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State of New York Public Employment Relations Board Decisions from October 12, 1977

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from October 12, 1977

Keywords

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

Comments

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

#2A-10/12-13/77

In the Matter of

BRIGHTON TRANSPORTATION ASSOCIATION,

Respondent,

-and-

RICHARD RAZ

Charging Party.

BOARD DECISION AND ORDER

CASE NO. U-2543

This matter comes to us on the exceptions of Richard Raz, charging party herein, from a hearing officer's decision dismissing his charge that the Brighton Transportation Association (BTA) violated §209-a.2(a) of the Taylor Law in that it breached its duty of fair representation to him when it refused to take his grievance to arbitration. Mr. Raz had been a bus driver for the Brighton Central School District for several years, driving in both the morning and afternoon runs. During that period of time, he was separately employed as a police officer by the Town of Brighton working the midnight shift. He was transferred to the morning shift by the Town and, therefore, could no longer drive the morning run for the School District. He then asked the District's Director of Transportation to give him part-time status, assigning him the afternoon run only. She refused. Raz's status was changed to substitute driver, but he was never called as a substitute.

Raz's grievance related to his being denied status as a part-time driver only. When it was denied at Stage 1, BTA appealed but it was denied again at Stage 2. Thereafter, BTA held a meeting at which its attorney persuaded them to take the grievance to Stage 3, which is arbitration. Subsequently, several

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members of BTA expressed concern that they had voted without knowing all the facts and a second meeting of BTA was held. The District's Director of Transportation was invited and attended. She satisfied the members of BTA that the grievance was without merit and they reversed their previous action and decided not to take the grievance to arbitration. Mr. Raz had not been available to attend either meeting.

The hearing officer is correct in his conclusion of law that an employee organization need not carry every grievance to arbitration so long as it administers all grievances fairly, impartially and in good faith. The circumstances in this case raise two questions as to whether that test was met. First, there is the testimony of another driver that he had offered to switch runs with Mr. Raz but that the District's Director of Transportation had declined the offer. This testimony might reflect upon the merits of the grievance. However, it cannot reflect discredit upon BTA because the circumstance was not brought to the attention of the membership when they decided not to arbitrate the grievance.

The second troublesome fact is that the Director of Transportation told the members that she had not assigned Mr. Raz work as a substitute driver for personal reasons, that is, because he had been harassing her. If, as appears likely, the harassment related to action taken by Mr. Raz to pressure her to grant him the afternoon run that he was seeking, those actions might have been sufficiently related to his grievance to make improper her refusal to assign him work as a substitute. The hearing officer correctly noted that the BTA membership was not asked to process a grievance regarding the referral to assign substitute work to Mr. Raz. Mr. Raz argues, however, that they should have concluded not only that the Director of Transportation's personal antipathy to him was improper but that it antedated and motivated her refusal to assign him an afternoon run. On the record, BTA could have concluded that this antipathy

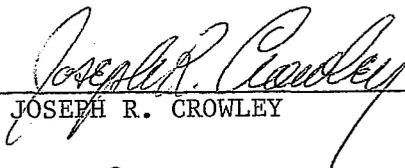
grew out of events that followed her denying him an afternoon run and was not a motivation for that denial.

We believe that the procedures followed by BTA in deciding not to take the grievance to arbitration were more casual than they should have been. Greater effort should have been made to give Raz an opportunity to try to persuade BTA to process his grievance further. In particular, it should have given him an opportunity to respond to the presentation of the District's Director of Transportation. However, the evidence does not indicate that BTA's conduct was improperly motivated or so negligent or irresponsible as to constitute a breach of the duty of fair representation.

ACCORDINLY, WE AFFIRM the finding of the hearing officer.

NOW, THEREFORE, WE ORDER THAT the charge herein be dismissed.

