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9-14-1978

## State of New York Public Employment Relations Board Decisions from September 14, 1978

New York State Public Employment Relations Board

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## State of New York Public Employment Relations Board Decisions from September 14, 1978

### 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-9/14/78

In the Matter of

GENEVA CITY SCHOOL DISTRICT,

Respondent,

-and-

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,

Charging Party.

BOARD DECISION AND ORDER

CASE NO. U-2219

In the Matter of

GENEVA UNIT OF THE ONTARIO COUNTY CHAPTER,  
CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,  
and THE CIVIL SERVICE EMPLOYEES ASSOCIATION,  
INC.,

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

CASE NO. D-0141

In the Matter of

GENEVA CITY SCHOOL DISTRICT,

Respondent,

-and-

THE CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.  
and GENEVA UNIT OF THE ONTARIO COUNTY CHAPTER,  
CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,

Charging Parties:

CASE NO. U-2441

MARTIN L. BARR, ESQ. (JEROME THIER, ESQ., of Counsel)  
for Charging Party (PERB) in Case No. D-0141

HANCOCK, ESTABROOK, RYAN, SHOVE & HUST, ESQS., (DAVID W.  
LARRISON, ESQ., and BENJAMIN J. FERRARA, ESQ., of Counsel)  
for Geneva City School District

ROEMER & FEATHERSTONHAUGH, ESQ. (STEPHEN J. WILEY, ESQ., of  
Counsel) for Civil Service Employees Association, Inc.  
and Geneva Unit of the Ontario County Chapter, CSEA, Inc.

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On November 24, 1976, Counsel to PERB charged both the Civil Service Employees Association, Inc. (CSEA) and the Geneva Unit of the Ontario County Chapter of CSEA (Unit) with violating §210.1 of the Taylor Law "in that they caused, instigated, encouraged, condoned and engaged in a strike" against the Geneva City School District (District) on October 13, 1976 (Case No. D-0141). The hearing officer sustained the charge against CSEA and the Unit. He also rejected their defense that the District engaged in such acts of extreme provocation as to detract from their responsibility for the strike. He found that the strike "had no effect on health or safety and only minimal impact on the welfare of the community." CSEA and the Unit have filed exceptions to these determinations, as has the District. The exceptions of CSEA and the Unit contend that the record establishes that the strike was caused by extremely provocative conduct of the employer. They also contend that the strike had no impact whatsoever on public welfare. The District's exceptions contend that the impact of the strike on public welfare was more than minimal.<sup>1</sup>

On December 6, 1976, CSEA and the Unit filed an improper practice charge against the District, alleging that between September 9 and October 14, 1976, the District failed to negotiate in good faith by refusing to participate properly in the statutory impasse procedures, by introducing a new negotiating demand subsequent to factfinding and by generally refusing to engage in meaningful negotiations during that period (Case No. U-2441). The hearing officer dismissed the first two bases of the charge, but found merit in the third. The

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<sup>1</sup> The hearing officer's decision was issued on August 8, 1977. Consideration of the exceptions was delayed by a court action brought by CSEA and the Unit to declare the strike penalty provisions of the Taylor Law unconstitutional. See CSEA et al. v. Helsby, 439 F.Supp. 1272 (U.S. Dist.Ct., So. Dist., N.Y. Nov. 11, 1977); 10 PERB ¶7018.

specific violation as found by the hearing officer was, that on October 6, the District made a formal offer of 4% inclusive of increments, while it was informally indicating its willingness to pay an increase of 6.1% inclusive of increments. CSEA and the Unit filed exceptions to the hearing officer's determination that the District did not refuse to participate in the statutory impasse procedures properly and did not introduce a new negotiating demand subsequent to factfinding. The District filed exceptions to the hearing officer's determination that it did not negotiate in good faith in that it refused to formalize its offer of 6.1% including increments on October 6.<sup>2</sup>

#### Discussion

##### The Strike -- Impact

We affirm the conclusion of the hearing officer that the strike "had no effect on the health or safety and only minimal impact on the welfare of the community." At issue is a strike in a school district that services 3,300 students. On the day of the strike, approximately 23% of the students were absent, whereas on a normal day student absenteeism amounts to less than 5%. The 1,800 students who are normally provided transportation were inconvenienced by the fact that buses did not run by reason of the strike and the 2,000 hot lunches that are normally provided each day were not provided on the day of the strike. These facts are consistent with the hearing officer's conclusion.

##### The Strike -- Extreme Provocation

The factual basis for the affirmative defense of extreme provocation is the same as for the improper practice charge. As explained infra, we conclude

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<sup>2</sup> CSEA had filed an earlier charge (Case No. U-2219) against the District alleging a failure to negotiate in good faith by reason of the District's refusal to pay salary increments after the expiration of the 1975-76 agreement. The hearing officer's dismissal of this charge occasioned no exceptions.

that those facts do not establish an impropriety in the negotiating conduct of the District. Moreover, even if the District's negotiating tactics were improper, they would not establish a defense of extreme provocation because they did not, in fact, provoke the strike. The hearing officer correctly determined that the Unit struck because the District failed to meet its demand for an increase of 6.5% including increments.

The Improper Practice Charge -- Refusal to Participate in Statutory Impasse Procedures

The record supports the hearing officer's findings of fact. The District did not make a formal proposal to the factfinder, but it did provide him with the appropriate data so as to enable the factfinder to prepare his report and recommendations. Hence, the allegation that the District refused to participate in the factfinding procedure is not supported.

