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State of New York Public Employment Relations Board Decisions from June 26, 1984

New York State Public Employment Relations Board

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Keywords

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

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

#2A-6/26/84

NIAGARA FRONTIER TRANSPORTATION AUTHORITY METRO BUS, INC.,

Respondent,

-and-

CASE NO. U-7314

ROBERT J. SMITH,

Charging Party.

ROBERT J. SMITH, pro se

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of Robert J. Smith to a decision of the Director of Public Employment Practices and Representation (Director) dismissing his charge against his employer, Niagara Frontier Transportation Authority Metro Bus, Inc. The charge complains of a violation of §209-a.1(a) of the Taylor Law but the Director found that it alleges no facts which would support a finding of interference, restraint or coercion. Smith was given two opportunities to amend his charge to allege facts which constitute a violation of the Taylor Law but he did not do so.

It appears from the charge that Smith, a bus operator, challenges the promotion of another bus operator to a supervisory position and that operator's subsequent return to his former job. Smith also complains that the employer's contract with the union should, but does not, set standards for the above stated conduct.

We affirm the decision of the Director that these allegations do not set forth a violation of the Taylor Law.

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

DATED: June 26, 1984
Albany, New York

Harold R. Newman, Chairman

Ida Klaus, Member

David C. Randles, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

#2B-6/26/84

In the Matter of

UNITED UNIVERSITY PROFESSIONS, INC.

Respondent,

-and-

CASE NO. U-7449

THOMAS C. BARRY,

Charging Party.

In the Matter of

UNITED UNIVERSITY PROFESSIONS, INC.,

Respondent,

-and-

CASE NO. U-7482

THOMAS C. BARRY,

Charging Party.

THOMAS C. BARRY, pro se

INTERIM DECISION

These matters come to us on the exceptions of Thomas C. Barry to decisions of the Director of Public Employment Practices and Representation (Director) dismissing his charges, both of which allege that the United University Professions, Inc. (UUP) violated the Taylor Law by using part of his agency shop fee payments in the support of activities of a political nature. The Director noted that the section of

the Taylor Law which allows for the agency fee has not been found illegal by any court and the Board has previously approved the UUP's refund procedure which allows it to use agency shop fee monies in support of political objectives so long as an objecting employee's money is refunded to him thereafter. Thus, without serving a copy of either charge on UUP, the Director dismissed them on the ground that they do not set forth a violation of the Taylor Law. We have consolidated these cases for decision.

Barry argues that it is illegal for UUP to use his money for a political purpose even temporarily. We rejected this proposition in 1978 when, in UUP (Eson), 11 PERB ¶3074 (1981), we found that UUP's procedure of collecting agency shop fees during the course of its fiscal year and refunding to objecting employees their pro rata share of expenditures in support of political and ideological causes at the end of the year, satisfied §208.3 of the Taylor Law.[1/] The decision of the U.S. Supreme Court in Ellis v. Brotherhood of Railway, Airline and Steamship Clerks, ___ US ___, 17 PERB ¶7511 (1984), raises the question whether our 1978 UUP (Eson) decision, is still appropriate.

[1/]This precedent has been applied consistently in several cases, the most recent being UUP (Barry), 17 PERB ¶3008 (1984).

Section 208.3 of the Taylor Law sanctions a wage or salary deduction of agency shop fees on behalf of employee organizations otherwise entitled to them which have:

> established and maintained a procedure providing for the refund to any employee demanding the return any part of an agency shop fee deduction which represents the employee's pro rata share of expenditures by the organization in aid of activities or causes of a political or ideological nature only incidentally related to terms and conditions of employment.

Relying in part upon the memorandum submitted in support of the bill which became §208.3 by its sponsor,[2/] we found that:

> the refund requirement was intended to limit the agency shop fee provision to the extent necessary to satify the prerequisite for constitutionality announced by the U.S. Supreme Court in Abood v. Detroit Board of Education, 431 US 209 (1977).[3/]

We then interpreted §208.3 and the Abood decision on which it was based as sanctioning the UUP refund procedure.

The U.S. Supreme Court has now expanded upon its Abood opinion in Ellis. In it, the Supreme Court dealt with a

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[2/]Memorandum of Senator John E. Flynn, reported in New York State Legislative Annual - 1977 at p. 225. The memorandum stated at p. 226:

> In accord with the U.S. Supreme Court decision in the Abood case, there is provision that only those unions that have established an appropriate rebate procedure will be entitled to an agency shop fee deduction.

