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State of New York Public Employment Relations Board Decisions from September 28, 1979

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from September 28, 1979

Keywords

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Comments

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of CITY OF WHITE PLAINS, Respondent, -and- WHITE PLAINS UNIT, WESTCHESTER CHAPTER, CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 860, Charging Party.	#2A-9/28/79 BOARD DECISION AND ORDER CASE NO. U-3664

RAINS, POGREBIN & SCHER, ESQ. (BRUCE R. MILLMAN, ESQ., of Counsel), for Respondent

GRAE & ROSE, ESQ. (ARTHUR H. GRAE, ESQ., of Counsel), for Charging Party

The charge herein was brought by the White Plains Unit, Westchester Chapter, Civil Service Employees Association, Inc., Local 860 (Local 860). It alleges that the City of White Plains (City) committed an improper practice by unilaterally altering a term and condition of employment when, on October 24, 1978, it directed Roche, the president of Local 860, to work for it on a full-time basis. Previously, Roche had been permitted to spend all his working time on the affairs of Local 860. The City contended that it did not unilaterally alter the term or condition of any employment because the obligation of Roche to work for it on a full-time basis had been exhaustively negotiated, and its directive to him was consistent with the parties' agreement.

FACTS

Local 860 and the City were parties to a series of collective agreements. In 1972, 1974 and 1976, Local 860 had submitted proposals for released time for Roche, and each time, the City successfully resisted the inclusion

of the proposals into the agreement. In 1974, the parties agreed that Roche could appear for grievants and otherwise assist in the administration of the agreement at times mutually acceptable to the parties.[1]

Despite its resistance to the Local 860 demands, the City had permitted Roche to spend his full time on CSEA affairs. In May, 1977, however, it advised him that, in the future, he would be required to request time off in accordance with the agreement. Shortly thereafter, the parties commenced negotiations for a new agreement to succeed the 1976-78 contract. Once again, Local 860 demanded that Roche be given full time off to handle its affairs, and, once again, the City resisted. This dispute became a major roadblock to agreement, with Local 860 making several alternative compromise proposals, each of which was rejected by the City.

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1 This agreement was Section 3 of their contract. It has been carried into subsequent contracts. It provides:

"Section 3. Rights of Representation

1. Representatives of the Union shall have the right to visit the Employer's facilities for the purpose of adjusting grievances and administering the terms and conditions of this Agreement as long as they first make their presence known to an authorized representative of the Employer and further, that such visit does not interfere with the performance of customary duties.

2. The President of the Union and/or his designees (stewards) shall have the right to assist and appear for any group or employee in the processing and adjustment of grievances and to assist in the administration rights of the Agreement at a time mutually agreed to by the Employer and the Union.

3. It is recognized that while grievances may be held outside working hours, requests by the Union for grievance meetings during work hours at times that will not unduly interfere with work operations and where the number of employees involved are limited to the aggrieved and the Union representative, shall not be unreasonably withheld."

Shortly before the City was to submit the impasse for a legislative determination, Local 860 withdrew its demand for released time for Roche and stated that the withdrawal was "without prejudice". The City acknowledged the withdrawal, and the parties entered into an agreement which incorporated the past clause relating to the right of Roche to appear on behalf of grievants and otherwise assist in the administration of the contract at times mutually acceptable to the parties.

THE HEARING OFFICER'S DECISION

Local 860 maintained before the hearing officer that the effect of the withdrawal of its demand "without prejudice" was a return to the past practice whereby Roche was free to devote all his working time to its affairs. The hearing officer rejected this position. He ruled that the right of Roche to time off in order to engage in union affairs had been exhaustively explored during negotiations and that the statement that the withdrawal of its demand was "without prejudice" was meaningless because Local 860 had knowingly yielded to the position of the City that Roche's right to time off would be as set forth in §3 of the contract. Accordingly, he dismissed the charge.

DISCUSSION

Local 860 has filed exceptions to the hearing officer's decision. The exceptions merely state the conclusion that the hearing officer erred in determining that it had lost its statutory right to negotiate by withdrawing its demand "without prejudice". No analysis of the record or legal arguments was submitted in support of the exceptions.

Having reviewed the record, we affirm the hearing officer's findings of fact and his determination that Local 860 had knowingly agreed to accept the position of the City that Roche's right to time off would be as set forth in the former agreement.

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

DATED: Albany, New York
September 28, 1979

Harold R. Newman, Chairman

Ida Klaus, Member

David C. Randles, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of TOWN OF OYSTER BAY, Respondent, - and - NASSAU COUNTY CHAPTER, CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., Charging Party.	#2B-9/28/79 BOARD DECISION AND ORDER CASE NO. U-3258

JOHN F. BOGUT, ESQ. (DAVID J. WEINBLATT, ESQ., of Counsel), for Respondent

RICHARD M. GABA, ESQ., for Charging Party

The charge herein was filed by the Nassau County Chapter, Civil Service Employees Association, Inc. (CSEA) on April 10, 1978. It alleges that the Town of Oyster Bay (Town) violated its duty to negotiate in good faith when it required employees in its Sanitation Department to collect bundled newspapers and to place them in baskets welded to the sides of the garbage trucks. The Town admitted that it unilaterally adopted a new system of collecting newspapers which imposed additional duties upon Sanitation employees. It argued, however, that the action taken by it was a management prerogative and, therefore, did not violate any duty to negotiate.

