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State of New York Public Employment Relations Board Decisions from May 13, 1983

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from
May 13, 1983

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of #2A-5/13/83
SUFFOLK REGIONAL OFF-TRACK
BETTING CORPORATION,
Employer,

-and-
LOCAL 237 TEAMSTERS,
Petitioner.

BOARD DECISION AND ORDER

On August 19, 1982, Local 237 Teamsters (petitioner) filed, in accordance with the Rules of Procedure of the Public Employment Relations Board, a timely petition for certification as the exclusive negotiating representative of certain employees of the Suffolk Regional Off-Track Betting Corporation.

The parties executed a consent agreement wherein they stipulated that the negotiating unit would be as follows:

Included: Managers, assistant managers, line supervisors and tel-a-bet supervisors.

Excluded: All other employees.

Pursuant to the consent agreement and in order for the petitioner to demonstrate its majority status, a secret ballot election was held on April 27, 1983. The results of
the election establish that a majority of eligible voters in the stipulated unit do not desire to be represented by the petitioner.¹

THEREFORE, IT IS ORDERED that the petition be, and it hereby is, dismissed.

DATED: May 13, 1983
Albany, New York

Harold R. Newman, Chairman

Ida Klaus, Member

David C. Randles, Member

¹ Of the 72 ballots cast, 4 were challenged, 30 were for and 38 against representation by the petitioner. The challenged ballots were not sufficient in number to affect the results of the election.
STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

VILLAGE OF SOUTHAMPTON,

Respondent,

-and-

SOUTHAMPTON VILLAGE POLICE RADIO OPERATORS ASSOCIATION,

Applicant.

SCHEINBERG, DePETRIS & PRUZANSKY, ESQS. (RICHARD E. DePETRIS, ESQ., of Counsel), for Respondent

SCHLACHTER & MAURO, ESQ. (REYNOLD A. MAURO, ESQ., of Counsel), for Applicant

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the Southampton Village Police Radio Operators Association (Association) to a determination by the Director of Conciliation (Director) that the Village Radio Operators are not employed as policemen by the Village of Southampton (Village) and, therefore, are not covered by the compulsory interest arbitration procedures of the Taylor Law.

The Association filed an application for interest arbitration on behalf of the radio operators and the Village opposed the application on the ground that the radio operators are not covered by the interest arbitration
provisions of the Taylor Law (§209.4). That section provides for interest arbitration to resolve impasses in collective negotiation disputes involving "officers or members of any organized fire department, police force or police department . . . ." The question before us is whether the radio operators are "officers or members" of the police force or police department of the Village. On the basis of information and memoranda of law submitted by the parties, the Director determined that they are not.

The Association argues that the Director's determination was in error. Apparently dissatisfied with the accuracy of the information contained in some of the documents submitted to the Director which was the basis for his decision, it also requests "a full record hearing."

After the exceptions were received, the parties were informed as to which documents were determined to constitute the record and they were invited to brief both the question whether the record, as designated, is satisfactory and the substantive merits of the Director's decision. The Village submitted a brief in which it stated that the record is satisfactory and that it supported the Director's decision. The Association's response was directed to the merits of the Director's decision only. Accordingly, we determine that the record, as designated, was adequate and no hearing is required.
Having reviewed the record, we affirm the decision of the Director that the radio operators are not "officers or members" of the police force or police department of the Village. The Village did not hire them to work as police officers and they do not meet the minimum qualifications for Village policemen as set forth in General Municipal Law §209-q and Civil Service Law §58.\(^1\) While the radio operators have been deputized by the Suffolk County Sheriff, and may therefore be peace officers of the County, the Sheriff's action does not alter the radio operators' employment relationship with the Village. We find that they are and remain civilian employees of the Village.

In Village of Potsdam, 16 PERB ¶3032 (1983), we held that civilian employees and police employees of a police department are subject to different impasse procedures, the interest arbitration procedures of §209.4 being applicable to police employees only. The Director properly found that decision to preclude his granting the Association's application, and we affirm his ruling.

\(^1\)The Taylor Law language "officer or member of an organized police force or department . . ." appears to parallel §302.11.c of the Retirement and Social Security Law. The radio operators are not members of the State Police and Firemen's Retirement System, which covers officers and members in the police or fire service.
NOW, THEREFORE, WE ORDER that the exceptions herein be,
and they hereby are, dismissed.

