2-21-1975

State of New York Public Employment Relations Board Decisions from February 21, 1975

New York State Public Employment Relations Board

Follow this and additional works at: https://digitalcommons.ilr.cornell.edu/perbdecisions
Thank you for downloading an article from DigitalCommons@ILR.
Support this valuable resource today!
State of New York Public Employment Relations Board Decisions from February 21, 1975

Keywords
NY, NYS, New York State, PERB, Public Employee Relations Board, board decisions, labor disputes, labor relations

Comments
This document is part of a digital collection provided by the Martin P. Catherwood Library, ILR School, Cornell University. The information provided is for noncommercial educational use only.

This article is available at DigitalCommons@ILR: https://digitalcommons.ilr.cornell.edu/perbdecisions/69
STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of
YONKERS FEDERATION OF TEACHERS, LOCAL 860,
AMERICAN FEDERATION OF TEACHERS, AFL-CIO,

Respondent,

-and-

BOARD OF EDUCATION OF THE YONKERS CITY
SCHOOL DISTRICT,

Charging Party.

#2A-2/21/75
BOARD DECISION AND ORDER
CASE NO. U-1308

In the Matter of
BOARD OF EDUCATION OF THE YONKERS CITY
SCHOOL DISTRICT,

Respondent,

-and-

YONKERS FEDERATION OF TEACHERS, LOCAL 860,
AMERICAN FEDERATION OF TEACHERS, AFL-CIO,

Charging Party.

CASE NO. U-1311

This matter comes to us on exceptions of the Yonkers Federation of Teachers, Local 860, AFT, AFL-CIO (YFT) to a decision of a hearing officer dismissing its charge (Case No. U-1311) against the Board of Education of the Yonkers City School District (School District) and finding merit in the charge (Case No. U-1308) of the School District against it. The cross-charges grow out of an agreement that, according to both parties, was reached on September 4, 1974. The School District charged YFT with failure to negotiate in good faith in violation of CSL §209-a.2(b) in that it reneged upon a clause of that agreement dealing with the observation and evaluation of teachers by refusing to sign the agreement unless inconsistent provisions of a predecessor agreement were retained. YFT charged the School District with failure to negotiate in good faith in violation of CSL §209-a.1(d) in that it refused to implement any
of the new working conditions specified in the agreement. At issue is Item 15 of the Memorandum of Agreement of September 4, 1974, which reads as follows:

"Page 36, Article XXI, Section X, Miscellaneous - Tenured Teachers
Each administrator has the right to observe tenured teachers. Such administrator has the right to confer with the teacher regarding such observation and may make positive and/or negative comments. The administrator may make notes regarding the evaluation. The administrator may use these notes to assist in the preparation of an annual rating. Once the annual rating has been issued, the administrator shall destroy all notes regarding observation conferences. There shall be no limitation to the extent that such notes may be incorporated into the annual evaluation. During the course of the year, the teacher shall at the teacher's request have access to such notes and the right to comment on them." (emphasis added)

The language of the predecessor agreement, the retention of which was insisted upon by YFT, is as follows:

Article XXI, Section X, Subsection 2 (Annual Evaluation)
"Tenured teachers shall receive an annual written rating of 'satisfactory' or 'unsatisfactory.' If the rating is 'satisfactory,' only positive comments supporting such a rating shall be rendered in writing. If the rating is 'unsatisfactory,' a written evaluation containing both positive and negative comments, where appropriate, shall be provided." (emphasis added)

In substance, YFT's exceptions allege the following:

1. As there had been no specific demand on September 4 that the language of the predecessor agreement be deleted, it could not have "reneged" on the agreement by insisting that the language be retained.
2. By reserving to the Yonkers Board of Education the right to ratify an agreement signed by its superintendent of schools, the School District violated the Taylor Law.
3. There having been an agreement, the School District could not refuse to implement undisputed aspects of that agreement because one clause of the agreement was in dispute. It was obligated to implement the balance of the agreement and to submit the disputed clause for interpretation pursuant to the grievance procedure contained in the agreement.
4. The hearing officer's resolution of credibility issues against a witness of the YFT was arbitrary and reflected a bias against the YFT.

5. The hearing officer admitted incompetent evidence prejudicial to YFT, further demonstrating his bias.

6. The order of the hearing officer directing YFT to negotiate in good faith by executing an agreement embodying an observation and evaluation clause consistent with his determination of the agreement exceeds the jurisdiction of both the hearing officer and of this Board.