FACTS

The Sanitation employees, who are represented by CSEA, had been working four days a week on a task completion basis.[1] This means that a Sanitation employee may go home as soon as he has completed his round. Until 1972, the

1 The agreement between CSEA and the Town treats the workday as being ten hours. This does not reflect the time actually spent working but is significant for record-keeping purposes that have implications for accrual of time.

Sanitation Division collected all garbage, including old newspapers. In 1972, the Town instituted, on an experimental basis, the separate collection of old newspapers by Environmental Division employees for reprocessing and sale. From 1975 through April, 1978, this became standard operating procedure. The amount of newsprint collected by the Environmental Division was dropping and the Town ascertained that, in part, the reason for this was that the collections by the Environmental Division were not on a regular basis. In 1977, the Town concluded that the Sanitation Division could collect the newspapers more efficiently than the Environmental Division and it initiated discussions with CSEA concerning a procedure whereby Sanitation employees would collect bundled newspapers at the curb every day from each home on their round and would place them in baskets welded to both sides of the garbage truck. During the ensuing negotiations, the Town and CSEA agreed that, as extra compensation for the additional assignment, Sanitation employees would receive half the revenue from the sale of the recycled newspapers. When submitted to the Sanitation employees for ratification, this agreement was rejected by them. The Town then unilaterally required the Sanitation employees to collect the bundled newspapers daily and to place them in the baskets on the sides of the trucks. Thereafter, the Town and CSEA continued to meet in an effort to reach an agreement on the compensation of the Sanitation employees for the additional work, but they were unsuccessful and, after awhile, the negotiations ceased.

THE HEARING OFFICER'S DECISION

The hearing officer agreed with the Town that its assignment of the separate collection of bundled newspapers to Sanitation employees was a management prerogative and, therefore, not a mandatory subject of negotiation. He found support for his conclusion in our decision in Waverly Central School District, 10 PERB ¶3103, in which we held that an employer need not negotiate as to work assigned to employees that are aspects of the essential duties and

functions for which they were hired. He ruled that the collection of paper was such a duty and function of Sanitation employees.

The hearing officer recognized that the change in the job assignment of the Sanitation employees might increase their workload or lengthen their workday. He, therefore, ruled that the Town was obligated to negotiate with CSEA regarding the impact of new assignments upon them. The hearing officer found, however, that the Town's participation in negotiations as to the compensation to be paid to the Sanitation employees for their new assignment satisfied its obligation to negotiate in good faith, and that those negotiations ceased when they were mutually abandoned by both parties. He also ruled that the failure of the parties to reach agreement during those negotiations did not prevent the Town from implementing its decision concerning the new assignment to Sanitation employees because a contrary holding would preclude the Town from exercising rights which it possessed.

CSEA has filed exceptions to the decision of the hearing officer.

DECISION

Having read the record and considered the written and oral argument of the parties, we affirm the findings of fact and conclusions of law of the hearing officer.

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

DATED: Albany, New York
September 28, 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-9/28/79
WHITNEY POINT CENTRAL SCHOOL DISTRICT,	:	BOARD DECISION AND ORDER
Respondent,	:	CASE NO. U-3622
-and-	:	
WHITNEY POINT TEACHERS ASSOCIATION,	:	
Charging Party.	:	

HOGAN & SARZYNSKI (JOHN HOGAN, Esq., of Counsel), for Respondent

WILLIAM FINGER, for Charging Party

The charge herein was filed by the Whitney Point Teachers Association (Association) on October 20, 1978. It alleges that the Whitney Point Central School District (District) violated its duty to negotiate in good faith when it refused to compensate teachers for graduate credits that were acquired after June 30, 1978. The District conceded that it refused to compensate teachers for graduate credits that were acquired after June 30, 1978, but it asserted that it was not required to do so. The hearing officer agreed and dismissed the charge. The case is before us on exceptions to the hearing officer's decision that were filed by the Association.

FACTS

The Association and the District were parties to an agreement that expired on June 30, 1978. That agreement provided premium compensation to employees who earned graduate credits in blocks of fifteen. Negotiations for a contract to succeed the one expiring on June 30, 1978 commenced during February 1978. The continuation of premium pay for graduate credit hours was

not a factor during those negotiations. The parties had not reached an agreement upon a successor contract and, at the time of the charge, they were continuing their efforts to reach an agreement through negotiations and with the assistance of mediators and factfinders.

During the 1978 summer vacation, several unit employees completed fifteen blocks of graduate credit hours and sought premium compensation for them upon the opening of school in September 1978. The District refused to provide the premium compensation and asserted that it was not required to do so.

THE HEARING OFFICER'S DECISION

The hearing officer agreed with the District. The basis for his decision was Rockland County BOCES v. PERB, 41 NY2d 753 (1977). In that decision, the Court of Appeals held that a public employer is not required to pay automatic annual salary increments after the expiration of an agreement. The hearing officer concluded that the ruling of the Court of Appeals would apply with equal force to premium pay for graduate credits earned by employees after the expiration of an agreement. He ruled that this conclusion was compelled by several prior hearing officer opinions that had been issued after the decision of the Court of Appeals, one of which, Carthage Central School District, 11 PERB ¶4504 (1978) was affirmed by this Board, 11 PERB ¶3051 (1978).