DATED: May 13, 1983
Albany, New York

[Signatures]
Harold R. Newman, Chairman
Ida Klaus, Member
David C. Randles, Member
STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

BOARD OF EDUCATION OF THE CITY SCHOOL
DISTRICT OF THE CITY OF NEW YORK,

Respondent.

-and-

DONALD J. BARNETT,

Charging Party.

-and-

UNITED FEDERATION OF TEACHERS,

Intervenor.

BOARD DECISION ON MOTION

This matter comes to us on a motion made by Donald J. Barnett for an extension of time during which to file exceptions to a hearing officer's decision dismissing his charge. The motion is made under §204.12 of our Rules of Procedure which permits an extension, even absent a timely request, "because of extraordinary circumstances". ¹/

¹/A request for an extension would have been timely within the Rule had it been filed not later than March 15, 1983. Barnett did not do so, but requested an extension on March 17, 1983.
In support of his motion, Barnett asserts that he did not make a timely request for an extension because he has been incapacitated since February 25, 1983 by reason of an in-service injury.

We are not persuaded from his papers or from the record of other proceedings he has brought before us that Barnett was prevented by physical incapacity or other extraordinary circumstances from making a timely request.

NOW, THEREFORE, WE ORDER that the motion herein be, and it hereby is, dismissed.

DATED: May 13, 1983
Albany, New York

Harold R. Newman, Chairman
Ida Klaus, Member
David C. Randles, Member
STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

WYANDANCH TEACHERS ASSOCIATION.

Upon the Charge of Violation of
Section 210.1 of the Civil Service Law.

BOARD DECISION ON MOTION

This matter comes to us on a motion dated March 21, 1983, made by the Wyandanch Teachers Association (Association). It moves this Board for an order rescinding the order that this Board previously issued in this matter on October 28, 1982 (15 PERB ¶3109), which directed the forfeiture of its dues deduction and agency shop fee privileges. The forfeiture was imposed as a penalty because the Association engaged in an illegal 41-day strike against the Wyandanch Union Free School District (District)¹/ from September 17 through November 16, 1979.

¹/ The District has filed a response to the motion in which it states that "neither legal nor factual showing has been made as to entitle the union to the relief requested."
In support of its motion, the Association has submitted two affidavits in which it affirms that it does not assert the right to strike against any government or to assist or participate in such a strike. One of the affidavits also states that the Association has done "all that is humanly possible to attempt to collect dues from the Wyandanch Teachers. . .", but no basis for this conclusory statement is specified in the affidavits.²

The motion papers allege that the Association collected $3,435.22 of the $15,056.30 (a 77% falloff) of the dues it normally would have collected between November 19, 1982, the date on which the forfeiture directive was issued, and February 28, 1983. There is no support for this allegation in the affidavits. Moreover, there is no statement of an audit showing the financial status of the Association and its ability to absorb the loss of dues income.

Neither the affidavits nor the motion papers contain information regarding the present financial ability of the Association to provide representational services to its unit employees. Rather, they deal with activities that are

²The motion itself does contain unsworn allegations of specific efforts made by the Association to collect its dues from its members.
not directly related to the statutory obligation of an employee organization to negotiate collectively and to represent its unit employees in grievances.

Relief from a dues checkoff forfeiture is not granted unless the effect of that forfeiture has been shown to have substantially impaired the employee organization's ability to provide representational service.\(^3\)

NOW, THEREFORE, WE ORDER that the motion herein be, and it hereby is, denied.

DATED: May 13, 1983
Albany, New York

Harold R. Newman, Chairman

Ida Klaus, Member

David C. Randles, Member

\(^3\)See Amalgamated Transit Union, AFL-CIO, Local 726, 16 PERB \#3021.
STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of
UNITED FEDERATION OF TEACHERS, LOCAL 2,
NYSUT, AFT, AFL-CIO.

Respondent,

-and-

DONALD J. BARNETT,

Charging Party.

JAMES. R. SANDNER, ESQ., (RICHARD E. CASAGRANDE, ESQ.,
of Counsel), for Respondent

DONALD J. BARNETT, pro se

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of both
Donald J. Barnett, the charging party, and United Federation
of Teachers, Local 2, NYSUT, AFT, AFL-CIO, the respondent, to
a hearing officer's decision. The hearing officer found that
respondent provided the benefits of an accidental death and
dismemberment policy to its members only, even though the
premiums were paid out of funds of the respondent which
include agency shop fee payments. He directed respondent to reimburse Barnett for the per-member costs of the insurance he paid during the four months before the filing of the charge. The hearing officer dismissed a second specification of the charge which alleged a violation in that respondent coerced agency shop fee payers into joining by stating that the insurance benefits were not available to nonmembers.