The Improper Practice Charge -- The Introduction of a New Demand Subsequent to Factfinding

The evidence supports the hearing officer's conclusion that the District did not make a new demand subsequent to factfinding. At issue is an alleged demand to reduce the length of the employees' work week. Perhaps as a negotiating tactic to counter the Unit's demand for an increase of 6.5% plus increments, the District indicated that it might have to reduce the number of days of work in order to balance its budget. It asked whether the proposed agreement would permit it to reduce the length of the employees' work week as an alternative to laying off employees. No doubt, the District's question was not a casual one and was designed to persuade the Unit to reconsider its salary demand; however, it was not a new negotiating demand.

The Improper Practice Charge -- The Informal Offer

We reject the hearing officer's conclusion that the District committed

an improper practice when, during the first negotiating session after its rejection of the factfinding report the District raised its formal offer to 4% including increments, even though it had earlier informally advised the Unit that it was prepared to pay an increase of 6.1% including increments. The hearing officer found this conduct to be improper because "the time has passed for anything but serious offers, and 4% cannot be termed genuine when at least half that much more was known by all present to be available." We do not find that the District's conduct constituted a refusal to negotiate in good faith. It had clearly signalled its willingness to go above the formally offered 4% and it knew that even the higher figure was not then acceptable to the Unit. Its failure to formalize its higher offer upon the resumption of face-to-face negotiations did not mislead the Unit and did not hamper the negotiations process. Although the District engaged in hard bargaining, it did not overstep the boundaries of good faith negotiations. In context, we find that the District approached negotiations with a willingness to make compromises and a desire to reach agreement.

NOW, THEREFORE, WE ORDER that charge U-2441 be dismissed in its entirety, and

WE FURTHER ORDER the District to cease deducting dues or agency shop payments on behalf of the CSEA or the Unit for a period of three months, commencing on the first practicable date after the date of this decision. Thereafter, no dues or agency shop payments shall be deducted on their behalf by the District until they

affirm that they no longer assert the right to strike against any government, as required by the provisions of §210.3(g) of the Taylor Law.

Dated, New York, New York  
September 15, 1978

*Harold R. Newman*  
HAROLD R. NEWMAN, Chairman

*Ida Klaus*  
IDA KLAUS, Member

*David C. Randles*  
DAVID C. RANGLES, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

#2B-9/14/78

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In the Matter of :  
POLICE BENEVOLENT ASSOCIATION OF :  
HEMPSTEAD, N.Y., INC., : BOARD DECISION AND ORDER  
Respondent, : CASE NO. U-3029  
-and- :  
INCORPORATED VILLAGE OF HEMPSTEAD, :  
Charging Party. :

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The charge herein was filed by the Village of Hempstead (Village) on December 9, 1977. It alleges that the Police Benevolent Association of Hempstead, N.Y., Inc. (PBA) violated its duty to negotiate in good faith by submitting five nonmandatory subjects of negotiation to an arbitrator who had been appointed to resolve a deadlock in negotiations. PBA responded that the five contested matters which it submitted to arbitration were all mandatory subjects of negotiation.

At the request of the parties, in accordance with §204.4 of our Rules, the dispute was submitted directly to this Board without any hearing officer report or recommendations.

PBA DEMAND NO. 1 - TERMINATION ENTITLEMENT

"Terminal Leave shall be computed on an Entitlement basis of (5) five days or prorated portion thereof for each Year of completed service up to and including the twenty fifth (25) year of completed service."

The Village argues that this demand is for a retirement benefit and, as such, it is a prohibited subject of

negotiation.<sup>1/</sup> We have previously held that a demand for a termination pay provision essentially identical to this one is not a retirement benefit and is a mandatory subject of negotiation. Lynbrook Police Benevolent Association, 10 PERB ¶3067; Village of Lynbrook, 10 PERB ¶3065. Those decisions have recently been confirmed by the Appellate Division, Second Department (Incorporated Village of Lynbrook v. PERB, AD2d, N.Y.L.J., August 9, 1978, page 11, col. 2). Accordingly, this demand is a mandatory subject of negotiation.<sup>2/</sup>

PBA DEMAND 2 - DENTAL PLAN

"The Village shall pay the full cost of a group Dental Health Insurance Plan for all active employees and employees who retire after June 1, 1977."

The Village contends that insofar as the demand applies to employees who retire during the period when this contract is in effect, it, too, is a prohibited retirement benefit. The parties have stipulated that this demand would require the payment of annual dental insurance premiums by the Village for the benefit of retired police officers until their death. In Incorporated Village of Lynbrook v. PERB, supra, the Appellate Division held

<sup>1/</sup>Section 201.4 of the Taylor Law, as amended in 1973, states:

"The term 'terms and conditions of employment' . . . shall not include . . . any benefits provided by or to be provided by a public retirement system or payment 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." (Emphasis supplied)

<sup>2/</sup>Apparently, the Village has agreed, under prior bargaining contracts, to pay the earned termination pay in six equal annual installments, without interest. The record does not disclose the reason for this schedule of payments. The right to negotiate a termination pay benefit, however, is not affected by such an agreement.

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that hospitalization insurance for families of current police officers who die after retirement is "exactly the type of supplementary payment to retirees and their beneficiaries which the Legislature sought to prohibit by enacting section 201 (subd. 4)." Continued payment of premiums for dental insurance by the Village for the benefit of employees after retirement must be considered a "payment to retirees" within the meaning of §201.4, and as such, is a prohibited subject of negotiation.

