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State of New York Public Employment Relations Board Decisions from September 11, 1975

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from September 11, 1975

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

#2A-9/11/75

In the Matter of

AMALGAMATED TRANSIT UNION, LOCAL DIVISION 580

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

BOARD DECISION AND ORDER

CASE NO. D-0096

On October 28, 1974, Counsel to the Public Employment Relations Board charged the Amalgamated Transit Union, Local Division 580 (Union) with violating Civil Service Law Section 210.1 "in that it caused, instigated, encouraged, condoned and engaged in a strike against C.N.Y. CENTRO, Inc. on October 2 and 3, 1974". In its answer, the Union denied that there had been a strike and asserted that its discouragement of bus drivers employed by CENTRO from performing overtime work had been provoked by the conduct of CENTRO in "refusing to reinstate an employee...to his former employment as a bus driver in accordance with the terms of the contract."

A hearing was held and on April 16, 1975 the hearing officer issued her report and recommendations. That report reached a conclusion that the Union had struck and that the strike was not occasioned by any acts of extreme provocation by CENTRO. Upon the request of the Union, which objected to the hearing officer's report and recommendations, we heard oral argument. Having reviewed the record and considered the positions of the parties, we confirm the findings of fact and conclusions of the hearing officer for the reasons stated in her report. We summarize them briefly.

The Strike

There is a procedure by which the bus drivers employed by CENTRO sign up for regularly scheduled runs. They also sign up for regularly scheduled "trippers" at four-month intervals. These "trippers" constitute overtime work

which is not obligatory for the drivers. Nevertheless, CENTRO's operations depend upon this work being performed by drivers who undertake it. When CENTRO refused to reinstate a bus driver who had suffered a heart attack, the union advised the bus drivers, on September 27, to discontinue extra work effective October 2, 1974. On October 2, 1974 about 51 of 54 drivers who had signed up for "trippers" failed to appear for such work. The following day none of the 56 drivers who had signed up for "trippers" appeared for such work. On both days about half the "trippers" were cancelled, with the remaining ones covered by drivers who would otherwise have been assigned to charter work. Thus, many charters were cancelled on those days. The Union argues that it did not strike because the work that its member refused to do was voluntary. The hearing officer properly rejected this argument because CENTRO must be able to rely upon the drivers who sign up at four-month intervals and because, under these circumstances, a concerted refusal to perform even voluntary overtime work is a strike. She found that employees who seek the advantages of overtime work must accept the collateral responsibility of performing that work as scheduled.

Extreme Provocation

Although the bus drivers were upset by conduct that they deemed to be a violation of their contract, to wit, the refusal of CENTRO to reinstate a driver who had suffered a heart attack, CENTRO considered its action to be protected under the contract and justified by the need to prevent accidents. CENTRO agreed to arbitrate the contract issue and proposed an expedited arbitration procedure. The hearing officer properly found that the conduct of CENTRO did not constitute extreme provocation.

Impact

The impact of the strike was relatively slight. It did not affect public health or safety, but the public was inconvenienced. Even the public

inconvenience caused by the strike was limited by the circumstance that over 90 percent of the scheduled work was performed notwithstanding the strike against overtime work. It should also be noted that the Union believed, albeit mistakenly, that its conduct did not constitute a strike.

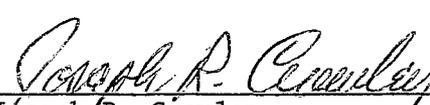
We find that the Amalgamated Transit Union, Local Division 580 violated Section 210.1 of the Civil Service Law in that it caused, instigated, encouraged, condoned and engaged in a strike as charged.

WE ORDER that the dues deduction privileges of Amalgamated Transit Union, Local Division 580 be suspended for a period of three months and that, if the employer does not normally deduct dues in equal monthly installments, it should not deduct more than three-quarters of the annual dues during the twelve-month period commencing this date; provided, however, that until Amalgamated Transit Union, Local Division 580 affirms that it no longer asserts the right to strike against any government, no dues shall be deducted on their behalf by CENTRO.