Barnett's exceptions complain that the hearing officer erred in dismissing the second specification of his charge. He also complains that the hearing officer erred in issuing an inadequate remedial order. In particular, he argues that the hearing officer should have directed respondent to refund to him, and to others paying an agency shop fee to respondent, their per-member costs of the insurance since January 1980, the effective date of our order in UUP (Eson), 12 PERB ¶ 3117 (1979), aff'd UUP v. Newman, 80 AD2d 23 (3d Dept., 1981), 14 PERB ¶ 7011, lv. to app. den. 54 NY2d 611 (1981), 14 PERB ¶ 7026 (1981).

Respondent's cross-exceptions relate to the hearing officer's processing of the case. In particular, it complains that the hearing officer erred in relying upon the record in UUP (Eson), supra and in denying it a hearing, and that the hearing officer erred in not dismissing Barnett's
charge as being barred by *res judicata*. ¹/

In *UUP (Eson)*, we found that United University Professions, Inc. (UUP) violated §209-a.2(a) of the Taylor Law in that it charged agency shop fee payers for insurance coverage that was not provided to them. We ordered it to provide the insurance benefits to the agency shop fee payers or, in the alternative, to cease collecting the per-member costs of the insurance benefits from them. That order became effective in January 1980.

In that case, the insurance coverage involved was provided pursuant to a policy owned by the New York State United Teachers (NYSUT), a state organization with which UUP was affiliated. The insurance benefits which Barnett complains about herein are the same as those dealt with in

¹/Barnett requested an extension of time in which to file a reply to respondent's cross-exceptions after the time in which to make such a request had passed. It was denied. He now moves for permission to make a late request on the ground that extraordinary circumstances prevented him from making a timely request. (See our Rules of Procedure §204.12.) In support of his motion, he has submitted evidence of an injury incurred on the day after respondent filed its cross-exceptions. There is no indication, however, that the injury disabled Barnett from writing a letter requesting an extension of time in which to file a reply. On the contrary, Barnett made a timely request for an extension and it was granted. He was late when he wrote for a further extension.

We find no evidence of extraordinary circumstances as would justify granting the motion herein, and we deny it.
UUP (Eson) and are furnished by respondent under the same NYSUT-owned policy.

Barnett argues that our order in UUP (Eson) is binding on all agency shop fee payers denied benefits under the NYSUT insurance policy. This would include not only UUP's agency shop fee payers, but also respondent's agency shop fee payers and, presumably, those in all NYSUT affiliates.

This argument is rejected on procedural and substantive grounds. The charge in the earlier case was brought against UUP; respondent was not a party. Barnett's charge was brought against respondent; UUP is not a party. NYSUT, which is the owner of the insurance policy, has not been a party in either case. The record in the instant case indicates that there may have been a difference in the time of coverage of agency shop fee payers in UUP's and respondent's units.

Barnett also takes exception to the hearing officer's failure to issue a cease and desist or posting order. The hearing officer did not issue the cease and desist order because he found that respondent had already come into compliance. He did not issue a posting order because he found that respondent had made its compliance known to unit employees.

We find that the hearing officer's remedy for respondent's violation as alleged in the first specification
of the charge was reasonable. The hearing officer dismissed Barnett's second specification on the ground that the information disseminated, that agency shop fee payers were not receiving the insurance benefits, was correct. The hearing officer correctly concluded that the second specification was subsumed under the first specification of the charge.

Turning to respondent's exceptions, it asserts that it was denied an opportunity to prove that, notwithstanding the conduct of UUP and NYSUT in UUP (Eson), its agency shop fee payers were eligible for the insurance benefits from the inception of the program. The hearing officer requested an offer of proof from respondent to show that its agency shop fee payers were treated differently from UUP agency shop fee payers under the identical NYSUT policy. There was evidence that the premiums were raised on October 1, 1981, because of the additional coverage of respondent's agency shop fee payers, and this was noted by the hearing officer. With respect to the period before October 1, 1981, however, respondent offered only to introduce evidence of unsupported statements that it had been the policy of NYSUT to provide coverage for agency shop fee payers. The hearing officer determined that such testimony would not be persuasive and did not hold a hearing.
Notwithstanding this exception, respondent states that it does not want a hearing at this time because the cost of participating in the hearing would exceed its obligations under the order recommended by the hearing officer. Accordingly, we treat this exception as moot.

