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State of New York Public Employment Relations Board Decisions from April 9, 1979

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from April 9, 1979

Keywords
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On October 10, 1975, the Corporation Counsel of the City of New York filed a charge alleging that the Council of Supervisors and Administrators of the City of New York, Local 1, SASOC, AFL-CIO (CSA) engaged in a five-day strike on September 9, 10, 11, 12 and 16, 1975 against the New York City Board of Education (Employer).

Hearing Officer Determination

A hearing officer determined that CSA engaged in a strike of supervisors and administrators as charged. The strike was simultaneous with a strike by the United Federation of Teachers (UFT) against the Employer and was in support of the UFT strike.

The disposition of this matter was long delayed because of parallel proceedings in a court action brought by the Employer against CSA for an injunction. The details of the delay are specified in the hearing officer's report and recommendations, 12 PERB ¶8001 (1979).
With respect to those matters that bear upon the penalty which this Board might impose, the hearing officer determined that "[a]lthough the educational processes of the Board of Education were effectively stopped by the UFT strike, the CSA strike was not without some impact. It contributed to the effectiveness of the UFT strike." He also determined that the strike was not occasioned by such acts of extreme provocation of the Board of Education as would detract from the responsibility of CSA for the strike and that "[t]he financial resources of the CSA would be seriously strained by an extended loss of dues deduction and agency shop privileges". Finally, the hearing officer found that CSA had engaged in a prior strike seven years earlier, but that in the earlier strike, "the Board of Education was found to have engaged in acts of extreme provocation which detracted from its responsibility for the strike, but 'not to the point of exculpation.' Since the strike charged in the instant case, CSA has negotiated two contracts with the Board of Education without a strike or a strike threat."

CSA has filed exceptions to the report and recommendations of the hearing officer. These exceptions contend that the hearing officer erred in determining that CSA engaged in a strike and that he further erred in that he failed to conclude that the conduct of CSA was caused by acts of extreme provocation by the Board of Education.

Discussion

Having reviewed the record, we affirm the findings of fact and conclusions of law of the hearing officer.

In determining the appropriate penalty, two matters require elaboration. The hearing officer reported that the CSA strike was in support of a strike by UFT and that the UFT strike had, in any event, effectively stopped the educational processes of the Board of Education. It is appropriate that we consider this circumstance in fixing the duration of the penalty to be imposed upon CSA.
because §210.3(f)(ii) of the Taylor Law requires us to consider the impact of a strike upon the public health, safety and welfare of the community. Here, the impact of the CSA strike was slight. It does not follow, however, that a secondary strike would always have less impact than a primary strike. A secondary strike could have more impact upon public health, safety and welfare than does the primary strike if, for example, teachers supported a strike by cafeteria employees.

The second matter that requires elaboration is the effect of the prior strike of CSA, given the hearing officer's recommendation that we "should deem this strike as something less than a second violation of §210.1 by CSA because the earlier strike was provoked by the Board of Education, even if not to the point of exculpation." Ordinarily, for a second strike by employees not performing public safety functions, we would impose an indefinite forfeiture of dues checkoff and agency shop privileges, with permission granted to the employee organization to apply for the restoration of those privileges after one year, provided that during the interim it had negotiated an agreement without striking or threatening to strike. Here, CSA has negotiated two agreements since 1975 without a strike or a strike threat. Moreover, the employer's extreme provocation of the earlier strike must be considered. But for the earlier strike, we would have imposed a three-month forfeiture of dues deduction and agency shop privileges. Because that earlier strike was extremely provoked but "not to the point of exculpation", we impose a forfeiture of four months.

NOW, THEREFORE, WE ORDER that the dues deduction and agency shop privileges of the CSA be suspended for a period of four months commencing on the first practicable date, provided, however, that if such deductions are not made in twelve equal installments per annum, the forfeiture shall continue.
for the period of time during which one-third of CSA's annual dues and agency shop fee payments would be deducted. Thereafter, no dues or agency shop fees shall be deducted on behalf of CSA until it affirms that it no longer asserts the right to strike against any government, as required by §210.3(g) of the Taylor Law.