Three alternative conclusions are available to us regarding the Memorandum of Agreement of September 4, 1974. We might conclude, as did the hearing officer, that the School District's understanding is correct, to wit, the parties agreed to a new observation and evaluation procedure which necessarily displaced preexisting inconsistent procedures. We might conclude that YFT's understanding is correct, to wit, the parties agreed to new contract language concerning observation and evaluation procedures, but that such language must be read in concert with any preexisting language not explicitly deleted by agreement, and that any apparent inconsistencies must be harmonized in accordance with the contractual grievance procedure. Finally, we might conclude that, although the parties agreed upon language on September 4, 1974, there was no true meeting of the minds and, therefore, no agreement. Having reviewed the record and read and heard the presentations of the parties, we confirm the findings of fact and conclusions of law of the hearing officer.

Resolution of the question of what, if anything, was agreed upon on September 4, 1974 about the observation and evaluation of teachers pivots on conflicting testimony of witnesses of the parties. In this connection the hearing officer did not credit the testimony of YFT's primary witness on various crucial points "based on his demeanor as a witness and his sometimes vague and contra-
dictory responses to other questions." The hearing officer further stated that the demeanor of the School District's primary witnesses as well as their clearer and fuller recall of crucial events persuaded him to credit their version of such crucial events. Based upon his reading of the credible testimony, he found that the parties agreed to observation and evaluation procedures on September 4, 1974 which permitted the School District to include in its annual evaluation of tenured teachers both positive and negative comments noted during such observations and evaluations. Implicit in this agreement, he found that preexisting contract language limiting the School District to the inclusion of "only positive comments" supporting a satisfactory annual evaluation to have been supplanted. By refusing to delete such inconsistent language of the predecessor agreement, the hearing officer found, and we agree, that YFT reneged on its agreement.

We confirm the hearing officer's determinations with respect to the other subsidiary exceptions. There is no indication of bias reflected in his conduct of the hearing nor any prejudicial error in his rulings on the admission of evidence. He was correct in reaching the merits of the case, rather than deferring to arbitration. It was appropriate for him to resolve the improper practice question in this case; in order to do so, it was necessary for him to determine whether or not there was an agreement and, if so, to define that agreement. As the parties negotiated on a "package" basis making each item individually agreed to contingent upon total agreement, the employer did not

---

1 "The determination of the hearing officer rested on a weighing of the credibility of the testimony adduced. In such a case, the findings of the hearing officer as trier of the fact should be given the greatest weight." Fashion Institute of Technology v. Helsby, 44 AD 2d 550 (1974).
commit an improper practice when it refused to implement new conditions contained in the agreement prior to resolution of the dispute over observation and evaluation of teachers. The hearing officer properly noted that, although a public employer may not unilaterally reserve to itself the right to ratify an agreement reached by its chief executive officer, its right to ratify may be, and was, established as a negotiating ground rule with the consent of the other party. (See Matter of Harrison Association of Teachers, 7 PERB 4565 [1974]; Matter of Glen Cove City School District, 6 PERB 3017 [1973]. Finally, we reassert the proposition—applied by the hearing officer—that a party, having reached agreement on contract terms, may not refuse to sign a written embodiment of that agreement, and that PERB may order that party to do so (Matter of Somers Faculty Association, 3 PERB 3583 [1970]). Thus we are not, as suggested by the dissent, dictating the terms of agreement. Rather we are directing the incorporation into the written agreement of a term agreed upon by the parties in the course of negotiations.

NOW, THEREFORE,

1. WE DISMISS the charge filed by YFT, Case No. U-1311, and

2. WE ORDER YFT to negotiate in good faith by ceasing and desisting from reneging on its agreement regarding the observation and evaluation of teachers and insisting upon an observation and evaluation clause contrary to that agreed upon in negotiations.

WE FURTHER ORDER YFT to negotiate in good faith by executing a final contract for 1974-1977 embodying an
observation and evaluation clause consistent with the parties' agreement in negotiations as described herein.

Dated: New York, New York
February 21, 1975

[Signature]
ROBERT D. HILSBY, Chairman

[Signature]
JOSEPH R. CROWLEY

Joseph R. Crowley
Opinion of Fred L. Denson, Concurring in Part and Dissenting in Part

I do not agree with the majority that YFT committed an improper practice, as charged in Case No. U-1308. I do concur in the result of the majority to the extent that it dismissed the charge of YFT in Case No. U-1311.