In its exceptions, the Association argues that the hearing officer in this case and the decisions upon which he relied did not interpret Rockland County BOCES v. PERB correctly. It argues that Rockland County BOCES does not apply to payment for graduate hours.

DISCUSSION

5946

We agree with the Association. Premium pay for graduate credits that are earned must be distinguished from annual salary increments which are automatic. To obtain automatic annual increments an employee need do no more than continue to work for his employer. By contrast, an employee earns premium

pay for graduate credit hours by embarking upon a program of formal study. Fifteen hours of graduate credits require an extended effort by an employee. In order to have completed a block of fifteen graduate credits in time to qualify for the premium pay sought in this charge, an employee would have commenced his studies while the prior agreement was still in effect. Benefits that are based upon conduct undertaken in reliance upon contract provisions then in effect, and which neither party to the contract is seeking to change, are not to be annulled merely because an agreement has expired. Such a benefit continues throughout the period when the parties remain obligated to negotiate a successor agreement.[1] The benefit of premium pay for earned graduate credits is such a benefit. As the subject of premium pay was not even placed in issue during the negotiations between the parties, it follows that they never exhausted their obligation to negotiate it. The unilateral change made by the District was, therefore, improper.

The hearing officer decisions relied upon by the hearing officer do not establish a legal precedent for the application of Rockland County BOCES to premium pay for graduate credits earned by employees. While we did express approval of such an application of Rockland County BOCES in Carthage Central School District, supra, the issue was not fully considered by us in that case because it was decided on other grounds. The dispute in Carthage was over the meaning of a new contract. The employer asserted that the financial terms of the settlement included monies to be paid for new graduate credit hours, while the employee organization asserted that the money for new graduate credit hours

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1 Cf. Enlarged City School District of Troy, 11 PERB ¶3056 (1978), at p. 3087:

> "The significant factor is that there had been no serious negotiations on the length of the teachers' workday, and certainly no genuine deadlock reached as to it, prior to the unilateral change instituted by the respondent. Respondent had not even communicated to the charging party that the length of the teachers' workday was a concern of high priority to it. Before an employer may make a unilateral change in terms and conditions of employment of its employees, it must exhaust all available opportunities and efforts to do so through negotiations until a genuine deadlock occurs."

was in addition to the amount specified in the settlement. We merely held that the disagreement between the parties must be resolved by the dispute mechanism established by the parties in their contract, and therefore, did not decide the case on the basis of any interpretation of Rockland County BOCES.

NOW, THEREFORE, WE determine that the Whitney Point Central School District violated its duty to negotiate in good faith in that, during the period when it was negotiating an agreement to succeed one that expired on June 30, 1978, it unilaterally terminated premium pay for graduate credits earned by employees represented by Whitney Point Teachers Association, and

WE ORDER it to provide such premium pay to the qualified affected employees retroactive to the date it was earned plus interest at the rate of three percent.

DATED: Albany, New York
September 27, 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	:	
ROCKLAND COUNTY PATROLMEN'S BENEVOLENT ASSOCIATION, INC.,	:	#2D-9/28/79
Respondent,	:	BOARD DECISION AND ORDER
-and-	:	
TOWN OF HAVERSTRAW,	:	CASE NO. U-3979
Charging Party.	:	

BRENT, PHILLIPS, DRANOFF & DAVIS, P.C. (RAYMOND G. KRUSE, ESQ., of Counsel), for Respondent

ARTHUR MOSKOFF, ESQ., for Charging Party

The charge herein was brought by the Town of Haverstraw (Town) against the Rockland County Patrolmen's Benevolent Association, Inc. (Association). It alleges that the Association violated its duty to negotiate in good faith by submitting a demand involving a nonmandatory subject of negotiation to an interest arbitration panel. As the dispute is one that primarily involves the scope of negotiations under the Taylor Law, it is being processed under §204.4 of our Rules. This section permits the submission of a dispute directly to the Board without any report or recommendations from a hearing officer.

The demand in question is:

> *"Retirement after twenty (20) years of service at half pay shall be provided by the Town at no cost to the employee (except as may be required by law). Final average salary shall be based on the last year of employment."*

As we stated in a recent case involving these same parties, Town of Haverstraw, 11 PERB ¶3109 (at page 3178):

> "The negotiation of retirement benefits is generally prohibited by §201.4 of the Taylor Law. An exception is provided by §80, Chapter 565 of the Laws of 1978, which mandates the negotiation of those benefits that are provided by specified retirement systems for which no new enabling state legislation is required."

We first ruled that demands for retirement benefits that are made available by current State law are mandatory subjects of negotiation in City of Albany (Police Officers), 7 PERB ¶3078 (1974) and City of Albany (Firefighters), 7 PERB ¶3079 (1974), aff'd City of Albany v. Helsby, 48 AD2d 998 (3rd Dept., 1975), 8 PERB ¶7012, 38 NY2d 778 (1975), 9 PERB ¶7005.

