacement language. That language is contained in section 336-c of the cur-

¹¹ See, e.g., *Danker v. Department of Health*, 194, N.E. 857, 859 (N.Y. 1935) (declaring that it is impermissible under section 16 of the Economy Act, ch. 178, 1934 N.Y. Laws 647, 654, to abolish civil service employees' positions for the pretextual purpose of substituting emergency relief workers); *AFSCME New York Council v. City of Lackawanna*, 476 N.Y.S.2d 666 (App. Div. 1984) (holding that a layoff involving at least 26 employees whose work is now being performed by workfare workers is sufficient to raise triable issues of fact regarding whether the city assigned workfare workers to perform the work “ordinarily and actually” performed by civil employees); *Ballentine v. Sugarman*, 344 N.Y.S.2d 39, 44 (Sup. Ct.) (determining that, at a minimum, section 164(2)(b) of the Social Service Law, N.Y. SOC. SERV. LAW § 164(2)(b) (McKinney 1992) (repealed 1997), prohibited the dismissal of “civil service employee[s] . . . to make room for . . . relief recipients”), *aff'd sub nom. Gotbaum v. Lindsay*, 350 N.Y.S.2d 1000 (App. Div. 1973).

¹² See N.Y. SOC. SERV. LAW § 164(2)(b) (McKinney 1992) (prohibiting workfare participants from “perform[ing] any work ordinarily and actually performed by . . . regular employees”), *repealed by Welfare Reform Act of 1997*, ch. 436, pt. B, § 147-a, 1997 N.Y. Laws 1080, 1208.

rent state law¹³ and is far broader than the language of the federal statute.¹⁴ It expands the laundry list of displacement actions that are prohibited to include not only layoffs but also infringement of promotional opportunities.¹⁵

In this state workfare workers are not allowed to do work ordinarily and actually performed by regular employees. There can be no partial displacement and no loss of bargaining unit positions on their account. This displacement language is much better. It is, however, relatively new. It has only been around since August 1997 and will be more meaningful when it has been comprehensively applied.

Utilizing workfare participants in City jobs has caused a decline in the City workforce in recent years, especially during the present administration.¹⁶ What DC 37 has done directly confronts this problem.

In April of 1998, there was a planned layoff for DC 37 members in Local 420, the hospital workers' local.¹⁷ These workers hold titles such as dietary aide, housekeeping aide, and institutional aide. Their jobs do not have major high-tech skill requirements, or educational requirements, but these workers are the front line workers at public hospitals. They clean the hospitals, assist in the care of the patients, help serve the food, and work in the cafeteria. They do not do glamorous work in the hospitals, but their work is absolutely necessary if there is to be a

¹³ See Welfare Reform Act of 1997, N.Y. SOC. SERV. LAW § 336-c(2)(e)(i)-(v) (McKinney 1998) (prohibiting a workfare participant from getting an assignment that would in any affect the rights of any currently employed worker).

¹⁴ Personal Responsibility and Work Opportunity Reconciliation Act, 42 U.S.C. § 607(f)(2) (1994 & Supp. 1997).

¹⁵ See Welfare Reform Act of 1997 § 336-c(2)(e)(ii) (prohibiting "the employment . . . of a participant . . . when any other person is on layoff from the same or any equivalent position"); *id.* § 336-c(2)(e)(iii) (prohibiting "any infringement of the promotional opportunities of any current employed person").

¹⁶ See Steven Greenhouse, *Many Participants in Workfare Take the Place of City Workers*, N.Y. TIMES, Apr. 13, 1998, at A1 ("[T]he 34,100 people in the city's Work Experience Program constitute a low-cost labor force that does a substantial amount of the work that had been done by municipal employees before Mayor Rudolph W. Giuiani reduced the city payroll by about 20,000 employees, or about 10 percent."); see also David Rohde, *City Hospital Workers Sue Over Layoffs*, N.Y. TIMES, Apr. 18, 1998, at B2 (reporting that District Council 37 "filed a lawsuit in State Supreme Court . . . accusing the city of laying off union members at city-run hospitals and illegally replacing them with workfare participants").

¹⁷ See Ian Fisher, *600 Laid Off in Hospitals as Deal Fails*, N.Y. TIMES, May 19, 1998, at B1; Dan Janison, *Workfare Railed as Slavery*, NEWSDAY, Apr. 20, 1998, at A8.

viable public hospital system. There were 649 of these workers scheduled for layoff on Friday, May 1, 1998.¹⁸ At the same time, approximately 900 WEP participants were working in the public hospitals, a number of which had layoffs.¹⁹

DC 37 filed an order to show cause, which alleged violations of the new anti-displacement language in the social services law. DC 37 argued that not only was there a layoff situation, but people would be losing their jobs to workfare participants. The city could not utilize workfare participants to do work that should be performed by regular employees in a layoff situation. DC 37 also claimed a loss of bargaining unit positions, because the number of regular jobs has decreased substantially in the past few years.

On April 23, 1998, the City announced that every workfare participant had been removed from the public hospitals and claimed the case was moot. This may be recognition by the City that it cannot cavalierly use the workforce in this manner. The City simply cannot have workfare participants working in a location where people are going to be laid off.