Implicit in the collective negotiations process under the Act is the right of the parties to freely negotiate and contract with one another concerning the terms and conditions of employment without third-party interference by this Board or any other governmental agency. Where parties have negotiated diligently and agreed upon language to be inserted into a contract, but have not agreed upon or taken the opportunity to negotiate the placement of such language into a contract (where such placement is crucial with regard to the meaning to be given such language), the matter is subject to further negotiations and the parties should be given the opportunity to negotiate the placement issue. For the majority to fashion an order which, in essence, dictates the terms of employment for a matter the parties have not been given the opportunity to negotiate and which, by acknowledgment of the parties, have not been earnestly negotiated, is not consistent with established notions of freedom of contract.

I am of the opinion that the relief sought by both parties should be denied since a binding "contractual agreement" (in a legal sense) was never reached by the parties regarding tenured teacher observations and evaluation procedures. The parties should be directed to return to the negotiating table to resolve the matter through either the negotiation or arbitration process.
Before a decision can be made as to whether or not either party committed an improper practice by refusing to execute and implement the terms of an "agreement", a determination must first be made as to whether or not a "contractual agreement" had been reached. Neither the majority nor the hearing officer have adequately treated this dimension of the matter before us.

Under Section 201.12 of the Act, the term "agreement" means "the result of the exchange of mutual promises...which becomes a binding contract."

Included among the several legal prerequisites for a binding contract is mutuality of assent, which includes "a meeting of the minds." Simpson, one of several basic authorities on contract law who deal rather extensively with mutuality of assent states:

"The first requisite of a contract is that the parties manifest to each other their mutual assent to the same bargain at the same time....

It has been declared in hundreds of decisions that before a contract can result the "minds of the parties must meet," meaning that they must reach an agreement on the same bargain on the same terms and at the same time....

It is essential that the parties shall have reached an agreement as to the nature and extent of the obligations assumed. If the terms of the bargain are not fully settled, or if the expressed assent of the parties is at variance as to the terms, no contract is created." (emphasis added)

Standing alone, the agreed-upon language is ambiguous and the interpretation urged by each of the parties in their briefs and at oral argument is equally plausible, thus the meaning and effect of this language is dependent upon its placement in the contract. Since there was no agreement as to the placement of the language in the contract or what should be deleted or replaced

in the old contract, as noted by the hearing officer, there could be no
mutuality of assent and thus no "agreement" within the meaning of the Act.
The majority has ascertained only that the parties have agreed upon the language
to be incorporated somewhere into the final contract. The majority further
recognizes, and the hearing officer notes, that the parties never agreed to,
nor even extensively discussed, the precise point of placement of the language
in the contract (which would control the meaning of the language as previously
explained). Admittedly, under certain circumstances it is argumentative whether
the meaning controls placement or whether placement controls meaning. Nonethe­
less where, as here, the parties have not agreed upon, negotiated, nor discussed
any one of these factors, then they must be given the opportunity to do so.

While PERB, through its conciliation arm, may lend assistance to the
parties to help them reach agreement, it is not the function of this Board under
these circumstances to dictate the terms of an agreement as the majority, in
essence, has done. Such action, in my opinion, is an abridgement: of the
parties' freedom of contract, as discussed by Justice Black in N. K. Porter v.
NLRB, 397 US 99, 107:

"...[i]t is implicit in the entire structure
of the Act that the Board acts to oversee and
referee the process of collective bargaining,
leaving the results of the contest to the bar­
gaining strength of the parties....The Board's
remedial powers under§10 of the Act are broad,
but they are limited to carrying out the policies
of the Act itself. One of these fundamental
policies is freedom of contract. While the
parties' freedom of contract is not absolute under
the Act, allowing the Board to compel agreement
when the parties themselves are unable to do so
would violate the fundamental premise on which
the Act is based - private bargaining under govern­
mental supervision of the procedure alone, without
any official compulsion over the actual terms of
the contract...."
In an attempt to avoid confrontation with the parties' freedom of contract, the majority has improperly cast the issue in a different mold. It has adopted a series of credibility findings by the hearing officer on certain crucial matters to determine the meaning of the language in question and, thereafter, to order that a contractual agreement be executed having the language in question placed therein in accordance with the majority's interpretation of its meaning. As noted by the majority, the hearing officer's credibility findings are to be given great weight and are not to be disturbed by a reviewing body unless clearly erroneous. Albeit, credibility findings are not sacrosanct and cannot be used as a vehicle to establish a fact which never existed. Thus, credibility findings cannot be used to determine the agreement of the parties as to placement of the clause in issue where such an agreement never, in fact, existed.

While Assistant Superintendent of Schools for Instruction, Stanley A. Shainker, a key witness for the District, assumed that the agreed-upon language would replace certain specified language in the old contract, he acknowledged that this assumption was never communicated to YFT (transcript p. 335). Such an uncommunicated assumption cannot be construed as a manifestation of intent which would create a mutuality of assent required for a contractual agreement.