Dated, New York, New York
October 12, 1977



JOSEPH R. CROWLEY



IDA KLAUS

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of	:	#2B-10/12-13/77
CHURCHVILLE-CHILI CENTRAL SCHOOL DISTRICT,	:	<u>BOARD DECISION & ORDER</u>
Respondent,	:	
- and -	:	
CHURCHVILLE-CHILI EDUCATION ASSOCIATION,	:	<u>CASE No. U-2273</u>
Charging Party.	:	

The charge herein, which was filed by the Churchville-Chili Education Association (Association), alleges that the Churchville-Chili Central School District (District) committed an improper practice in violation of §§209-a.1(a) and (d) of the Taylor Law in that it unilaterally and without proper motivation changed certain terms and conditions of employment of unit employees. During the life of an agreement, the District unilaterally reduced the hours of summer employment of guidance counselors and of the Director of Physical Education without contemplating any reduction in the work produced by these employees. The hearing officer determined that this constituted a refusal to negotiate and the District has not filed exceptions to that determination. The hearing officer also determined that the District's unilateral abolishment of the position of Television Director and its assignment of the duties of that position to the Chairman of the Library Department was a refusal to negotiate. This determination, too, is not before us because the District has filed no exceptions.

The Association has taken exception to that part of the hearing officer's decision that dismisses its charge that the District failed to negotiate in good faith when it unilaterally assigned to the Director of

Physical Education two teaching periods. The hearing officer determined that the assignment of a second teaching hour was authorized by Section III.K of the agreement which permits the District to assign two classes to any department chairman who supervises between ten and thirteen teachers and that the number of teachers in physical education falls within that number. The Association argues that this contract clause applies "only to 'Department Chairpersons'" and that "The Director of Health, Physical Education and Swimming is not a 'Department Chairperson', but is a Director." (Emphasis as in the Association's brief). It also argues that the Director supervises between forty-eight and fifty-three positions because his department includes coaches of intramural and interscholastic sports, among others.

The basic point of difference between the Association and the hearing officer is the hearing officer's conclusion that the Director of Physical Education has several different and separable assignments. He finds divisible the assignments of Chairman of the Department of Physical Education and Director of Athletics. It is in the one capacity that he is subject to Section III.K of the contract and was assigned a second class because he supervises no more than thirteen teachers. It is in the other that he supervises a large number of coaches and other employees. The hearing officer finds support for his conclusion in the fact that the Director is separately compensated for the two positions. This derives from an interpretation of Exhibit CP 3. It shows a basic salary for the Director of Physical Education supplemented by two stipends. One is for his supervisory responsibilities as Department Head, and the other for his work as the Director of Health, Physical Education and Swimming Programs. We agree with the hearing officer that this establishes the divisible nature of the Director's assignments.

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The Association also makes an argument that even if, as a matter of law, the assignments are divisible, the District has - by past practice - treated the assignments as one. The basis for this position is that when the position was created in 1970, it involved the teaching of two periods but that in 1971-72, with the inclusion of after school swim activities in the Director's responsibilities, the teaching assignment was reduced to one. There is an explanation for this other than the District's acquiescence in treating the divisible assignments as one. It is that the teaching workload was reduced at a time when the Director was given charge of the after school swim program so that his total workload would not be so onerous as to interfere with the performance of his several - albeit separable - duties; thus, when the after school swim program was abandoned for the 1976-77 school year, the reason for cutting the teaching assignment evaporated..

We affirm the conclusion of the hearing officer that the assignment of a second teaching period to the Chairman of the Department of Physical Education was authorized by the contract and therefore, did not involve a refusal to negotiate.

The Association makes a request in its exceptions for a modification of his order. This request is not in the nature of an exception because it is beyond question that a remedial order of the kind requested by the Association would have been illegal on June 16, 1977 when the hearing officer's decision was issued. By virtue of L. 1977 c. 429 which became effective on July 12, 1977 and which amended §205.5(d) of the Taylor Law, this Board now has expanded authority to prescribe remedies for a violation of the duty to negotiate in good faith. The Association requests us to use that expanded authority to order the District to restore the status quo ante for guidance counselors, the Director of Physical Education, the Television Director and the Chairman of the Library Department and to make them whole

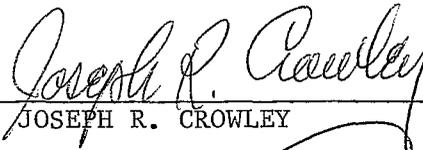
for any losses that they may have suffered.

