12-21-1976

State of New York Public Employment Relations Board Decisions from December 21, 1976

New York State Public Employment Relations Board

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

#2B-12/21/76

In the Matter of	:	
VILLAGE OF WAYLAND,	:	BOARD DECISION & ORDER
Respondent,	:	CASE NO. U-2006
-and-	:	
WAYLAND POLICE BENEVOLENT ASSOCIATION,	:	
Charging Party.	:	

BOARD DECISION AND ORDER

The charge herein was filed by the Wayland Police Benevolent Association (Association) on February 9, 1976. It alleges that the Village of Wayland (Village) violated CSL §§209-a.1(a), (b), (c) and (d) [1] in that it abolished the positions of its only three patrolmen because of the formation of the Association. In its answer, the Village denied that the jobs were eliminated because of the formation of the Association and alleged that its action was prompted by financial considerations.

After a hearing, lasting two days, the hearing officer found that the Village had abolished the positions of its three patrolmen in order to avoid having to negotiate with the recently formed Association. He concluded that

1] These sections make it improper practices for an employer "(a) to interfere with, restrain or coerce public employees in the exercise of their rights guaranteed in section two hundred two for the purpose of depriving them of such rights; (b) to dominate or interfere with the formation or administration of any employee organization for the purpose of depriving them of such rights; (c) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any employee organization; or (d) to refuse to negotiate in good faith with the duly recognized or certified representatives of its public employees."

this conduct violated CSL §§209-a.1 (a) and (c), but that it did not violate CSL §§209-a.1(b) and (d).[2]

As a remedy for the violation of CSL §§209-a.1(a) and (c), the hearing officer recommended that the Village be ordered to offer reinstatement to the three discharged police officers and to compensate them for wages and benefits lost as a result of the violation with three percent interest. He also recommended that the Village be ordered to cease and desist from engaging in further discriminatory acts against them and to post an appropriate notice to be supplied by this Board.

The Village has filed exceptions to the hearing officer's determination. The exceptions and supporting memoranda argue that:

1. the evidence does not support the findings of fact that its action was motivated by animus against the Association or by anything else but financial considerations.

2. the Village Law precludes this Board from ordering a Village to reestablish abolished positions as does the Taylor Law, because the abolition of a position is a management prerogative and,

3. because one of the positions was filled by a police officer employed pursuant to the Comprehensive Employment and Training Act (CTEA) with federal funds, the hearing officer could not order his reinstatement.

2] His reasoning with respect to the alleged violation of CSL §209-a.1(d) was that although the Association had requested negotiations on November 3, 1975, simultaneously with its request for recognition, it had not renewed the request for negotiations after December 8, 1975, on which date it was granted recognition. According to the hearing officer, the request for negotiations, having been made before the grant of recognition, was of no legal consequence even after the Association was recognized and because an employer is under no obligation to negotiate until it has been requested to do so, he dismissed the allegation of a "(d)" violation.

The Association did not file any exceptions to the hearing officer's dismissal of the alleged violations of CSL §§209-a.1(b) and (d). It responded to the Village's exceptions by urging that the Decision and Recommended Order of the hearing officer be made final.

Having reviewed the record, we determine that the hearing officer's analysis of the evidence is sound and we confirm his findings of fact. We also confirm those of his conclusions of law that led to the determination that the Village had violated CSL §§209-a.1(a) and (c).[3]

The analysis contained in his opinion is sufficient to answer all of the Village's exceptions except the one relating to the employee whose position had been financed by CETA funds. On that, we have already indicated that persons working for a public employer covered by the Taylor Law are employees of that covered public employer and are entitled to the protections of the Taylor Law even though their salary and benefits are financed by federal funds. (Matter of Amityville Public Schools, 5 PERB ¶3043 [1972]).

