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State of New York Public Employment Relations Board Decisions from October 12, 1979

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from October 12, 1979

Keywords

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

Comments

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

BOARD OF COOPERATIVE EDUCATIONAL SERVICES,
CATTARAUGUS-ERIE-WYOMING COUNTIES,

Respondent,

-and-

CATTARAUGUS BOCES TEACHERS ASSOCIATION,

Charging Party.

2A-10/12/79

BOARD DECISION AND ORDER

CASE NO. U-3482

WILLIAMS, SPRAGUE & HULBURT (PETER K. HULBURT, ESQ.
of Counsel), for Respondent

D. L. EHRHART, for Charging Party

This matter comes to us on the exceptions of the Cattaraugus BOCES Teachers Association (Association) from a hearing officer's decision dismissing its charge that the Board of Cooperative Educational Services, Cattaraugus-Erie-Wyoming Counties (employer) committed an improper practice by unilaterally increasing the work year of unit employees from 182 to 184 days and by refusing to negotiate the matter. The hearing officer determined that the Association had relinquished its right to negotiate as to the change.

FACTS

The Association and the employer have been parties to a series of contracts. Prior to 1976, they had negotiated four agreements which specified a 200-day limitation upon the work year of unit employees. Throughout this period, the work year of unit employees varied, but never exceeded 187 days. During the 1976 negotiations for a one-year contract, the Association had unsuccessfully sought a shorter contractual work year. The 200-day maximum was dropped from the contract as being meaningless and the employer unilaterally

adopted a 182-day work year. The following year the parties agreed upon a three-year contract. During the course of negotiations leading to that contract, the Association had demanded a 180-day work year. It carried this demand forward until the final day of negotiations. The demand was then dropped by the Association reluctantly because it was necessary to do so in order to achieve an otherwise satisfactory agreement. Moreover, the Association already knew that the employer had adopted a 1977-78 calendar providing for 182 days, and it had been given oral assurance by the employer that during the remaining years of the contract there would be no "substantial" variance from that 182-day work year. For the 1978-79 school year, the employer adopted a calendar that increased the number of workdays from 182 to 184. It refused to negotiate as to this action.

DISCUSSION

We affirm the decision of the hearing officer dismissing the charge. In 1977, when the current agreement was negotiated between the Association and the employer, the length of the work year was given prominent attention. The Association withdrew its demand for a specific limitation on the length of the work year because it was satisfied with the entirety of the agreement that it achieved and because it was given an oral assurance that the length of the work year would continue to be "substantially" the same as it was in 1977-78, when it was 182 days. The oral agreement is part of the terms and conditions of employment agreed upon by the parties. The Association is not entitled to reopen negotiations on the demand for a limitation upon the work year but must live with the agreement that it would not be increased substantially.

The sole remaining question is whether the employer violated its commitment to the Association not to "substantially" increase the work year of unit employees when it added two days to their work year. The answer to this

question requires an interpretation of the commitments made by the parties to each other; it does not raise any improper practice issues. It should be resolved in accordance with the dispute resolution mechanisms adopted by the parties.

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

DATED: New York, New York
October 11, 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	:	#2B- 10/12/79
	:	
UNITED UNIVERSITY PROFESSIONS, INC.,	:	
	:	<u>BOARD DECISION AND ORDER</u>
Respondent,	:	
	:	
-and-	:	<u>CASE NO. U-2951</u>
	:	
MORRIS ESON,	:	
	:	
Charging Party.	:	

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

MORRIS ESON, pro se, for Charging Party

The History of this Proceeding

Morris E. Eson, an employee of the State of New York, is a member of the State University Professional Services negotiating unit, but he is not a member of United University Professions, Inc. (UUP), the exclusive representative of the employees in that unit. The charge herein was filed by Eson on October 27, 1977. It alleged that UUP violated §209-a.2(a) of the Taylor Law in that it interfered with his right not to join UUP and coerced him into doing so by taking agency shop fee payments from him without having first established a proper refund procedure.

