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State of New York Public Employment Relations Board Decisions from December 30, 1977

New York State Public Employment Relations Board

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of STATE OF NEW YORK (Office of Employee Relations), Employer, -and- PUBLIC EMPLOYEE FEDERATION, AFL-CIO, Petitioner, -and- CIVIL SERVICE EMPLOYEES ASSOCIATION, INC. Intervenor.	BOARD DECISION AND ORDER CASE NO. C-1537
In the Matter of STATE OF NEW YORK (Office of Employee Relations), Respondent, -and- PUBLIC EMPLOYEE FEDERATION, AFL-CIO, Charging Party, -and- CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., Intervenor.	CASE NO. U-2755

We have before us exceptions in a representation case (C-1537) filed by the State of New York (hereinafter the employer) and the Civil Service Employees Association, Inc. (hereinafter CSEA), and exceptions in an improper practice case (U-2755) filed by the Public Employee Federation, AFL-CIO

(hereinafter PEF).

PROCEDURES AND BACKGROUND

The exceptions in the representation case allege that the Director of Public Employment Practices and Representation erred when, on October 26, 1977, he declined to dismiss a petition of PEF for certification as the representative of the Professional, Scientific and Technical Unit of State employees (hereinafter PS&T Unit), and he ordered that an election be held among the employees in such unit. The employer argues that the petition should be dismissed because it was not timely by reason of having been filed at a time when a challenge to the representation status of CSEA was precluded by the contract bar provisions of §208.2 of the Taylor Law. CSEA, the incumbent representative of the PS&T Unit, makes the same argument in its exceptions. CSEA also argues that the petition cannot be entertained because the Director has not properly ascertained that it is supported by a showing of interest of 30% of the employees, as required by §201.3 of our Rules.

The improper practice charge was filed by PEF on June 23, 1977. It alleges that the employer violated §209-a.1(a) and (b) of the Taylor Law[1] by denying it access for organizational solicitation purposes to employees on the premises of the State. CSEA intervened in the proceeding and argued that the PEF charge should be dismissed because PEF is not an employee organization within the meaning of §201.5 of the Taylor Law and, consequently, has no standing under §204 of our Rules to avail itself of the procedures and benefits of that law. The hearing officer rejected the CSEA position and, on October 19, 1977, we affirmed his determination that PEF is an employee organization within the

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1 The language of the statute is: "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;"

meaning of the Taylor Law, 10 PERB ¶3093. The hearing officer further determined that, although the employer had excluded PEF from access to employees at State facilities for organizational solicitation purposes as charged, this conduct did not constitute a violation of §209-a.1(a) or (b) of the Taylor Law because it was not established that the employer was motivated by animus, which is generally deemed an essential element of such a violation. When PEF's exceptions to this determination were first presented to us, we reserved judgment on the improper practice case, saying:

> "The question of denial of access cannot be answered without first reaching the question of whether the representation petition was timely. Accordingly, we defer consideration of the PEF exception until receipt of the decision of the Director...in the representation case."

We now decide both the representation and the improper practice cases, which we find to be interrelated in their decisional context.

We restate at the outset established principles relevant to our decision in both cases because of the importance of the issues presented.

The fundamental right assured to public employees by the Taylor Law is the right to form, join and participate in any employee organization of their own choosing. The enjoyment of this right is protected and implemented by paragraphs (a) and (b) of §209-a.1 of the Taylor Law. Thus, the Act guarantees the fundamental right of public employees both to select their organizational representatives and to change duly chosen representatives. It restricts that freedom, however, in the interest of achieving the countervailing public policy objective of stability of established bargaining relationships by protecting the exclusive representative status of duly chosen organizations against challenge for a reasonable length of time sufficient to afford a period of quiet enjoyment of the benefits of the collective bargaining relationship. The law also seeks to free employees from the frustration of their desire, after a reasonable period, to change representatives. Inherent in the practical imple-

mentation of these basic policies of the Act is the availability to employees of an opportunity to hear the views and arguments of competing ideas and organizations. Thus, it becomes necessary as a practical matter that organizations have the opportunity to present to the employees their views and arguments in favor of a change of representatives. Generally, such access must be allowed by the employer at times consistent with the fundamental policies of the Act and under circumstances which will not interfere with the conduct of the public employer's operations or impair the efficiency of the performance of its functions.

The employer here has plainly recognized the nature of its obligations. It conscientiously devised and promulgated, in May 1975, Section 12 of its Employee Relations Manual striking a reasonable balance between the freedom of access of employee organizations and the need for uninterrupted conduct of its operations. The Manual also reflects a clear policy of maintaining employer neutrality as between competing employee organizations. On the matter of access, it provides:

> "All organizations shall have equal access to employees for campaign purposes, i.e., soliciting membership, distributing reading, obtaining signatures on authorization cards and petitions, and related activities during a campaign period. When an employee organization has been recognized or certified as a representative of the employees in a negotiating unit, the campaign period shall begin no earlier than 90 days prior to the date upon which the incumbent organization's representation status is subject to challenge under §208 of the Taylor Law."