ACCORDINGLY, we confirm the determination of the hearing officer and

WE ORDER that:

1. The Village forthwith offer reinstatement to Ruscitto, Muhleisen and Zigenfus;

2. The Village forthwith compensate Fuscitto, Muhleisen and Zigenfus for any wages and benefits lost as a result of the violation found herein, plus interest at the rate of three percent minus the amount of wages actually earned by each from the time of his termination until his reinstatement.

3] We do not confirm the reasoning of the hearing officer that a request for negotiations, made in advance of recognition and simultaneously with a request for recognition, is a nullity and without legal consequence as an appropriate request after recognition has been granted. However, inasmuch as the Association has not directed any exceptions to this conclusion, we treat the allegation of a "(d)" violation as having been withdrawn and do not make any determination on it. (See §204.14 of our Rules)

3. The Village cease and desist from engaging in similar coercive and discriminatory acts toward Ruscitto, Muhleisen and Zigenfus because of their exercise of rights protected by the Act; and

4. The Village conspicuously post appropriate notices to be supplied by this Board at locations ordinarily used for written communications to employees in the Police Department.

Dated at Albany, New York

This 21st day of December, 1976

ROBERT D. HELSBY, Chairman

JOSEPH R. CROWLEY, Member

IDA KLAUS, Member

APPENDIX

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 our employees that:

1. WE WILL forthwith offer reinstatement to Patrolmen Ruscitto, Muhleisen and Zigenfus and compensate each of them for any wages and benefits lost as a result of the elimination of their positions, plus interest at the rate of three percent minus the amount of wages actually earned by each from the time of his termination until his reinstatement.

2. WE WILL neither discriminate nor interfere with, restrain or coerce employees as a result of their exercise of rights protected by CSL §202.

.....
Employer

Dated..... **By**.....
(Representative) **(Title)**

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of	#2C-12/21/76
CORNING POLICE DEPARTMENT, STEUBEN COUNTY CHAPTER CSEA, Respondent, -and- CITY OF CORNING, Charging Party.	BOARD DECISION AND ORDER CASE NO. U-2295

The charge herein was filed by the City of Corning (City) on September 20, 1976. As amended, it alleges that the Corning Police Department, Steuben County Chapter CSEA (respondent) violated CSL §209-a.2(b) in that it improperly insisted upon the negotiation of four demands that are not mandatory subjects of negotiation by requesting an arbitrator to issue an award granting those demands. Respondent's answer asserts that the demands in question are mandatory subjects of negotiation. As this matter involves a disagreement as to scope of negotiations, it was accorded expedited treatment under §204.4 of our Rules and is before us on the stipulation and briefs of the parties, without a report or recommendation from a hearing officer.

The demands in question are:

1) "The officer will receive payment at time and one-half his regular hourly rate for hours worked due to a shift change for which he did not receive written notification at least forty-eight (48) hours prior to such change, said notification to contain the reason for such change."

2) "There will be no shift change in a three (3) month period, except in a police emergency, which does not include a shortage of manpower."

3) "There shall be only one (1) work schedule for each three (3) - month period which is to be posted in three (3) places."

4) "There will be a rotation of days off."

We determine that the first demand is a mandatory subject of negotiation. It is essentially a demand for reasonable notification of a shift change and for a premium wage rate to compensate employees for the inconvenience caused them when such notification is not given. Reasonable advance notice is a proper demand for fair treatment. Premium wage rates for the purpose here involved are not unusual. Such premiums are found in the minimum wage orders promulgated by the New York State Department of Labor. For example: the Minimum Wage Order for the Laundry-Cleaning and Dying Industry establishes a premium rate for employees who are inconvenienced by having to work a split shift (12 NYCRR §135-1.7) and the Minimum Wage Order for the Restaurant Industry requires premium rates for employees who are inconvenienced by having to report for duty on a day when not assigned to actual work (12 NYCRR §137-1.6) or by work spread out over an excessive number of hours (12 NYCRR §137-1.7).