The hearing officer assigned to the case determined (11 PERB ¶4519, April 7, 1978) that the charge had merit in that the refund procedure was defective in certain particulars, one of which involved the use of an arbitrator at the final appellate step of the procedure. The objectionable aspects of this were that an employee was required to pay half the cost of the arbitration and that he would have only a right to a limited review of the arbitrator's award even though he never consented to arbitration. One of the aspects of the

refund procedure that the hearing officer determined to be acceptable is that UUP could retain the agency fee payments collected throughout its fiscal year, while providing a brief period after the close of its fiscal year during which an employee whose agency fee payments were collected could file for a refund. The amount of the refund could then be calculated for the entire fiscal year of UUP and the money then returned to the employees who seek it. The UUP procedure called for the filing of refund applications during the first two weeks following the close of its fiscal year, i.e., the first two weeks of September.

As a remedy for the defects which he found in the refund procedure, the hearing officer directed UUP to correct those defects. He declined to declare the past collections illegal and to order their return.

Both Eson and UUP filed exceptions to his decision. Eson's exceptions were directed to the remedy proposed by the hearing officer. He contended that it was inadequate. UUP's exceptions were directed to the inadequacies that the hearing officer found in the refund procedure. It contended that the hearing officer had imposed unnecessary and inappropriate restrictions upon it.

After reviewing the record and considering the arguments of the parties, we affirmed the material findings of fact and conclusions of law of the hearing officer.¹ We directed UUP to correct the deficiencies in its refund procedure within four weeks and retained jurisdiction to evaluate its changes (11 PERB ¶3068, August 23, 1978).

UUP submitted a revision of its refund procedure. The final appellate step of the refund procedure was the submission of any dispute involving the

¹ Our only point of disagreement with the hearing officer related to the implication of the omission of the words "of a political or ideological nature" from the part of the statute authorizing agency shop fee payments by employees of the State, while those words were found in the part of the law applicable to employees of other public employers. That issue is not relevant to the question before us. In any event, L.1978, c. 122 has eliminated the discrepancy.

amount of the refund to a neutral appointed by UUP from lists to be supplied by the American Arbitration Association, with the costs of this procedure to be borne by UUP. We determined that the revised refund procedure corrected the deficiencies that had been noted. Accordingly, on the understanding "that the submission by the respondent to the neutral party will be accomplished in an expeditious manner", we approved the refund procedure. That condition was imposed because expedition must be considered of utmost importance in evaluating the reasonableness of any refund procedure.

After receiving a complaint from Eson that UUP was not implementing its refund procedure in an expeditious manner, we directed that there be an investigation into the merits of the complaint (12 PERB ¶3053, June 7, 1979)². The investigation was conducted by Martin Barr, counsel to this Board, as he is normally charged with seeking compliance with our orders. This matter is now before us on his report of investigation (12 PERB ¶8005, August 24, 1979) and upon the responses of the parties.

Report of Investigation

Barr ascertained that Eson filed a request for a refund on September 1, 1978, for excessive agency shop fees collected from him during the previous year. The total amount collected from Eson was \$250.00; on March 9, 1979, he received a check in the amount of seventy-six cents, representing the refund. He filed an appeal with UUP, and on June 19, 1979, he was informed that his appeal had been denied by the UUP Executive Board. Eson then filed an appeal to the UUP Delegate Assembly, which is the next step in the refund procedure. The Delegate Assembly meets three times a year. The next scheduled meeting is

5976

² UUP has unsuccessfully sought a court order prohibiting this investigation. The court ruled that this Board could investigate to ascertain whether there has been compliance with its prior order, but that it could not otherwise consider whether UUP was maintaining a proper refund procedure unless a new charge be filed, UUP v. Newman et al., 12 PERB ¶7013 (Supreme Court, Albany County, July 23, 1979). UUP has filed but not perfected an appeal from this decision.

in October 1979. UUP's procedures provide that the Delegate Assembly "shall render a decision within thirty (30) days after hearing the appeal." Only after the decision of the Delegate Assembly can the dispute be submitted to a neutral party. The secretary of UUP testified before Barr that he had no idea how long the further appeal to the neutral might take or what procedures might be followed.