DATED: Albany, New York
April 9, 1979

Harold R. Newman, Chairman

David C. Randles, Member

Board Member Ida Klaus did not participate in the consideration of this matter.
This matter comes to us on exceptions taken by the County of Onondaga (County) to the decision of a hearing officer that it refused to negotiate in good faith with the Onondaga County Chapter of the Civil Service Employees Association, Inc., Local 834 (CSEA). The charge of CSEA, which the hearing officer sustained, had alleged that the County had violated §209-a.1(d) of the Taylor Law by unilaterally discontinuing a past practice of assigning vehicles to employees of the County's Department of Health, Division of Environmental Sanitation, on a 24-hour basis. The exceptions are as follows:

1. The charge was untimely filed.

2. The matter is covered by the collective bargaining agreement between the parties and is, therefore, not appropriate for consideration as an improper practice.

3. The decision is not supported by substantial evidence.

4. The proposed Order usurps the lawful authority of the County of Onondaga.

5. The proposed Order is too broad.
FACTS

The charge was filed by CSEA on June 13, 1977. The County denied the material allegations of the charge and raised the affirmative defense that the charge was not timely.

The circumstances giving rise to the charge are substantially undisputed. On April 19, 1976, Dr. William A. Harris, the County Commissioner of Health, issued a memorandum that as of April 21, 1976, motor vehicles previously assigned to employees on a round-the-clock basis would be stored at a car pool and checked out to them as needed. Previously, while the cars had been furnished to employees for on-site inspections during and outside of their normal working hours, they had also been used for their personal transportation to and from work. Although the practice of assigning cars to employees on this basis was of long standing, dating back at least to 1967, it had not been incorporated in any of the parties' contracts. Further, the parties stipulated that "there is nothing in the job specifications for the titles involved in this proceeding stating that vehicles are an incident of employment". However, the availability to employees of County vehicles for their personal transportation to and from work had been communicated to job applicants by the Bureau Chief and had been an inducement to them to take the job.

PROCEDURAL ISSUES

Timeliness

The hearing officer found the charge to be timely even though CSEA did not file it with PERB until fourteen (14) months following the issuance of the April 1976 memorandum. We affirm his decision. The record supports his conclusion that the affected employees, CSEA, and some of the County agents charged with implementing the change reasonably believed it to be experimental and not permanent. Three employees - Soule, the President of the CSEA unit;
Orr, one of the Bureau Chiefs; and Harris, the Commissioner of Health who issued the April 19th memo— all testified that it was their belief that the program was "experimental" and subject to review after a trial period. More importantly, sometime before April 1976, Soule was told by the Financial Officer of the Department of Health that "...management was trying to have the issue revoked and please don't take any union action until such time as it was definite".

Guala, the Director of the Division of Environmental Sanitation, met with his Bureau Chiefs on the 26th of January and indicated that he would implement a voluntary mileage reimbursement program for those employees who chose to use their own cars in lieu of the County car. The following day he met with two unit employees and advised them that the use of County vehicles on a 24-hour basis would not be reinstated. These employees were not CSEA representatives. On February 14, 1977, he met with most of the Division employees, including Embury, the CSEA Division representative. It was at that meeting that the finality of the decision was first disclosed to CSEA. CSEA relies upon this date as marking the commencement of the period for determining the timeliness of the charge.

We find, on these facts, that the County is estopped from arguing that the charge should have been filed within four months of April 19, 1976. It was at the County's behest, and thus in the interest of maintaining harmonious relations, that the CSEA refrained from filing a charge until the experiment

1 Harris could not recall having used the word "experimental". Nevertheless, he testified that he did consider it to be such and so advised the involved employees.

2 The four month provision is not a jurisdictional requirement that is imposed by statute; it is an affirmative defense that is made available by our Rules.
was completed and final action was taken. It was not until February 14, 1977, that CSEA was made aware that the decision was final. As the charge was filed within four months of that date, we deem the charge to be timely.

Waiver of Right to Negotiate

The County argues that it was under no duty to negotiate as to the discontinuation of the assignment of County vehicles because the matter was already covered by contract. It further argues that this Board cannot interpret the contract. The contract clause relied upon by the County provides that it has the right,

"...(4) to maintain the efficiency of government operations entrusted to them, (5) to determine the method, means and personnel by which operations are to be conducted, (6) to take whatever actions may be necessary to carry out the mission, policies or purpose of the department, office or agency concerned...."

The County's contention is not that this clause expressly deals with the use of vehicles, but that it does so generally and that it therefore constitutes a waiver of CSEA's right to negotiate about the matter.