The other three demands in question are all covered by our determination in Matter of City of White Plains, 5 PERB, ¶3088 (1972). In that Decision, we said (at p. 3015):

> "It is the City alone which must determine the number of firemen it must have on duty at any given time. It cannot be compelled to negotiate with respect to this matter. However, there are many ways in which the schedules of individuals and groups of firemen may be manipulated in order to satisfy the City's requirement for fire protection. It is this manipulation of the schedules of individuals and groups of firemen which is involved in the Fire Fighters' demand. Within the framework which the City may impose unilaterally that a specified number of Fire Fighters must be on duty at specified times, the City is obligated to negotiate over the tours of duty of the Fire Fighters within its employ."

Applying that analysis, we determine that the second and third demands are not mandatory subjects of negotiation and that the fourth is. Both the second and third demands would compromise the right of the City to determine the number of police it should have on duty at any given time.

Except in a police emergency, the City would not be permitted to change the schedule of policemen so as to alter the number of men who would be on duty

at any time or to replace absent policemen in order to maintain the desired complement.

The fourth demand does not interfere with the City's prerogative of determining the number of policemen it should have on duty at a given time. Rather, it is directed to the manipulation of the schedules of individuals and groups of policemen, which can be accomplished in a manner that respects the right of the City to determine its manpower needs.

NOW, THEREFORE, in view of the above conclusions of law, with respect to those matters therein that we determine to be mandatory subjects of negotiation, we find that respondent did not insist upon negotiations improperly because there is a duty to negotiate over them, and we dismiss the charge. With respect to those matters that we determine not to be mandatory subjects of negotiation, we find that respondent did insist upon negotiations improperly and

WE ORDER respondent to negotiate in good faith with the City of Corning.[1]

Dated at Albany, New York
This 21st day of December, 1976

ROBERT D. HELSBY, Chairman

JOSEPH R. CROWLEY, Member

IDA KLAUS, Member

1 Respondent's duty to negotiate in good faith over such non-mandatory subjects of negotiation contemplates their withdrawing such demands from arbitration.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of AUBURN CITY UNIT, CAYUGA COUNTY CHAPTER, CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., Charging Party, -and- THE CITY OF AUBURN, Respondent.	#2D-12/21/76 BOARD DECISION AND ORDER CASE NO. U-2175

On June 28, 1976, the Auburn City Unit of the Cayuga County Chapter of CSEA (charging party) filed a charge under CSL §209-a.1(d) alleging that the City of Auburn (respondent) had refused to negotiate in good faith in that it unilaterally promulgated a residency requirement covering employees in a unit represented by the charging party. The respondent acknowledged that it had promulgated a residency requirement as alleged in the charge, but defended its actions on the ground that the residency requirement was not a mandatory subject of negotiation so that its conduct was not violative of the Taylor Law. As the dispute involves a disagreement as to the scope of negotiations under the Taylor Law, the matter has been transferred to this Board pursuant to §204.4 of our Rules.

After receiving a letter brief from the charging party and hearing oral argument by the respondent, we sought additional comment on the legal issue involved in the case. Memoranda of law and oral argument were solicited and received from various public employer associations and employee organizations.

FACTS

During negotiations between the charging party and the respondent for an agreement to become effective on July 1, 1976, a proposal was submitted by the respondent on March 20, 1976 that would have required not only new employees but also existing employees who resided within the city on the effective date of the agreement to continue to reside within the city.[1] It was rejected by the charging party. Thereafter, on June 3, 1976, the Auburn City Council enacted an ordinance amending the municipal code of the respondent which embodied the substance of the rejected negotiations proposal.[2] Since its enact-

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1 The respondent's proposal was as follows:

> "All employees covered by this Agreement shall reside within a ten mile radius of the City of Auburn, but in no event shall they reside outside of Cayuga County, except Local Public Officers who must by statute reside in the City of Auburn. A Public Officer is defined as one who is appointed to discharge a public duty and receives a compensation for the same. Classifications presently considered Public Officers contained under this Agreement are as follows: Court Clerk and Stenographer, Registrar of Vital Statistics, employees designated as Deputy City Treasurer and Deputy City Clerk, Plumbing Inspector, Housing Code Inspector, Building Inspector, Sealer of Weights and Measures, Dog Warden. All new employees and all existing employees now residing within the City of Auburn, effective upon the date of this Agreement, will be required to reside within the City of Auburn.
>
> "A determination pursuant to the New York State Public Officers Law will be made when a new classification is added under this Agreement."