PBA DEMAND 3 - OVERTIME (FOR PERFORMANCE OF DUTIES WHILE OFF-DUTY)

"If an employee performs police duties on his off-duty hours, he shall be entitled to all the benefits which would have accrued to him had he been on duty at the time the duties were performed."

The record establishes that these benefits are to be provided when the employees are off-duty and outside the boundaries of the Village and "are not under the direct control or supervision of the Village." Thus, it deals with circumstances that are beyond the employment relationship of the parties. As such, the demand does not deal with a term and condition of employment and is not a mandatory subject of negotiation.

PBA DEMAND 4 - POLYGRAPH AND CHEMICAL TESTS

"The Village shall not make use of polygraph and/or chemical tests on employees when investigating their activities. An employee may not be ordered or requested to take any of the aforementioned tests."

In Troy, 10 PERB ¶3095, we held that a similar demand was not a mandatory subject of negotiation. As in Troy, the demand herein is not limited to investigations of departmental misconduct. It would prohibit the employer from ordering an employee to take a polygraph or chemical test for any reason. In this form, the demand encompasses investigations made pursuant to the

normal police responsibilities of the employer and is, therefore, beyond the employment relationship. Accordingly, it is not a mandatory subject of negotiation.

PBA DEMAND 5 - EMPLOYMENT QUALIFICATIONS

"Commencing January 1st, 1978, all Police Applicants must meet the requirements as per Nassau County Police Department for employment."

Qualifications for appointment is a management prerogative and not a mandatory subject of negotiation, Association of Central Office Administrators, 4 PERB ¶3058, affirming 4 PERB ¶4509.<sup>3/</sup>

NOW, THEREFORE, we determine that the PBA has violated its duty to negotiate in good faith by submitting demands 2, 3, 4, and 5 to an arbitrator, as charged, and

WE ORDER the PBA to withdraw said demands, and with respect to Demand No. 1, the charge herein is dismissed.

DATED: New York, New York  
September 14, 1978

Harold R. Newman  
Harold R. Newman, Chairman

Ida Klaus  
Ida Klaus, Member

David C. Randles  
David C. Randles, Member

<sup>3/</sup> See also Orange County Community College, 9 PERB ¶3068, at page 3119, in which we determined that a demand to establish procedures for the screening of job applicants is not a mandatory subject of negotiation.

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of :  
: #2C-9/14/78  
: HICKSVILLE UNION FREE SCHOOL DISTRICT, :  
: Respondent, : BOARD DECISION AND ORDER  
-and- : CASE NO. U-3036  
: HICKSVILLE CONGRESS OF TEACHERS, NYEA/NEA, :  
: Charging Party. :  
:

CAMPANELLA, ZOLOTOROFE & GUERCIO, ESQS. (JOSEPH W.  
CAMPANELLA, ESQ., of counsel) for Respondent

R. WHITNEY MITCHELL for Charging Party

The Hicksville Congress of Teachers, NYEA/NEA (charging party) charged the Hicksville Union Free School District (respondent) with violation of its duty to negotiate in good faith in that it unilaterally changed terms and conditions of employment by making a verbatim record of proceedings at Steps 2 and 3 of a four-step grievance procedure.<sup>1</sup> The specific conduct that

<sup>1</sup> Step 1 of the grievance procedure involves the oral presentation of the grievance to the immediate supervisor of the aggrieved. At Step 2, a written grievance is presented to the superintendent. At Step 3, a written grievance is presented to the Board of Education. Step 4 involves arbitration which in some instances is advisory and in other instances is binding.

the charging party complained about occurred on July 15, 1977, September 22, 1977 and November 9, 1977, three occasions on which respondent prepared a verbatim record of Steps 2 or 3 of a grievance. In the seven years preceding these grievances, there had been only one grievance, and no verbatim record was prepared of any part of that proceeding. The current agreement between the parties contains no provision permitting or prohibiting a party from preparing a verbatim record of any step of a grievance proceeding.

A hearing officer determined that these facts do not establish any violation of respondent's duty to negotiate in good faith. This matter now comes to us on charging party's exceptions.<sup>2</sup> Charging party specifies several bases for its exceptions, only one of which is material. It contests the hearing officer's conclusion of law that respondent did not violate its duty to negotiate in good faith by preparing a verbatim record of Steps 2 and 3 of the grievance procedure over charging party's objection. We affirm the hearing officer's determination. The charging party has not established facts that would indicate that either past practice, or any agreement with respondent, barred either party from preparing a verbatim record of proceedings at Steps 2 and 3 of a grievance proceeding.<sup>3</sup> On the record before us, we must dismiss the charge that respondent unilaterally altered terms and conditions of employment.

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<sup>2</sup> On June 15, 1978, we denied the charging party's motion to reopen the hearing for the admission of newly discovered evidence on the ground that the evidence that charging party sought to introduce dealt with matters that occurred after the events complained about in the charge and, therefore, were not covered by it.

<sup>3</sup> Because it has made a full presentation in its brief, we deny the request of the charging party for oral argument.

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

DATED: New York, New York  
September 14, 1978

*Harold R. Newman*  
\_\_\_\_\_  
Harold R. Newman, Chairman

*Ida Klaus*  
\_\_\_\_\_  
Ida Klaus, Member

*David C. Randles*  
\_\_\_\_\_  
David C. Randles, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

#2D-9/14/78

In the Matter of

BOARD DECISION AND ORDER

EAST RAMAPO CENTRAL SCHOOL DISTRICT,

Petitioner,

CASE NO. C-1427

-and-

EAST RAMAPO TEACHERS ASSOCIATION,

Intervenor.