In support of its res judicata argument, respondent refers to UFT (Barnett), 15 PERB ¶3103 (1982). It, like the instant case, involved an insurance plan provided by respondent. Barnett complains in both charges that respondent denied coverage to agency shop fee payers and that plan descriptions made by respondent coerced unit employees into joining it. The question raised by this exception is whether Barnett split his cause of action by making two separate charges. The hearing officer determined that he did not because there were two separate causes of action, each dealing with a separate insurance policy. While we find that Barnett could have combined the two charges and that it would have been better practice if he had done so, we agree with the hearing officer that his failure to do so did not preclude the bringing of the charge herein.

Finally, we note that both Barnett and UFT ask this Board to award them costs. We find no basis for doing so and deny both requests.

NOW, THEREFORE, WE ORDER respondent to pay Barnett a sum equal to the per-member cost of the
insurance coverage from August 10, 1981 until the date when unit members paying an agency shop fee to respondent were actually covered by the insurance policy with interest at nine percent per annum.

WE FURTHER ORDER that in all other respects the charge herein be, and it hereby is, dismissed.

DATED: May 13, 1983
Albany, New York

[Signatures]
Harold R. Newman, Chairman
Ida Klaus, Member
David C. Randles, Member
STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

STATE OF NEW YORK (STATE UNIVERSITY
OF NEW YORK AT ALBANY),

Respondent,

-and-

THE CIVIL SERVICE EMPLOYEES
ASSOCIATION, INC.,

Charging Party,

-and-

PUBLIC EMPLOYEES FEDERATION,

Intervenor.

JOSEPH BRESS, ESQ. (WILLIAM COLLINS, ESQ., of
Counsel), for Respondent

ROEMER & FEATHERSTONHAUGH, ESQS., (MARJORIE E.
KAROWE, ESQ., of Counsel), for Charging Party

JAMES R. SANDNER, ESQ. (SUSAN JONES, ESQ., of
Counsel), for Intervenor

BOARD DECISION AND ORDER

On July 15, 1980, we issued a decision dismissing
charges of the Civil Service Employees Association (CSEA) and
the Public Employees Federation (PEF), 13 PERB ¶3044.¹/
alleging that the State of New York (State University of

¹/The charges were originally filed by CSEA. Subsequent
to the filing of the charges, PEF replaced CSEA in one of the
negotiating units affected by the alleged improper practices.
It was then permitted to intervene in support of the charges.
New York at Albany) improperly directed employees to absent themselves from work on the day following Thanksgiving Day in 1976, 1977 and 1978, and to charge such absences to accumulated leave credits or absence without pay.\(^2\)

The basis for our decision was that the State had not acted without prior negotiations in that CSEA had made a relevant proposal during negotiations for the agreement covering the 1976-77 school year, and then had dropped it. We ruled that by failing to press its proposal, CSEA had waived its right to protest the State's action as to the day after Thanksgiving Day in the year covered by the 1976-77 contract.\(^3\) We also found that the State's past action and announced intention to do the same in 1977 imposed a burden upon CSEA to raise the issue of pay for the day after Thanksgiving Day in its negotiations for the 1977-79 agreement and that its failure to do so constituted a waiver of its right to protest the State's action in the two years covered by that agreement.

\(^2\)Three separate charges complained about this conduct. U-2462 was directed to 1976, U-3221 to 1977 and U-3777 to 1978.

\(^3\)CSEA had not filed an improper practice charge when the State had taken similar action in 1975, but had relied upon a contract grievance. That grievance was decided against CSEA by an arbitrator and we found CSEA's decision to drop its negotiation proposal all the more evidence of a waiver in the light of the prior arbitration award.
Our decision was appealed to the Appellate Division, Third Department, which issued its decision on May 6, 1982. CSEA v. Newman, 88 AD2d 685 (3d Dept., 1982), 15 PERB ¶7011; appeal dismissed 57 NY2d 775 (1982), 15 PERB ¶7020. It affirmed the holding of this Board that CSEA's failure to press its negotiation proposal for the 1976-77 agreement constituted a waiver of its right to complain about the State's action in that year. Reversing this Board, however, it determined that CSEA did not waive its right to protest the State's actions during the two years covered by the succeeding contract by failing to make a relevant demand during those particular negotiations. Accordingly, it remanded to us charges U-3221 and U-3777 to consider the other issues raised by them.