The District responds that the request must be disregarded because "The Charging Party is asking the Board to exercise authority now that it did not possess in June or during any time in which such exceptions might have been timely filed. . .". It argues "that the Board may not exercise its new powers to this or any other case decided prior to July 12, 1977."

~~We believe that it would be inappropriate to issue a remedial order that was first authorized by an amendment to the Taylor Law that took effect on July 12, 1977 -- in a case such as this in which the hearing officer's decision was issued before that date.~~^{1/}

NOW, THEREFORE, WE ORDER the Churchville-Chili Central School District to negotiate in good faith with the Churchville-Chili Education Association regarding the hours of summer employment of guidance counselors and the Director of Physical Education and the assignment of the duties of the Television Director to the Chairman of the Library Department.

Dated: New York, New York
October 12, 1977


JOSEPH R. CROWLEY


IDA KLAUS

^{1/} On that day the Association could still have filed exceptions which could have urged reconsideration of the proposed remedy of the hearing officer. Section 204.10 of our rules permits the filing of exceptions within 15 working days of receipt of the hearing officer's decision. The decision was received by the Association on June 20, 1977. The 15th day was July 12, 1977. Further, under Section 204.14(c) of our rules, we could have decided to review the remedial action of the hearing officer until July 19, 1977. Even though the time limitation expressed in Section 204.14(c) of our rules may not be obligatory in a situation in which the remedial power of this Board was expanded during the intervening period, we think that it would not be appropriate for us to exercise our discretion to alter the remedy under these circumstances.

We turn, therefore, to the merits of the firefighters' exceptions. After the underlying grievance had been denied at Stage 1, the firefighters demanded arbitration on November 5, 1976. That demand was refused by the fire district in writing on November 15, 1976. On November 22, counsel to the firefighters wrote the fire district that the fire district's refusal to participate in the arbitration was "rejected" and that he was advising the grievant "to resort to his civil remedies". On December 2, 1976, the fire district responded negatively to the firefighters' letter of November 22 and, on December 10, the firefighters were told orally that "the position of the Board was final...." The firefighters argue that the charge is timely because the fire district did not refuse to participate in the arbitration of the grievance until December 10, 1976. The hearing officer found that the fire district refused to participate in the arbitration on November 15, 1976 and that the charge was filed more than four months thereafter. He wrote:

"The charging party takes the somewhat anomalous position that, because respondent's attorneys were courteous enough to further discuss and explain respondent's position on going to arbitration, the original rejection was something other than the final word. Not once, however, did respondent's attorneys indicate that it would reconsider its decision of November 15, which stands, therefore, as the date from which the four months in which an improper practice charge could be timely filed began to run."

We agree with this reasoning. Moreover, even if the charge were timely, we would dismiss it because it does not set forth a violation of Section 209-a.1(d) of the Taylor Law. Expressing no opinion on the obligation of the fire district to process the grievance through arbitration, we note that the duty to arbitrate derives from the contract between the parties. In Matter of St. Lawrence County, 10 PERB ¶13058 (1977) we determined that breach of a collectively negotiated contract does not

of itself constitute a refusal to negotiate.³

NOW, THEREFORE, WE ORDER that the charge herein be dismissed.

Dated: New York, New York
October 12, 1977



JOSEPH R. CROWLEY



IDA KLAUS

³ To the same effect, see Section 205.5(d) of the Taylor Law as amended by Chapter 429 of the Laws of 1977 which provides that this Board "shall not have authority to enforce an agreement between an employer and an employee organization and shall not exercise jurisdiction over an alleged violation of such an agreement that would not otherwise constitute an improper employer or employee organization practice."

#2D-10/12-13/77

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

CITY OF BINGHAMTON,	In the Matter of	:	
	Respondent,	:	BOARD DECISION AND ORDER
-and-			
		:	Case No. U-2662
BINGHAMTON FIREFIGHTERS, LOCAL 729, IAFF, AFL-CIO,		:	
	Charging Party.	:	

	In the Matter of	:	
BINGHAMTON FIREFIGHTERS, LOCAL 729, IAFF, AFL-CIO,		:	Case No. U-2776
	Respondent,	:	
-and-			
CITY OF BINGHAMTON,		:	
	Charging Party.	:	