In the Matter of

EAST RAMAPO CENTRAL SCHOOL DISTRICT,

Respondent,

CASE NO. U-2466

-and-

EAST RAMAPO TEACHERS ASSOCIATION,

Charging Party.

Attorneys for Petitioner-Respondent

Greenberg & Wanderman  
35 North Madison Avenue  
Spring Valley, New York 10977

Attorneys for Intervenor-Charging Party

Rowley and Forrest  
90 State Street  
Albany, New York 12207

On November 10, 1976, the East Ramapo Central School District (District) filed a timely petition to exclude department chairmen from the teachers' unit represented by the East Ramapo Teachers Association (Association) (Case No. C-1427). Department chairmen and teachers had been in the same unit since 1968. The Association intervened in the proceeding. On December 23, 1976, the Association charged that the District had committed an improper practice when it filed its petition because the filing of it was

intended to deprive the employees of rights guaranteed by the Taylor Law (Case No. U-2466).

The Director of Public Employment Practices and Representation issued his decision in Case No. C-1427 on September 14, 1977. He found that a close community of interest was shared by department chairmen and teachers. He also found that department chairmen do not exercise supervisory responsibilities that would create a conflict of interest between them and teachers. Accordingly, he determined that the department chairmen should not be excluded from the teachers' unit. The District has filed exceptions to this decision. Its exceptions fall into two categories. First, it argues that the evidence establishes that the department chairmen supervise the teachers and that the nature of their supervisory responsibilities precludes both groups being represented in a single negotiating unit. Alternatively, it argues that department chairmen are supposed to supervise teachers, but that it has been unable to compel them to do so because both groups are represented in a single negotiating unit.

The hearing officer issued his decision in Case No. U-2466 on September 1, 1977. It dismissed the Association's improper practice charge. He determined that an employer cannot be held to have committed an improper practice by reason of its filing a timely representation petition because it has an absolute right to utilize the statutory procedures available for the resolution of representation questions. He further found that the evidence establishes that the District's motivation in filing the petition was not improper; rather, it was for a "legitimate objective of restructuring the existing unit for administrative purposes." The Association has filed exceptions to this decision. It contends that where a petition is filed with this Board that would not have been filed but for the District's anti-union animus, the mere filing of the petition would constitute an improper practice, and it

takes exception to the hearing officer's finding of no animus.

Although separate briefs were submitted in the two cases, we combined them at the time of oral argument. Having reviewed the records in both cases and considered the arguments of the parties, we affirm the decisions below in both cases.

#### The Representation Case

There does not appear to be any dispute about the applicable legal principles in this case. A negotiating unit is not appropriate if it includes both teachers and department chairmen who exercise significant supervisory responsibilities over them, City School District of the City of Binghamton, 10 PERB ¶3062 (1977). Moreover, in ascertaining whether the duties of department chairmen include these responsibilities, the Board will look to the duties actually required and performed, and not to those duties merely listed in a statement of job duties. Therefore, while in 1971 the employer promulgated a new job description for department chairmen which included significant supervisory responsibilities, that job description is not conclusive. The District's alternative argument that it has unsuccessfully sought to compel department chairmen to perform the supervisory tasks specified in the 1971 job description falls before evidence that it has given the department chairmen satisfactory evaluations based upon the work that they actually performed.

The Director determined, and we affirm, that "since its promulgation the department chairmen have never been required to fully perform these functions." He evaluated the evidence of the work actually performed by department chairmen against five indicia of supervisory responsibilities and concluded that supervisory status was not established by a preponderance of the evidence.

#### 1. Curriculum

Although the job description speaks of the department chairmen's

"district-wide" responsibility in initiating and implementing curriculum, the Director found that their role in initiating curriculum was restricted to meeting with fellow teachers and discussing curriculum in a collegial manner. Their duties in implementing curriculum were satisfied by being conduits through whom the principals' directions were communicated to the other teachers. We agree with the Director's determinations in this regard.

## 2. Discipline

Department chairmen have no responsibility in this area, either in practice or by way of job description. We fully concur in this finding.

## 3. Grievances

Although the first step of the grievance procedure involves the "immediate supervisor" of the teacher, the Director determined that, in practice, this function has been performed by the building principal. The record evidence affords us no basis for disturbing this determination.

## 4. Hiring of New Employees

While the job description assigned a significant responsibility to the department chairmen, the Director found that, in fact, no meaningful role was exercised. The evidence supports this conclusion.

## 5. Evaluation of Existing Employees

This is the most troublesome of the indicia of supervisory responsibility. A department chairman does observe classroom teachers and a report is forwarded to the building principal, who has the responsibility of preparing written evaluations. However, it was the conclusion of the Director that the report of the department chairman's observations is not intended to be an important factor in the principal's preparation of his evaluation. Indeed, it is not even an incident of the department chairman's job to make an effective recommendation to the principal. Rather, the primary objective of the department chairman's observation is to provide a basis for the remediation of teaching skills. Although the record shows that occasionally a principal does

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give considerable weight to the report of a department chairman's observations, it is based upon a personal relationship between the principal and a particular department chairman and, therefore, is not common to department chairmen in general.

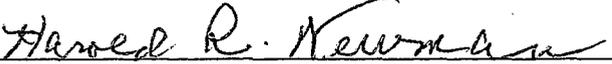
The Director's conclusions of fact are supported by the record. It establishes that notwithstanding job descriptions assigning significant supervisory assignments to department chairmen, they have not been required to exercise such responsibilities over teachers. Because it is the job duties actually required and not those specified in a duty statement that determines whether employees have a community of interest, we conclude that department chairmen should remain in the teachers' unit.