This Board may interpret an agreement in order to ascertain whether a union has waived its right to negotiate, St. Lawrence County, 10 PERB ¶3058 (1977). The hearing officer found that there was no waiver by the CSEA of its right to negotiate as to the use of the County cars. He was not persuaded that the management's rights clause in the contract left this matter to the discretion of the County. We affirm the hearing officer's decision that the language involved does not constitute a waiver on the part of CSEA and that the respondent was therefore obligated to negotiate about the change for the reasons hereinafter stated.
DUTY TO NEGOTIATE

In County of Cattaraugus, 8 PERB ¶4516 (1975) affirmed 8 PERB ¶3062 (1975), it was held that employee use of an employer-owned car for personal purposes is an economic benefit and is a term and condition of employment which cannot be unilaterally withdrawn by the employer. In that case the use of the car was an inducement relied upon by the employees in accepting employment and had "...a significant and material relationship to conditions of employment". That decision is applicable in this case. Here, too, the employees were offered and enjoyed an economic benefit as a significant and material condition of their employment.

USURPATION OF THE COUNTY'S AUTHORITY

The County points to a resolution adopted by its legislature on July 5, 1977, prohibiting the personal use of County vehicles by employees. It claims that this Board's remedial powers do not permit it to set aside the legislative action of a County. This claim is without merit. When a County acts through its legislature to perpetuate an improper practice, that action is subject to the jurisdiction of this Board, Koenig v. Morin, 70 Misc.2d 185 (Monroe Co., 1977), 10 PERB ¶7529.

NOW, THEREFORE, WE affirm the decision of the hearing officer, and WE ORDER the County of Onondaga to:

1. Reinstate the practice of providing County-owned vehicles on a 24-hour basis to employees in the Division of Environmental Sanitation of the Department of Health.

2. Reimburse the affected employees for reasonable expenses incurred by them in connection with their transportation to and from work, at a three-percent-per-annum interest rate, retroactive to February 14, 1977.
3. Negotiate with CSEA, at its request, as to the use of County vehicles by employees in the Division of Environmental Sanitation of the Department of Health.

DATED: Albany, New York
April 10, 1979

Harold R. Newman, Chairman
Ida Klaus, Member
David C. Randles, Member
In the Matter of
BOARD OF EDUCATION OF THE CITY SCHOOL
DISTRICT OF THE CITY OF NEW YORK,
Respondent,
-and-
ASSOCIATION OF DISTRICT AND BOROUGH
SUPERVISORS OF SCHOOL CUSTODIANS
AND CUSTODIAN ENGINEERS,
Charging Party,
-and-
INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 891,
Intervenor.

RAMON IRIZARRI, ESQ., for Respondent
MORRIS WEISSBERG, ESQ., (FRANK J. PRIAL II,
of Counsel) for Charging Party
WILLIAM F. CASSIN, SR., ESQ., for Intervenor

The charge herein was brought by the Association of District and
Borough Supervisors of School Custodians and Custodian Engineers (Association)
on January 12, 1978. It alleges that the Board of Education of the City School
District of the City of New York (Employer) violated its duty to negotiate in
good faith by unilaterally abolishing its past practice of processing applica-
tions by supervisors who seek to revert to custodial positions and by refusing
the Association's demand to negotiate about the matter. The supervisors were in
a negotiating unit represented by the Association at that time. The custodial
positions are in a unit represented by the International Union of Operating
Engineers, Local 891 (Intervenor).
In a decision issued on October 12, 1978, the hearing officer dismissed the petition on the ground that the matter in dispute was not a mandatory subject of negotiation with the representative of the supervisors.

FACTS

Supervisors are paid a salary. The custodians in the District are paid an allowance based primarily on the size of the school to which they are assigned. The custodian must provide for the upkeep and maintenance of the building from this allowance, from which he also derives compensation for his services. Thus, assignment to several schools, or to a larger school, usually means a larger allowance and offers the opportunity for greater compensation. Custodians at larger schools may, therefore, earn more than supervisors. Since 1952, the Employer has utilized a Custodial Rating and Transfer Plan, which provides, so far as is here relevant, that, for purposes of transfer, custodians will be ranked according to seniority and job performance. Although, by its terms, the Rating and Transfer Plan does not apply to supervisors, for many years the Employer allowed supervisors to make application for reversion to the position of custodian and assignment to schools in which there were custo-

On November 1, 1978, the charging party filed exceptions to the hearing officer's decision. At that time, a representation petition by the Intervenor for certification in the unit represented by the charging party was being processed (C-1764). Following an election in which a majority of the employees in the supervisors' unit selected the Intervenor as their representative, this Board, on January 24, 1979, certified the Intervenor as the negotiating representative of the supervisors. The Employer now moves to dismiss the exceptions on the ground that the dispute has become "academic," the charging party no longer having standing to complain that the Employer is refusing to negotiate with it because the Employer is no longer under any duty to do so. The Intervenor, which is now the representative of the supervisors as well as of the custodians, supports this motion. In view of our position on the merits of the charge, we do not find it necessary to pass upon the motion.
dial vacancies. The supervisors' participation in the transfer provisions of the Plan was never a term of their contract and was not negotiated with them.

