4-26-1979

State of New York Public Employment Relations Board Decisions from April 26, 1979

New York State Public Employment Relations Board

State of New York Public Employment Relations Board Decisions from April 26, 1979

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

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of STATE OF NEW YORK (STATE UNIVERSITY OF NEW YORK), Employer, -and- COMMITTEE OF INTERNS AND RESIDENTS, Petitioner, -and- UNITED UNIVERSITY PROFESSIONS, INC., Intervenor.	#2A-4/26/79 BOARD DECISION ON MOTION CASE NO. C-1751

JOSEPH M. BRESS, ESQ., for Employer

IRWIN GELLER, ESQ., for Petitioner

JAMES R. SANDNER, ESQ., for Intervenor

On March 29, 1979, the Director of Public Employment Practices and Representation (Director) dismissed the petition of the Committee of Interns and Residents (CIR) for certification as the exclusive representative of medical and dental interns, residents and fellows (collectively referred to as interns) employed by the State of New York throughout the State University system. The effect of his decision is that the interns remain in a larger negotiating unit comprising other professional employees of the State University of the State of New York. In that unit they are represented by United University Professions, Inc. (UUP). CIR has filed exceptions to the decision of the Director. It has also moved this Board for an order directing the State and UUP to refrain from engaging in collective negotiations until its exceptions to the decision of the Director have been considered by this

Board. Neither the State nor UUP has submitted any position on this motion.

This Board has no authority to grant the relief sought. Accordingly, we deny the motion for want of jurisdiction.

DATED: New York, New York
April 27, 1979

Harold R. Newman, Chairman

Ida Klaus, Member

David C. Randles, Member

NEW YORK STATE PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of	#2B-4/26/79
LEVITTOWN UNITED TEACHERS,	BOARD DECISION AND ORDER
upon the Charge of Violation of Section 210.1 of the Civil Service Law.	CASE NO. D-0173

On December 8, 1978, Martin L. Barr, Counsel to this Board, filed a charge alleging that the Levittown United Teachers (LUT) had violated Civil Service Law (CSL) §210.1 in that it caused, instigated, encouraged, condoned and engaged in a strike against the Levittown Union Free School District (District) for a period of 34 school days from September 6, 1978 to and including October 27, 1978.

The charge further alleged that out of a negotiating unit of 636 teachers the number of those who participated in the strike ranged from 609 to 616.

The LUT filed an answer but thereafter agreed to withdraw it, 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 forfeiture of its deduction privileges to the extent of the amount to be deducted during one full school year plus twenty-five (25%) percent of the amount to be deducted during the succeeding school year.[1/] The charging

1/ This is intended to be the equivalent of a fifteen month suspension of the privileges of dues and/or agency shop fee deduction, if any, if such were withheld in equal monthly installments throughout the year.

party has recommended a suspension of deduction privileges to the extent indicated.

On the basis of the unanswered charge, we find that the LUT 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 the deduction privileges of the Levittown United Teachers be suspended commencing as soon as practicable and continuing for such a period as would be required to deduct an amount equal to the dues and agency shop fee deduction, if any, which would otherwise be deducted during one full school year plus twenty-five (25%) percent of the amount that would be deducted during the succeeding school year. Thereafter, no dues and agency shop fees shall be deducted on its behalf by the Levittown Union Free School District until the Levittown United Teachers affirms that it no longer asserts the right to strike against any government as required by the provisions of CSL §201.3(g). Should it become necessary to utilize the dues or agency shop fee deduction process for the purpose of paying the whole or any part of a fine imposed by order of a court as a penalty in a contempt action arising out of the strike herein, the suspension of the deduction

privileges ordered hereby may be interrupted or postponed for such period as shall be sufficient to comply with such order of the court, whereupon the suspension ordered hereby shall be resumed or initiated, as the case may be.