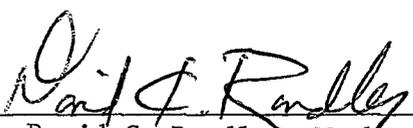
The Improper Practice Charge

We do not accept the Association's position that the mere filing of the representation petition in this case constituted an improper practice. The jurisdiction of this Board may be invoked over matters that may properly be brought before it. It is important that those subject to the benefits of the Taylor Law not be discouraged from utilizing its processes. We need not consider whether there might be extraordinary circumstances in which resort to this Board's jurisdiction would be improper.

NOW, THEREFORE, WE ORDER that both the petition of the East Ramapo Central School District in Case No. C-1427 and the charge of the East Ramapo Teachers Association in Case No. U-2466 be, and they hereby are, dismissed.

Dated, New York, New York  
September 15, 1978

  
Harold R. Newman, Chairman

  
David C. Randles, Member

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OPINION OF BOARD MEMBER KLAUS

1]

DISSENTING IN PART

In my view, the majority decision does not reflect the full and realistic appraisal of the status of the chairmen essential to a disposition of the issue before us.<sup>2]</sup>

Chairmen are required by State law to possess a supervisory certificate obtained on the basis of prescribed educational qualifications and practical experience. They achieve tenure as certified supervisors. They receive a substantial differential in salary over that of teachers. Except for the one or two periods a day in which they teach, they devote all their working time to their duties and responsibilities as chairmen.

As the evidence shows, the chairman is in fact the operating and administrative head of the department. As such, he maintains his department as a self-contained, distinct and integrated unit of the total school organization and its ongoing essential instructional system. Apart from his responsibility for the basic essentials and normal day-to-day demands of administration, he maintains the teaching staff of the department as an established professional entity within the structure of the department. He meets regularly with the staff members as a group, and often with individuals, and discusses administrative and instructional policy and problems with them. He serves as the direct link between his staff and the principal, who, of course, has the first responsibility for the general operation of the school and for its total instructional program.

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1] I concur in the decision dismissing the improper practice charge of the Association.

2] I assume that the majority's enunciation here of the test of "significant" supervisory responsibility over the teachers is synonymous with the Board's established standard of "effective" supervision. Otherwise, I would, as an initial point, disagree with the test itself as requiring a greater degree of supervisory authority than is commonly the rule.

In the general organization and operation of the school, the chairman acts in a direct line of responsibility to the principal. He is a part of the administrative and supervisory structure of the school. He participates together with assistant principals (who unquestionably hold significant supervisory rank) in executive meetings with the principal at which matters of schoolwide importance are considered and discussed. The chairmen also meet separately with the principal, when necessary, to recommend or report on matters of importance in their respective departments.

Testimony on the nature of the relationship of the chairmen and the teachers in their respective departments was given by the District and by the chairmen. Three chairmen, of a total of 24 currently employed, testified on this point. While they characterized their role as "cooperative" rather than "directive", their evidentiary description of their actual duties and responsibilities supports the principals' assertion that "cooperation" at this and all levels in the school setting connotes a desirable style and method for achieving a consensus but not, however, a division of authority. It is not a process of joint decision-making or of shared responsibility. The burden of making and submitting recommendations to the principal affecting the department and the teachers remains that of the chairman. As the two principals called by the District together represent almost 50 percent of the chairmen employed in the District, I consider their testimony to be adequately representative in important respects of the total policy and experience of the District.

It is this profile of the chairman's real role that is reflected in the job description and in the testimony. I find no solid basis for the majority's crucial conclusion that the extent of variance between the job description and the actual duties and responsibilities chairmen perform is such as to reduce their supervisory function to a level of ineffectiveness or insignificance. In point of fact, the evidence reveals a general fidelity of

3] job performance to job description. This may be due to the unusual circumstance that the job description was negotiated jointly in 1971 by the District and the Association and spelled out the duties actually performed at that time so as to delineate clearly the nature of the chairman's status. The job description is also incorporated in the collective bargaining agreement. Both documents designate and recognize the chairmen as supervisors. Most important is the testimony of the principals and of the chairmen themselves. The principals stated that the actual duties chairmen perform are, and have been, the same as those enumerated in the job description. Each of the chairmen gave substantially the same testimony as the principals with respect to the content of his own duties.

4]

The record thus supports a finding that, weighed in their totality and evaluated in the context of the special characteristics of their position, the duties prescribed and performed adequately establish the chairman's role as one of substantial supervisory authority. Such finding should be dispositive of the issue before us. The majority's contrary conclusion rests, in the main, on the argument of the District's counsel that the chairmen have refused to perform the full measure of their duties. On this assertion, and from the chairmen's satisfactory annual ratings, the Board has concluded that what the

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- 3] It would be most surprising if all duties and responsibilities stated in general terms and enumerated in detailed examples in the form and style of a public-service job description were actually and uniformly executed in all work locations at any given time.
- 4] Similar testimony was given by some eight chairmen and former chairmen in an improper practice proceeding brought by the Association before this Board some six months before the institution of the instant representation proceeding. It is worthy of note that the Association there stipulated that all chairmen, if called, would have given the same testimony. Matter of East Ramapo Central School District and East Ramapo Teachers Association, 10 PERB ¶13064 (1977).

chairmen are expected to do is substantially less than the job description calls for. Counsel's bare assertion is at odds with the actual testimony of both the District's own witnesses and those of the Association. It should be regarded as no more than an advocate's effort to persuade the Board of the existence of a conflict of interest between the chairmen and the teachers.