[3/]UUP (Eson), 11 PERB ¶3068, at p. 3106 (1978).

question similar to the one before us, arising under the Railway Labor Act. That statute is silent on all relevant matters, but the Court read into it the proposition that a union may not use agency shop fees even temporarily in support of its political or ideological activities. Moreover, it may have done so in order to preserve the constitutionality of agency shop fee payments under that statute. The following quotations from the Ellis decision are relevant:

> "[T]he Act does not authorize a union to spend an objecting employee's money to support political causes."
>
> "[T]here is language in this Court's cases to support the validity of a rebate program . . . . On the other hand, we suggested a more precise advance reduction scheme . . . . [N]ow we hold that the pure rebate approach is inadequate . . . ." (emphasis supplied)
>
> "The only justification for this union borrowing would be administrative convenience. But there are readily available alternatives, such as advance reduction of dues and/or interest-bearing escrow accounts, that place only the slightest additional burden, if any, on the union. Given the existence of acceptable alternatives, the union cannot be allowed to commit dissenters' funds to improper uses even temporarily." (emphasis supplied)

In the light of this language, we now question the correctness of our interpretation of §208.3 of the Taylor Law as sanctioning UUP's refund procedure. If it is not correct, we question what alternative procedures would satisfy the statute, and what should be done about UUP's current agency shop fee

procedure. We therefore invite Barry and UUP to submit memoranda of law concerning these questions. Such memoranda should be submitted not later than July 20, 1984. Reply memoranda may be filed not later than August 10, 1984.

DATED: June 26, 1984
Albany, New York

Harold R. Newman, Chairman

David C. Randles, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of #2C-6/26/84

CITY OF ALBANY,

Respondent,

-and- CASE NO. U-6788

ALBANY POLICE OFFICERS UNION, LOCAL 2841, NEW YORK STATE INSPECTION, SECURITY AND LAW ENFORCEMENT EMPLOYEES, DISTRICT COUNCIL 82, AFSCME, AFL-CIO,

Charging Party.

VINCENT J. Mc ARDLE, JR., Corporation Counsel (W. DENNIS DUGGAN, ESQ., of Counsel), for Respondent

ROWLEY, FORREST and O'DONNELL, P.C. (RICHARD R. ROWLEY, ESQ., of Counsel), for Charging Party

BOARD DECISION AND ORDER

The charge herein was filed by the Albany Police Officers Union, Local 2841, New York State Inspection, Security and Law Enforcement Employees, District Council 82, AFSCME, AFL-CIO (Local 2841). It complains about statements made by responsible spokesmen for the City of Albany (City), from April 7, 1983 through April 29, 1983. It alleges that these statements violated §209-a.1 (a), (b) and (d) of the Taylor Law in that they constituted threats to lay off employees if a tentative collective bargaining agreement were not ratified and an arbitrator were to award a salary increase which exceeded that provided in the tentative agreement.

The City had negotiated with Local 2841 on behalf of two units of policemen for an agreement to succeed one that

expired on December 31, 1982. The union petitioned for arbitration on February 4, 1983. Nevertheless, negotiations continued and tentative agreements were reached on April 7, 1983. Those agreements were rejected by the union members at a ratification vote held on April 28, 1983.

On April 7, McCormack, the commanding officer of the administrative services bureau of the police department and a member of the City's negotiating team, told Renna and other unit employees that he thought that the City's salary offer was reasonable and that there might be layoffs if Local 2841 succeeded in obtaining a greater increase. Several days later McCormack told a larger group of unit employees that an excessive increase might lead to layoffs. On both occasions McCormack told the unit employees that a study conducted by the City indicated that the police force was overstaffed by 50 to 70 employees and he showed them a roster which underlined the names of the 50 employees with least seniortiy.

Our review of the record shows that it was not unusual for McCormack to join in ongoing conversations with unit employees, that neither conversation was initiated by McCormack, and that McCormack's demeanor was "cordial" and "friendly" throughout the discussions. The record does not indicate that unit employees had reason to feel under a compulsion to remain; instead, those who were present chose to attend and listen.

Unrelated to McCormack's statements, the Common Council president and the Corporation Counsel responded to reporters' questions on April 25, 28 and 29, and told them of the possibility of layoffs should an arbitrator award more than the City's last offer.

The record establishes that the City was not in a deficit situation during the course of the negotiations and that layoffs had not been discussed at the weekly meetings of the City's leadership dealing with its operations.

This matter comes to us on the exceptions of Local 2841 to the decision of the Administrative Law Judge (ALJ) that the City's conduct did not violate the Taylor Law. The ALJ distinguished between a threat of retaliation because either a union or covered employees exercises protected rights and a statement that there might be layoffs if the exercise of protected rights results in cost increases for the employer. This is a subtle distinction but we conclude that it is a sound one.[1/]

The statements of the City's representatives would be improper only if they were intended or likely to coerce employees into relinquishing rights guaranteed by the Taylor

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[1/]Accord: City of Easton, 9 PERB ¶9109, at pp. 228 and 229. (Pa. Labor Relations Bd., 1979). See also State of New York, 12 PERB ¶3009 (1979); City of Mount Vernon, 12 PERB ¶3108 (1979); County of Nassau, 16 PERB ¶3006 (1983).

Law, such as the right of the union's membership to decide whether or not to accept or reject a negotiated agreement or the right to take the dispute to arbitration. The City's representatives are entitled, however, to express opinions regarding the merits of the agreement and its potential economic consequences so long as they do not do so in a coercive manner nor subvert the authority of the Local's negotiators.[2/]

Having reviewed the record, we affirm the findings of fact and conclusions of law of the ALJ. At worst, McCormack's participation may have been indiscreet, but we do not find that his comments were made in a threatening manner or that they were intended to or were likely to coerce the unit employees into ratifying the agreement or rejecting arbitration.