FACTS

The facts here found are based upon a stipulation of the parties. The employer and CSEA, the duly certified representative, had an agreement covering the PS&T Unit for the period from April 1, 1973 through March 31, 1976. On May 30, 1976, a successor agreement continuing and amending the expired agreement was entered into for a term ending on March 31, 1978. By its terms, the successor agreement could be reopened for specified purposes upon appropriate

notice by either party before October 31, 1976. Negotiations were reopened. A memorandum issued by the employer on May 12, 1977, to Department and Agency Heads reported that "the State and CSEA, Inc. have entered into a two-year agreement which is pending ratification by the CSEA membership and approval of the Legislature." The agreement was signed on June 3, 1977. The agreement recites that it is "the entire agreement between the State and CSEA, terminates all prior agreements and understandings and concludes all collective negotiations during its term." The "Duration of Agreement" article provides that, "The term of this agreement shall be from April 1, 1977 through March 31, 1979."

On May 2, 1977, PEF sought access from an Agency Head to the employer's premises pursuant to the rules of the Manual referred to above. In the May 12, 1977, general memorandum the employer barred access to its premises to all competing organizations on the ground that, by virtue of the new agreement, CSEA's status was immune from challenge and that, accordingly, the 90-day period under the Manual was not operative.[2]

On June 23, 1977, PEF filed with PERB its improper practice charge. Thereafter, on August 13, 1977, it filed its petition for certification. Together with the petition, PEF submitted, as its showing of interest, signed designation cards and petitions indicating support of PEF by 30% of the

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2 Following is the text of the memorandum:

> "Questions have arisen regarding the rights of unions not currently representing employees to have access to State facilities for the purpose of soliciting employee interest in order to support a petition to be submitted to PERB challenging the representation status of CSEA.
>
> Access to State offices for the purpose of solicitation should not be granted at this time, since the State and CSEA, Inc. have entered into a two-year agreement which is pending ratification by the CSEA membership and approval of the Legislature.
>
> Accordingly, the exclusivity provisions of the Agreements between the State and the CSEA, Inc. are to be honored during this period of time and competing unions should not be granted access to State premises for the purpose of solicitation."

employees in the PS&T Unit. These were accompanied by a sworn declaration submitted by PEF attesting to the fact that the people whose names appeared thereon had personally signed them on the dates specified. The Director then conducted an investigation during which these names were compared with the names submitted by the employer as those comprising the employees within the PS&T Unit, and thereupon the names were counted.

DISCUSSION

A. The Representation Proceeding

In support of its contention that the Director erred when he determined that PEF's showing of interest was adequate, CSEA argues that the Director should have obtained copies of the signatures of the employees in the PS&T Unit from tax forms on file with the employer and conducted a random check against them of the authenticity of the signatures on the documents constituting the showing of interest. CSEA was advised by the Director that it is not the policy of this Board to conduct a detailed investigation, such as that sought by CSEA, unless information is presented "which might cast doubt upon the authenticity of the submission...." CSEA proffered no such information. It simply stated that, under the recent Freedom of Information Act, the names of employees in the PS&T Unit were available to PEF and thus subjected the showing of interest requirement to the possibility of fraud and abuse. We find this assertion to be no more than mere conjecture, insufficient to constitute a reasonable basis for casting doubt upon the authenticity of the showing of interest. Accordingly, we reject CSEA's contention that the Director's determination regarding the sufficiency of the showing of interest should be reversed.[3]

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[3] For further discussion of the nature of the requirement of a showing of interest and of the policy of deferring to the Director when he determines that a showing of interest is sufficient, see Board of Education of the City of Yonkers, 10 PERB ¶3100.

We also affirm the Director's determination that the petition was timely filed. Central to this determination is the interpretation of §208.2 of the Taylor Law. It provides:

> "2. An employee organization certified or recognized pursuant to this article shall be entitled to unchallenged representation status until seven months prior to the expiration of a written agreement between the public employer and said employee organization determining terms and conditions of employment. For the purposes of this subdivision, (a) any such agreement for a term covering other than the fiscal year of the public employer shall be deemed to expire with the fiscal year ending immediately prior to the termination date of such agreement, (b) any such agreement having a term in excess of three years shall be treated as an agreement for a term of three years and (c) extensions of any such agreement shall not extend the period of unchallenged representation status." (emphasis supplied)

The 1976-78 agreement was superseded during its life by an agreement purporting to commence in mid-term of the 1976-78 agreement and to end on March 31, 1979, one year after the stated expiration date of the superseded agreement. The issue before us is whether the later agreement granted CSEA immunity from challenge until seven months prior to its 1979 expiration date or whether it constituted an extension of the 1976-78 agreement and thereby failed to prolong the period of CSEA's unchallenged representation status beyond August of 1977.