Dated: New York, New York
September 11, 1975



Robert D. Helsby, Chairman



Joseph R. Crowley



Fred L. Denson

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of : #2B-9/11/75
: :
TOWN OF RAMAPO, Employer, : BOARD DECISION AND
: ORDER.
- and - : :
NEW YORK COUNCIL 66, AMERICAN FEDERATION OF :
STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, : CASE NO. C-1072
: :
Petitioner, : :
- and - : :
TOWN OF RAMAPO UNIT OF THE CIVIL SERVICE :
EMPLOYEES ASSOCIATION, INC., : :
Intervenor. : :

This matter comes to us on exceptions of the Town of Ramapo Unit of the Civil Service Employees Association, Inc. (CSEA), intervenor herein, to a decision of the Director of Public Employment Practices and Representation finding appropriate a unit sought by N.Y. Council 66, AFSCME, AFL-CIO (AFSCME), the petitioner herein. In its response, AFSCME urges us to reject CSEA's exceptions on technical grounds. Further, arguing that the Director's determination granting its petition is correct, it nevertheless asserts that he erred in one significant finding which, if reversed, would render even more compelling the justification for the unit that it sought. In the case before the Director, the Town of Ramapo (Town), along with CSEA, opposed fragmentation of the existing unit. AFSCME indicated that if a separate unit of Highway Department employees was not appropriate, its alternative position would be that a separate blue collar unit would be appropriate, but it wished to participate in any election for a unit found to be appropriate.

Having reviewed the record, heard the parties' arguments, and read their briefs, we reject the unit sought and continue the existing unit.

Background

For several years, CSEA has been the representative of a unit of about 142 blue and white collar employees of the Town of Ramapo, and in that capacity it has negotiated successive collective agreements with the Town, its most recent agreement being for 1973-74. Of the approximately 82 blue collar employees in the unit, 47 are in the Highway Department (which has no white collar employees), with the rest in the Department of Public Works or Parks and Recreation. AFSCME petitioned for the decertification of CSEA in the overall unit and for its own certification in a unit of Highway Department employees. At the hearing, AFSCME amended its petition to specify that the employees it is seeking to represent are employed by the Town Superintendent of Highways (Superintendent) rather than by the Town itself. Much of the evidence and argument went to the question of whether either the Town or the Superintendent was the sole employer of the Highway Department employees or whether they were a joint employer. In his decision the Director wrote: "If the Superintendent is a sole or a joint employer of the highway department employees, these employees would perforce belong in a separate negotiating unit." Finding that the Town and the Superintendent jointly employed the Highway Department employees, he determined that the case for a separate unit for Highway Department employees was compelling, and he directed an election in that unit.

CSEA's exceptions assert that the Town is the sole employer of the Highway Department employees and that such employees share a community of interest with the other Town employees in the overall unit. AFSCME argues that the exceptions are technically defective by reason of their failure to comply with the requirements of §201.12(b) of our Rules which require that exceptions designate by page citations the portions of the record relied upon. Over the objections

of AFSCME, we rejected this argument but we required CSEA to file supplemental exceptions providing the required information. AFSCME was then permitted to file a supplemental response to exceptions and a supplemental brief in support thereof and it availed itself of this opportunity. The other AFSCME responses to the exceptions assert that Highway Department employees have a community of interest among themselves, which interest is in conflict with the interests of employees of other departments of the Town. The implication of these assertions is that a separate unit of Highway Department employees is required regardless of who their employer is. Although willing to accept the Director's conclusion of a joint employer, it states in its brief: "In view of the independence and statutory responsibilities of the Superintendent of Highways, AFSCME submits that he is the sole employer of Highway employees."

Discussion

Were we persuaded by the Director's analysis that the Superintendent and the Town were joint employers, or by AFSCME's analysis that the Superintendent is a sole employer of Highway Department employees, we would have to consider the appropriateness of a multi-employer unit in the light of the negotiating unit standards in CSL §207. But concluding as we do that the Town is a sole employer, we do not reach that question.