On April 18, 1977, the Binghamton Firefighters, Local 729, IAFF, AFL-CIO (hereinafter Local 729), filed a charge alleging that the City of Binghamton (hereinafter employer) refused to negotiate with it in violation of Section 209-a.1(d) of the Taylor Law with respect to personnel on "permanent 207-a status".^{1/}

^{1/} This refers to Section 207-a of the General Municipal Law which provides that a fireman "who is injured in the performance of his duties . . . shall be paid by the municipality or fire department by which he is employed, the full amount of his regular salary or wages until his disability arising therefrom has ceased . . .". "Permanent" 207-a status is not a statutory construct. Rather, it is the employer's designation of those firemen who are paid pursuant to Section 207-a who are not expected to ever recover enough to return to duty.

In its answer the employer admits that it had refused to negotiate with Local 729 regarding the firemen in permanent Section 207-a status. It justifies its refusal by arguing that those persons are no longer public employees under the Taylor Law.

On July 11, 1977, the employer filed a charge alleging that Local 729 refused to negotiate in good faith with it when Local 729 sought to compel it to arbitrate terms and conditions of 20 permanently disabled firemen who are receiving benefits under General Municipal Law Section 207-a.

The two proceedings have been consolidated. As both involve a disagreement as to the scope of negotiations under the Taylor Law, they are being processed under Section 204.4 of our Rules of Procedure which provide for submission of the dispute to this Board without a report and recommendation from a hearing officer.

FACTS

The facts as stipulated by the parties are:

"1. On February 1, 1977, at the first negotiation session for a new contract, representatives of the City presented the annexed Exhibit A to representatives of the Binghamton Firefighters, Local 729, IAFF.

[Exhibit A is the following statement of the employer: 'We do not intend to negotiate with Local 729 as to terms and conditions of employment of all personnel in permanent 207-a status upon the ground that those persons are no longer public employees under the Taylor Law.']

2. The Binghamton Firefighters, Local 729, IAFF is the recognized exclusive negotiating representative for all employees of the Binghamton Bureau of Fire, excluding the Fire Chief.

3. Salary increases negotiated in prior years by the Binghamton Firefighters, Local 729, IAFF and other contractual fringe benefits have been extended to personnel covered by Section 207-a of the General Municipal Law."

The only other item submitted by the parties is the 1976 agreement between them.

DISCUSSION

It is undisputed that the negotiating unit that has been represented by Local 729 in the past includes all firemen who were on 207-a status. This is made clear by Article IX, Section A of the 1976 agreement which denies a uniform allowance to a "Member of the Bureau of Fire...[who is] permanently classified as 207(a)." Moreover, in 1976 this Board was called upon by the parties herein to rule upon whether three demands of the employer were mandatory subjects of negotiations, all of which related to firemen on Section 207-a status, Matter of City of Binghamton, 9 PERB ¶3026.

To the extent that the employer's position is that the unit ought not include permanently disabled firemen, it must be rejected in this case. A change in a negotiating unit is not a mandatory subject of negotiation. Such a change may be sought through the institution of a representation proceeding but not by the filing of an improper practice charge (Matter of So.

Cayuga CSD, 9 PERB ¶3056, aff'd Sup. Ct., Monroe County, April 22, 1977, not officially reported, 10 PERB ¶7008). Thus the employer's position that it need not negotiate with Local 729 with respect to permanently disabled firemen can be sustained only if such firemen are not public employees within the meaning of the Taylor Law. However, this proposition must be rejected. Section 201.7(a) of the Taylor Law defines a "public employee" as

"any person holding a position by appointment or employment in the service of a public employer...".

The statute does specify exceptions but those exceptions are not relevant to the issue before us. General Municipal Law §207-a requires the payment of benefits to disabled firemen "by the municipality or fire department by which he is employed...".

It therefore appears that a fireman on Section 207-a status is an employee of the municipality and remains such until he is properly terminated by the municipality or fire department by which he was employed at the time he acquired that status.

One court decision raises the possibility that the right to benefits under General Municipal Law §207-a can be separated from employment status. It is Matter of Earl Tyler v. Leonard Gadwood, 279 App. Div. 1138 (4th Dept., 1952). That case deals with a person who had been appointed a temporary fireman and had become disabled. As he was a temporary employee, he could have been and was dismissed, but the court found that he continued to be entitled to benefits under Section 207-a. That was a unique situation. The record herein does not indicate that any of the 20 permanently disabled firemen had been terminated.