DATE: New York, New York
April 26, 1979

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	#2C-4/26/79
THE BALDWINSVILLE CENTRAL SCHOOL DISTRICT	BOARD DECISION AND ORDER
Upon the Application for Designation of Persons as Managerial or Confidential	CASE NO. E-0544

O'HARA AND O'HARA, for the District

This matter comes to us on the exceptions of the Baldwinsville Central School District (District) to a decision of the Director of Public Employment Practices and Representation (Director) dismissing its application for the designation of nine secretaries as confidential employees in accordance with the criteria set forth in §201.7 of the Public Employees' Fair Employment Act. The application was filed by mail. It was signed and posted on November 30, 1978 and was received by PERB on the following day. The Director determined that the application was late because November 28, 1978 was the last acceptable date for filing the application by mail, it being two days before the end of the fifth month of the fiscal year of the public employer.[1] Accordingly, he dismissed it as untimely.[2]

---

1 Section 201.10 of our Rules permits the filing of an application for the designation of persons as managerial or confidential between the first day of the fourth month and the last day of the fifth month of the fiscal year of the public employer, which, for the District is between October 1, and November 30, of each year. Section 200.10 of our Rules provides that: "The term 'filing', as used herein, shall mean delivery to the Board or an agent thereof, or the act of mailing to the Board no less than two days before the due date of any filing."

2 The application was dismissed before the secretaries or their representative became parties to the proceeding.

EXCEPTIONS

In support of its exceptions,[3] the District makes three arguments:

1. The rule specifying the time during which an application may be filed does not necessarily mean that an application may be filed only during that time.
2. By reason of §19 of the General Construction Law, and of §2004 and Rule 2103 of the Civil Practice Law and Rules, the filing is timely if received by PERB before midnight December 1 and, in any event, PERB has the discretion to accept a late filing "upon good cause shown" and should do so where the application is posted no later than the due date of the filing.[4]
3. The lateness is de minimis and should be waived as a mere technicality.

---

[3] The District has requested permission to present oral argument. We deny the request.

[4] To the extent that they are relied upon by the District, these Laws provide:

"General Construction Law §19

> Day Calendar. A calendar day includes the time from midnight to midnight...."

"CPLR §2004.

> Extensions of time generally. Except where otherwise expressly prescribed by law, the court may extend the time fixed by any... rule...for doing any act, upon such terms as may be just and upon good cause shown, whether the application for extension is made before or after the expiration of the time fixed."

"CPLR Rule 2103.

> Service of Papers. (b)2 ...service by mail shall be complete upon deposit of the paper enclosed in a postpaid properly addressed wrapper, in a post office or official depository under the exclusive care and custody of the United States post office department within the state; where a period of time prescribed by law is measured from the service of a paper and service is by mail, three days shall be added to the prescribed period;...."
>
> "(c) If a party has not appeared by an attorney or his attorney cannot be served, service shall be upon the party himself by a method specified in paragraph one, two or four of subdivision (b)."

DISCUSSION

We affirm the decision of the Director. The rules for the filing of an application clearly permitted the District to file its application by delivering it in person not later than November 30, 1978 or by mailing it not later than November 28, 1978. It follows and is plainly implicit in these rules that an application may not be filed after the specified time and PERB has consistently interpreted its Rules in this manner, Nassau Chapter, CSEA, 6 PERB ¶3057. Although the issue has not arisen before in connection with an application for the designation of employees as managerial or confidential, it has arisen frequently in connection with improper practice charges, which may be filed within four months of the conduct complained about (Rules, §204.1(a)(1)). PERB has construed its timeliness rules strictly and it has consistently dismissed charges that are late, Brighton Fire District, 10 PERB ¶3091.[5]