Pursuant to the order of the Appellate Division, we now consider the merits of the charges and defenses in U-3221 and U-3777. The allegation that the State directed unit employees not to report to work on the day following Thanksgiving Day in 1977 and 1978 and to charge those days to

4/The Court said that there was "no evidence of an explicit, unmistakable, unambiguous waiver of CSEA's right to negotiate. CSEA's failure to demand negotiations may have been inexplicable, but it should not be construed as a waiver".
their accumulated leave credits, if any, or, in the absence of such leave credits, to leave without pay is conceded. However, the State raises four defenses for its conduct.

It notes that it first took the action complained of in 1975 and asserts that the impropriety, if any, occurred in that year. Thus, according to the State, the charges complain about conduct that occurred more than four months prior to the time they were filed, and are therefore not timely. In rejecting this argument, the hearing officer found that the State determined on an annual basis whether the employees should or should not be directed to report to work on the day after Thanksgiving Day. "Thus, the improper practices, if any, occurred on each occasion that the State implemented its annual decision." We affirm this determination of the hearing officer for the reasons stated by him.

The State's second defense is that it was exercising a management prerogative when it directed unit employees not to report to work on the day after Thanksgiving Day and to charge the absence to accumulated leave or to take leave without pay. We have already affirmed the decision of the hearing officer dismissing this defense. In our prior decision we held that while a public employer may direct employees not to come to work, it may not unilaterally decide that employees shall lose pay for the days of such
absence.\(^5\)

The State's third defense is that CSEA waived its right to negotiate the impact of the layoffs upon the compensation of the unit employees. In part this argument is based upon CSEA's failure to make a negotiation demand. To that extent, the decision of the Appellate Division is binding upon us as the rule of this case.\(^5\) In part this argument is also based upon an alleged contractual right which, the State asserts, was established by several arbitration awards upholding its conduct under its various contracts with CSEA. The collective bargaining agreements between the State and

\(^5\)In Vestal CSD, 15 PERB ¶3006 (1982), we distinguished temporary layoffs because of a significant diminution of the amount of work available from layoffs such as those that occurred in the instant cases where there is no indication in the record of a diminution of the work to be performed. The action of a public employer compelling employees to perform the same amount of work as before in less time and therefore with less compensation constitutes an improper practice. Oswego City School District, 5 PERB ¶3011 (1972), aff'd, City School District of Oswego v. Helsby, 42 AD2d 262, (3d Dept., 1973), 6 PERB ¶7008.

\(^6\)We attempted to challenge the decision of the Appellate Division with respect to Cases U-3221 and U-3777 by seeking review by the Court of Appeals, but our notice of appeal was dismissed, "upon the ground that the order appealed from does not finally determine the proceeding within the meaning of the Constitution." CSEA v. Newman, 57 NY2d 775 (1982), 15 PERB ¶7020. We therefore did not test the holding of the Appellate Division that, under the circumstances herein, CSEA's failure to make a demand did not constitute an unmistakable waiver, just as its failure to press its demand for its 1976 agreement did. We intend to raise the issue of unexpressed waiver before the Court of Appeals in the appropriate case at an appropriate opportunity in the future.
CSEA did not authorize the State to direct employees to take absences without pay or with charges to accruals. According to the hearing officer, the arbitration awards add little to the State's argument in this regard in that they merely hold that nothing in the parties' collective bargaining agreements prevented the State from taking the action it did. We affirm this determination of the hearing officer.

Finally, the State argues that its action requiring unit employees to take leave which would be charged to accruals or would be without pay did not constitute a unilateral change because it did not constitute a change at all. The State points to occasions where, because of special conditions such as weather emergencies, plant breakdowns and evacuations in the face of emergencies such as bomb threats, it directed employees not to report to work and to charge the absence to their accruals. We find that the action of the State in dismissing or excusing employees from work during the course of a temporary emergency and not paying them for the time missed does not support its action herein. Here it made a deliberate, advance decision that employees should not work on a day on which in previous years they had been paid for performing a relatively light workload.