Except in the case of a voluntarily retired employee, a temporary employee who was terminated, or perhaps a permanent employee who was discharged pursuant to Section 75 of the Civil Service Law, a disabled fireman receiving benefits under General Municipal Law §207-a continues to be the employee of the municipality that hired him, Matter of Birmingham v. Mirrington, 284 App. Div. 721 (4th Dept., 1954).

The employer raises one other point that we must consider.² It argues that General Municipal Law §207-a is subordinate to the Taylor Law and that Local 729 must therefore negotiate over demands that would deny statutory benefits to disabled firemen. We have already dealt with this question in Matter of City of Binghamton, supra, and rejected it.

NOW, THEREFORE, WE ORDER that the charge in Case U-2776 be dismissed and

WE FURTHER ORDER the City of Binghamton to negotiate with Local 729 regarding

² Two further points raised by the parties must have no bearing on our decisions. One is the contention that General Municipal Law §207-a does not require the payment of negotiated increases to disabled firefighters as a matter of law. The second deals with the implications of an amendment to §207-a that will take effect on January 1, 1978 (L. 1977, c. 965) and will permit permanently disabled firemen to be retired or to be assigned light duty at the request of the employer.

the terms and conditions of employment
of permanently disabled firemen who are
receiving benefits under General Municipal
Law §207-a.

DATED: New York, New York
October 12, 1977



Joseph R. Crowley, Member



Ida Klaus, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

#2E-10/12-13/77

In the Matter of	:	
	:	
BRADFORD CENTRAL SCHOOL DISTRICT,	:	
	:	<u>BOARD DECISION AND ORDER</u>
Respondent,	:	
	:	<u>CASE NO. U-2328</u>
-and-	:	
	:	
BRADFORD TEACHERS ASSOCIATION,	:	
	:	
Charging Party,	:	
	:	
	:	
	:	

The Bradford Teachers Association (BTA) has filed exceptions to the decision of a hearing officer dismissing its charge that the Bradford Central School District (district) violated §209-a.1(a), (b) and (c) of the Taylor Law ¹ when its supervising principal and board of education reprimanded the president of BTA for issuing a press release announcing scholarships and prizes awarded by BTA to graduating high school students. The hearing officer determined that the district did reprimand the president of BTA as charged, but that the reprimand was not for the purpose of depriving her or any other employee of protected rights. He also determined that the issuance by BTA of the press release announcing its scholarship awards did not constitute an exercise of any right protected by the Taylor Law.

¹ These sections of the Act provide that "It shall be an improper practice for a public employer or its agents deliberately (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;..." (emphasis supplied)

After reading the briefs of the parties and hearing oral argument by BTA, we remanded the matter to the hearing officer to obtain more evidence relating to the press release. On the basis of the now completed record, we affirm the conclusion of the hearing officer that the conduct of the district did not violate §209-a of the Taylor Law.

FACTS

On April 13, 1976 the district's supervising principal issued a memorandum containing, inter alia, the following:

"All public media news releases concerning the school district will either be initiated through the Office or cleared through the Office prior to release. In this manner, we will have a record of news releases and the Office will be responsible for district information. The administration encourages news releases to the public on school activities."

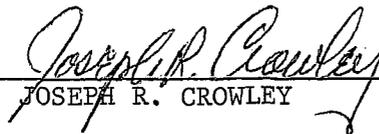
Thereafter, BTA issued the press release in question. It was clearly identified as a release of BTA. However when, on June 29, 1976, a story appeared in the "Corning Leader", a local newspaper, the story described what appeared to be a school activity, rather than a union activity, and it was so understood by the supervising principal and the school board. Without checking to ascertain whether the release had been issued in the name of BTA, on July 1, 1976 the supervising principal wrote to the BTA president reprimanding her for issuing a release concerning the school district which had not been cleared through his office. When BTA protested the reprimand, the supervising principal sent the BTA president a second letter reaffirming the reprimand. On July 14, 1976 the school board ratified the reprimand in a letter that it sent to all teachers which characterized the issuance of the press release by BTA as an act of "pettiness, unprofessionalism, and demoralizing insubordination...."