Section 208.2(c) provides that an extension of an agreement "shall not extend the period of unchallenged representation status." The employer and CSEA would read clause (c) as being merely a clarification of clause (b), which provides that an agreement for a term in excess of three years shall bar a challenge only for as long as would an agreement having a term of three years. Thus, according to the employer and CSEA, clause (c) means simply that just as the parties may not bar a challenge by a single contract of more than three years, they may not do so by extending the duration of an existing agreement of less than three years to a period in excess of three years. Hence, they argue that, as the total duration of the two agreements in question did not extend beyond three years, the later agreement afforded a shield against a

challenge for seven months prior to its prolonged expiration date.

We find such an interpretation of clauses (b) and (c) to be strained and contrary to the clear policy of the law. The first sentence of subdivision 2 of §208 sets forth the basic policy by which the Legislature has sought to achieve a reasonable balance between the conflicting objectives of stability of bargaining relationships and the right of employees to change representatives. It declares that a collectively negotiated agreement between a public employer and an employee organization entitles the employee organization "to unchallenged representation status until seven months prior to the expiration of a written agreement between the public employer and said employee organization determining terms and conditions of employment." This policy is implemented by §201.3(d) of our Rules, which permits a competing employee organization to file a petition during the life of an existing contract only during the month before the expiration of the period of unchallenged representation. The statutory scheme allows the final seven months of the term of the agreement as the period of time in which the challenge process can reasonably be expected to go forward to completion -- an adequate time for such a petition to be processed, an election held, the victorious employee organization certified, and a successor agreement negotiated with the public employer.

The second sentence of subdivision 2 prescribes the exceptions to the general policy in three specific separate clauses set forth earlier in this decision. Clause (a) provides that, if an agreement is not coterminous with the fiscal year of the public employer, for the purpose of contract bar, it "shall be deemed to expire with the fiscal year ending immediately prior to the termination date of such agreement." This exception to the basic contract bar rule has no analogy in the private sector. Its purpose is to synchronize the

timetable of negotiations with the public employer's budget-making cycle so as to provide a sound and realistic fiscal framework for the negotiations.[4]

The exceptions contained in clauses (b) and (c), in essence, embody and codify private sector law developed under the National Labor Relations Act. Clause (b) embodies the general rule adopted by the NLRB in General Cable Corp., 139 NLRB 1123 (1962), (51 LRRM 1444), by which contracts having fixed terms longer than three years will be treated for contract-bar purposes as three-year agreements. As explained by the National Labor Relations Board, an accommodation must be made "in balancing the interest of employees' freedom to choose representatives and the interest of stability of industrial relations...."

Clause (c) embodies a principle reaffirmed by the National Labor Relations Board in Deluxe Metal Furniture Co., 131 NLRB 995 (1958), (42 LRRM 1470). It is that an agreement is deemed to be "prematurely extended" if a successor agreement is reached, or the duration of an existing one is extended, prior to a so-called "insulated" period which follows the failure of any competing organization to file a timely petition. A "prematurely extended" agreement does not extend the period of contract bar beyond that which resulted from the duration of the original contract. The reason for this rule, according to the National Labor Relations Board, is that "hereinafter, unions and employees will know precisely when they may be expected to file a petition in order to obtain an election." This rule, too, recognizes an accommodation among

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4 The Taylor Committee Report -- which is the legislative history of the Taylor Law -- states, "Collective negotiations in government employment needs to be closely coordinated with the calendar of the legislative and budget year. Indeed, an impasse is typically identified by the failure to have achieved an understanding or agreement before the approach of budget deadlines established by law." Section 209 of the Taylor Law provides for a negotiation and mediation schedule that dates "from the end of the fiscal year of the public employer."

the competing considerations we have already discussed.[5] The principle exists and applies without regard to whether the premature extension results in a total duration period of three years or longer achieved by more than a single agreement.