It is recognized that in many situations, in order to facilitate settlement during contract negotiations, the parties will agree to placement of ambiguous provisions into a contractual agreement and, should a problem arise regarding these provisions during the life of the contract, to refer the matter to an arbitrator. Such is not the case here since the parties simply have not

2 Fashion Institute of Technology, 7 PERB 7009 (1974).
reached a "contractual agreement." While language has been agreed to, the meaning and effect of this language is dependent upon its placement in the contract; since there has been no agreement as to the placement, there is no enforceable "contractual agreement" within the meaning of Section 201.12 of the Act.

Not to be overlooked is the fact that the District had knowledge of the lack of mutuality of assent between the parties on the placement issue after verbal agreement had been reached on language, but prior to the time the memorandum of understanding incorporating the agreed-upon language was reduced to writing and signing, but failed to communicate such knowledge to the YFT.

Immediately after the meeting on September 4, 1974 during which verbal agreement was reached on the language, Counsel to the District and a representative from YFT met to draw up a memorandum of understanding for the parties to sign, incorporating the various items agreed to during the contract negotiations which had transpired over the previous several months. While drafting the memorandum, Counsel to the District became aware of the lack of mutuality of assent between the parties on the issue of placement into the contract of the language in question (transcript, pages 406, 537). The record does not indicate that the representative of the YFT had similar knowledge, but does establish that Counsel to the District knew that the legal consequences of the lack of mutuality of assent and a "meeting of the minds" was that there could be no legal and binding contract (transcript, p. 409). This knowledge of Counsel must be imputed to the District, thereby giving the District such knowledge before the memorandum of understanding was signed and after verbal agreement on the language was reached.

In my opinion, the District had an obligation to inform the YFT of the lack of mutuality of assent and the nonfulfillment of this duty should bar the employer
from acquiring the sought-after relief.

The conclusions herein are not in opposition to the credibility findings of the hearing officer, but rather are based upon uncontradicted testimony contained in the record and upon the sequence of events as outlined in the hearing officer's decision. The decision of the hearing officer should be reversed and the matter should be referred back to the parties to allow them to negotiate their differences.

Having found that the parties did not reach a "contractual agreement," it follows that the School District did not violate CSL Section 209-a.2(b) by failing to implement such an agreement. This is clear because, as noted by the hearing officer and by the majority, the parties had agreed to negotiate on a "package" basis, making each item individually agreed to contingent upon total agreement. I, therefore, concur with my associates in dismissing the charge filed by YFT in Case No. U-1311.

Fred L. Denson, Member of the Board
This matter comes to us upon exceptions of Rockland County BOCES (respondent) from a decision of a hearing officer who found that it violated CSL §209-a.1(d) in that it refused to pay annual increments during negotiations for a successor contract to one that had expired. The hearing officer found that respondent had failed to negotiate in good faith and he recommended an order requiring respondent to do so; the order contemplated a requirement that respondent pay increments retroactive to the commencement of the 1974-75 school year with interest thereon at the rate of 3 per cent per annum from September 13, 1974 to the date of payment. The charge had been filed by BOCES Staff Council (charging party) which is the recognized negotiating representative of instructional employees of respondent.

The material facts are not in question. Since 1968, the parties have been signatories to a series of four agreements, the most recent of which covered a period from July 1, 1972 to June 30, 1974. Each of these agreements had provided for a progression of automatic step increments for employees in the unit. In prior years, after previous contracts between the parties had expired and before successor agreements had been reached, the employer had paid the automatic step increments to unit employees.

Negotiations for a successor agreement to the one expiring on June 30, 1974 did not commence until August 1974 and as of the date of the closing of the record, no successor agreement had been achieved. In anticipation of the
Board - 2 -

Commencement of negotiations, the employer adopted a resolution on June 19, 1974 which provided

"RESOLVED that pending the completion and execution of new agreements between the respective parties or September 1, 1974, whichever is sooner, the provisions of the agreements expiring June 30, 1974 will be recognized, including salary and salary rates in effect on June 30, 1974, for the period herein contemplated."

This resolution was subsequently extended. Pursuant to it, the respondent maintained salaries at the rate in effect on June 30, 1974 but refused to pay step increments to returning unit employees.