The circumstances that persuaded the Director that the Superintendent was a separate government who could be and was a joint employer are the statutory nature of his responsibilities^{1/} and the extent of his control over the working conditions of Highway Department employees. It is not unusual for public

^{1/} The Director wrote "It has long been recognized that the maintenance of highways and bridges is a governmental function [footnote omitted], and this duty devolves upon the elected Superintendent by statute."

officers of State and municipal governments to have responsibilities assigned by statute.^{2/} Most of the incidents of control over Highway Department employees that the Director finds are exercised by the Superintendent are exercised by persons who are "appointing officers" within the meaning of that term under the Civil Service Law. Such persons are not usually independent public employers. It would be significant if the Superintendent enjoyed the right, as concluded by the Director, to veto parts of an agreement negotiated by the Town that are related to non-fiscal terms and conditions of employment of Highway Department employees. The record, however, does not establish that this is the case. All that has been established is that the Town negotiators were deferential to the judgment of the Superintendent with respect to matters coming up in negotiations that involved his Department. What remains to distinguish the Superintendent from other department heads of the Town is that he alone is elected. We do not find that this circumstance is sufficient to constitute him as a separate public employer or government within the meaning of the Taylor Law. In this regard, we find little difference between a town superintendent of highways who is elected and county superintendents of highways who under County Law §400.4(a) are appointed. County superintendents of highways also have their duties specified by statute^{3/} and under local law many are "appointing officers".^{4/}

^{2/} e.g. See Labor Law §21 which specifies responsibilities of the State Industrial Commissioner and County Law §725 and Highway Law §102 which specify the responsibilities of the County Superintendents of Highways.

^{3/} County Law §725 and Highway Law §102.

^{4/} e.g. See Orleans County Local Law No. 2 of 1972, Otsego County Local Law No. 1 of 1962, Schuyler County Local Law No. 1 of 1951 and Orange County Local Law No. 1 of 1954. Also see Seely v. Kaplan, 24 Misc. 2d 381 (Albany County, 1960) re the Orange County Superintendent of Highways.

The Director relied upon our decision in Matter of Ulster County (3 PERB 4205, Aff'd County of Ulster v. CSEA, 37 App.Div. 2d 437 [3rd Dept. 1971]) for the conclusion that the Superintendent and the Town constituted a joint employer. That decision, in which we held a county and a sheriff were a joint employer, is inapposite. A sheriff exercises unique authority over deputy sheriffs^{5/} that are not duplicated by the heads of other departments of state or municipal governments.

Concluding as we do that the Town is the sole employer of persons employed by the Highway Department, we must resolve the question of whether those employees share a community of interest with other Town employees. On the evidence in the record we determine that they do.^{6/} We also determine that there is no conflict between their interest and those of other Town employees.^{7/} Thus we find no basis for isolating Highway Department employees from other blue collar employees of the Town. We also reject a separation of blue and white collar employees into different units in this case. Ordinarily we do establish separate units for blue and white collar employees of a single employer because of a presumption that the two groups of employees cannot negotiate effectively in a single unit. Where, however, as in this case, there is a long-standing history of negotiations in a single unit, which history

^{5/} See Matter of Flaherty v. Milliken, 193 N.Y. 564 (1908); Matter of O'Brien v. Ordway, 218 N.Y. 509 (1916); Matter of DeIorio v. County of Suffolk, 48 Misc. 2d 584 (1965). See also Boardman v. Holliday, 10 Paige 223 (1843); Edmunds v. Barton, 31 N.Y. 495 (1865).

^{6/} Although we do not here recite all the evidence on which we base this conclusion, we do give special emphasis to the occasional interchange of personnel and equipment between the Highway Department, the Sewer Division and the Department of Parks and Recreation.

^{7/} There is evidence that the negotiating representative was not successful in obtaining for Town Highway Department employees the demanded double-time which they sought, but indications are that the compromise settlement resulted from the normal give and take of collective bargaining in the course of which other Highway Department employees' demands were achieved, and not from a conflict of interest.

indicates that negotiations have been meaningful and effective, we do continue overall units (Matter of Town of Smithtown, 8 PERB 3016).

Accordingly, we reverse the decision of the Director, and we determine the unit which consists of employees of the Town as follows:

Included: All employees of the Town of Ramapo,

Excluded: 1. Members of the Town of Ramapo Police Department.