The benefits sought by the demand herein are made available by current State laws. Accordingly, we find it to be a mandatory subject of negotiation. The demand is comprised of two parts. The first is for retirement after twenty years at half pay. Such a retirement benefit is presently authorized, Retirement and Social Security Law §284-d. The second is for the final average salary to be based upon the last year of employment. Such a retirement benefit is presently authorized by Retirement and Social Security Law §203.9(d).

The Town contends that even if the retirement benefits sought are mandatory subjects of negotiation, they may not be submitted to an arbitration panel because, with respect to retirement benefits, the scope of arbitration is narrower than the scope of negotiation. The basis for this contention is an alleged limitation imposed upon an arbitration panel by the State Constitution and the Taylor Law. Under the State Constitution, the grant to employees of improved retirement benefits is irrevocable, Article 5,

§7,[1] while §209.4(c)(vi) of the Taylor Law provides that the determination of an arbitration panel shall be binding upon the parties for a period that may not exceed two years. The Town reasons that because a retirement benefit becomes permanent as soon as it takes effect, no such benefit can be imposed by an arbitration panel whose award may not extend beyond two years.

In the early part of this decade, there was much concern that the cost of public employee pensions had become an excessive burden upon taxpayers. The Permanent Commission on Public Employee Pension and Retirement Systems issued reports on July 11, 1972, and on January 30, 1973, recommending limitations upon the retirement benefits that were being provided to public employees. In this context, it expressed frustration that, by reason of Article 5, §7 of the State Constitution, benefits once granted to an employee could not "be reduced or discontinued with respect to that employee subsequent to the effective date of such benefit."[2] As a result of this concern, §201.4 of the Taylor Law was amended in 1973 to prohibit the negotiation of retirement benefits.[3] Later in 1973, however, the Legislature enacted a statute which permits the negotiation of retirement benefits that do not require approval by the State legislature.[4]

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1 Art. 5, §7 reads: "After July first, nineteen hundred forty, membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired."

2 Report of the Permanent Commission on Public Employee Pension and Retirement Systems, January 30, 1973, p.5.

3 See Governor's Memorandum, McKinney's 1973 Session Laws, p. 2343.

4 L. '73, c.1046, §70. In pertinent part it provides:

> "Notwithstanding any inconsistent provisions of this act or of any general or special law, during the period July first, nineteen hundred seventy-three to June thirtieth, nineteen hundred seventy-four: (a) a participating employer in the New York state employees' retirement system or the New York state policemen's and firemen's retirement system shall continue to have the right to negotiate with its employees with respect to any benefit provided by or to be provided by such employer to such employees as members of such system and not requiring approval by act of the legislature;"

Annually thereafter the Legislature has extended the duty to negotiate such retirement benefits.

Thus the Legislature chose to permit the negotiation of pension benefits, which, like those in this case, required no legislative authorization and were deemed to be irrevocable.

Compulsory interest arbitration for police and firefighter negotiation disputes was provided by an amendment of the Taylor Law in the year following the enactment of the pension reform acts. It was a highly controversial amendment for reasons having nothing to do with pension reform. Among the concerns that were then being expressed by both advocates and opponents of compulsory interest arbitration was that it might discourage collective bargaining.[5] The Legislature chose to make compulsory interest arbitration available to resolve police and firefighter negotiation disputes, but only for a specified period immediately following such a dispute. The determination of the arbitration panel was made retroactive to the termination of the previous agreement and would apply up to a maximum of two years from that termination date.

The purpose of the two-year limitation, as we understand it, was to permit the relationship of the parties to a deadlock in negotiations to survive the absence of an agreement during the deadlock period while preserving their duty to negotiate their own terms and conditions of employment thereafter. There is no indication that the Legislature intended the two-year limitation to restrict the arbitration of retirement benefits any more than the legislation of the preceding year restricted the negotiation of retirement benefits. Had the Legislature wished to do so, it could have enacted a law creating a narrower scope of arbitration than the scope of negotiation as it was fully

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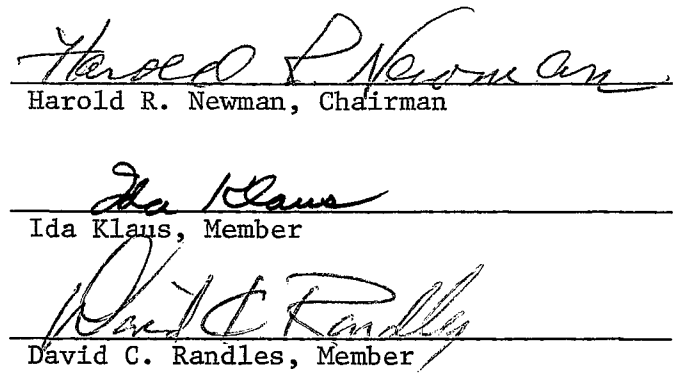
5 See Anderson, Arvid, "Compulsory Arbitration under State Statutes", Proceedings of the New York University Twenty-Second Annual Conference on Labor, Matthew Bender, 1970; McAvoy, Joan Z., "Binding Arbitration of Contract Terms: A New Approach to the Resolution of Disputes in the Public Sector", Columbia Law Review, Vol. 72 (1972), pp. 1192-1213; Howlett, Robert G., "Contract Negotiation Arbitration in the Public Sector", Cincinnati Law Review, Vol. 42 (1973), pp. 47-75.

aware of the irrevocable nature of such benefits. Such limitations appear in statutes elsewhere.[6]

We determine that the Association committed no improper practice when it submitted the demand herein to an interest arbitration panel.