On these facts, Barr concluded that "UUP's refund procedures have not been accomplished in an expeditious manner as required by PERB's order of September 15, 1978." He recommended that UUP be required to complete all procedures, including the report of the neutral, by December 1, 1979. Another recommendation proposes a refund procedure for future years that would provide a determination by a neutral on or before May 1 of the year following the filing of the objection.³

Responses of the Parties

In his written response, Eson makes no comment on the substance of the report and recommendations. He merely indicates his availability should we wish to hear argument. UUP, however, has submitted a memorandum which takes issue with the report and recommendations. Its primary thrust is that this Board has no jurisdiction to consider whether the refund procedure is taking too long. It further argues that Barr's determination that the refund procedure is taking too long is arbitrary and unreasonable.

Discussion

For the reasons set forth in Barr's report, we conclude that we have jurisdiction.

³ Barr also discussed other issues that he recognized were not properly before him in this "compliance" proceeding. His observations may be considered should a new improper practice charge raise similar issues.

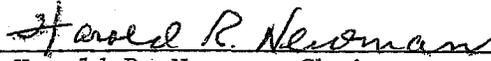
Having reviewed the record and considered the arguments of the parties, we adopt the finding recommended by Barr that the refund procedure has not been accomplished in an expeditious manner as required by our Order of September 15, 1978. We also accept in principle, although not in detail, his recommendations regarding a further remedial order in this proceeding. He recommended that UUP be required to complete its appellate process for the 1977-78 fiscal year by December 1, 1979 and that in future years it be completed by May 1 of the year following the filing of the objection. We believe that the schedule proposed by Barr may allow too little time to complete all the steps that UUP has adopted. We do, however, deem it essential that the refund procedure for one year be completed before the time to file for a refund the following year; otherwise, the delay is likely to discourage non-members from asserting their statutory right to a refund. It is no longer possible for the appellate steps of the refund procedure to be completed in time to meet this requirement for applications filed in 1978. We conclude that January 31, 1980 is a realistic date for the completion of the refund procedure for applications filed in 1978.⁴ However, for refund applications filed with UUP during September 1979 and in succeeding years, all appellate steps afforded by the procedure should be completed with final decision given to the applicant by August 31 of the following year.

NOW, THEREFORE, WE ORDER UUP to complete all appellate steps of its refund procedure involving applications for a refund for agency shop fee payments made through August 31, 1978 by January 31, 1980.

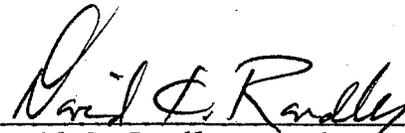
⁴ For this purpose, we assume that Eson will file any appeal that he may wish to take from the decision of the Delegate Assembly within two weeks of his receipt of that decision.

WE FURTHER ORDER UUP to complete all appellate steps of
its refund procedure for applications made in
subsequent years by August 31 of the year
following the application.

DATED: New York, New York
October 12, 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
CITY OF PEEKSKILL,
Respondent,
-and-
PEEKSKILL POLICE ASSOCIATION,
Charging Party.

#2C-10/12/79

BOARD DECISION AND ORDER

CASE NO. U-3862

RAINS, POGREBIN & SCHER, ESQS. (TERENCE M. O'NEIL, ESQ.,
BRUCE R. MILLMAN, ESQ. & MARTIN GRINGER, ESQ., of Counsel)
for Respondent

HARTMAN & LERNER, ESQS. (REYNOLD A. MAURO, ESQ., of Counsel)
for Charging Party

This matter comes to us on the exceptions of the Peekskill Police Association (Association) to a hearing officer's decision dismissing a charge that the City of Peekskill (City) committed an improper practice by unilaterally imposing a residency requirement upon its employees.

FACTS

On January 10, 1977, the City adopted a resolution which took effect on January 13, 1977, requiring employees who would be hired thereafter to establish and maintain residence within the City. Gorey, a police officer in the unit represented by the Association, was hired by the City on January 19, 1977. At the time when the resolution was imposed, Gorey had already applied for employment and was on a civil service list. When he took the civil service examination, the notice for that examination specified no residency requirement.

Gorey was discharged during March 1979 because he failed to continue residency in the City. The charge herein was filed on February 21, 1979.