2. All employees in the unclassified service.

3. All employees in the exempt class of the classified service.

4. Elected officials.

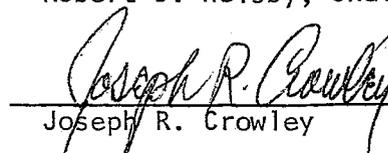
5. The officer or head of each department, office, or agency who has the power to appoint, pursuant to law, any employee appointed as a Deputy to such officer or head of department, office or agency and is paid as such, chief executive or director of each department, office or agency under the jurisdiction of a Board or Commission, the Chief Clerk of the Justice Court, all Town Attorneys, the Confidential Clerk to the Supervisor and the Publicity Director of the Town of Ramapo.

IT IS ORDERED that an election by secret ballot shall be held under the supervision of the Director among employees of the Town in the negotiating unit set forth above who were on the payroll immediately preceding this decision; and

IT IS FURTHER ORDERED that the Town shall submit to the Director, as well as to AFSCME and CSEA, within seven days from the date of receipt of this decision, an alphabetical listing of the employees in the negotiating unit set forth above who are employees on the payroll date immediately preceding the date of this decision.

Dated: New York, New York
September 11, 1975


Robert D. Helsby, Chairman


Joseph R. Crowley

Dissent of Board Member Fred L. Denson

I do not agree with either the rationale or result reached by the majority in reversing the decision of the Director.

In his decision, the Director has adequately enumerated several reasons why the Superintendent of Highways is a joint employer with the Town. As an elected official, the Superintendent has been granted certain "governmental powers" as delineated in Section 140 of the Highway Law, leaving little doubt that he is an employer within the meaning of CSL Section 201.6(a). I am unable to find a significant distinction between the present matter and our Ulster County decision that a Sheriff is a joint employer with a County. The Sheriff and the Superintendent of Highways are similar for Taylor Law purposes. Both are elected officials, both are liable for acts of negligence by their subordinates, both are responsible for the hire, discharge and supervision of employees and both are fiscally dependent upon a legislative body for appropriations. Granted, the duties of their offices are vastly different, but this has no impact upon whether or not they are joint employers. Thus, for reasons mentioned by the Director and for reasons of consistency with prior decisions by this Board and the Courts, it is my opinion that the Superintendent is a joint employer for Taylor Law purposes.

Whether or not the Town has afforded him the right to veto portions of a negotiated agreement involving his employees is not germane in this determination even though the majority has stressed this factor in support of its finding. The Superintendent of Highways is accountable to the electorate for his actions and is dependent upon the Town for appropriations only. The Town Board can neither bestow nor take away from him the power to veto parts of an agreement with employees in his department since, absent any statutory restriction in this regard, he inherently has this right by virtue of being an elected official. The fact that he may not have exercised his veto power does not mean that he does not have it. Much to the contrary, an appointed official has only

as much power as the appointing agency has granted; obviously, the appointing agency may withhold or grant veto powers to its appointees with regard to contract negotiations.

Although not discussed in the majority opinion, one factor of concern to the entire Board is the potential effect on existing units in other towns which include highway department employees, of a determination that the Superintendent of Highways is a joint employer. Each town having employees working for a Superintendent of Highways would be entitled to separate unit status, thus greatly increasing the potential number of bargaining units under the jurisdiction of this Board. Be that as it may, unless and until the definition of public employer as set forth in Section 201.6(a) of the Civil Service Law is changed by legislation to exclude Superintendents of Highways as public employers, a unit determination should not be made which is contrary to existing statutory as well as case law on the subject.

Not only do I disagree with the majority's finding that the Superintendent of Highways is not a joint employer, but assuming arguendo that I were to accept that position, I would still dissent from their decision. I disagree with their refusal to grant separate unit status to blue collar employees. As set forth in my dissenting opinion in Smithtown, 8 PERB 3016, 2017, as well as in several prior Board and Director decisions (Islip, 3 PERB 4213; Babylon, 3 PERB 4235; Sullivan County, 7 PERB 3117), the interests of blue collar workers and white collar workers are inherently different and they should not be placed in the same unit unless there are other special circumstances to dictate such.

I would sustain the decision of the Director.



Fred L. Denson

Dated: New York, New York
September 11, 1975