6-7-1979

State of New York Public Employment Relations Board Decisions from June 7, 1979

New York State Public Employment Relations Board

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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 INCORPORATED VILLAGE OF HEMPSTEAD, Employer, -and- EDWARD R. GRAHAM and VINCENT J. MARINO, Petitioners, -and- POLICE BENEVOLENT ASSOCIATION OF HEMPSTEAD, INC., Intervenor.	#2A - 6/7/79 BOARD DECISION AND ORDER CASE NO. C-1770

CULLEN AND DYKEMAN, (GERARD FISHBERG, ESQ., of Counsel) for the Employer

GEHRIG, RITTER, COFFEY, McHALE & McBRIDE (JOHN J. COFFEY, ESQ., of Counsel) for Petitioners and Intervenor

Edward R. Graham and Vincent J. Marino filed a timely representation petition for a unit of policemen employed by the Village of Hempstead in the ranks of Police Officer through Captain. At the present time, the policemen up to the rank of Lieutenant are in a negotiating unit that is represented by the Police Benevolent Association of Hempstead, Inc. (PBA). That organization moved to intervene in the instant proceeding and indicated its support for the petition. If the petition were granted, a new negotiating unit would be created consisting of all the titles currently in the negotiating unit represented by PBA and two positions of Police Captain currently filled by Graham and Marino. The showing of interest was executed by Graham and Marino only.

In his decision, the Director of Public Employment Practices and Representation (Director) dismissed the petition on two grounds. The first ground is that it lacked a sufficient showing of interest, there being an indication of support for the petition by only two employees, Graham and Marino, in a proposed unit of approximately 90 employees. The second ground is that the petition was filed by individuals and §201.2(a) of the Rules of this Board does not permit individual employees to file a petition for certification.

Graham and Marino have filed exceptions to the decision of the Director. In their exceptions, they argue that the grounds relied upon by the Director for the dismissal of the petition do not apply to the instant petition because it is, in reality, an application for the accretion of Captains to the existing unit represented by PBA. They argue that since PBA supports the petition, they are the only employees whose interest would be affected by it and they have both executed the showing of interest.

The petition herein is not an application for accretion. Accretion is a procedure for clarifying a negotiating unit by specifying the inclusion within it of job titles that were implicitly within that unit when it was first defined. Thus, for example, a claim of accretion arises when an employer acquires an additional facility or when it creates new positions after the original unit was defined. The claim is that the original unit definition is sufficiently broad to encompass the employees working at the new facility or filling the new position. Because the negotiating unit is not changed, but only clarified, no new position or showing of interest is required. Here, however, we have no question of accretion. The position of Captain existed previously and was excluded from the negotiating unit represented by PBA.[1] The

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1 In 1976, PBA filed a petition to amend its negotiating unit to include the two Captains (C-1538). That petition was withdrawn for reasons not reaching its merits. Thereafter, Graham and Marino filed a petition for the creation of a separate Captains' unit (C-1558). That petition, too, was withdrawn for reasons not reaching its merits.

petition herein is for a change in, and not the clarification of a negotiating unit. Accordingly, it is subject to all the requirements of Part 201 of our Rules. The petition does not comply with these Rules and must be dismissed.

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

DATED: New York, New York
June 7, 1979

Harold R. Newman
Harold R. Newman, Chairman

David C. Randles
David C. Randles, Member

Member Klaus did not participate.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of HEMPSTEAD HOUSING AUTHORITY, Respondent, -and- LOCAL 307, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, Charging Party.	#2B - 6/7/79 BOARD DECISION AND ORDER CASE NO. U-3011

BARATTA & SOLLEDER (BRUNO BARATTA, ESQ., of Counsel), for Respondent

ISRAELSON, MANNING & RAAB (PERRY S. HEIDECKER, ESQ., of Counsel), for Charging Party

This matter comes to us on the exceptions of Local 307, SEIU, AFL-CIO (Local 307), from a hearing officer's decision dismissing its charge that the Hempstead Housing Authority (Employer) discriminated against three employees by discharging them because of their support of Local 307. The hearing officer concluded that the evidence did not establish that the discharge of any of the three employees was related to their support of Local 307. Accordingly, he dismissed the charge.