The question is what is going to happen next? Because of the way the workfare program has been exploited in the City, the hospital workers' problem is a situation that could easily be repeated. Perhaps when the layoffs are forgotten, workfare participants will be put in. This issue is not moot in a legal sense.

This is the first time this law has been so directly challenged. The last thing the City probably wants is a decision on the merits of the case, which is probably why they took the preventive action they did.

There are a couple of other issues DC 37 is concerned about as a union of organized labor. One of them is the issue of the privatization of eligibility checking. DC 37 represents a title called "eligibility specialist." These are the people that work in the wel-

¹⁸ See Frank Lombardi, *After City Hosp Deal Erodes, Lay-Offs for 600*, DAILY NEWS (New York), May 17, 1998, at 6 (reporting that more than 600 hospital workers were scheduled to be laid off the following day because of the inability of Mayor Rudolph Giuliani and labor officials to reach a compromise).

¹⁹ See Michael Finnegan, *Union Sues vs. Hosp-Aide Lay-Offs*, DAILY NEWS (New York), Apr. 18, 1998, at 3 ("The city has assigned about 850 Work Experience Program participants to clean, prepare food and perform other tasks . . . previously . . . done by civil servants."); see also Ian Fisher, *Court Allows Hospital Layoffs, But Doesn't Settle Workfare Issue*, N.Y. TIMES, Apr. 28, 1998, at B7 (reporting District Council 37's allegations that the city planned to replace 905 laid off hospital workers with workfare workers).

fare centers and determine the eligibility of individuals for benefits, for food stamps, and for Medicaid. DC 37 has a substantial number of members who perform that function.

Prior to the Personal Responsibility and Work Opportunity Reconciliation Act of 1996,²⁰ federal law had provided that anyone who worked in this area and made the eligibility determination had to be selected based on a merit system.²¹ That merit system had always been interpreted to be the civil service system. Thus, civil service employees would perform the eligibility determinations. The Welfare Reform Act revoked that requirement, and the question became who can do the eligibility determination?

There was great concern in the American Federation of State, County and Municipal Employees and other national unions whose members performed this function that private companies would be very interested in getting into the market for performing eligibility determinations. Companies have stated they are interested in assuming this function for the government. Certain jurisdictions, most notably Texas, have attempted to privatize all of their benefit eligibility determinations. It wanted to have a private company determine whether someone is only eligible for benefits or also for food stamps and Medicaid. Texas applied for a waiver to allow it to contract out all eligibility determinations for all federal benefits. The federal government rejected that waiver, which is good news. It makes sense that if a public employer cannot contract out *all* of its eligibility determinations, it is not going to necessarily want to contract out some of them.

In New York State and New York City, legislation passed on both the state and local level concerning the privatization of functions like eligibility determination. In the social services law, there are specific provisions concerning privatization of eligibility determinations.²² Also under Local Law 35, a New York City law, the City is required to engage in an administrative process prior to contracting out work that may have displaced city

²⁰ Pub. L. 104-193, 110 Stat. 2105.

²¹ See 42 U.S.C. § 602(a)(5) (1994) (amended 1996).

²² See N.Y. SOC. SERV. LAW § 20-c (McKinney 1996 & Supp. 1999).

workers.²³ This law is another method by which privatization can be opposed.

DC 37 is also concerned about workplace violence. It has not received sufficient attention. It is usually not until something tragic happens that people focus on this issue. There is concern, as the welfare system changes and people either lose benefits or are taken off cash assistance and put on voucher assistance, that there may be an increase in violent incidents in the workplace. DC 37 wants to enable its workers to address more effectively the issues that will arise as a result of the integration of a welfare workforce.

Finally, job supply is an important issue. Work is certainly a noble and positive thing, but unfortunately there is severe unemployment in the City.²⁴ DC 37 submitted affidavits to the courts in the Hospital Workers case discussed above to demonstrate that fact. The affidavits were from people that had been on welfare for a number of years or months and who were finally able to get a job at a city hospital that had benefits and paid a decent wage. Now they were being given pink slips. They felt that they had kept their end of the bargain in getting a job and were then being laid off.

In all of this, the basic problem is that there can be all the workfare in the world, but if there are not enough decent jobs, there simply is not much else to do. Those are the union's issues, in a nutshell. They are also your issues, and the issues of everyone in the nation concerned about social justice.

²³ See N.Y. CITY CHARTER § 312 (N.Y. Legal Publ'g Corp. 1990 & Supp. 1998) (outlining City's procurement procedure), amended by N.Y. CITY LOCAL LAW No. 35 § 1 (1994) (stating that "[s]ound procurement practice requires an assessment by the agency of the costs and benefits of providing a service in-house prior to any determination to solicit bids or proposals").

²⁴ See Sylvia Nasar, *January Gain in Jobs Doubled the Forecast*, N.Y. TIMES, Feb. 6, 1999, at C1 (reporting that the unemployment rate in New York City is one of the highest among large cities in the United States).