B. The Improper Practice

Having found that the PEF petition was timely filed, we must determine whether the employer committed an improper practice when, on May 12, 1977, it denied to PEF under its 90-day rule access to State facilities for the purpose of soliciting employee interest in support of its petition. We reverse the determination of the hearing officer that it did not. While we agree with his finding as to the absence of employer animus, we do not believe that a showing of animus is a necessary basis for a finding of improper practice in the circumstances here present. The employer's denial to PEF of access to employees on its premises after May 12 must be regarded not only as a violation of Rule 12 of its own Employee Relations Manual, but of §209-a.1(a), in view of our finding that the contract did not bar the filing of a petition by PEF during August 1977. Thus, the employer must be found to have interfered with the free exercise of employees' rights to change representatives by denying them the opportunity to be solicited by PEF and to support it. Also, the employer obstructed

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5 The NLRB wrote:

> "The Board considers the establishment of a specific period for the timely filing of a petition desirable because it will preserve as much time as possible during the life of a contract free from the disruption caused by organizational activities. Also, employees and any outside unions will be put on notice of the earliest time for the filing of a petition. This will create a guide as to the appropriate time to organize for, and seek a change of, representatives and, since there will be little desire to engage in organizational activities much before the time when a petition will be accepted, it should also provide longer periods of stability. Finally, from an administrative viewpoint, the establishment of a definite period will have the salutary effect of enabling Regional Offices, by obtaining a limited amount of information, to dismiss prematurely filed petitions, thus preventing a large percentage of such cases from being processed until an appropriate time."

PEF's efforts to achieve a showing of interest adequate to support a petition. The rights dealing with employees' freedom to organize, to select an employee organization, or to reject an organization are among the most fundamental and basic rights of those granted by the Legislature.

The statutory language making it an improper practice to engage in proscribed conduct against employees "for the purpose of depriving them of such rights" is not necessarily a requirement that animus be shown. Although proof of animus is persuasive evidence that an employer's conduct was improperly motivated, it may be determined under certain circumstances that an employer interfered with employee organizational rights "for the purpose of depriving them of such rights" even absent a showing of animus. In the instant case, the employer, in reliance upon its erroneous interpretation of the contract bar provisions of the Taylor Law, withheld opportunities to organize that it would and should otherwise have afforded to its employees and to PEF. Such conduct, in and of itself, was inherently destructive of basic §202 rights and must thus be irrebuttably presumed to have been engaged in "for the purpose of depriving them of such rights."

The employer's lack of animus is, however, an important factor to be considered in devising a remedy for the improper practice. So, too, is the fact that PEF had alternative means and was able to achieve a satisfactory showing of interest notwithstanding its lack of direct access.

We find a violation of §209-a.1(a). We do not find, however, any basis for a violation of §209-a.1(b) for the reason that the nature of the improper conduct was not such as to dominate or interfere with the formation or administration of the employee organizations involved.

ORDER

NOW, THEREFORE, WE ORDER the employer to cease and desist from denying PEF access to employees at State facilities for organizational purposes at appropriate times, and

WE ORDER that an election by secret ballot be held under the direction of the Director of Public Employment Practices and Representation among employees in the PS&T Unit.

DATED: New York, New York
December 30, 1977

Joseph R. Crowley

Joseph R. Crowley

Ida Klaus

Ida Klaus

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of	
TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY,	
Respondent,	BOARD DECISION ON
-and-	MOTION
BRIDGE AND TUNNEL OFFICERS BENEVOLENT ASSOCIATION, INC.,	
Charging Party.	Case No. U-2768

This matter comes to us on a motion of the Bridge and Tunnel Officers' Benevolent Association, Inc., the charging party herein, to remand it to the hearing officer for reconsideration by him of the motion to dismiss that he granted.

The charge herein, as amended, alleges that the Triborough Bridge and Tunnel Authority (Authority) failed to negotiate in good faith with it in that it discontinued cost of living adjustment (C.O.L.A.) benefits while the parties were in negotiation for an agreement to succeed the expired agreement which established those benefits. The hearing officer assumed that "all C.O.L.A. payments made during the contractual term have been continued . . ." and that the charge related only to the refusal of the Authority to apply the C.O.L.A. formula of the expired contract to increases in the cost of living so as to require further increases in the payments to the employees. In support of its motion, the Association alleges that past C.O.L.A. payments have not been maintained and that its charge relates to the maintenance of past C.O.L.A. benefits as well as to the payment of new C.O.L.A. benefits.

The Association's motion for remand cannot be granted. Our Rules

provide no such procedure. They do, however, provide for the filing of exceptions to the hearing officer's decision and for a response by the Authority (see Sections 204.10 and 204.11). Upon receipt of exceptions and the Authority's response on the merits, this Board can determine whether the decision of the hearing officer should be adopted, modified or reversed. In appropriate cases, this Board may remand the matter to the hearing officer.[1]

Accordingly, we deny the Association's motion to remand this proceeding to the hearing officer but we grant its alternative motion for an extension of time in which to file its exceptions. Such time is extended until January 23, 1978.

Dated, New York, New York
December 30, 1977

Joseph R. Crowley
Joseph R. Crowley

Ida Klaus
Ida Klaus

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1 See North Shore Union Free School District, 10 PERB ¶3082 (1977)