In its exceptions, Local 307 argues that the hearing officer erred in the test that he applied for determining that there was no violation. It contends that the hearing officer should have asked whether the discharge of the three employees was "inherently destructive of public employees' rights" and should not have asked whether the discharges would have occurred "but for" the employer's animus towards Local 307. It further argues that the hearing officer misread the record because the evidence compels a conclusion that the three employees were discharged because of their support of Local 307. Speci-

fically, it asserts that the decision to discharge the employees was made by Bernard Streifter, manager of the Employer, who had demonstrated some animus toward Local 307. Further, it asserts that this was done upon the advice of Aaron James, the supervisor of the discharged men, and that James had also demonstrated animus toward Local 307 while urging the employees to support a rival employee organization.

DISCUSSION

In reaching his conclusion that the discharge of the three employees was motivated by reasons other than their support of Local 307, the hearing officer relied upon the testimony of Streifter and James. At all critical points, the hearing officer credited the testimony of Streifter and James over inconsistent testimony of Local 307's witnesses. We find no basis in the record for rejecting the hearing officer's resolution of the witness credibility issue. The record contains contradictions in the testimony of Local 307's witnesses even to the point of whether James expressed support for or disapproval of the rival employee organization.

Once the testimony of Streifter and James is credited over that of Local 307's witnesses, the weight of the evidence supports the hearing officer's conclusion that the three employees were not discharged because of their support for Local 307. Against that testimony, there is only suspicion and surmise. Accordingly, we affirm the hearing officer's findings of fact. We also affirm his conclusion of law that the charge must be dismissed notwithstanding the assertion that the discharge of the three employees was "inherently

destructive of public employees' rights." The discharge of employees for reasons not related to activities protected by the Taylor Law is not destructive of Taylor Law rights.

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

DATED: New York, New York
June 7, 1979

Harold R. Newman, Chairman

David C. Randles, Member

Member Klaus did not participate.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of GARRISON UNION FREE SCHOOL DISTRICT, Employer, -and- GARRISON EDUCATORS' ASSOCIATION, Petitioner, -and- GARRISON TEACHERS' ASSOCIATION, Intervenor.	#2C - 6/7/79 BOARD DECISION AND ORDER CASE NO. C-1554

VAN DE WATER & VAN DE WATER (JOHN M. DONOGHUE, ESQ., of Counsel), for Employer

PAUL E. KLEIN, ESQ., (DEBORAH WATARZ, of Counsel), for Petitioner

ANTHONY D. WILDMAN, for Intervenor

This matter comes to us on the exceptions of the Garrison Educators' Association (GEA), petitioner herein, to a decision of the Director of Public Employment Practices and Representation (Director) that there be a runoff election between GEA and the Garrison Teachers' Association (GTA) in a unit including all certified teachers of the Garrison Union Free School District (District).

FACTS

By its petition, GEA sought to represent the District's teachers, now represented by GTA. Among specific positions it sought to have excluded from the unit were supervisors and the District's vice principal, Tintle, who also is a full-time teacher. A hearing was held, but it was limited almost exclusively to a contract-bar issue, although some testimony was offered as to Tintle's duties. There was no decision after the hearing because, after completion of the testimony, the parties agreed to hold an election in November in the GTA unit; that unit excluded supervisors, but not the vice principal.

The election was held on November 16, 1978, with the following results:

Eligible Voters	21
Votes Cast	20
GEA	10
GTA	8
Challenged Ballots	2

The two challenges were made by GEA. It challenged the eligibility of two voters, Tintle, on the ground that she is a supervisor, and Burpee, on the ground that he is a confidential employee. Burpee is a full-time teacher who is also taking a college course leading to State certification in administration and supervision. In addition to teaching, he is serving an internship under the tutelage of the principal.

The Director investigated the challenges, held a second hearing, and determined that both Tintle and Burpee were eligible voters. With respect to Tintle, he determined that her functions as vice principal included no supervisory responsibilities. He further found that GEA had implicitly consented to her inclusion in the unit by withdrawing its proposal that the position of vice principal be excluded. He also determined that there was no evidence that Burpee assisted or acted in a confidential capacity to the principal in connection with any labor relations function.

At this point, the Director authorized the opening of the two challenged ballots. As both were cast for GTA, resulting in a tie vote, he directed that there be a runoff election.

EXCEPTIONS

In its exceptions, GEA asserts that the Director erred in dismissing the challenges. It argues that the evidence supports a conclusion that Tintle is a supervisor and that Burpee is a confidential employee. It further argues that it never waived any right to litigate Tintle's unit placement. Finally, it argues

that the Director should not have opened the ballots until his determination was reviewed by this Board.

DISCUSSION

We affirm the Director's decision. First, as to Tintle, the evidence supports his determination that she is not a supervisor. This can be seen by evaluating GEA's allegations.