While it is not necessary to express any further basis for disagreement with the majority decision, I am nevertheless constrained to speak as well on the criteria selected and applied by them for making the critical test.

To be sure, chairmen do not assume the responsibilities normally lodged in the head of the school or in the Board of Education. They do not impose discipline; prefer charges; dismiss teachers; or officially recommend the grant of tenure. As only one of the criteria cited by the majority need be met in order to support a finding of significant supervisory status,<sup>5]</sup> it is sufficient to state that the evidence as to the role of the chairmen in the hire of applicants for employment in their respective departments constitutes a sufficiently compelling basis for such a finding, as does their function of visitation and observation of teachers.

It is clear from the testimony of the chairmen, as well as that of the principals, that chairmen do in fact as a general rule conduct extensive and thorough interviews of applicants for employment in their respective departments and make recommendations to the principal based on those interviews. The principal gives great weight to the recommendation and does not normally bring into the department a teacher who is not acceptable to the chairman. Both of the two current chairmen who testified on the subject agreed that no

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5] See, e.g. NLRB v. Yeshiva University, \_\_\_ F2d \_\_\_ (C.A.2, July 31, 1978).

6]  
teacher has been hired over their negative recommendation. Consequently, I regard the majority's negative conclusion on this criterion as resting on somewhat less than solid ground. I would find that department chairmen effectively recommend the hire of new teachers.

With respect to visitation of classrooms and observation of teachers, characterized in the majority decision under the heading, "Evaluation of Existing Teachers," the Board, in my view, has underestimated and misconceived the significance of this essential function. The evidence establishes that chairmen, in the exercise of their independent judgment or at the behest of the principal, make classroom visitations to oversee and assess the teacher's ability to create an effective learning environment and to perform the essential mission of instruction. As part of the process, the chairman gives such verbal help and guidance as he deems necessary to improve the teacher's classroom performance. In the case of newly hired or nontenured teachers, visitations occur frequently. Temporarily assigned teachers are visited almost daily and in some instances several times in one day. Formal written observation reports, made at required intervals, record the chairman's judgment of

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6] It should be noted that, when hiring must be done during the summer vacation period, the chairman may not be available and, unless he voluntarily comes in to conduct the interview, as has often been the case in at least one school, the principal must assume that task himself. The job description recognizes that possible exception in stating that the chairman interviews all candidates for employment in his department, "to the extent that the chairman is available," and makes recommendations relevant to the candidate's employment. A parallel provision in the collective bargaining agreement, under the sub-heading "Supervisory Approval of Assignments," states that "whenever possible, personnel will not be hired and/or assigned without prior interview by their department chairman (chairmen)."

the teacher's ability and progress in the classroom.

An examination of the standard form used in the District for observation reports shows that the eight categories of items listed for comment are essentially no different from those in general use in other school districts. Among the items listed are "Constructive suggestions" and "General comments". As is done in other districts, a copy of the report is given to the teacher, and another is sent to the principal and placed in the teacher's personal file.

It was recognized by the principals and chairmen alike that the purpose of the classroom visits and observations and reports is to stimulate the professional growth of the teacher and to enhance her instructional performance. Such significant quality control of the essential mission of the educational system cannot, without further analysis, simply be characterized as "providing a basis for the remediation of teaching skills." Each observation and each report with its suggestions and comments, often followed by personal conferences with the teacher, must be deemed, as the principals have noted, to reflect the chairman's own evaluation of the ongoing performance and progress of the teacher as viewed directly by him at the scene. In the school setting, with its own style of professional oversight, this function may well be regarded as analogous to the authority in the world of industrial enterprise "responsibly to direct" employees in the performance of their work -- a controlling criterion for determining significant supervisory status.

Furthermore, the observations and judgments of the chairman have a serious impact on the teacher's employment career. The testimony of the principals is that they have placed heavy reliance on the observation reports for purposes of rating, retention, and granting or denial of tenure in arriving at their own formal evaluation of teachers. One of the principals has never rated a teacher unsatisfactory over the objection of the chairman. The other firmly insisted, even during forceful cross-examination, that "the input of

the chairman is very substantial in arriving at that evaluation." The four chairmen who testified on the use made of their observation reports were generally agreed that the reports were of assistance to the principal in making his overall evaluation. That the teachers deem the reports to be of serious consequence to the terms and conditions of their employment, is evident from the right accorded them in the agreement to prepare comments for the record in reply to the chairman's reports on classroom visits and on each formal observation.

Unlike the majority, I do not find it "troublesome" to reach the conclusion that, on the evidence as to the visitation and observation functions alone, the department chairmen effectively recommend important personnel actions and consequently meet the test of significant supervisory responsibility. As indicated, I would find that the test has also been satisfied by their effective recommendations as to hire, as it has by their authority responsibly to direct the work of the teachers.

Consequently, as a matter of established PERB principle, the chairmen should be removed from the existing unit in order to afford the teachers the opportunity freely to exercise their rights under §202 of the Act, unhampered by the necessarily deterrent effect --whether consciously perceived by them or not -- of the presence of their immediate supervisors in a single unit with them. Such disposition is all the more compelling in this particular case in view of the control which the chairmen have had, and still have, over the leadership of the Association.