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

DATED: Albany, New York
September 27, 1979



Harold R. Newman, Chairman

Ida Klaus, Member

David C. Randles, Member

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6 See the laws of Rhode Island (Section 28-9.4-13 of the Rhode Island Municipal Employees Labor Relations Act provides that the decision of an arbitrator is only binding on matters not involving the expenditure of money) and Canada (Section 70 (1) of the Canadian Public Service Staff Relations Act provides that arbitration is limited to "rates of pay, hours of work, leave entitlement, standards of discipline and other terms and conditions of employment directly related thereto." This is narrower than the scope of negotiation under the statute).

Also note that before the original police-fire arbitration statute was due to expire, this Board conducted a Symposium on December 1-3, 1976, evaluating the experience under that statute. One of the proposals to the Legislature made during that Symposium was that a distinction should be made between the scope of arbitration and the scope of negotiation (Symposium on Police and Firefighter Arbitration in New York State, Proceedings, p.161). When, in 1977, compulsory interest arbitration for police and firefighters was extended (L.'77, c.210), the prior statute was amended, but those amendments did not address the problem of scope of arbitration. Thus, it allowed the scope of arbitration under §204.4(c)(vi) of the Taylor Law to be coextensive with the scope of negotiation.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of CSEA, ERIE CHAPTER 815, Respondent, - and - RACHEL C. MARTIN, Charging Party	#2E-9/28/79 BOARD DECISION AND ORDER CASE NO. U-3492

KAVINOKY, COOK, SANDLER, GARDNER, WISBAUM & LIPMAN, ESQ. (RONALD L. JAROS, ESQ., of Counsel), for Respondent

RACHEL C. MARTIN, Charging Party, pro se

The charge herein was filed by Rachel C. Martin on August 19, 1978. It alleges that CSEA, Erie Chapter 815 (CSEA) violated its duty of fairly representing her by improperly handling complaints and grievances that she had against her employer concerning out-of-title work. The hearing officer dismissed the charge on both procedural and substantive grounds. Procedurally, he determined that the charge was not timely. Substantively, he determined that CSEA committed no violation in that it gave due consideration to Martin's grievance and refused to process it because it concluded that the grievance lacked merit. This matter comes to us on Martin's exceptions to the hearing officer's decision.

FACTS

On November 8, 1976, Martin complained to her employer and to CSEA that she, a licensed practical nurse, was performing duties that were more properly

assigned to registered nurses. She received no satisfaction, and the situation was exacerbated on January 1, 1977, when 26 registered nurses were laid off by the County and their duties were assigned to licensed practical nurses, including Martin. In early January, 1977, Martin again complained to CSEA, this time speaking directly to Clark, the CSEA grievance representative. Martin, Clark and the CSEA vice-president met with appropriate representatives of the employer to discuss her complaint concerning out-of-title work. At the meeting, she was told by the employer's representatives that she was obligated to perform the duties previously performed by registered nurses without receiving premium pay. Thereafter, the CSEA representatives confirmed to Martin that the employer was acting within its contractual rights.

Under the grievance procedure, Martin was required to file a written grievance within five working days after the meeting with her supervisors that occurred in January, 1977. She testified that she did not do so because she believed that Clark would file on her behalf. The hearing officer concluded, however, that Martin must have known in February, 1977, that no such grievance was filed because she would have received a written decision at that time.

Martin continued to complain to Clark, but she did not ask whether any formal grievance had been filed. Clark continued to tell her that there was no contractual basis for her grievance. Nevertheless, he did file a grievance on her behalf in December, 1977. It was rejected for late filing and CSEA decided not to carry it further.

DISCUSSION

5955

The hearing officer determined that the charge was not timely because it ripened in February, 1977, and was not filed until 18 months later.[1] He also determined that the charge should be dismissed because CSEA believed that

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1 We note, moreover, that even if the improper practice were deemed to have occurred as late as December 1977 when CSEA decided not to appeal the rejection of the grievance, the charge herein would still have been untimely.

Martin's grievance was without merit and it was under no obligation to process such a grievance.[2]

Martin's exceptions do not indicate any facts nor do they advance any legal arguments that might cast doubt upon the decision of the hearing officer.

Accordingly, we affirm the hearing officer's findings of fact and conclusion of law, and

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

DATED: Albany, New York
September 28, 1979

Harold R. Newman, Chairman

Ida Klaus, Member

David C. Randles, Member

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2 The hearing officer concluded: "[E]ven if the charge were timely it would have to be dismissed. An employee organization interferes with an employee's rights in violation of §209-a.2(a) of the Public Employees' Fair Employment Act when it acts negligently, irresponsibly or with improper motivation in the processing of grievances. Brighton Transportation Association, 10 PERB ¶3090. It has no obligation to process a grievance which it does not believe to have merit. Scio-Allentown Teachers Association, 10 PERB ¶3050. The record evidence shows that CSEA did not process Martin's grievance because it believed it had no merit."