1. Allegation: Tintle is introduced to both staff and public as vice principal, and has attended functions to which only administrators and board of education members were invited.

She has been introduced as vice principal, since she holds that extra-compensated position, but she is also a full-time teacher. The only evidence that she attends functions where only administrators and board of education members are invited is her testimony that she once attended a gathering to honor a retiring board member whom she had known for many years. There were former, although no current, teachers present.

2. Allegation: Tintle is in charge of the school district when the principal is not in school.

The principal testified that Tintle has two duties in his absence: (1) to call him if a problem arises and (2) to close school in bad weather. There has been only one occasion on which he could not be reached by telephone.

3. Allegation: Tintle can hire substitutes and promote aides.

She does not hire substitutes; she calls them from a list. If a teacher is late, it is Tintle's duty to get someone into that class until the teacher or a substitute arrives. On occasion, when a teacher becomes sick, Tintle has asked her own aide -- who happens to be a certified teacher -- to go into the classroom while she tries to get a regular substitute.

4. Allegation: Tintle gives permission for teachers to leave the building.

Teachers do tell Tintle when they leave the building so that she can arrange for a substitute. Although one teacher testified that if the principal were absent she would ask Tintle for permission to leave, there was no evidence that such permission had to be requested.

5. Allegation: Tintle negotiates her own stipend.

This is true. It had been covered by the collective agreement, but no longer is. GTA has not objected to the change.

6. Allegation: In the absence of the principal, Tintle gives advice and direction on scheduling.

On the one occasion when the principal could not be reached, some teachers had a question as to whether they were supposed to work under a new schedule. They asked Tintle, who suggested they do so.

7. Allegation: Tintle has a role in the hiring of teachers.

The record indicates that an applicant, Butcher, had been an aide to Tintle and two other teachers, all of whom were asked for their opinions. It further indicates that Tintle filled out a recommendation form on behalf of Toman, who, as a student aide, practice taught in Tintle's room.

8. Allegation: Tintle has access to the principal's office.

The record indicates only that she goes into his office to get standardized tests, which she is in charge of distributing. There was no testimony that other teachers do not enjoy the same access.

9. Allegation: Tintle distributes and requisitions audio-visual materials. Requisition forms are sent to her by teachers because she maintains a list of all the school's equipment.

10. Allegation: Tintle chairs faculty meetings. She has chaired a faculty meeting, limited to completing State-required forms, because the principal was absent.

11. Allegation: Tintle is the Title IX compliance officer. She recalled the Title IX appointment, but did not know if she still had that assignment; she did not know what Title IX is.

The record also supports the Director's determination that Burpee is not a confidential employee for the purposes of excluding him from representation under the Taylor Law. The evidence introduced at the hearing does not support a conclusion that he has assisted or acted in a confidential capacity to any managerial employee in connection with any labor relations function, or that he may reasonably be required to do so.

Having ascertained that Tintle and Burpee are eligible to vote in the election, it is unnecessary for us to respond to the other exceptions made by GEA.

NOW, THEREFORE, WE ORDER that a runoff election between GTA and GEA be conducted under the auspices of the Director.

DATED: New York, New York
June 7, 1979

Harold R. Newman, Chairman

David C. Randles, Member

Member Klaus did not participate.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of BOARD OF EDUCATION, KENMORE-TOWN OF TONAWANDA UNION FREE SCHOOL DISTRICT, and its Agent, DR. PHILIP TIEMAN, Superintendent of Schools, Respondent, -and- KENMORE EDUCATORS ASSOCIATION (NYEA/NEA), Charging Party.	#2D - 6/7/79 BOARD DECISION AND ORDER CASE NO. U-3381

NORTON, RADIN, GELLMAN & GORDON (DAVID A. HOOVER, ESQ., of Counsel), for Respondent

PAUL E. KLEIN, ESQ. (ZACHARY WELLMAN, ESQ., of Counsel), for Charging Party

The charge herein was filed by the Kenmore Educators Association (KEA). It alleges that the Board of Education of the Kenmore-Town of Tonawanda Union Free School District and Philip Tieman, its Superintendent of Schools, (respondent) interfered with the organizational rights of public employees by denying KEA's request for access to faculty mailboxes and to the inter-school mail system. At present, the Kenmore Teachers Association (KTA), is the exclusive representative of respondent's teachers. It is stipulated by KEA and respondent that KTA and respondent are parties to a six-year agreement running from July 1, 1974 to June 30, 1980. Although no contracts between KTA and respondent were put in evidence, they are available to us; Section 214.1 of our Rules requires public employers entering into a written contract pursuant to the Taylor Law to file a copy of the contract with this Board. The contracts between KTA and respondent have been filed with this Board and we take official notice of them. There are two relevant contracts. One is a 1974-77 agreement; the other is a 1974-80 agreement. The second of the agreements was executed

on December 10, 1976. It is an amendment and an extension of the earlier three-year contract.