The provisions of the General Construction Law and the CPLR cited by the District do not support its position. General Construction Law §19, which defines the term "calendar day", is irrelevant. So is CPLR Rule 2103, which is concerned with the manner and not the time of service of papers. CPLR §2004 does deal with the time of service of papers, but it applies to courts and not to administrative agencies like PERB. It endows courts with broad discretion to extend the time for a party to perform required acts but it does not authorize PERB to exercise similar discretion. PERB's procedures are governed by its own Rules, promulgated pursuant to its authority under CSL §205.5(1). These Rules do not permit the extension or waiver of the time limits for the filing of

---

5 In State of New York (University), 11 PERB ¶4590, a hearing officer dismissed a charge which, like the application in the instant case, was late because it was mailed on the last day when it could have been delivered in person.

an application to designate employees as confidential.[6]

We reject the District's argument that its lateness should be waived because it was de minimis. In Cattaraugus County Chapter of CSEA v. Helsby, 3 PERB ¶7005, June 19, 1970, the Supreme Court (Rensselaer County) determined that the Director erred when he declined to dismiss a petition "on a technicality" involving a question of its timeliness because to do so "would put form above substance and abort both the spirit and intent of the Act." It held that an administrative agency cannot waive or disregard its own Rules and that this Board was arbitrary and capricious when it attempted to do so because it was not in the same position as a court.

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

DATED: New York, New York
April 26, 1979

Harold R. Newman, Chairman

Ida Klaus, Member

David C. Randles, Member

6 The absence of authority to permit such extensions or waivers in management/confidential cases becomes more clear when the rules on improper practice charges are considered. By its Rules (§204.12), this Board may, upon request, extend the time for the filing of exceptions to a hearing officer's decision in an improper practice case. Also, an objection to the timeliness of a charge may be waived, Rules, §204.7(1).

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, Respondent, -and- NATIONAL EDUCATION ASSOCIATION, Charging Party, -and- UNITED FEDERATION OF TEACHERS, LOCAL 2, AFT, AFL-CIO, Intervenor.	#2D-4/26/79 BOARD DECISION AND ORDER CASE NO. U-3291

JAMES R. SANDNER, ESQ., (DAVID N. STEIN, ESQ., of Counsel), for Intervenor

HOWARD N. MEYER, ESQ., for Charging Party

DAVIS BASS, ESQ., for Respondent

The charge herein was filed by the National Education Association (NEA) against the Board of Education of the City School District of the City of New York (District) on May 2, 1978. It alleges that the District interfered with the protected rights of the NEA and of Marvin Datz, that it discriminated against Datz, and that it assisted a rival employee organization, United Federation of Teachers, Local 2, AFL-CIO (UFT). The UFT was not a named respondent, but was permitted to intervene in the proceeding.

5731

FACTS

The UFT is the recognized representative of teachers of the District including attendance teachers. Its contract with the District precludes a unit employee from being represented at any step in the grievance procedure by

an "officer or executive board manager, delegate or agent of a minority organization..."[1] Datz is an attendance teacher who had been serving as a grievance representative for other attendance teachers and was a member of NEA. In September and December 1977 he wrote to other attendance teachers urging them to support NEA. The letters were written on the letterhead of NEA. On December 20, 1977, the District's Office of Personnel ruled that Datz was precluded from representing grievants. Datz denied being a representative or agent of NEA and on the following day he was told that he would be authorized to represent grievants again if he could clarify his status. Datz and the District agreed that he and NEA would both inform the District by letter that he was not an agent or representative of the organization and that copies of those letters would be sent to the attendance teachers who received his letters of September and December.

Both Datz and NEA sent appropriate letters to the District and NEA advised the District that an appropriate letter was being sent to the addressees of Datz's letters of September and December. This was followed, on April 26, by

---

1 Section 15B(5)(b) of the contract provides:

> "No officer or executive board member, delegate, representative, or agent of a minority organization shall represent the aggrieved employee at any step in the grievance procedure. An agent shall include any person who, acting in an official capacity for a minority organization, regularly performs for that organization such acts as: distributing literature, colecting dues, circulating petitions, soliciting membership, or serving as a spokesman at attendance teachers' conferences. An agent shall not include any person who performs such duties occasionally or without any official designation by the minority organization involved...."

an affidavit stating that the appropriate disclaimers had been sent to the attendance teachers who had been sent Datz's September and December letters. However, NEA refused to divulge the names of the attendance teachers to whom the letters had been sent, saying that those names were on a confidential list. This did not satisfy the District, which insisted that Datz furnish it with a list of attendance teachers to whom the letters were sent. The charge was filed at this point.