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of CITY OF BINGHAMTON, Employer-Petitioner, - and - BINGHAMTON FIREFIGHTERS LOCAL 729, I.A.F.F., AFL-CIO, Intervenor.	#2F-9/28/79 BOARD DECISION AND ORDER CASE NO. C-1686
In the Matter of CITY OF BINGHAMTON, Employer-Petitioner, - and - BINGHAMTON POLICE BENEVOLENT ASSOCIATION, INC., Intervenor.	BOARD DECISION AND ORDER CASE NO. C-1687

JOHN W. PARK, ESQ., for City of Binghamton

BALL & McDONOUGH, P.C., for Binghamton Firefighters

EARL D. BUTLER, P.C., for Binghamton Police Benevolent Association, Inc.

The two petitions herein were both filed by the City of Binghamton (City) on May 31, 1978. By the first (C-1686), it seeks to remove "permanently disabled" firemen from a unit of firemen represented by Binghamton Firefighters Local 729, I.A.F.F., AFL-CIO (I.A.F.F.). By the second (C-1687), it seeks to remove "permanently disabled" policemen from a unit of policemen represented by Binghamton Police Benevolent Association, Inc. (P.B.A.). For the purposes of

the two petitions, firemen and policemen who receive benefits under General Municipal Law §207-a or §207-c would be deemed to be permanently disabled.

The Director of Public Employment Practices and Representation (Director) dismissed both petitions, and the City has filed exceptions to his decision.

GENERAL MUNICIPAL LAW §207-a AND §207-c

General Municipal Law §207-a and §207-c respectively require that a public employer pay the full salary and certain other benefits to a fireman and policeman who is injured or becomes ill in the performance of his duties. These benefits include any salary increases that are given to other firemen or policemen[1] and coverage for certain hospital and medical expenses. Certain fringe benefits that may be provided to other firemen and policemen pursuant to a collective agreement need not be extended to disabled firemen and policemen by reason of the General Municipal Law,[2] but they have been extended to the disabled firemen and policemen who work for the City pursuant to the terms of the negotiated agreements.

Until January 1, 1978, there were two significant differences between statutory provisions applicable to firemen and policemen. First, the obligation of a public employer to pay a disabled policeman his full salary terminated when the policeman reached retirement age, but for a fireman, it continued indefinitely. Second, the public employer could require a disabled policeman to perform light duties that are consistent with his status as a policeman, but it could not impose a comparable requirement upon a disabled fireman. Thus, in

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1 Barber v. Lupton, 307 N.Y. 770 (1964), aff'g 282 App. Div. 1008 (4th Dept. 1953); Birmingham v. Mirrington, 284 App. Div. 721 (4th Dept. 1954); Pease v. Colucci, 59 App. Div. 2d 233 (4th Dept. 1977); Devens v. Gokey, 18 Misc.2d 647 (S. Ct. Oswego Co. 1958); Ellis v. Fire Chief of the City of Ithaca, 29 Misc.2d 37 (S. Ct. Tompkins Co. 1961); 1976 Op. Atty. Gen. 120; 1978 Op. State Compt. 31; 1978 Op. State Compt. 924; 1978 Op. State Compt. 926; 1959 Op. State Compt. 979.

2 Phaneuf v. City of Plattsburgh, 84 Misc.2d 70 (S. Ct. Clinton Co. 1974), aff'd. mem., 50 App. Div. 2d 614 (3d Dept. 1975); Geremski v. Dept. of Fire of the City of Syracuse, 78 Misc.2d 555 (S. Ct. Onondaga Co. 1974); 1978 Op. State Compt. 489; 1977 Op. State Compt. 356; 1976 Op. State Compt. 429.

the case of a fireman who was partially but permanently disabled, a public employer was seriously disadvantaged in that it would have had to pay him for the rest of his life without being able to assign any alternative work to him. On January 1, 1978, however, this changed because General Municipal Law §207-a, applicable to firemen, was amended to conform to General Municipal Law §207-c,[3] applicable to policemen.

DISCUSSION

The City asserts that it has been paying benefits to more than 30 firemen and policemen pursuant to General Municipal Law §207-a and §207-c, who have not worked for a period of time ranging from one to twenty-five years. It contends that these employees have no community of interest with firemen and policemen who are actively engaged in their occupations, because there is an inherent difference between employees who work and those who do not. It further contends that the disabled employees can no longer be deemed firemen or policemen because an essential characteristic of those two occupations is the hazard to which incumbents are exposed, and disabled employees are not exposed to those hazards.

The arguments of the City do not convince us that disabled firemen and policemen should be removed from the negotiating units of the active firemen and policemen. Disabled firemen and policemen are public employees, City of Binghamton, 10 PERB ¶3092 (1977). It is also clear that they continue to be policemen and firemen respectively within the meaning of General Municipal Law §207-a. It repeatedly refers to disabled employees who are subject to its provisions as firemen and indicates that they are members of the fire company or fire department of the public employer that hired them. Subdivision 3 of that Section, which authorizes the assignment of light duty, requires that

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3 L. 1977, ch. 965.