The conduct of the supervising principal and of the school board was not warranted. It violated standards of fairness and rules of courtesy, but it did not violate the Taylor Law because it was not for the purpose of depriving

employees of protected rights. The district's conduct followed a misconception that the issuance of the release had violated its procedures. It was undisputed by both parties that the supervising principal's memorandum did not apply to press releases issued by BTA about BTA activities. The district acknowledges that it would have no objection to the BTA press release if it were so identified. Here the district reacted to the newspaper story precipitously. Even if it were understandable for the supervising principal to assume on July 1 that the story reflected the BTA release, it is not understandable that, after the protest of BTA, the Board should have issued its intemperate letter without first ascertaining the true facts. But, we do not find the district's conduct to be violative of Sections 209-a.1(a), (b) or (c) of the Taylor Law. Each of these three subparagraphs condemns conduct of a public employer that was designed to deprive employees of their rights of organization or was for the purpose of encouraging or discouraging participation in the activities of an employee organization. The district's conduct herein, albeit imprudent, was not so motivated. BTA argues that such employer motivation must be imputed to the district because its conduct was inherently destructive of significant employee rights.² We do not read the letters of the supervising principal or the board as being inherently destructive of such rights.

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

Dated, New York, New York
October 12, 1977


JOSEPH R. CROWLEY


IDA KLAUS

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See NLRB v. Great Dane, Inc., 388 U.S. 26 (1967) for development of the doctrine that conduct that is inherently destructive of significant employee rights is an unfair labor practice under the National Labor Relations Act.

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

#2F-10/12/13-77

In the Matter of :
: BOARD OF EDUCATION, CITY OF YONKERS, :
: Respondent, : BOARD DECISION AND ORDER
: -and- :
: CASE NO. U-2408
: CIVIL SERVICE EMPLOYEES ASSOCIATION :
: (YONKERS CITY SCHOOL DISTRICT UNIT), :
: Charging Party, :
:

The charge herein was filed by the Yonkers City School District Unit of the Civil Service Employees Association, Inc. (CSEA). It alleges that the Board of Education of the City of Yonkers (employer) breached its duty to negotiate in good faith when it unilaterally decided to withdraw the coverage of its employees by the Social Security System. The employer acknowledges that it decided to withdraw such coverage unilaterally, but it justifies this refusal to negotiate by the argument that the Social Security System provides retirement benefits and retirement benefits may not be negotiated.¹

The hearing officer concluded that "social security is a form of insurance distinct and separate from any retirement system...[and that CSL §201.4] is not referable to social security." The employer has filed exceptions to the hearing officer's ruling that withdrawal from Social Security

1 Section 201.4 of the Taylor Law provides:

"The term 'terms and conditions of employment' means salaries, wages, hours, agency shop fee deduction and other terms and conditions of employment provided, however, that such term shall not include agency shop fee deduction for negotiating units comprised of employees of the state or any benefits provided by or to be provided by a public retirement system, or payments to a fund or insurer to provide an income for retirees, or payment to retirees or their beneficiaries. No such retirement benefits shall be negotiated pursuant to this article, and any benefits so negotiated shall be void."

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is a mandatory subject of negotiation and that its unilateral action violated §209-a.1(d) of the Taylor Law.² In support of its exceptions, it has submitted a brief that contains many arguments why we should consider Social Security coverage to be a retirement benefit within the meaning of CSL §201.4. In reply, CSEA argues that Social Security "is distinguishable from a retirement system because it "is intended to protect individuals against loss of income due to inability to work for whatever reason."

Since the filing of the employer's exceptions, there has been a change in New York State law that makes it unnecessary for us to decide whether or not Social Security coverage is a retirement benefit. Chapter 837 of the Laws of 1977 prohibits a political subdivision from withdrawing from the Social Security System and nullified the unilateral decision of the employer to do³ so.

2 Section 209-a.1(d) of the Taylor Law provides:

"to refuse to negotiate in good faith with duly recognized or certified representatives of its public employers."