THE HEARING OFFICER'S DECISION and THE EXCEPTIONS

The hearing officer dismissed the charge because he concluded that the City had been free to impose a residency requirement as a qualification for employment. He found support for this conclusion in our decisions in City of Buffalo, 9 PERB ¶13015 (1976) and City of Auburn, 9 PERB ¶13085 (1976) in which we held that a residency requirement for persons not yet hired is a condition for employment and, therefore, not a mandatory subject of negotiation.

In its exceptions, the Association argues that the prior Board decisions should be distinguished because they did not involve an employee who had already applied for the position and was awaiting appointment when the residency requirement was imposed. It also argues that the operative date was neither January 10, 1977, when the resolution was adopted, nor January 13, 1977 when it became effective, but March 1979, when Gorey was discharged. In support of this, it argues that following its adoption, the residency requirement was abandoned by the City by reason of the City's failure to impose it.

DISCUSSION

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

There is no evidence in the record to support the Association's contention that the City failed to impose the residency requirement after its adoption or that it abandoned the requirement in any other way.

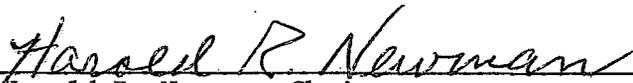
We also reject the Association's argument that the City was obligated to negotiate with it before adopting a residency requirement that would be applicable to persons who were not yet hired, but who had already applied for employment. A public employer is obligated to negotiate with an employee organization regarding current employees who are in its negotiating unit. It is under no duty to negotiate regarding potential employees except insofar as

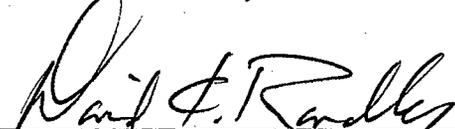
the terms and conditions of employment that are negotiated for current employees will be applied to them if and when they are hired. As a residency requirement for a person to be hired is a qualification for employment and not a term and condition of employment, the City was under no duty to negotiate regarding the application of a residency requirement to Gorey before he was actually hired.¹

Finally, even if the City had been obligated to negotiate regarding the application of a residency requirement to Gorey before he was hired, the Association's charge would not be timely. The time during which the Association could have filed a charge would have passed because the residency requirement was adopted more than four months prior to the filing of the charge.

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

DATED: New York, New York
October 12, 1979


Harold R. Newman, Chairman


David C. Randles, Member

Member Klaus did not participate.

¹ See Salamanca, 12 PERB ¶3079 (1979), in which we held that the continuing application of a residency requirement to an employee who has been hired subject to such a requirement is a function of statute (Public Officer's Law §30) and not negotiation.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of	:	#2D-10/12/79
	:	
BALDWINSVILLE CENTRAL SCHOOL DISTRICT,	:	
	:	
Employer,	:	<u>BOARD DECISION AND ORDER</u>
	:	
-and-	:	<u>CASE NO. C-1815</u>
	:	
BALDWINSVILLE CENTRAL SCHOOL ASSOCIATION	:	
OF OFFICE PERSONNEL NYEA/NEA,	:	
	:	
Petitioner.	:	
	:	

O'HARA AND O'HARA, ESQS., for Employer

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

This matter comes to us on the exceptions of the Baldwinsville Central School Association of Office Personnel NYEA/NEA (Association) from a decision of the Director of Public Employment Practices and Representation (Director) that the nine teacher aides employed by the Baldwinsville Central School District (District) should not be added to an existing unit of clerical ¹ employees of the District which is presently represented by the Association. The Director accepted the position of the District that the teacher aides should be placed in a separate unit of their own.

FACTS

As found by the Director, the primary role of teacher aides is to assist teachers in their non-teaching functions. Thus, teacher aides perform such tasks as marking papers, typing letters, supervising the cafeteria, making

5983

¹ The Association had proposed that, in the alternative, teacher aides be added to an existing unit of teaching assistants. The Director determined that such a unit would also not be appropriate. The Association's exceptions do not address this part of the Director's determination.

arrangements for field trips and obtaining supplies, and one works for the high school librarian. They do, however, occasionally fill in for clerical employees. The clerical employees perform normal clerical duties in satisfaction of the administrative responsibilities of the District. They have little or no contact with the personnel involved in the District's instructional program. Their assignments are made and their work supervised by the administrators of the District, while the work of each teacher aide is assigned and supervised by a committee of three teachers and the building principal, except for one whose work is supervised by the high school librarian.²