2 The ordinance provides:

> "Section 7-54. No new person shall be employed by the City unless at the commencement of his or her employment with the City said employee is a domiciliary of the City of Auburn.
>
> "In the event a City employee after commencing working for the City moves his domicile outside of the City of Auburn, his or her employment with the City of Auburn shall be terminated immediately upon said event occurring.
>
> "City employees who are legally residing outside of the City of Auburn at the time of adoption of this Ordinance shall not be required to move back into the City.
>
> "This Ordinance shall take effect immediately upon adoption."

ment, the City Manager has refused to negotiate over the residency requirement. It is this refusal to negotiate, in reliance upon the ordinance, and not its enactment, that now concerns us.

Although the ordinance contains three provisions regarding residency, the charge relates only to one. The charging party does not complain about the requirement that no new person shall be employed by the respondent unless, at the commencement of such employment, the employee resides in the City of Auburn. Obviously, it does not complain of the provision that authorizes current city employees who were residing outside of the City of Auburn at the time of the enactment of the ordiance to continue to reside outside of the city. The charge is solely directed to the provision that a city employee would be fired if he should move from the city and, more particularly, to its impact upon persons employed by the respondent prior to the adoption of the ordinance. Thus, the narrow issue before us is whether a public employer violates its duty to negotiate in good faith when it unilaterally prohibits employees from moving out of the community upon penalty of discharge, where such employees were not hired subject to such a residency restriction.

DISCUSSION

The question herein is not before us for the first time. In Matter of Local #650, AFSCME and City of Buffalo, 9 PERB ¶3015, we ruled that, while a decision whether or not to offer employment only to prospective employees who meet a residency requirement is a management prerogative, an employer may not unilaterally impose residency requirements upon persons who are already employed by it. In general, we confirm our holding in that case. However, the briefs call to our attention an interesting question that requires further consideration. If a residency requirement is a qualification for initial employment, and we believe that it is, may an employee, deemed qualified for em-

ployment prior to the residency requirement be disqualified by the subsequent imposition of a new qualification for his continued employment? We conclude that an employee who enjoys the protections of CSL §75 may not.[3]

As a matter of law, tenured employees are exempt from a residency requirement imposed subsequent to their hire. For such employees, a residency requirement is thus prohibited by law and the imposition of such a requirement upon them is not a mandatory subject of negotiation. It may be argued that, since individuals can waive their exemption from such a residency requirement, their employee organization can waive it on their behalf in a collectively negotiated agreement in consideration for benefits received in that agreement (See Antinore v. State of New York, 49 App.Div. 2d 6 [4th Dept., 1975], aff'd. ___ NY ___ [November 16, 1976]). Even if this were so, the imposition of a residency requirement upon already tenured employees is not a mandatory subject of negotiation because "[a]n employee organization cannot be compelled to negotiate over a demand that statutory rights of employees whom it represents be waived." (Matter of City of Binghamton, 9 PERB ¶3026 [1976], at p. 3045). Thus,while the respondent need not negotiate over a residency requirement for existing tenured employees, it may not impose such a requirement unless the employees' rights have been properly waived.

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3. Accord: an opinion of the Commissioner of Education in Matter of Halloran, 72 St. Dept. Rep. 17 (1951) overturning a requirement imposed by the New York City Board of Education that all members of its professional staff take a course qualifying them for the American Red Cross Standard First Aid Certificate. He reasoned that,

> "the taking and the completion of a course is a qualification for teaching and not a duty. The teacher's qualifications are set at the time of employment. That board of education, particularly after a teacher achieves tenure, may not add to these qualifications, dismissing a teacher for subsequent failure to meet them. The tenure law would be meaningless if this were so."