The first specification of the charge is that the District's refusal to permit Datz to assist fellow employees in the handling of grievances is improper.[2] The hearing officer dismissed the specification on the ground that he lacked jurisdiction. Datz's claim is that the District violated his contractual rights while the District asserts that its conduct was authorized by the contract -- if Datz were an agent or representative of a minority employee organization, his exclusion as representative of grievants would have been authorized by contract, if not, his disqualification would have been a contract violation. The hearing officer ruled that he could not interpret the contract.

The second specification is that the District improperly conditioned Datz's clearance upon the submission to it of a confidential list of employees

---

2 This specification states that the District committed an improper practice

> "(1) By its arbitrary treatment in refusing teachers the services and assistance of a duly authorized teacher named Marvin Datz, a member of the National Education Association, to assist them in grievance handling, the employer, in connivance with the United Federation of Teachers, has been attempting to coerce and restrain said teachers and Mr. Datz in their exercise of their rights of free association, and their rights under the Taylor Law, all for the purpose of assisting the United Federation of Teachers and interfering with the administration of the National Education Association (N.E.A.)."

maintained by NEA.[3] The hearing officer found merit in this part of the charge and he ordered the District "to cease and desist from requiring submission of any list of District employees prepared or maintained by the NEA".

The third specification of the charge is that the contractual language relied upon by the District was illegal and that the District acted improperly by agreeing to and by relying upon such language.[4] The hearing officer dismissed this part of the charge on the ground that the contractual clause in question was valid.

EXCEPTIONS

Both the NEA and UFT have filed exceptions to the hearing officer's decision. The exceptions of NEA argue that:

1. The hearing officer should have interpreted the contract in order to ascertain whether NEA's rights were violated because NEA was neither a party to the contract nor a beneficiary under it. Accordingly, it had no contractual rights that it could have sought to enforce.

---

3 This specification states that the District committed an improper practice

> "(2) By purporting to condition its 'clearance' of Marvin Datz for representational purposes on the extracting from him or the N.E.A. of a confidential list of N.E.A. members or supporters, the Board is acting in violation of the Fourteenth Amendment of the Constitution as applied and construed in NAACP vs. Alabama, 357 U.S. 449, and the constitution and laws of the State of New York, and by such threatened extraction of lists seeks to coerce and restrain persons on said lists from assisting or supporting N.E.A., and to induce it to be more complaisant in negotiations."

4 This specification states that the District committed an improper practice

> "(3) By entering into and continuing to maintain and purport to enforce a collective bargaining contract provision excluding from the right to represent individual teachers, persons who are officers, representatives, delegates, or agents of 'minority' labor organizations, the Board and the United Federation of Teachers have entered into a coercive and illegal agreement which is void on its face, as favoring membership in the United Federation of Teachers and tending to discourage membership in the N.E.A., and said violation is a continuing one for each day that said agreement continues to be in effect."

2. The hearing officer failed to make a determination that the District's conduct was coercive of teachers who might wish to affiliate with or support NEA and that, consequently, the remedy that he proposed was inadequate -- the only adequate remedy being the reinstatement of Datz as a grievance representative.

For its part, the UFT has filed exceptions which argue that:

1. The entire charge should have been dismissed because it was not timely, all allegedly improper conduct having occurred in December 1977.

2. Since there was no indication on the record that the NEA list was confidential, the District's request for it was not inappropriate.

3. There is no evidence that the District's conduct was motivated by an intention of depriving employees of their right of organization, an essential element in the alleged violation.