There are significant differences in the conditions of employment of the two groups. Teacher aides work an institutional calendar of 10 months, while the work year of clericals varies, some working 10 months, some 11 months and some 12 months. Teacher aides are in the labor class of the civil service, which means that they do not enjoy the job security protections of §§75 and 80 of the Civil Service Law. The clerical employees are in the competitive class of civil service and enjoy the protections of the Civil Service Law.³ Other differences in the conditions of employment of the two groups involve sick leave and holidays. There are also differences of lesser dimension involving vacation time and the availability of health insurance.

Another difference between the two groups involves the qualifications for appointment. There are no specified qualifications for a teacher aide, although all are high school graduates. Clerical employees, on the other hand, must have clerical skills.

² The aide who works for the high school librarian works more than twenty hours. The others do not.

³ One clerical employee is classified as non-competitive.

THE DIRECTOR'S DECISION

On these facts, the Director determined that there was a relatively slight community of interest between teacher aides and the clerical employees. He concluded that the community of interest was not sufficient to overcome the District's claim of administrative convenience in having teacher aides placed in a separate unit. The basis for this determination of administrative convenience was the Director's finding that a combined unit might inhibit the assignment of non-clerical work to teacher aides.

EXCEPTIONS

In its exceptions, the Association asserts that the Director erred in both his findings of fact and conclusions of law. It contends that there are substantial similarities between teacher aides and clerical employees and that there are significant dissimilarities within each of the two groups which make the dissimilarities between them less significant. It further argues that the Director has disregarded prior decisions in which this Board has indicated a preference for broader negotiating units and that he has given undue consideration to the District's argument that its administrative convenience would be better served by separate units.

DISCUSSION

Having reviewed the record and considered the arguments of the parties,⁴ we affirm the Director's findings of fact and his conclusion of law that teacher aides should not be added to the existing unit of clerical employees. The dissimilarities between the two groups are significantly greater than the dissimilarities within each, and the District's concern for its administrative convenience was given appropriate consideration.

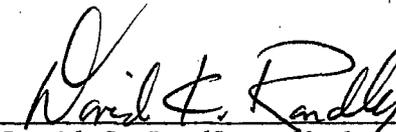
⁴ In addition to submitting briefs, the parties were also given the opportunity to present oral argument.

NOW, THEREFORE, WE ORDER that an election by secret ballot be held under the supervision of the Director among the employees in the unit determined by him to be appropriate who were employed on the payroll date immediately preceding the date of this decision, unless the petitioner submits to him within fifteen days of receipt of this decision evidence sufficient to satisfy the requirements of §201.9(g)(1) of the Rules of this Board for certification without an election.

IT IS FURTHER ORDERED that the employer submit to the Director and to the petitioner, also within fifteen days of receipt of this decision, an alphabetized list of all employees within the unit determined by the Director to be appropriate who were employed on the payroll date immediately preceding the date of this decision.

DATED: New York, New York
October 11, 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	:	#2E-10/12/79
GOUVERNEUR CENTRAL SCHOOL DISTRICT,	:	
Respondent,	:	<u>BOARD DECISION AND ORDER</u>
-and-	:	<u>CASE NO. U-3573</u>
GOUVERNEUR TEACHERS ASSOCIATION,	:	
LOCAL #3549,	:	
Charging Party.	:	

ARTHUR GRISHAM, for Respondent

WM. L. CURTIS, JR., for Charging Party

This matter comes to us on the exceptions of the Gouverneur Central School District (District) to the determination of a hearing officer that it violated §209-a.1(d) of the Taylor Law in that it unilaterally changed the length of the workday of teachers employed by it for the 1978-79 school year. The District also excepts to the remedy proposed by the hearing officer that it be ordered to rescind its directive that all teachers remain on duty until 3:15 p.m. and that it be further ordered to "pay each teacher required to remain upon school premises beyond the time required by the prior practice, an amount equal to such teacher's salary, pro-rated by such time." In support of its exceptions, the District argues that both the terms of its agreement with the Gouverneur Teachers Association, Local 3549, charging party herein, and past practices establish that it was authorized to determine the dismissal time of teachers. It further argues that "money damages" are inappropriate in this case because, inter alia, they could not be calculated.