3 L.77, c.837 provides:

"Notwithstanding any other provisions of law to the contrary, on and after the effective date of this act a political subdivision, as defined in section one hundred thirty-one of the retirement and social security law, shall be prohibited from discontinuing coverage of its employees under the provisions of the federal social security act (42 U.S.C.A. §301 et seq.) as amended."

FACTS

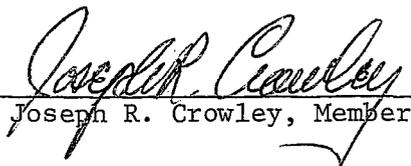
Without having negotiated about the matter, the employer adopted a resolution on September 9, 1976, terminating its participation in the Social Security System effective June 30, 1979. Written notice of the employer's action was transmitted to the Secretary of Health, Education and Welfare by the Director of the New York State Social Security Agency on September 30, 1976. The charge herein was filed on November 18, 1976 and the hearing officer's decision was issued on June 24, 1977. Chapter 837 of the Laws of 1977 became effective on August 11, 1977. The Attorney General issued a formal opinion to the State Comptroller on October 3, 1977 interpreting that enactment. Noting that under the Social Security Act (42 USC §418) notice of a decision to withdraw from coverage may be rescinded by a public employer prior to the date on which coverage ends, he ruled that:

"The pending twenty-one notices of intention to terminate coverage are now rescinded as a matter of law. In other words, any political subdivision which has not actually terminated its coverage under the Social Security Act as of August 11, 1977 is barred from terminating such coverage...."

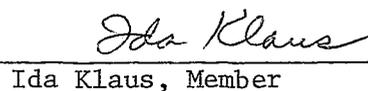
CONCLUSION

We withdraw the Order of the hearing officer directing the employer to negotiate in good faith over the termination of Social Security coverage because there can be no duty to negotiate over the performance of what has become an illegal act (Matter of Auburn City Unit, CSEA, 9 PERB ¶13084 [1976]).

DATED: New York, New York
October 12, 1977



Joseph R. Crowley, Member



Ida Klaus, Member

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

COUNTY OF ROCKLAND,

Employer,

- and -

SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO,

Petitioner,

- and -

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,

Intervenor.

:
:
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BOARD DECISION & ORDER

CASE No. C-1397

This matter comes to us on the exceptions of the Service Employees International Union, AFL-CIO (SEIU) to a decision of the Director of Public Employment Practices and Representation rejecting its objections to the conduct of an election involving a unit of employees of Rockland County. The exceptions complain that the election should have been set aside because the ballots of employees of the judicial branch of the state government were counted. Rockland County and the Civil Service Employees Association, Inc. (CSEA) both responded to the exceptions by asserting that SEIU waived any objection to the counting of the ballots in question. CSEA also argues that the court personnel share a community of interest with the county employees and might properly belong with them in a single negotiating unit temporarily.

FACTS

On June 1, 1976 SEIU filed a petition to be certified in the place of CSEA as exclusive representative of employees of Rockland County other than

faculty at the community college, deputy sheriffs and jailors and blue collar employees of the Highway Department. This petition was consolidated with two others seeking changes in the unit and a hearing was held. In a decision issued on February 16, 1977 we retained the existing unit and we directed that an election be held in that unit with the eligibility date for voting to be February 11, 1977. At that time, the court personnel were employees of Rockland County. This changed on April 1, 1977 by reason of the enactment of Section 220.6 of the Judiciary Law which provides in part:

"[C]ommencing April first nineteen hundred ~~seventy-seven~~... employees of the courts and court-related agencies of the unified court system...shall be employees of the state of New York...."

That enactment also provides for the filing of petitions to alter existing negotiating units by separating court employees from other employees (Judiciary Law §220.7). Effective August 5, 1976, new agreements affecting the terms and conditions of court personnel are "subject to the prior approval of the administrative board of the judicial conference." (Judiciary Law §220.6[b]). No petition has been filed to alter the unit placement of the court personnel who had been employees of Rockland County.