"such light duty shall be consistent with his status as a fireman..." General Municipal Law §207-c contains parallel language with respect to policemen.

It is clear that General Municipal Law §207-a and §207-c maintain the status of the disabled employees as firemen and policemen respectively, and that, as such, they guarantee for them the salary increases and some other benefits of the active firemen and policemen. This indicates a continuing community of interest between active and disabled firemen and policemen. Further supporting the conclusion of the Director that there is a community of interest between the injured and active employees, we note that there is no clearly discernible line of demarcation between them. A fireman or policeman who is active today may tomorrow suffer an injury in the performance of his duties. A fireman or policeman who is today inactive by reason of a disability may tomorrow be assigned light duty, or he may even recover sufficiently to assume his full responsibilities. Accordingly, both active and disabled firemen or policemen have an interest in the benefits of the other group.

We are not unsympathetic to the concern of the City that firemen and policemen employed by them who are, indeed, permanently disabled should be removed from the list of active employees. This, however, is a statutory problem for which the City must turn to the procedures in General Municipal Law §207-a and §207-c. However, until such employees are retired or otherwise relieved of their status as employees, they continue to be firemen and policemen respectively and continue to have a sufficient community of interest with active firemen and policemen to remain in negotiating units with them.

NOW, THEREFORE, we affirm the decision of the Director, and WE ORDER that the petitions herewith be and they hereby are dismissed.

DATED: Albany, New York
September 28, 1979

Harold R. Newman, Chairman

Ida Klaus, Member

David C. Randles, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of COUNTY OF NASSAU, Respondent, -and- NASSAU COUNTY PATROLMEN'S BENEVOLENT ASSOCIATION, INC., Charging Party.	#2G-9/28/79 CASE NO. U-3400
In the Matter of COUNTY OF SUFFOLK, Respondent, -and- SUFFOLK COUNTY PATROLMEN'S BENEVOLENT ASSOCIATION, INC., Charging Party.	CASE NO. U-3436

EDWARD G. McCABE, ESQ. (PETER A. BEE, ESQ., of Counsel), for Nassau County

KIMMEL & KIMMEL (LEONARD KIMMEL, ESQ., of Counsel), for Suffolk County

HARTMAN & LERNER (DAVID SCHLACHTER, ESQ., of Counsel), for the Charging Parties

BOARD DECISION AND ORDER

The charge in Case No. U-3400 was filed by the Nassau County Patrolmen's Benevolent Association (N-PBA) on June 28, 1978. It alleges that the County of Nassau violated its duty to negotiate in good faith when it invited a representative of Suffolk County to be present at negotiating sessions between N-PBA and Nassau County.

The charge in Case No. U-3436 was filed by the Suffolk County Patrolmen's Benevolent Association (S-PBA) on July 25, 1978. It alleges that the County of Suffolk violated its duty to negotiate in good faith when it invited a representative of Nassau County to be present at negotiating sessions between S-PBA and Suffolk County.

FACTS

Nassau County and N-PBA were parties to a collective agreement which terminated on December 31, 1978. Suffolk County and S-PBA were also parties to a collective agreement which terminated on the same day. Before commencing negotiations for successor agreements with N-PBA and S-PBA respectively, the County Executives of Nassau County and Suffolk County issued a joint statement on March 31, 1978. In that statement, they said that the two counties would "coordinate their efforts in labor negotiations with municipal employees" with particular emphasis placed on contract negotiations with their respective police unions. As part of this plan, they said that each county would "send observers to sit in the other's negotiating session. In that way, each county will have a thorough knowledge of each union's bargaining positions." Finally, they said that they would also coordinate their mutual efforts with those villages and towns in the two counties which maintain their own police forces.

The first negotiating session between Nassau County and N-PBA occurred on May 26, 1978. Kevin Darcy, an employee in the Office of Labor Relations of the County of Suffolk was present at those negotiations at the invitation of Nassau County, and N-PBA was advised that he was a member of the Nassau County negotiating team. N-PBA objected to his presence, but Darcy remained and continued to attend most of the subsequent negotiating sessions.

The first negotiating session between Suffolk County and S-PBA occurred on July 21, 1978. William Mairs, an employee in the Office of Labor Relations of the County of Nassau was present at those negotiations at the invitation of Suffolk County, and S-PBA was advised he was a member of the Suffolk County

negotiating team. S-PBA objected to his presence, but Mairs remained and continued to attend most of the subsequent negotiating sessions.

As the two charges raise identical issues of law, they were consolidated for decision by the hearing officer.

THE HEARING OFFICER'S DECISION AND THE EXCEPTIONS

The hearing officer determined that the Taylor Law does not prohibit a public employer from appointing an employee of another public employer to its negotiating team. He further found that in the instant case, the appointment of Darcy and Mairs to the negotiating teams of Nassau County and Suffolk County, respectively, did not inhibit the ability of either county to reach an agreement with the representatives of their police employees. Accordingly, he dismissed the two charges.