Neither the original agreement nor its extension authorized KTA to use faculty mailboxes or the inter-school mail system. The bylaws adopted by the respondent board of education prohibit solicitation of employees on the employer's property without prior approval from the board of education and prohibit unreasonable commercial solicitation. In fact, respondent has permitted KTA to use faculty mailboxes and the inter-school mail system for the distribution of organizational materials. It has also afforded mail system access to a credit union, to the parent-teachers association, to the United Fund, and to certain insurance companies authorized to sell annuities to teachers. On May 5, 1978, KEA requested respondent to afford it access to faculty mailboxes and the inter-school mail system for the distribution of organizational materials. The request was denied by respondent. It is that denial which occasioned the charge herein.

A hearing officer dismissed the charge. He did so on the basis of his determination that KEA could not file a representation petition at any time proximate to May 5, 1978 and his conclusion that an employee organization is not entitled to use teacher mailboxes except at a time proximate to the time when it can file a representation petition. For his conclusion, he relied upon our decision in Cheektowaga-Maryvale, 11 PERB ¶3080 (1978), (since affirmed ___AD2d___[3rd Dept., 1979], 12 PERB ¶7009).

KEA filed exceptions to the hearing officer's decision. Those exceptions allege that the hearing officer erred in that he failed to note three factors that distinguish Cheektowaga-Maryvale from the instant situation:

> First, in Cheektowaga-Maryvale, the agreement of the incumbent employee organization granted it the privilege, albeit nonexclusive, of access to teacher mailboxes. Here, KTA enjoys no similar grant.

Second, unlike Cheektowaga-Maryvale, here respondent promulgated a type of no-solicitation rule. That rule has been applied discriminatorily to the detriment of KEA.

Third, a petition was timely on May 5, 1978 and, indeed, at all times after November 1, 1977 because, under §208.2 of the Taylor Law and §201.3(e) of our Rules, the 1974-80 contract could not bar a petition filed after that date.

DISCUSSION

We affirm the decision of the hearing officer. The right of KEA, a challenging employee organization, to access to employee mailboxes is not affected by or contingent upon any contractual provision granting access to or withholding such access from KTA, the incumbent employee organization. Neither is it significant that respondent's action in granting access to KTA and community groups or in withholding access from them was taken pursuant to or in disregard of a unilaterally promulgated no-solicitation rule. From the point of view of the Taylor Law, the treatment of the incumbent employee organization and community groups is irrelevant to the right of a potential challenger to have access to teacher mailboxes and the inter-school mail system. The Taylor Law affords public employees a reasonable opportunity to organize. It also affords public employers and recognized or certified employee organizations reasonable periods of stability during which to negotiate and to live under collective agreements. On occasion, the interests of employees seeking to organize or to change organizations may come into conflict with the interests of public employers and recognized or certified employee organizations in maintaining stability. In such circumstances, an appropriate balance must be struck. In Cheektowaga-Maryvale and in Great Neck, 11 PERB ¶3039 (1978), we ruled that a public employer cannot interfere with employees' right of organization by denying an employee organization reasonable access to employee mailboxes at a

time proximate to the time when a representation petition may be filed, but that it can deny such access at other times. This ruling has been affirmed by the Appellate Division.

We also affirm the ruling of the hearing officer that KEA could not file a representation petition at any time proximate to May 5, 1978. KEA argues that for the purposes of contract bar, the 1974-80 contract must be deemed to expire on June 30, 1977. Thus, under §201.3(d) of our Rules, a petition could have been filed during November 1976. If no petition were filed during that month, KTA would have until November 1, 1977 in which to negotiate another agreement. Having failed to do so, KEA thus contends that a petition would be timely pursuant to §201.3(e) of our Rules at any time after November 1, 1977 until KTA and respondents negotiated a new agreement. According to KEA, the final three-year period of the six-year agreement would not bar any petition.