During the negotiations with the Intervenor for a successor to the custodians' 1972-75 contract, supervisors were eliminated from participation in the transfer provisions of the Rating and Transfer Plan. Subsequently, the Employer refused to accept applications for reversion and transfer by three supervisors. When, on January 5, 1978, the matter was sought to be negotiated by the Association during its contract negotiations, the Employer refused the request. At that point, the Association filed the improper practice charge.

**DISCUSSION**

The hearing officer correctly held that the practice of allowing supervisors to apply for reversion and transfer to custodial vacancies is not a term and condition of their employment. The movement of employees from a position within their negotiating unit to a position in another unit is not a term or condition of their employment within the meaning of the Public Employees' Fair Employment Act, City of Albany, 7 PERB ¶3078 (1974), Somers Faculty Association, 9 PERB ¶3014 (1976) and Onondaga Community College, 11 PERB ¶3045 (1978).

The charging party, in its exceptions, asserts that a public employer that has, for many years, conferred upon its employees a benefit which was not a mandatory subject of collective bargaining may not unilaterally discontinue such benefit and then refuse to bargain about it with the employees' representative. The cases cited by the charging party do not support this assertion. On the contrary, we have held that a non-mandatory subject does not become mandatory because it is voluntarily negotiated, Troy Firefighters, 10 PERB ¶3105 (1977).
NOW, THEREFORE, WE ORDER that the charge herein be, and it hereby is, dismissed.

DATED: Albany, New York
April 10, 1979

Harold R. Newman, Chairman
Ida Klaus, Member
David C. Randles, Member
The charge herein was filed by the Parishville-Hopkinton Central School Non-Teacher Employees Association (Association) on December 23, 1977. It alleges that the Parishville-Hopkinton Central School District (District) violated §209-a.1(d) of the Public Employees' Fair Employment Act in that it unilaterally extended the workday of secretaries who are within the negotiating unit and that it refused the Association's demands to negotiate over the extension.

On or about August 17, 1977, while negotiations for a successor agreement were awaiting mediation, the District's Supervising Principal informed two of the District's secretaries that the secretaries were to remain in the school offices until 4:00 P.M. beginning September 1, 1977. Although the expired contract between the District and the Association contained no provision concerning the hours of the workday, the offices had closed at 3:30 P.M. for the past ten years.
The extended workday schedule was implemented on September 1, 1977. There is no evidence or indication that the Association was or should have been aware of the extension before September 1977. On or about September 15, 1977, the Association informed the District that it considered the action a unilateral change and it insisted that the status quo be restored and that there be no extension of the workday unless one be negotiated. On October 15, 1977, a District spokesman replied that he understood the matter had been resolved between the District and the Association. Within the next two weeks the Association discovered that the matter had not been resolved and it so informed the District on November 1, 1977. On or about December 16, it requested that the extended workday be rescinded and stated that the District should request negotiations if it wanted to extend the workday. The District responded that to open the issue at that time would jeopardize ratification of a successor agreement. The Association then filed this charge.

In December 1977, a successor agreement, retroactive to July 1, 1977, was ratified. This agreement, which contained a salary increase for secretaries and other employees, does not refer to the extension of the workday.

After the Association's filing of this improper practice charge, the District executed a stipulation in which it conceded that it had unilaterally extended the workday of secretaries and that it had refused the Association's request to submit the matter to negotiation, "thus effectively refusing to bargain on the matter". In defense of its actions, the District argued before the hearing officer that (1) the charge was not timely and, (2) the collective agreement entered into by the Association and the District in December, 1977, constituted a "waiver" by the Association of its right to negotiate over the extra time for secretaries. The waiver argument is not based upon any express language to that effect in the agreement, but upon the argument that the wage increase was designed by the parties to compensate the secretaries for the
extension of the workday from 3:30 P.M. to 4:00 P.M. The District further argued that the extension of the workday did not add to the working time of the secretaries because compensatory time off was provided through an expansion of their lunch period.