In their joint exceptions, N-PBA and S-PBA argue that Darcy and Mairs were observers rather than members of the negotiating teams of Nassau and Suffolk Counties, and they assert that a public employer commits an improper practice when it insists upon the presence of a third party during negotiations over the objections of the employee organization. As an alternative argument, N-PBA and S-PBA contend that it would be an improper practice for Nassau County and Suffolk County to appoint Darcy and Mairs to their respective negotiating teams because "a labor organization has a right to bargain with the employer of a unit it represents and it should not be required to bargain with any other employers."

DISCUSSION

Although the plan originally announced by the Nassau and Suffolk County executives on March 31, 1978 was to send "observers" to each others' police negotiations, when those negotiations commenced, Darcy and Mairs were introduced as members of the negotiating teams. N-PBA and S-PBA, the charging parties herein, have failed to meet their burden of proving their charges that Darcy and Mairs were not members of the negotiating teams of Nassau and Suffolk Counties, respectively. There is nothing in the record describing the roles

actually played by Darcy and Mairs during negotiations and, therefore, we cannot conclude that they were anything other than what the counties said they were, members of the respective negotiating teams.

We affirm the hearing officer's conclusion of law that the two counties did not violate the Taylor Law when they designated employees of the other county to serve on their respective negotiating teams.[1] It is well settled that as a general matter each party may designate whomever it desires to represent it in negotiations, General Electric Co. v. NLRB, 417 F2d 512, 71 LRRM 2418 (CA2,1969); Standard Oil Co. v. NLRB, 322 F2d 40, 54 LRRM 2076 (CA6, 1963).[2] A comparison of wages, hours and other terms and conditions of employment of employees in

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1 In view of our determination that Darcy and Mairs were members of the negotiating teams, we need not reach the question whether it would have been improper for the Counties to insist upon their presence as observers of negotiations as a condition for its participating in such negotiations. We do note, however, that there is support in the private sector for the opinion of the Counsel of this Board (11 PERB ¶5006 [1978]) that a party to negotiations may not so insist upon the presence of observers. A decision of the NLRB holds that such a matter is a threshold issue preliminary and subordinate to substantive negotiations which should not be permitted to interfere with negotiations, Bartlett-Collins Co., 99 LRRM 1034 (1978).

We also note that the New York State Freedom of Information and Open Meetings Laws respect the confidentiality of the negotiating process by excluding collective negotiations from their application, Public Officer's Law, Sections 87.2(c) and 100.1(e).

2 The courts have recognized that the right of a party to choose its own bargaining representatives is not absolute. In Standard Oil v. NLRB the court said: "If there are unusual or exceptional circumstances management may make a valid objection to some agent or representative presented by the Union for bargaining." In General Electric v. NLRB the court said: "There have been exceptions to the general rule that either side can choose its bargaining representatives freely, but they have been rare and confined to situations so infected with ill-will, usually personal, or conflict of interest as to make good faith bargaining impractical." See also IBEW v. NLRB, 557 F2d 995, 95 LRRM 2996 (CA2, 1977) in which the court stated the test in terms of "a 'clear and present danger' to the collective bargaining process."

None of the stated bases for an exception to the general rule is applicable in this case.

adjacent communities who perform similar services which require similar skills is a significant factor in negotiations. As employees in the Office of Labor Relations of Suffolk and Nassau Counties, respectively, Darcy and Mairs could provide such information to their fellow members of the negotiating teams of Nassau County and Suffolk County. Nassau County and Suffolk County commit no improper practice when they seek people with such a capability to serve on their negotiating teams.

NOW THEREFORE, WE ORDER that the charges herein be and they hereby are dismissed.

Dated at Albany, New York
September 27, 1979

Harold R. Newman, Chairman

Ida Klaus, Member

David C. Randles, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATI(BOARD

In the Matter of

NEW YORK CITY BOARD OF EDUCATION,

Employer,

-and-

UNITED FEDERATION OF TEACHERS,
AMERICAN FEDERATION OF TEACHERS, AFL-CIO,

Petitioner.

#3B-9/28/79

Case No. C-1921

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 United Federation of Teachers, American Federation of Teachers, AFL-CIO

has been designated and selected by a majority of the employees of the above named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: School Medical Inspectors including Substitutes.

Excluded: School Medical Director; Assistant School Medical Director; and all other employees of the Board of Education.

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with the United Federation of Teachers, American Federation of Teachers, 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 28th day of September, 1979
Albany, New York

Harold R. Newman
Harold R. Newman, Chairman

Board Member Klaus did not participate
Ida Klaus, Member

David C. Randles
David C. Randles, Member

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIC BOARD

In the Matter of CITY SCHOOL DISTRICT OF THE CITY OF ONEIDA, Employer, - and - ONEIDA SCHOOL EMPLOYEES UNITED, NYSUT, Petitioner.	#3A-9/29/79 Case No. C-1925

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 Oneida School Employees United, NYSUT

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 custodians and cleaners.

Excluded:

Head maintenance mechanic (Superintendent of Building and Grounds), temporaries, casuals, per diem substitutes and confidential employees.

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with Oneida School Employees United, NYSUT

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 September, 1979

Harold R. Newman

Harold R. Newman, Chairman

Board Member Klaus did not participate

Ida Klaus, Member

David C. Randles

David C. Randles, Member

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