The record also affords no basis for concluding that the statements of the president of the City Council and the Corporation Counsel were intimidating or designed to be so. The fact that the City was not running a deficit is not in itself sufficient evidence that its spokesmen lacked good faith when they conjectured about layoffs. The mere availability of funds does not establish any obligation that the funds be allocated to any specific purpose, such as salary increases.

[2/] Harborfields CSD, 5 PERB ¶3047 (1972).

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

DATED: June 26, 1984
Albany, New York

Harold R. Newman, Chairman

Ida Klaus, Member

David C. Randles, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

#2D-6/26/84

In the Matter of

COUNTY OF ERIE,

Respondent,

-and-

CASE NO. U-5866

LOCAL 1095, AFSCME, COUNCIL 66, AFL-CIO,

Charging Party.

EUGENE F. PIGOTT, JR., ESQ. (MICHAEL A. CONNORS, ESQ., of Counsel), for Respondent

MICHAEL A. TREMONT, ESQ., for Charging Party

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of Local 1095, AFSCME, Council 66, AFL-CIO (AFSCME) to the decision of an Administrative Law Judge (ALJ) dismissing its charge. The charge alleges that the County of Erie (County) both interfered with the protected rights of employees and refused to negotiate with AFSCME in January 1982 in that it transferred unit work to nonunit employees with the result that unit employees were laid off and overtime assignments were curtailed.

The unit employees performed work for the Department of Youth Services in several different titles. The unit includes full-time employees, meaning those who work 40 hours a week, and regular part-timers, meaning those who work 20 to 39 hours a week. AFSCME complains that in January 1982, work that had

previously been performed by the unit employees was assigned to occasional workers, meaning part-timers who work fewer than 20 hours a week.

The record shows that the work had been performed by such occasional workers before January 1982, and that their terms and conditions of employment had not been addressed in the parties' collective bargaining agreements. Based upon this history of the employment of occasional workers to perform the same work as the unit employees who work 20 or more hours a week prior to January 1982, the ALJ determined that the assignments involved had not been the exclusive work of the employees who constituted AFSCME's unit. Relying upon our decision in Guilderland CSD, 16 PERB ¶3038 (1983), and several earlier decisions, he ruled that the impact of the new work assignments upon full-time and regular part-time employees notwithstanding, there had been no showing of a Taylor Law violation.

AFSCME argues that the ALJ erred in determining that the assignments in question had not been unit work exclusively before January 1982. In support of this argument, it points to evidence in the record that before January 1982, 90% of the occasional workers had also held positions as full-timers or regular part-timers. It notes that this preponderance of unit employees performing the occasional assignments did not continue after January 1982. This, according to AFSCME,

demonstrates that the work of these occasional part-timers had been unit work until the County acted unilaterally to assign it to persons other than full-timers and regular part-timers. AFSCME further asserts that the role and function of occasional workers was changed in that prior to January 1982, they were hired to relieve temporary staff shortages while thereafter they were expected to perform ongoing assignments.[1/]

Reviewing the record, we affirm the decision of the ALJ that the County did not assign work that had been exclusively that of full-timers and regular part-timers to other persons. While most, but not all, of the occasional workers employed before January 1982 had also held positions as full-timers or regular part-timers, we find that they were not working in that capacity when they performed as occasional workers. We also find that both before as well as after January 1982, occasional workers were employed to perform ongoing assignments paralleling those of full-timers and regular part-timers as well as to relieve temporary staff shortages among the full-timers and regular part-timers.

1/AFSCME also argues that the County refused to negotiate the change or its impact. The charge, however, makes no such complaints. It merely complains about the County's unilateral action.

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

DATED: June 26, 1984
Albany, New York

Harold R. Newman

Harold R. Newman, Chairman

Ida Klaus

Ida Klaus, Member

David C. Randles

David C. Randles, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of #3A-6/26/84

TOWN OF ALMOND,

Employer,

-and- CASE NO. C-2763

CHAUFFEURS, TEAMSTERS, WAREHOUSEMEN & HELPERS LOCAL UNION NO. 65, IBT,

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 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 the Chauffeurs, Teamsters, Warehousemen & Helpers Local Union No. 65, IBT has been designated and selected by a majority of the employees of the above named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: All town maintenance employees of the Town of Almond.

Excluded: Maintenance Superintendent.

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with the Chauffeurs, Teamsters, Warehousemen & Helpers Local Union No. 65, IBT and enter into a written agreement with such employee organization with regard to terms and conditions of employment of the employees in the unit found appropriate, and shall negotiate collectively with such employee organization in the determination of, and administration of, grievances of such employees.

DATED: June 26, 1984
Albany, New York

Harold R. Newman, Chairman

Ida Klaus, Member

David C. Randles, Member