The hearing officer found that the District had unilaterally extended the workday of secretaries and that it had refused to negotiate over the change. He also found that the District's two defenses were without merit. As to the defense of timeliness, he determined that the Association was not aware of the extension of the workday before September 1977, a period within four months of the charge. The District has not taken exception to this determination. As to the defense of waiver, he determined that the District never communicated to the Association that it deemed the 1977-79 contract increase in the secretaries' salaries to be compensation for the change in their workday. Accordingly, he concluded that the Union's agreement to the salary provision did not constitute a waiver of negotiations as to the change in the workday.

The hearing officer determined that the half-hour added to the workday constituted an increase in the work time of the secretaries and ordered that the secretaries be compensated for that time.

In its exceptions, the District disputes the hearing officer's determination that the Association made a demand that it negotiate as to the extension of the workday or that it refused to do so. It bases this exception upon the absence of a formal demand and argues that this absence caused "a confused state of affairs". It also contends that the extension of the workday did not add to the working time of the secretaries because the secretaries were given an extended lunch break, and, therefore, the hearing officer should not have proposed the remedy that the secretaries be compensated for the extension of the workday.

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1 The hearing officer found that the secretaries were not given an extended lunch break.
DISCUSSION

We affirm the decision of the hearing officer.

The exceptions of the District are based upon narrow and meaningless distinctions. First, the District contends that the hearing officer should not have relied upon its concession that by its conduct it was "effectively refusing to bargain on the matter", because the concession constituted a statement of opinion and not of fact. Second, while admitting that it knew that the Association was seeking to negotiate over the extension of the workday, it argues that it was confused by the absence of a formal demand. These arguments are not persuasive. The District's characterization of its own conduct in the stipulation is supported by the facts set forth in it and is sufficient to establish a violation of its duty to negotiate in good faith. The record also establishes that the unilateral extension of the workday added working time to the secretaries' schedules. Accordingly, we adopt the order recommended by the hearing officer.

NOW, THEREFORE, WE ORDER that the Parishville-Hopkinton Central School District restore the work schedule of secretaries that existed prior to September 1, 1977 and that it compensate the affected secretaries for the hours in excess thereof worked by them thereafter on a pro rata percentage of their 1977-79 contract salary plus interest at three percent per annum.

DATED: Albany, New York
April 10, 1979

Harold R. Newman, Chairman

Ida Klaus, Member

David C. Randels, Member
In the Matter of

COUNTY OF NASSAU (NASSAU COUNTY MEDICAL CENTER),

   Respondent,

   and-

NASSAU CHAPTER OF THE CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,

   Charging Party.

RICHARD M. GABA, ESQ., (ALVIN M. SCHWARTZ, ESQ., of Counsel), for Charging Party

JACK OLCHIN, ESQ., for Respondent

This matter comes to us on the exceptions of the Nassau Chapter of the Civil Service Employees Association, Inc. (CSEA), to a hearing officer's decision dismissing its consolidated charges. The first charge (U-2896) complained that the Nassau County Medical Center (County) had unilaterally instituted a new morning shift for certain unit employees. The second charge (U-2971) complained that the County unilaterally instituted a Saturday shift for certain unit employees. In both charges, CSEA alleged as well that the County refused to negotiate over the impact of these unilateral changes.

In dismissing the charges, the hearing officer determined that the County had unilaterally instituted new shifts as charged, but that in their
agreement CSEA had conceded to the County the right to do so. He also determined that the County had not violated any duty to negotiate over the impact of its unilaterally instituted shift changes because CSEA had never demanded such negotiations.

CSEA's exceptions contested both determinations of the hearing officer. It argues that the hearing officer misread the contract in determining that it had conceded to the County the right to change the work schedules. It further argues that the hearing officer misread the evidence in the record in determining that it had not made a demand of the County to negotiate over the impact of the changed work schedules.

We affirm the determinations of the hearing officer. In our opinion, the broad management rights clause negotiated by the parties constitutes a waiver of CSEA's right to negotiate as to the work schedules involved in this case. We also find no evidence in the record that CSEA demanded negotiations over the impact of the changed work schedules.