There is support for this position in decisions of the National Labor Relations Board. Between 1958 and 1962 the National Labor Relations Board issued several opinions in which it ruled that where a collective agreement extends beyond the maximum period for purposes of contract bar, a challenging petition would be timely if filed either during the open period preceding the end of the contract bar period or at any time after the expiration of the brief insulated period thereafter.[1] However, if the parties enter into a written reaffirmation or extension of a long-term contract during the appropriate insulated period prior to the end of the contract bar period, or after the expiration of the contract bar period but prior to the filing of a petition, that extension would serve to commence a new contract bar period.[2]

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1 E.g. Pacific Coast Assn. of Pulp and Paper Mfrs., 121 NLRB 990 (1958); Deluxe Metal Furniture, 121 NLRB 995 (1958); General Cable Corp., 139 NLRB 1123 (1962).

2 See Pacific Coast, supra and Southwestern Portland Cement Co., 126 NLRB 931 (1960)

We have found no explanation or rationale for the NLRB rulings between 1958 and 1962 that unless a long-term contract is reaffirmed or extended at an appropriate time it will have no effect as a contract bar after the original contract bar period has run. Perhaps the NLRB was concerned that there would be uncertainty as to the precise anniversary dates of the contract and that a long-term contract could therefore renew itself without a potential challenger knowing when it could file its petition. If so, that concern does not arise under the Taylor Law because, for purposes of contract bar, all contracts are deemed to be co-terminous with the fiscal year of the government involved.

We are persuaded by the reasoning of the hearing officer in the instant case that the public policy underlying the contract bar rule is adequately served if a six-year agreement is treated as two three-year agreements for the purpose of contract bar. The presence or absence of a reaffirmation or extension is irrelevant to the policy that guarantees employees an opportunity to file a representation petition at least once every three years but not necessarily more often. That is the intent of §208.2 of the Taylor Law. Thus, we would affirm the hearing officer on the facts considered by him. We note, however, from the contracts between KTA and respondent in our file, that on December 10, 1976, respondent and KTA extended an earlier three-year agreement. That extension occurred during the appropriate insulated period near the end of the first three years of the contract and, therefore, even under the NLRB rule there would be a second three-year contract bar.

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

DATED: New York, New York
June 7, 1979

Harold R. Newman, Chairman

David C. Randles, Member

Member Klaus did not participate.

NEW YORK STATE PUBLIC EMPLOYMENT RELATIONS BOARD

#2E - 6/7/79

In the Matter of

UNITED UNIVERSITY PROFESSIONS, INC., BOARD ORDER

Respondent,

Case No. U-2951

-and-

MORRIS ESON,

Charging Party.

This Board having rendered a decision and order in this proceeding on August 23, 1978 determining that the agency shop fee refund procedures promulgated by the United University Professions, Inc. (UUP), were not valid and that, accordingly, the collection of agency shop fee payments on behalf of the UUP constituted an improper practice in violation of Civil Service Law §209-a(2)(a), and, as the remedy for said violation, having directed revision in said refund procedure as the condition for continued collection of agency shop fee payments, and the UUP having submitted revised refund procedures, and this Board, by decision and order dated September 15, 1978, having approved said revised refund procedures upon the condition, among others, that said procedures will be implemented in an expeditious manner, and it appearing that the UUP may not be implementing said refund procedures in an expeditious manner, and the charging party herein having requested further relief,

Therefore, this Board determines that an investigation should be instituted to determine whether the UUP has failed to implement in an expeditious manner, or has otherwise failed to establish and maintain, an agency shop fee refund procedure as required by this Board's orders of August 23, 1978 and September 15, 1978, and whether the collection of all agency shop fee payments on behalf of the UUP should be terminated or other remedial relief granted, and it is

ORDERED that the United University Professions, Inc. show cause at a hearing to be held on Wednesday, June 27, 1979, at 10:00 AM at the offices of this Board, 50 Wolf Road, Fifth Floor, Albany, New York, why this Board should not order further remedies in this proceeding.

DATED: New York, New York
June 7, 1979

Harold R. Newman
HAROLD R. NEWMAN, Chairman

David C. Randles
DAVID C. RANDLES, Member

Member Klaus did not participate.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of	:	
FALCONER CENTRAL SCHOOL DISTRICT,	:	#2F - 6/7/79
Employer,	:	
-and-	:	Case No. C-1868
FALCONER SECRETARIAL AND CLERICAL UNIT,	:	
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 Falconer Secretarial and Clerical Unit

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: Clerk II, Typist, Account Clerk, Sr. Account Clerk, and Stenographer.

Excluded: All other employees.

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with the Falconer Secretarial and Clerical Unit

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 7th day of June, 1979
New York, New York

Harold R. Newman
Harold R. Newman, Chairman

David C. Randles
David C. Randles, Member

Member Klaus did not participate.

5782