2/We reached the same conclusion at 11 PERB ¶3026 (1978) with respect to the first of the arbitration awards.
Having again considered the record evidence and heard the arguments of the parties, we determine that the conduct of the State constitutes improper unilateral action in violation of §209-a.1(d) of the Taylor Law. This leaves us with the question of what the appropriate remedy is for that violation. The hearing officer recommended that the State be ordered "to cease and desist from directing its employees not to report to work and to charge their absence to leave without pay or to accrued leave credits." He recommended, at 12 PERB ¶4606 (1979), however, that the State not be ordered to make the employees whole for the charges to their leave credits or their loss of pay because in past years many employees had taken vacations voluntarily, and it was not possible to determine "which employees would have worked on the days in question were it not for the State's order."

CSEA and PEF have filed exceptions to the decision of the hearing officer which complain that he should have granted affirmative relief to the employees who were directed not to work on the day after Thanksgiving Day. They contend that all employees who were directed not to come to work on the Friday following Thanksgiving Day, and who had not previously requested the day off, should be credited for that day if they worked on the previous Wednesday and the following Monday. In support of this proposition, they argue that the hearing officer engaged in irrelevant speculation
when he concluded that some of the employees who were prevented from working might have chosen not to work. According to CSEA and PEF, the State had the burden of proving that specific employees were not entitled to compensation for the Friday following Thanksgiving Day and it did not meet that burden.

We find merit in the position of CSEA and PEF. The unit employees at the State University were prevented from earning their wages on the day after Thanksgiving Day in both 1977 and 1978 by reason of the State's improper practices. While the State asserts that some of the employees might, in any event, have chosen not to come to work on those days, its assertion is based on speculative claims and the State neither identifies any such individuals nor offers any reasonable basis for identifying them. CSEA and PEF concede that it would be reasonable to conclude that employees who had requested the day off before the State's improper conduct or who did not come to work on the Wednesday before or the Monday following Thanksgiving Day, would have taken the Friday off. We agree with these organizations that it would be unreasonable to reach the same conclusion with respect to the other employees. There is consequently no basis in the record for denying relief to all other individuals who were not permitted to work on those days.

NOW, THEREFORE, WE ORDER the State to:

1. cease and desist from unilaterally requiring unit
employees to absent themselves from work on the day after Thanksgiving Day and from charging those absences to accumulated leave or to forego the wages that would have been earned but for such absences.

2. reimburse unit employees at the State University of New York at Albany who were required to take leave without pay on the day following Thanksgiving Day in 1977 and 1978, who had not previously requested the day off, and who had worked on the previous Wednesday and the following Monday their wages lost on those days plus interest at three percent per annum until April 1, 1983 and nine percent per annum thereafter, and

3. restore to unit employees at the State University of New York at Albany who were required to charge to accumulated leave absences that they were required to take on the day following Thanksgiving Day in 1977 and 1978, who had not previously requested the day off, and who had worked on the previous Wednesday and the following Monday, their accumulated leave so charged, and

4. reimburse former unit employees at the State University of New York at Albany who were required to take leave without pay on the day following Thanksgiving Day in 1977 or 1978, or to charge their
absences on those days to accumulated leave, who had
not previously requested the day off, and who had
worked on the previous Wednesday and the following
Monday at their daily rate of pay for such days plus
interest at three percent per annum until April 1,
1983 and nine percent per annum thereafter, and
5. post the attached notice at all work locations
normally used to communicate with unit employees at
the State University of New York at Albany.

DATED: May 13, 1983
Albany, New York

Harold R. Newman, Chairman

Ida Klaus, Member

David C. Randles, Member
NOTICE TO ALL EMPLOYEES

PURSUANT TO

THE DECISION AND ORDER OF THE

NEW YORK STATE

PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE

PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all unit employees of the State University of New York at Albany that:

1. we will not unilaterally require unit employees to absent themselves from work on the day after Thanksgiving Day and from charging those absences to accumulated leave or to forego the wages that would have been earned but for such absences.