1 The hearing officer relied upon §3.2 of the agreement between the County of Nassau and the Nassau Chapter of CSEA, which provides:

"3.2 Except as validly limited by this agreement, the County reserves the right to determine the standards of service to be offered by its various agencies; to set the standards of selection for employment; to direct its employees; to regulate work schedules; to take disciplinary action; to relieve its employees from duty because of lack of work or for other legitimate reasons; to maintain the efficiency of governmental operations; to determine the methods, means and personnel by which governmental operations are to be conducted; to determine the content of job classifications; to take all necessary actions to carry out its mission in emergencies; and to exercise complete control and discretion over its organization and the technology of performing its work. (Emphasis Supplied)."
NOW, THEREFORE, WE ORDER that both charges be, and they hereby are, dismissed.

DATED: Albany, New York
April 9, 1979

Harold R. Newman, Chairman
Ida Klaus, Member
David C. Randles, Member
This matter comes to us on the exceptions of the Freeport Union Free School District (the Employer) to a hearing officer's determination that it violated §209-a.1(a) and (c) of the Civil Service Law (the Act) in that it improperly reassigned Mary Rice from the kindergarten to the third grade at the Columbus Avenue School because of her participation in the activities of the Freeport Teachers Association, Local 2660, NYSUT, AFT, AFL-CIO (the charging party). As building coordinator for the charging party at the Columbus Avenue School, Rice brought many faculty complaints to the Employer, with particular attention given to the complaints of kindergarten teachers.

The remedy proposed in the report of the hearing officer provides that Rice should be offered the position of kindergarten teacher at the Columbus Avenue School at the commencement of the second semester of the 1978-79 school year.

In its exceptions, the Employer contends that the charge should have been dismissed because the hearing officer did not find that the Employer's conduct was motivated by animus toward the charging party. It further contends
Board - U-3402

that the evidence does not support the hearing officer's determination that the Principal of the Columbus Avenue School knew that Rice was the building coordinator for the charging party. Finally, it contends that the proposed remedy is inappropriate because the assignment of a teacher to a particular grade involves educational judgments that are beyond the authority of PERB to make; moreover, a mid-year switch in assignments would be detrimental to both the kindergarten and the third grade.

The charging party responds that the hearing officer's decision is correct and that his recommended order should be imposed because to permit the wrong to continue is to condone it.

DISCUSSION

Having reviewed the record, we find that the evidence supports the determination of the hearing officer that the building principal was aware of Rice's position as building coordinator for the charging party. We also affirm the hearing officer's conclusion that animus against an employee organization is not an essential element of a violation of §209-a.1(a) and (c) of the Act, State of New York, 10 PERB ¶3108 (1977). The relevant language of the statute is that a public employer commits an improper practice (a) when it interferes with employees in the exercise of their protected rights "for the purpose of depriving them of such rights" and (c) when it discriminates against employees "for the purpose of...discouraging...participation in the activities of, any employee organization". Rice's activities on behalf of the charging party were protected by the Act and were known to the Employer. We conclude from the evidence that the Principal of the Columbus Avenue School was disturbed by those activities and he transferred her from the kindergarten to the third grade in order to interfere with them by disrupting communications between
Rice and the other kindergarten teachers. Whether or not the building principal may, in fact, have felt animus toward the charging party is irrelevant. His reason for interfering with those activities, thereby discriminating against Rice, was sufficient to establish a violation within the meaning of the Act. The record establishes that the transfer of Rice, a kindergarten teacher of 12 years, to the third grade was made for the purpose of interfering with her rights under §209-a.1(a) and (c) of the Act, and not for educational policy reasons. Accordingly, contrary to the Employer's claim, this Board has not substituted its judgment for an educational policy decision of the Employer. In any event, actions that might generally be within the discretion of a public employer are nevertheless subject to the remedial powers of this Board when they are taken for reasons prohibited by §209-a.1 of the Act, Bd. of Ed., CSD No. 1, Grand Island v. Helsby, 32 NY 2d 660 (1973), 6 PERB ¶7004; City of Albany v. PERB, 43 NY 2d 954 (1978), 11 PERB ¶7007.

We determine that the remedy proposed by the hearing officer is appropriate.

NOW, THEREFORE, WE ORDER the Freeport Union Free School District to:

1. Cease and desist from engaging in discriminatory and coercive conduct toward employees in the exercise of their rights protected by the Public Employees' Fair Employment Act;

2. Restore Mary Rice to the position of kindergarten teacher at the Columbus Avenue School; and

3. Conspicuously post a notice in the form attached at locations ordinarily used for written communications.
to employees of the Columbus Avenue School.