Relying upon our Triborough doctrine (Matter of Triborough Bridge and Tunnel Authority, 5 PERB 3064 [1972]) the hearing officer determined that respondent violated its duty to negotiate in good faith in that it unilaterally altered terms and conditions of employment during negotiations. This duty, as articulated in the Triborough case, is directly applicable to the circumstances in the instant case. It consists of two propositions, 1) it is a violation of a public employer's duty to negotiate in good faith for it to alter, unilaterally during negotiations, terms and conditions of employment, and 2) a long standing and continual practice of providing annual salary increments is such a term and condition of employment that cannot be altered unilaterally during negotiations.

In its exceptions, respondent argues that the second proposition is invalid; thus, notwithstanding its failure to pay increments, it did not violate any duty to maintain the status quo. It further argues that this Board and its hearing officers are without authority to direct it to pay to employees increments as a remedy for a violation of CSL §209-a.1(d), or interest thereon.

We endorse the reasoning of the hearing officer and his conclusions of law. Supplementing his analysis, we reassert the validity of the Triborough doctrine. Civil Service Law §209-a.1(d) declares it to be an improper practice for a public employer "to refuse to negotiate in good faith with the duly recognized or certified representative of its public employees." The sine qua non of negotiating in good faith is refraining from imposing unilateral
changes in terms and conditions of employment during negotiations. This proposition is the essence of our Triborough doctrine. In the Triborough case, we held that the expectation of an annual increment based upon a long standing and continual practice of its having been paid is a term and condition of employment that cannot be altered unilaterally during negotiations. For this purpose, it makes no difference whether or not such practice was ever embodied in an agreement.

The respondent's second exception is supported by both a constitutional and statutory argument. The constitutional argument is that the payment of salary increments to employees when there is no contractual duty to do so would violate Article VIII, Subdivision 1 of the State Constitution which prohibits "gifts" of public monies to employees. In our opinion, the continued service performed by the employees on behalf of respondent constitutes consideration for the increments. Thus, we find that the issue of constitutional gifts does not arise (see Bd. of Educ. Huntington v. Teachers, 30 NY 2d 122, 130 (1972)).

The statutory argument derives from the language of CSL §205.5(d) which provides that in case of a violation of CSL §209-a.1(d) our procedures "shall provide only for the entry of an order directing the public employer...to negotiate in good faith." This language dates from 1969. We believe that it was intended as a legislative rejection of a decision of the Federal Court of Appeals in United Steel Workers v. NLRB, 389 F 2d 295 (1967), in which for the first time the remedial powers of the NLRB to correct the unfair labor practices of bargaining in bad faith were considered broad enough to compel acceptance of a determination or condition of employment not agreed upon. Subsequent to the enactment of CSL §205.5(d), the United States Supreme Court reversed the

1) In this connection, we find persuasive a private sector decision, this being the decision of the National Labor Relations Board in Peterson Builders, Inc., 215 NLRB No. 12, 1974-75 CCH NLRB ¶15, 248. In that case, the majority of the NLRB said "an employer with a past history of a merit increase program may no longer continue to unilaterally exercise its discretion with respect to such increases, but it also may not discontinue them."
Federal Court of Appeals and held that the NLRB could not compel an employer to enter into an agreement it had not reached, *H. K. Porter Company v. NLRB*, 397 U.S. 99 (1970). We do not question that such a limitation upon our remedial powers was intended and is appropriate, but respondent's posture, which would limit our power to the entry of an order containing the specific language of the statute, would render procedures under CSL §209-a.1(d) meaningless. We do not believe that the Legislature intended that such procedures should be futile.

Authority to impose upon respondent a duty to pay interest of 3 per cent per annum in addition to the increments not paid derives from General Municipal Law §3-a.

NOW, THEREFORE, we affirm the decision of the hearing officer and we order respondent to negotiate in good faith, such order contemplating that respondent will cease and desist from refusing to pay increments to those of its employees entitled to increments under the recently expired agreement and that it will forthwith pay to such employees increments retroactive to the commencement of the 1974-75 school year with interest thereon at the rate of 3 per cent per annum from September 13, 1974 to the date of payment.

Dated at New York, New York
This 21st day of February, 1975

ROBERT D. HELSBY, Chairman

JOSEPH R. CROWLEY

FRED L. DENSON
This matter comes to us upon exceptions of Livingston, Steuben, Wyoming BOCES (respondent) from a decision of a hearing officer who found that it violated CSL §209-a.1(d) in that it refused to pay annual increments during negotiations for a successor agreement to one that had expired. The hearing officer found that respondent had failed to negotiate in good faith and he recommended an order requiring respondent to cease and desist from such violation; the order contemplated a requirement that respondent pay increments retroactive to the commencement of the 1974-1975 school year with interest thereon at the rate of 3 percent per annum. The charge had been filed by the Livingston, Steuben, Wyoming BOCES Teachers Association (charging party) which is the recognized negotiating representative for a unit consisting of all professional teaching personnel employed by the respondent.