A residency requirement is generally a term and condition of employment. It may, however, be a continuing qualification for employment. An employee who is hired subject to a residency requirement continues to be subject to it as a qualification set at the time of his hire. But for the implications of CSL §75 and tenure, it would be a mandatory subject of negotiation for employees not hired subject to it. Therefore, the reasoning of our decision in Local #650 remains valid for employees not hired subject to a residency requirement who do not enjoy the protections of CSL §75. The respondent violates its Taylor Law duty to negotiate in good faith when it unilaterally imposes a residency requirement upon them subsequent to the time of their employment.

NOW, THEREFORE, in accordance with this above finding of fact and conclusions of law, and with regard to this specific violation of the Act that we have found,

WE ORDER the City of Auburn to negotiate in good faith with the Auburn City Unit, Cayuga County Chapter, Civil Service Employees Association, Inc. concerning a residency requirement for existing employees who are not subject to CSL §75; in all other respects, the charge should be, and hereby is, dismissed.

DATED: Albany, New York
December 21, 1976

Robert D. Helsby, Chairman

Joseph R. Crowley

Ida Klaus

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of	:	#2E-12/21/76
TOWN OF ISLIP, Employer,	:	
-and-	:	
LOCAL 237, I.B.T., Petitioner,	:	Case No. C-1394
-and-	:	
C.S.E.A., INC., SUFFOLK COUNTY CHAPTER, TOWN OF ISLIP UNIT, 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 LOCAL 237, I.B.T.

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 employees in the white collar unit included in the classifications set forth in attached Schedule "A".

Excluded: Elected or appointed officials, department heads and deputies, designated confidential employees, part-time, seasonal and temporary employees.

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with LOCAL 237, I.B.T.

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 December, 19 76.

ROBERT D. HELSBY, CHAIRMAN

JOSEPH R. CROWLEY

IDA KLAUS

PERB 58 (2-68)

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Engineering Aide
Engineering Inspector
Principal Engineering Aide
Sr. Draftsman
Sr. Engineering Aide
Building Inspector
Building Plans Examiner
Fire Prevention Inspector
House Numbering Clerk
Housing Inspector
Plumbing Inspector
Sr. Building Inspector
Sr. Housing Inspector
Sr. Zoning Inspector
Zoning Inspector
Community Relations Assistant
Community Relations Specialist
Neighborhood Aide
Research Technician
Environmentalist I
Planner
Sr. Planner
Auditor
Sr. Account Clerk
D&A Community Coordinator
Drug & Alcohol Counselor I
Drug & Alcohol Counselor II
Clerk-Spanish Speaking
Labor Specialist I
Cultural Affairs Supervisor

SCHEDULE A

White Collar titles in the Town of Islip are as follows:

Clerk
Clerk-Typist
Mail Clerk
Sr. Clerk-Typist
Stenographer
Sr. Stenographer
Principal Clerk
Budget Analyst
Assessment Aide
Assessment Assistant
Sr. Assessment Assistant
Law Assistant I
Legal Stenographer
Ordinance Inspector
Sr. Zoning Inspector
Account Clerk
Administrative Aide
Sanitation Inspector
Switchboard Operator
Micrographics Operator
Computer Operator I
Computer Programmer
Key Punch Operator
Sr. Computer Programmer
Clerk-Handicapped
Traffic Technician I
Traffic Technician II
Administrative Assistant
D&A Program Co-ordinator
Hotline Coordinator
Principal Stenographer
Public Relations Specialist
Recreation Leader
Assistant Rec. Center Manager
Recreation Aide
Recreation Specialist
Assistant Recreation Leader
Environmentalist II
Environmentalist III
Exec. Secretary to Bicentennial Committee
Community Relations Assistant
Senior Citizens Aide
Sr. Citizens Program Supervisor
Sr. Citizens Center Manager
Environmental Analyst
Engineer-in-Training
Assistant Civil Engineer
Draftsman

Engineeri