DATED: Albany, New York
April 10, 1979

Harold R. Newman, Chairman

Ida Klaus, Member

David C. Randles, Member
NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE
NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the
NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify our employees that:

1. The Freeport Union Free School District will not engage
   in discriminatory or coercive conduct towards employees
   as a result of the exercise of rights protected under the
   Public Employees' Fair Employment Act; and

2. The Freeport UFSD will restore Mary Rice to the position
   of kindergarten teacher at the Columbus Avenue School.

Employer

Dated By

(Representative) (Title)

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.
STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD  

In the Matter of:  
CITY OF NIAGARA FALLS,  
Employer,  
-and-  
OPERATORS AND ASSISTANT OPERATORS REPRESENTATION GROUP,  
Petitioner,  
-and-  
LOCAL 15071, UNITED STEEL WORKERS OF AMERICA,  
Intervenor,  
-and-  
LOCAL 14551, UNITED STEEL WORKERS OF AMERICA,  
Intervenor.  

• STACK & TAVANO, ESQS., (BERNARD E. STACK, ESQ., of Counsel) for Petitioner  
CARL MOORADIAN, ESQ., for Employer  
McMAHON & CROTTY, ESQS., (E. JOSEPH GIROUX, JR., ESQ., of Counsel) for Local 15071  
WILLIAM GRACE, ESQ., for Local 14551  

On May 24, 1978, the Operators and Assistant Operators Representation Group (petitioner) filed a petition for certification as the representative of a unit of employees of the Utilities Department of the City of Niagara Falls comprising Operators and Assistant Operators in the Sewer Division and Operators, Assistant Operators and Control Maintenance Mechanics in the Water Division. There are approximately 41 Sewer Operators and Assistant Sewer Operators in a
negotiating unit of about 450 employees that is currently represented by Local 15071 of the United Steel Workers. Most of the employees in that unit perform white-collar work. There are approximately 32 Water Operators, Assistant Water Operators and Control Maintenance Mechanics in a separate negotiating unit that is represented by Local 14551 of the United Steel Workers. Both Local 15071 and Local 14551 intervened in the proceeding.

The Director of Public Employment Practices and Representation determined that the Sewer Operators and Assistants had a close community of interest with the Water Operators, Assistants and Control Maintenance Mechanics and that this community of interest was greater than that between the Sewer Operators and Assistants and the other employees in the larger unit represented by Local 15071. He also found that the proposed unit was consistent with the other standards specified in §207.1 of the Public Employees Fair Employment Act. Accordingly, he proposed the establishment of a negotiating unit that would contain the two groups of employees. He further determined that two Instrument Technicians and nine Control Maintenance Mechanics in the Sewage Plant not sought by petitioner should be added to that unit.

Local 15071 has filed exceptions to the determination of the Director. In its exceptions, Local 15071 argues that the Director erred in determining that the Sewer Division employees share a close community of interest with the Water Division employees and that they do not have as close a community of interest with the other employees in the existing unit represented by Local 15071. No exceptions were filed by the Employer, the petitioner, or Local 14551.

DISCUSSION

Having reviewed the record, we find that the evidence supports the conclusions reached by the Director. Most significantly, the Operators and Assistant Operators of both the Water and Sewer Divisions work according to a 21-shift weekly schedule that is designed to accommodate the employer's
need to keep both operations open 24 hours a day, seven days a week. The Operators and Assistants in both Divisions work a schedule of seven days on and two days off, with no holidays. In both Divisions the employee enters as an Assistant and has the opportunity to advance to the position of Operator. In both Divisions the Operators and Assistants purify water through the use of filters and chemicals and both groups use similar pumps to keep the water moving. The same type and level of skills is required of the employees in both Divisions. By way of contrast, most other employees in the unit represented by Local 15071 work a regular 9:00 - 5:00 schedule, with holidays and weekends off. Thirty to thirty-five auto mechanics in that unit do work in shifts, but they, too, have weekends and holidays off. On this evidence, we affirm the determination of the Director that the Operators and Assistant Operators in the Sewer Division should be in a single unit with the Operators, Assistant Operators and Control Maintenance Mechanics of the Water Division.

We also affirm his determination that the Mechanics and Technicians in the Sewage Plant should be included in that unit. The Sewer Mechanics are the counterparts of the Control Maintenance Mechanics in the Water Division. There are no counterparts of the Sewer Technicians currently in the Water Division only because the appropriate instruments involved in those duties are not now operational there. Although the employees who fill these added positions do work regular hours in rotating shifts, they nevertheless have more in common with the Operators and Assistants in the Water and Sewer Divisions than they do with the remaining employees in the unit represented by Local 15071.