The material facts are not in question. A preexisting collective agreement expired on June 30, 1974, by which date negotiations for a successor agreement had not borne fruit. On September 4, 1974, with negotiations for a successor agreement still continuing, respondent's superintendent of schools informed the charging party that, during the "contractual hiatus" the teachers would be compensated at the same rate as during the 1973-1974 school year — this notwithstanding the fact that it had been a long-standing and continual
practice in the district that unit members had received annual salary increments. From that day until October 21, 1974, the date of the hearing, the increments were not paid.

Relying upon our Triborough doctrine (Matter of Triborough Bridge and Tunnel Authority, 5 PERB 3064 [1972]), the hearing officer determined that (1) it is a violation of a public employer's duty to negotiate in good faith for it to alter unilaterally, during negotiations, terms and conditions of employment, and (2) a long-standing and continual practice of providing annual salary increments is such a term and condition of employment that cannot be altered unilaterally during negotiations. Respondent's exceptions argue that the Triborough doctrine is invalid; that private sector precedents are inapplicable; that assuming arguendo there is a duty to maintain the status quo, the expectation of increments is not a part of that status quo, and that assuming arguendo that it did violate its duty to maintain the status quo by failing to pay increments, the charging party is nevertheless estopped from relying on that violation because it, too, violated that status quo.

Many of these arguments were dealt with by the hearing officer and we endorse his reasoning and his conclusions of law. Supplementing his analysis, we reassert the validity of the Triborough doctrine. Civil Service Law §209-a.1(d) declares it to be an improper practice for a public employer "to refuse to negotiate in good faith with the duly recognized or certified representative of its public employees." The sine qua non of negotiating in good faith is refraining from imposing unilateral changes in terms and conditions of employment during negotiations. This proposition is the essence of our Triborough Doctrine.

---

1 The hearing officer has not only cited several decisions of this Board in point, he has also cited decisions in the private sector, the reasoning of which supports this doctrine. Although not bound by private sector precedents (CSL §209-a.3), we nevertheless look to their reasoning for assistance and we agree with the hearing officer that the cases cited by him are persuasive.
Secondarily, in the Tri Borough case we held that the expectation of an annual increment based upon a long-standing and continual practice of its having been paid is a term and condition of employment that cannot be altered unilaterally during negotiations. For this purpose it makes no difference whether or not such practice was ever embodied in an agreement.

Finally, we note that respondent alleges that on October 9, 1974 and again on October 25, 1974 the charging party engaged in conduct violative of its duty to maintain the status quo during negotiations. These allegations are based upon material submitted to us along with respondent's brief, but are not included in the record before us. Accordingly, we do not consider it. Respondent's underlying point is, nevertheless, well taken. The duty to maintain the status quo devolves not only upon the public employer, but also upon the employee organization. Moreover, there may be circumstances where the failure of one party to maintain the status quo is a defense against unilateral alteration of the status quo by the other party. In the Tri Borough case, we said that an employee organization's right to have the status quo maintained depends upon its not having violated that status quo by engaging in a strike. In the instant case, however, no such issue is before us.

NOW, THEREFORE, we affirm the decision of the hearing officer and

2 In this connection, too, we find persuasive a private sector decision, this being the decision of the National Labor Relations Board in Peterson Builders, Inc., 215 NLRB No. 12 (1974-75), CCH NLRB ¶15,248. In that case the majority of the NLRB said, "an employer with a past history of a merit increase program may no longer continue to unilaterally exercise its discretion with respect to such increases, but it also may not discontinue them."
WE ORDER respondent to negotiate in good faith, such order contemplating that respondent will cease and desist from refusing to pay increments to those of its employees entitled to increments under the recently expired agreement, and that it will forthwith pay to such employees increments retroactive to the commencement of the 1974-1975 school year, with interest thereon at the rate of 3 percent per annum.

Dated: New York, New York
February 21, 1975

Robert D. Helsby, Chairman

Joseph R. Crowley

Fred L. Denson
STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

IN THE MATTER OF
FARMINGDALE UNION FREE SCHOOL DISTRICT,
Employer,
-and-
FARMINGDALE FEDERATION OF TEACHERS, LOCAL 1889,
NEW YORK UNITED FEDERATION OF TEACHERS, AFT, NEA;
Petitioner,
-and-
NASSAU CHAPTER, CIVIL SERVICE Employees
ASSOCIATION, INC.,
Intervenor.