The District filed no exceptions.

DISCUSSION

We affirm the decision of the hearing officer.

With respect to their timeliness, there is a distinction between the first and second specifications of the charge. The first was not timely, while the second was. The first specification deals with the denial of Datz's right to represent grievants, an event which occurred in December 1977, more than four months before the filing of the charge. The second specification deals with the conditioning of the restoration of Datz's right to represent grievants upon his submitting to the District an NEA mailing list. This condition was not apparent in December 1977, and did not become apparent until a time within the four-month period of the charge.

In view of our conclusion that the first specification of the charge was not timely filed, it is not necessary for us to reach the question whether the hearing officer could have interpreted the District's contract with UFT in order

to ascertain whether or not its language supports the District's action in December 1977. The merit or lack of merit of that action is irrelevant.

We affirm the determination of the hearing officer that the NEA list was confidential and that the District could not condition the restoration of Datz's status as grievance representative upon its divulgence. Moreover, we conclude that in doing so the District conducted itself in a manner that was inherently destructive of the right of unit employees who might wish to affiliate with or support the NEA, and thus a violation of §209-a.1 of the Civil Service Law.[5]

We agree that the hearing officer's proposed remedial order is inadequate. Although we do not reach the question whether the District acted improperly in December 1977, when it disqualified Datz as a grievance representative, we note that it agreed to reinstate him. It is the subsequent refusal of the District to restore Datz's status upon improper conditions that constitutes the violation. As requested by the District, both Datz and NEA advised the District by letter that Datz was not an agent of NEA. They also notified the District that this information was being sent to addressees of Datz's letters of September and December. Thus the proper conditions imposed by the District were satisfied and Datz should be reinstated as a grievance representative.

NOW, THEREFORE, WE ORDER the District to restore the status of Marvin Datz as a grievance representative.

DATED: New York, New York
April 27, 1979

5736

Harold R. Newman, Chairman

David C. Randles, Member

Member Ida Klaus did not participate in the decision of this matter

5 See State of New York, 10 PERB ¶3108.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIC BOARD

In the Matter of	:	
LAKELAND CENTRAL SCHOOL DISTRICT OF SHRUB OAK,	:	#2F-4/26/79
Employer,	:	
- and -		
LAKELAND CAFETERIA ASSOCIATION,	:	Case No. C-1664
Petitioner,	:	
- and -		
LAKELAND SCHOOL UNIT, WESTCHESTER CHAPTER, CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 860,	:	
Intervenor.	:	

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the Lakeland School Unit, Westchester Chapter, Civil Service Employees Association, Inc.. Local 860
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 cafeteria employees.

Excluded: School Lunch Manager.

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with the Lakeland School Unit, Westchester Chapter, Civil Service Employees Association, Inc., Local 860
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 26th day of April, 1979
New York, New York

Harold R. Newman
Harold R. Newman, Chairman

Ida Klaus
Ida Klaus, Member

David C. Randles
David C. Randles, Member

5738

PERB 58.3

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIC BOARD

In the Matter of	:	#2E-4/26/79
WHEATLAND-CHILI CENTRAL SCHOOL DISTRICT, Employer,	:	
- and -	:	Case No. C-1859
WHEATLAND-CHILI NON-TEACHING ASSOCIATION, NYSUT, AFT, 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 the Wheatland-Chili Non-Teaching Association, NYSUT, AFT

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 clerical personnel, school nurses and aides, including teacher aides; clerk typists, school aides, telephone operator, payroll clerk, and registered nurse, who are employed 10 or more months per year.

Excluded: All other employees.

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with the Wheatland-Chili Non-Teaching Association, NYSUT, AFT

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 26th day of April, 1979
New York, New York

Harold R. Newman
Harold R. Newman, Chairman

Ida Klaus
Ida Klaus, Member

David C. Randles
David C. Randles, Member

5737

PERB 58.3