NOW, THEREFORE, WE ORDER that there be a unit for the following employees:

5715
INCLUDED: Pumping plant operator, assistant pumping plant operator, filter operator, assistant filter operator, water and sewer control maintenance mechanic, sewage plant operator, sewage plant assistant operator, instrument technician.

EXCLUDED: All other employees.

IT IS FURTHER ORDERED that there be an election by secret ballot under the supervision of the Director among the employees in the unit determined to be appropriate who were employed by the City of Niagara Falls on the payroll date immediately preceding the date of this decision.

FURTHER, IT IS ORDERED that the City of Niagara Falls submit to the Director, the petitioner and the employee organizations participating in the election, within 15 days from the date of this decision, an alphabetized list of all employees within the unit described above who were employed on the payroll date immediately preceding this decision.

DATED: Albany, New York
April 10, 1979

Harold R. Newman, Chairman
Ida Klaus, Member
David C. Randles, Member

Both Local 15071 and Local 14551 are eligible to participate in the election along with the petitioner. If they desire to do so, they should advise the Director and all parties within ten working days from receipt of this decision.

5716
In the Matter of the:

LYNBROOK DEPARTMENT OF PUBLIC WORKS UNIT OF THE:
NASSAU COUNTY CHAPTER, LOCAL 830, CIVIL SERVICE
EMPLOYEES ASSOCIATION, INC., NASSAU COUNTY
CHAPTER, LOCAL 830, CIVIL SERVICE EMPLOYEES
ASSOCIATION, INC., and the CIVIL SERVICE
EMPLOYEES ASSOCIATION, INC.,

Respondents,

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

On January 16, 1979, Martin L. Barr, Counsel to this Board, filed a charge alleging that the respondents herein had violated Civil Service Law (CSL) §210.1 in that they caused, instigated, encouraged, condoned and engaged in a strike against the Village of Lynbrook on September 21, 22, 23, 25 and 26, 1978.

Respondents agreed to forego filing an answer and thus admit to all allegations of the charge, upon the understanding that the charging party would recommend and this Board would accept a penalty of forfeiture of their deduction privileges for six months. The charging party has recommended a six-month suspension of the respondents' deduction privileges.

On the basis of the unanswered charge, we find that the respondents violated CSL §210.1 in that they engaged in a strike as charged, and we determine that the recommended penalty is a reasonable one.
WE ORDER that all dues deduction privileges arranged by the Nassau County Chapter, Local 830, Civil Service Employees Association, Inc. (Chapter), as exclusive representative of Department of Public Works employees of the Village of Lynbrook, and agency shop fee deductions, if any, be suspended for a period of 6 months commencing on the first practicable date. Thereafter, no dues and agency shop fees shall be deducted by the Village of Lynbrook from the salaries of said employees on behalf of the Chapter, the Lynbrook Department of Public Works Unit of the Nassau County Chapter, Local 830, CSEA, Inc. (Unit), or CSEA, Inc., until the Unit and the Chapter affirm that they no longer assert the right to strike against any government as required by the provisions of CSL §210.3(g).

DATED: Albany, New York
April 10, 1979

Harold R. Newman, Chairman

Ida Klaus, Member

David C. Randles, Member
STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATION BOARD

In the Matter of
LEVITTOWN PUBLIC LIBRARY,
Employer,
- and -
CIVIL SERVICE EMPLOYEES ASSOCIATION,
NASSAU CHAPTER, AFSCME, 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 accord­
ance 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 the Civil Service Employees
Association, Nassau Chapter, AFSCME, 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 representa­
tive for the purpose of collective negotiations and the settle­
ment of grievances.

Unit: Included: All full and part-time professionals,
non-professionals, custodial and
maintenance employees.

Excluded: All pages, Director, Assistant to Director,
Secretary to Director, Public Information
Assistant, Senior Account Clerk, Senior
Library Clerk in Administrative Office, and
Clerk-Typist in Administrative Office.

Further, IT IS ORDERED that the above named public
employer shall negotiate collectively with the Civil Service
Employees Association, Nassau Chapter, AFSCME, 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 on the 9th day of April, 1979
Albany, New York

Harold R. Newman, Chairman

Ida Klaus, Member

David C. Randles, Member