Certification of Representative and Order to Negotiate

A representation proceeding having been conducted in the
above matter by the Public Employment Relations Board in accordance
with the Public Employees' Fair Employment Act and the
Rules of Procedure of the Board, and it appearing that a
negotiating representative has been selected;

Pursuant to the authority vested in the Board by the
Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that Nassau Chapter, Civil Service
Employees Association, Inc.,
has been designated and selected by a majority of the employees
of the above named public employer, in the unit described below, as their exclusive representative for the purpose of collective
negotiations and the settlement of grievances.

Unit:

Included: All clerical, operational, and maintenance employees.
Excluded: All other employees.

Further, IT IS ORDERED that the above named public employer
shall negotiate collectively with Nassau Chapter, Civil Service
Employees Association, Inc.,

and enter into a written agreement with such employee organization
with regard to terms and conditions of employment, and shall
negotiate collectively with such employee organization in the
determination of, and administration of, grievances.

Signed on the 21st day of February , 1975.

ROBERT D. HELSBY, Chairman

FRED W. Denson

PERB 58 (2-68)
STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

IN THE MATTER OF:

HAMPTON BAYS UNION FREE SCHOOL DISTRICT,
Employer,

-and-

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,
SUFFOLK EDUCATION CHAPTER,
Petitioner,

-and-

HAMPTON BAYS SCHOOL SERVICE EMPLOYEES ASSOC.,
Intervenor.

#2E-2/21/75
Case No. C-1165

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected;

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that Civil Service Employees Association, Inc., Suffolk Education Chapter,

has been designated and selected by a majority of the employees of the above named public employer, in the unit described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit:

Included: All non-teaching personnel, including custodial workers, cafeteria personnel, aides, clerk-typist, stenographers, account-clerks, bus drivers.

Excluded: All other employees.

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with Civil Service Employees Association, Inc., Suffolk Education Chapter,

and enter into a written agreement with such employee organization with regard to terms and conditions of employment, and shall negotiate collectively with such employee organization in the determination of, and administration of, grievances.

Signed on the 21st day of February , 1975 .

FRED L. Denson

PERB 58(2-68)
IN THE MATTER OF

HERKIMER COUNTY BOCES,

Employer,

-and-

CIVIL SERVICE EMPLOYEES ASSOCIATION,
INC.,

Petitioner.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the
above matter by the Public Employment Relations Board in accord­
ance with the Public Employees’ Fair Employment Act and the
Rules of Procedure of the Board, and it appearing that a
negotiating representative has been selected;

Pursuant to the authority vested in the Board by the
Public Employees’ Fair Employment Act,

IT IS HEREBY CERTIFIED that Civil Service Employees
Association, Inc.

has been designated and selected by a majority of the employees
of the above named public employer, in the unit described below, as
their exclusive representative for the purpose of collective
negotiations and the settlement of grievances.

Unit:

Included: All non-instructional employees.

Excluded: Secretary to the District Superintendent
and all other employees.

Further, IT IS ORDERED that the above named public employer
shall negotiate collectively with Civil Service Employees
Association, Inc.

and enter into a written agreement with such employee organization
with regard to terms and conditions of employment, and shall
negotiate collectively with such employee organization in the
determination of, and administration of, grievances.

Signed on the 21st day of February , 1975

Dated: New York, New York
February 21, 1975

ROBERT D. HELSEY, Chairman

FRED L. DENSON

FERB 58(2-68) 3744
IN THE MATTER OF
WHITEHALL CENTRAL SCHOOL DISTRICT,
- and-
Employer,

C.S.E.A., INC.,
- and-
Petitioner,

WHITEHALL NON-INSTRUCTIONAL EMPLOYEES ORGANIZATION,

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected;

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that C.S.E.A., Inc.

has been designated and selected by a majority of the employees of the above named public employer, in the unit described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit:
Included: Regular full-time and regular part-time secretarial, clerical, maintenance, service and transportation employees, teacher aides and all other regular full-time and regular part-time employees of the District.

Excluded: All certificated and confidential employees of the District.

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with C.S.E.A., Inc.

and enter into a written agreement with such employee organization with regard to terms and conditions of employment, and shall negotiate collectively with such employee organization in the determination of, and administration of, grievances.

Signed on the 21st day of February, 1975.

Dated: New York, New York
February 21, 1975

ROBERT D. HELSBY, Chairman

FRED L. DENSON,

PERB 58(2-68)
STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

IN THE MATTER OF

LOCKPORT MEMORIAL HOSPITAL,
Employer,

-and-

NIAGARA COUNTY CHAPTER, CIVIL SERVICE
EMPLOYEES ASSOCIATION, INC.,
Petitioner.