2. we will reimburse unit employees at the State University of New York at Albany who were required to take leave without pay on the day following Thanksgiving Day in 1977 and 1978, who had not previously requested the day off, and who had worked on the previous Wednesday and the following Monday their wages lost on those days plus interest at three percent per annum until April 1, 1983 and nine percent per annum thereafter, and

3. we will restore to unit employees at the State University of New York at Albany who were required to charge to accumulated leave absences that they were required to take on the day following Thanksgiving Day in 1977 and 1978, who had not previously requested the day off, and who had worked on the previous Wednesday and the following Monday, their accumulated leave so charged, and

4. we will reimburse former unit employees at the State University of New York at Albany who were required to take leave without pay on the day following Thanksgiving Day in 1977 or 1978, or to charge their absences on those days to accumulated leave, who had not previously requested the day off, and who had worked on the previous Wednesday and the following Monday at their daily rate of pay for such days plus interest at three percent per annum until April 1, 1983 and nine percent per annum thereafter.

State University of New York at Albany

Dated ........................................

By .......................................................

(Representative) (Title)
This matter comes to us on the exceptions of Fred Greenberg to a hearing officer’s decision dismissing his charge that the Board of Education of the City School District of the City of New York (District) acted improperly when, in violation of its own bylaws, it permitted employees trained by the United Federation of Teachers (UFT) to represent fellow employees in more than two unsatisfactory rating reviews (105A hearings) per year and to be compensated by UFT for such service. Employees other than those trained by UFT were held to the bylaw provisions restricting them to two appearances a year without
This case is related to an earlier one, UFT (Barnett), 14 PERB ¶3017 (1981). We held then that UFT acted improperly by providing trained representatives in 105A hearings to its members but not to nonmembers. The instant charge, which is against the District rather than UFT, complains about discrimination in the treatment of representatives rather than in the treatment of those being represented. Moreover, the hearing officer noted that there was no discrimination in the treatment of those being represented in that both UFT members and nonmembers were confronted with the same choice: they could be represented by UFT-trained, regular, compensated representatives or by non-UFT trained, irregular, noncompensated representatives.

The hearing officer found that the District did accord preferred treatment to UFT trained representatives. She concluded, however, that this preferred treatment was not

1/Greenberg requested an opportunity to file a reply to the District's response to his exceptions. He was informed that the Rules of this Board do not provide for replies but that we accept and consider them when they arrive early enough so they do not delay the processing of exceptions. This did not satisfy Greenberg, who had asked for three weeks time in which to file a reply, and he renewed his request. Greenberg was granted several extensions of time in which to file his original exceptions, and the District's response does not raise any new issues. We, therefore, deny Greenberg's request and decide this matter on the record and the argument already before us.
improper because:

UFT is the exclusive bargaining representative of the unit in which charging party is a member. As such, UFT has the right to exclusivity regarding matters affecting the employment relationship, including representation of unit employees at 105A hearings.

She also concluded that the fact that the distinction violated the District bylaws is irrelevant. She reasoned that as the right to a hearing and its procedures is a term and condition of employment, the District cannot act unilaterally but must subject its actions to negotiation with UFT. The implication of this analysis is that the District's unilaterally established bylaws could be, and were, changed by agreement between it and UFT.

In essence, Greenberg's exceptions argue that it was discriminatory for the District to permit employees who were UFT trainees to act as regular, compensated representatives in 105A hearings without permitting other District employees to do so. Greenberg also complains that he was denied a hearing.

We find that the procedures followed by the hearing officer were correct and we affirm her decision. No hearing was required as the case presents no question of fact.

The representation of unit employees at 105A hearings is a term and condition of employment. UFT (Barnett), 14 PERB ¶3017 (1981). As such, UFT and the District may agree to restrict employee representation at such hearings to representatives of UFT only or to permit such representation by outsiders on any basis that does not deny unit employees their right to fair
representation at such hearings.\footnote{Compare Randolph Central School District, 10 PERB ¶3073 (1977) and New York City Board of Education (NEA), 11 PERB ¶4579 (1978), aff'd 12 PERB ¶3042 (1979).}

Notwithstanding the District's unilaterally promulgated bylaw, it is apparent that UFT and the District have agreed upon different ground rules. UFT's agreement can be inferred from the fact that it is paying its trainees for their work as 105A representatives. The District's agreement can be inferred from the fact that it has permitted the new practice.

The hearing officer correctly concluded that the new ground rules do not deny to unit employees their right to fair representation in 105A hearings.

NOW, THEREFORE, WE ORDER that the charge herein be, and it hereby is, dismissed.

DATED: May 13, 1983
Albany, New York

[Signatures]

Harold R. Newman, Chairman
Ida Klaus, Member
David C. Randles, Member