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7] Several chairmen have served as president, including the last three incumbents; others have been and are now vice presidents; and at least two, including the incumbent, have served as chairman of the grievance committee. A chairman acts as chief negotiator for the Association.

In my view, the denial of the District's petition perpetuates a history of conflict of loyalties on the part of the chairmen which overlooks the statutory prescription (§207.1(c)) that the unit "shall be compatible with the joint responsibilities of the public employer and public employees to serve the public."

DATED: New York, New York  
September 15, 1978

*Ida Klaus*  
\_\_\_\_\_  
Ida Klaus, Member

5361

NEW YORK STATE PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of the : #2E-9/14/78  
ROCKLAND COUNTY UNIT OF THE ROCKLAND COUNTY :  
CHAPTER OF THE CIVIL SERVICE EMPLOYEES : BOARD DECISION  
ASSOCIATION, INC. and CIVIL SERVICE EMPLOYEES : AND ORDER  
ASSOCIATION, INC., : Case No. D-0165  
Respondents, :  
upon the Charge of Violation of Section 210.1 :  
of the Civil Service Law. :

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On May 9, 1978, Martin L. Barr, Counsel to this Board, filed a charge alleging that the Rockland County Unit of the Rockland County Chapter of the Civil Service Employees Association, Inc. (Respondent) had violated Civil Service Law (CSL) §210.1 in that it caused, instigated, encouraged, condoned and engaged in a strike against the County of Rockland. Inasmuch as the Respondent Unit had authorized the County to remit its dues deductions to CSEA, Inc., CSEA, Inc. was named as a respondent. The charge further alleged that the strike took place between December 28, 1977 and January 7, 1978, involving approximately 1400 public employees.

Respondents filed answers but thereafter agreed to withdraw them, thus admitting to all of the allegations of the charge, upon the understanding that the charging party would recommend and this Board would accept a penalty of loss of their dues deduction privileges for ten months. The charging party has recommended a ten month suspension of the Respondents' dues deduction privileges.

On the basis of the unanswered charge, we find that the Rockland County Unit of the Rockland County Chapter of the Civil Service Employees Association, Inc. violated CSL §210.1 in that it

engaged in a strike as charged, and we determine that the recommended penalty is a reasonable one.

WE ORDER that all of the dues deduction privileges arranged by the Rockland County Unit of the Rockland County Chapter of the Civil Service Employees Association, Inc. as exclusive representative of employees of the County of Rockland and agency shop fee deductions, if any, be suspended for a period of ten months commencing on the first practicable date. Thereafter, no dues deductions and agency shop fees shall be deducted on its behalf or on behalf of the CSEA, Inc. by the County of Rockland until the Rockland County Unit of the Rockland County Chapter of the Civil Service Employees Association, Inc. affirms that it no longer asserts the right to strike against any government as required by the provisions of CSL §210.3(g).

DATED: New York, New York  
September 14, 1978

Harold R. Newman  
Harold R. Newman, Chairman

Ida Klaus  
Ida Klaus, Member

David C. Randles  
David C. Randles, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of	:	#2F-9/14/78
	:	
UNITED UNIVERSITY PROFESSIONS, INC.,	:	
	:	
Respondent,	:	<u>BOARD DECISION AND ORDER</u>
	:	
-and-	:	
	:	<u>CASE NO. U-2951</u>
MORRIS ESON,	:	
	:	
Charging Party.	:	

BERNARD F. ASHE, ESQ. (ROCCO A. SOLIMANDO and  
IVOR R. MOSKOWITZ of counsel) for Respondent

MORRIS ESON, pro se, for Charging Party.

In our decision of August 23, 1978, we determined that the agency shop fee refund procedure promulgated by the United University Professions, Inc. (respondent) was not valid in that (1) the respondent did not contemplate applying the refund procedure to the pro rata share of agency shop fee payments spent "in aid of activities or causes of a political or ideological nature only incidentally related to terms and conditions of employment" by the New York State United Teachers (NYSUT) and the American Federation of Teachers (AFT); the state and national organizations with which respondent is affiliated; and (2) it imposed arbitration as the final step to resolve disputes as to the proper amount which an employee would be entitled to receive by way of refund and which also imposed half the costs of the arbitration.

We directed the respondent to submit a revised refund procedure by September 22, 1978,<sup>1</sup> and one was received from respondent on September 12, 1978. In an accompanying letter, the respondent's president affirmed that the refund would extend to the pro rata share of monies spent by NYSUT and AFT

<sup>1</sup> The proposed refund procedure is attached as an appendix.

in aid of activities or causes of a political or ideological nature only incidentally related to terms and conditions of employment.<sup>2</sup> This letter satisfies our first objection.

As to the second objection, the respondent has deleted any reference to imposed arbitration and any sharing of its costs in the revised procedure.

In its place, the procedure now provides:

"If he/she is dissatisfied with the governing body's action the objection will be submitted by the Union to a neutral party appointed by the Union from lists to be supplied by the American Arbitration Association for hearing and resolution. The costs for any such appeal to a neutral party shall be borne by the Union."  
(emphasis supplied)

This would meet our second objection if (1) it is understood that the submission by the respondent to the neutral party will be accomplished in an expeditious manner; and, (2) the reference to "resolution" is not deemed final and binding upon a dissatisfied employee, but would leave him free to initiate a plenary action regarding the amount of the refund as determined by the neutral party. We so understand this to be the procedure which will be adhered to by the respondent, and we approve it on that basis.