Case No. C-1182

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected;

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that Niagara County Chapter, Civil Service Employees Association, Inc., has been designated and selected by a majority of the employees of the above named public employer, in the unit described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: All licensed practical nurses and respiratory therapists.

Excluded: All other job titles.

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with Niagara County Chapter, Civil Service Employees Association, Inc., and enter into a written agreement with such employee organization with regard to terms and conditions of employment, and shall negotiate collectively with such employee organization in the determination of, and administration of, grievances.

Signed on the 21st day of February 1975.

ROBERT D. HELSBY, Chairman

FRED L. DENSON

PERB 58 (2-68)
CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected;

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that Monroe-Woodbury School Unit, Orange County Chapter, Civil Service Employees Association, Inc., has been designated and selected by a majority of the employees of the above named public employer, in the unit described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit:

Included: All custodial, maintenance and transportation personnel.

Excluded: Director of Facilities and Pupil Transportation, Transportation Dispatcher, Head Maintenance Man and Head mechanic.

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with Monroe-Woodbury School Unit, Orange County Chapter, Civil Service Employees Association, Inc., and enter into a written agreement with such employee organization with regard to terms and conditions of employment, and shall negotiate collectively with such employee organization in the determination of, and administration of, grievances.

Signed on the 21st day of February, 1975.
CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected;

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act, IT IS HEREBY CERTIFIED that Civil Service Employees Association, Inc., has been designated and selected by a majority of the employees of the above named public employer, in the unit described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit:

Included: All full-time cleaners, custodians, audio-visual technician, maintenance and grounds employees.

Excluded: Superintendent of buildings and grounds, Asst. Superintendent of buildings and grounds, and all other employees.

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with Civil Service Employees Association, Inc., and enter into a written agreement with such employee organization with regard to terms and conditions of employment, and shall negotiate collectively with such employee organization in the determination of, and administration of grievances.

Signed on the 21st day of February, 1975.

ROBERT D. HELSBY, Chairman

FRED L. DENTON
IN THE MATTER OF

CLARKSTOWN CENTRAL SCHOOL DISTRICT,
Employer,

-and-

CLARKSTOWN SCHOOL UNIT, ROCKLAND COUNTY
CHAPTER, CIVIL SERVICE EMPLOYEES ASSOCIATION,
INC.,
Petitioner.

Case No. C-1174

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected;

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that Clarkstown School Unit, Rockland County Chapter, Civil Service Employees Association, Inc., has been designated and selected by a majority of the employees of the above named public employer, in the unit described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit:

Included: Principal food service supervisor, senior food service supervisor, food service supervisor II, head cook, cook, senior food service helper, food service supervisor I, head cashier, food service helper, cashier.

Excluded: All other employees.

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with Clarkstown School Unit, Rockland County Chapter, Civil Service Employees Association, Inc., and enter into a written agreement with such employee organization with regard to terms and conditions of employment, and shall negotiate collectively with such employee organization in the determination of, and administration of, grievances.

Signed on the 21st day of February 1975.

ROBERT D. HELBRY, Chairman

JOSEPH A. CROWLEY

FRED L. DENTON

PERB 59(2-68)
On November 29, 1974, S.E.I.U., Local 227, AFL-CIO (petitioner) filed, in accordance with the Rules of Procedure of the New York State Public Employment Relations Board, a timely petition for decertification of the Batavia City School District Custodial Association and for certification as the exclusive negotiating representative of custodians and cleaners employed by the Batavia City School District. Thereafter, the parties entered into a consent agreement in which they stipulated to the following as the appropriate negotiating unit:

   Included: Custodians, cleaners and head custodians.
   Excluded: Sup'r of buildings and grounds and all other employees.

The consent agreement was approved by the Director of Public Employment Practices and Representation on January 13, 1975.

Pursuant to the consent agreement, a secret ballot election was held on January 31, 1975. The results of this election indicate that a majority of the eligible voters in the stipulated unit who cast ballots do not desire to be represented for purposes of collective negotiations by the petitioner.

1] The Association advised that it was not interested in participating in this proceeding.

2] Of the 29 employees participating in the election, 14 voted in favor of and 15 voted against representation by the petitioner.
THEREFORE, IT IS ORDERED that the petition should be, and
hereby is, dismissed.

Dated: New York, New York
February 21, 1975

ROBERT D. HELSEY, Chairman

JOSEPH R. CROWLEY

FRED L. CENSON