The election, which was held on April 27, 1977 was inconclusive and a run-off election was held on May 25, 1977. First, Rockland County and then SEIU challenged the consideration of ballots cast by approximately thirty-three court officers on the ground that they were state employees. Both the County and SEIU withdrew their challenges and the disputed ballots were then counted. The vote was CSEA 674 and SEIU 664. Thereafter SEIU's designated observer signed the tally of ballots on behalf of SEIU, certifying the accuracy and fairness of the count and the tabulation.

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DISCUSSION

It is the contention of SEIU that its consent to the counting of the ballots of the court personnel should have been disregarded because it constituted a definition of the unit and only PERB could determine whether court personnel were in the unit. This contention overlooks the language of Section 207 of the Taylor Law which provides that this Board shall apply the statutory standards in defining negotiating units in the course of "resolving disputes concerning representation status . . .".

A question might arise if the parties were to consent to the counting of the ballots of people who were not given representation rights by the Taylor Law. However, this is not the fact in this case.

We find the consent of SEIU to the counting of the ballots of the court personnel to be final and binding. On April 1, 1977 they ceased to be County employees but they continued to be public employees within the ambit of the Taylor Law. Until a petition is filed pursuant to Judiciary Law Section 220.7 and resolved, their unit placement will not be clear. The Director of Public Employment Practices and Representation suggests that Judiciary Law Section 220.6(b) establishes a joint employer relationship between the County and the Administrative Board of the Judicial Conference. We do not reach that question in deciding that SEIU cannot now be heard objecting to the counting of ballots when it consented at the time of the election.

NOW, THEREFORE, WE ORDER that the objections to the conduct of the election be and they hereby are dismissed.

Dated, New York, New York
October 12, 1977



JOSEPH R. CROWLEY



IDA KLAUS

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of : #2R-10/12-13/77
COUNTY OF ROCKLAND, :
Employer, :
-and- :
SERVICE EMPLOYEES INTERNATIONAL UNION, : CASE NO. C-1397
AFL-CIO, :
Petitioner, :
-and- :
CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., :
ROCKLAND COUNTY, :
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 Civil Service Employees Association, Inc., Rockland County

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.

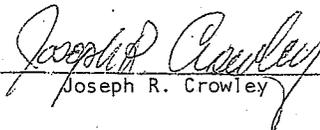
Unit: Included: All employees exclusive of those specifically mentioned below.

Excluded: All employees in the unclassified service; all employees in the exempt class of the classified service; 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, and the chief executive or director of each department, office or agency under the jurisdiction of a board or commission; deputy sheriffs and jailers; student employees; all executive, managerial, administrative, confidential, supervisory and professional employees.

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

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 12th day of October , 1977 .


Joseph R. Crowley


Ida Klaus

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

#2H-10/12-13/77

In the Matter of :
 :
FAIRPORT CENTRAL SCHOOL DISTRICT, :
 :
Employer, :
 :
- and - : CASE NO. C-1521
 :
CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., :
 :
Petitioner. :

BOARD DECISION

On July 14, 1977, the Civil Service Employees Association, Inc., (herein referred to as the petitioner) filed, in accordance with the Rules of Procedure (herein referred to as the Rules) of the New York State Public Employment Relations Board (herein referred to as the Board) a timely petition for certification as the exclusive negotiating representative for all Village employees of the Village of Akron (herein referred to as the employer). Thereafter, the parties entered into a Consent Agreement providing that the appropriate unit is as follows:

Included: All full time and part time bus drivers, mechanics and bus driver-mechanics employed by the Fairport Central School Transportation Department.

Excluded: Director of Transportation, clerk-typist and all other employees.

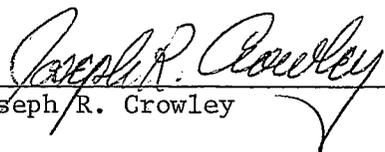
Pursuant to the Consent Agreement, a secret ballot election was held under the supervision of the Director on September 21. The results of the

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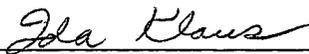
election indicate that a majority of the eligible voters in the unit set forth in the Consent Agreement do not desire to be represented for purposes of 1/ collective negotiations by the petitioner.

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

Dated at New York, New York
This 12th day of October, 1977



Joseph R. Crowley



Ida Klaus

1/ There were 14 ballots cast in favor of and 52 cast against representation by the petitioner and 6 challenged ballots.