<sup>2</sup> The letter states:

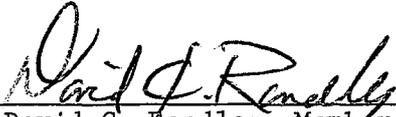
"To satisfy the decision and interim order of the Public Employment Relations Board, dated August 23, 1978, in the above matter, the United University Professions, Inc. will request both the New York State United Teachers and the American Federation of Teachers to supply the UUP with a financial breakdown of monies paid to these organizations on a per capita basis by the UUP for non-members, which funds were expended in aid of activities or causes of a political or ideological nature only incidentally related to terms and conditions of employment. This financial breakdown together with the normal accounting for funds received by the UUP from its members and agency shop fee payers will then be utilized by the UUP in determining the amount of any refund of agency shop fee deductions."

The refund procedure requires an employee requesting a refund to do so during the period between September 1 and 15 of each year. While many unit employees may have exercised the opportunity to do so this year, others may nevertheless not have done so because the status of the refund procedure was unclear by reason of the pendency before us of this matter. Therefore, while the September 1 to 15 period will be adequate in future years, we would only approve the revised procedure on the condition that respondent accept refund requests by registered or certified mail during the 15-day period commencing 10 days after it gives notice of its revised refund procedure to all unit employees. This notification, together with the revised refund procedure and the accompanying letter of explanation from its president, is to be mailed by the respondent to each unit member and posted upon all bulletin boards regularly used by the respondent to communicate with unit employees. Such notification shall be accomplished no later than October 15, 1978.

Dated, New York, New York  
September 15, 1978

  
Harold R. Newman, Chairman

  
Ida Klaus, Member

  
David C. Randles, Member

"UNITED UNIVERSITY PROFESSIONS, INC.

POLICY ON AGENCY FEE DUES REFUNDS  
(AS AMENDED, SEPTEMBER 11, 1978)

AGENCY FEE DUES REFUND: Any person making service payments to the Union in lieu of dues, as mandated by Chapter 677, Laws of 1977, as amended by Chapter 678, Laws of 1977 and Chapter 122, Laws of 1978, shall have the right to object to the expenditure of his/her portion of any part of any agency shop fee deduction which represents the employee's pro-rata share of expenditures by the organization in aid of activities or causes of a political or ideological nature only incidentally related to terms and conditions of employment.

Such objections shall be made, if at all, by the objector individually notifying the Union President and Treasurer of his/her objection by registered or certified mail during the period between September 1 and 15 of each year.

The approximate proportion of service fees spent by the Union for such purposes shall be determined annually, after each fiscal year of the Union, by the Union's officers. Rebate of a pro-rated portion of his/her service fees corresponding to such proportion shall thereafter be made to each individual who has timely filed a notice of objection, as provided above.

Appeals

If an objector is dissatisfied with the proportional allocation that has been determined on the ground that it assertedly does not accurately reflect the expenditures of the Union in the defined area, an appeal may be taken by such person to the Union Executive Board within thirty (30) days following its receipt. If the objector remains dissatisfied, he/she may file an appeal therefrom to the local's governing body by lodging the appeal with the President of the Union within thirty (30) days following receipt of the Executive Board decision which appeal shall be heard at the next regular meeting of the governing body. The governing body shall render a decision within thirty (30) days after hearing the appeal.

If he/she is dissatisfied with the governing body's action the objection will be submitted by the Union to a neutral party appointed by the Union from lists to be supplied by the American Arbitration Association for hearing and resolution. The costs for any such appeal to a neutral party shall be borne by the Union.

The Union, at its option, may consolidate all objections and have them resolved at one hearing to be held for that purpose."

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of :  
 : #2G-9/14/78  
COUNTY OF ALBANY, :  
 :  
Employer, : Case Nos. C-1704 & C-1713  
 :  
-and- :  
 :  
LOCAL 200, GENERAL SERVICE EMPLOYEES' :  
UNION, SEIU, AFL-CIO, :  
 :  
Petitioner. :  
 :

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that Local 200, General Service Employees' Union, SEIU, AFL-CIO has been designated and selected by a majority of the employees of the above named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: All full-time, non-supervisory employees at the Albany County Nursing Home and Ann Lee Home in the following sections or titles: Boiler Room; Housekeeping; Laundry; Bus Driver; Activities except the Director; X-Ray Technician in Radiology; Beauty Shop; Laboratory; Cardiology; Receiving; Meals on Wheels; Maintenance; Preventative Maintenance; Crafts; Groundsman; LPN's; Nursing Assistants; Clinics; Central Supply; Messenger; Transportation; Medical Stores Clerk; Physical Therapy Aides and Assistants; Plumber; U.R. Coordinator; Building Mechanic Maintenance Foreman; Assistant Activities Leader; Clinic Coordinator; Phlebotomist; Occupational Therapy Aides and Assistants; Carpenter; Educational Service Training Instructor; Electrician.

Excluded: Pastoral Care; Administrator; Administrative Aide; Medical Services; Staff Development; Barber Shop; Personnel; Pharmacy; Business Office; Procurement Officer; Superintendent of Buildings and Grounds; Assistant Administrator; Switchboard Operator; Security; Social Services; Medical Records; Admitting; Preventative Maintenance Coordinator; Relief Site Manager; Registered Nurses and all other employees.

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with Local 200, General Service Employees' Union, SEIU, AFL-CIO 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 September 14, 1978  
New York, New York

Harold R. Newman  
Harold R. Newman, Chairman

Ida Klaus  
Ida Klaus, Member

David C. Randles  
David C. Randles, Member