DISCUSSION

We have reviewed the record and read the briefs of both parties. Also, at the request of the District, we have heard oral argument presented by the parties. The material facts are as stated by the hearing officer and we repeat the most significant of them.

On September 5, 1978, the District unilaterally determined that its teachers would be required to remain in school until 3:15 p.m.¹ Prior to that date, the departure time for teachers employed by the District was controlled by §11.4 of the 1976-78 collective agreement between the parties and by policies set forth in teachers' handbooks. This agreement, which expired on June 30, 1978, provided that, "The dismissal time of any teacher shall be subject to the professional responsibility of that teacher." On September 5, 1978, while the parties were in negotiations for a successor agreement, the District instituted its new policy.

Notwithstanding the language of the prior agreement, which appeared to leave the dismissal time of teachers a matter for the professional responsibility of each teacher, the teachers' handbooks set forth varying policies. The elementary teachers' handbook provided that, "Teachers are expected to be available at their building as requested by the administrator." The secondary teachers' handbook provided, "All teachers are expected to make a general practice of remaining in the building for a reasonable time after the pupils are dismissed...The Building Principal, with the Superintendent's approval, shall establish the length of the school working day." In point of fact, principals at three of the District's five elementary schools had established specific departure times for teachers. At one school, teachers were expected to remain until 3:00 p.m., at another until 3:45 p.m., and at a third until one-half hour

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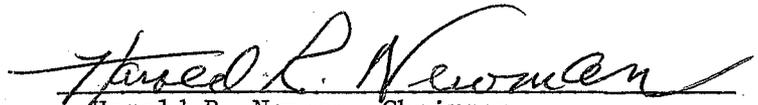
¹ In some schools the teachers actually remained beyond that time because the school buses did not depart before 3:15 p.m.

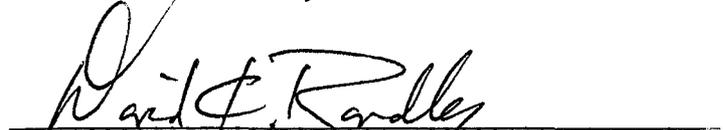
after the school buses left. The record also shows that teachers often stayed beyond the time when they were authorized to leave and that many had stayed beyond 3:15 p.m.

On these facts, we affirm the determination of the hearing officer that the District violated §209-a.1(d) of the Taylor Law in that it unilaterally changed a term and condition of employment of its teachers by establishing a uniform dismissal time for teachers. However, we agree with the District that a remedy of money damages would be inappropriate. The dismissal time of teachers in the past had varied from school to school and the time when teachers actually left had varied from teacher to teacher and from day to day. While some teachers may have had to work later under the new, unilaterally introduced, uniform policy, others may have even been permitted to leave earlier. We conclude that, on the facts herein, the remedy should not include back pay for any teachers.

NOW, THEREFORE, WE ORDER the District to rescind its order of September 5, 1978 that all teachers remain on duty until 3:15 p.m. and to restore the status quo ante until it is altered by procedures authorized by the Taylor Law.

Dated: New York, New York
October 11, 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 : #2F-10/12/79
STATE OF NEW YORK (STATE UNIVERSITY :
OF NEW YORK), :
Employer, :
-and- : BOARD DECISION AND ORDER
COMMITTEE OF INTERNS AND RESIDENTS, :
Petitioner, : CASE NO. C-1751
-and- :
UNITED UNIVERSITY PROFESSIONS, INC., :
Intervenor. :

JOSEPH M. BRESS, ESQ. (JOSEPH P. MARTINICO,
ESQ., of Counsel), for Employer

IRWIN GELLER, ESQ., for Petitioner

The question before us is whether the petition of the Committee of Interns and Residents (CIR) for certification as the exclusive representative of hospital house staff employed by the State of New York throughout the State University System should be dismissed because the no-strike affirmation which accompanied that petition on August 31, 1978, is invalid.¹ The Director of Public Employment Practices and Representation determined that the affirmation was invalid because CIR struck against the New York City Health and

¹ Section 207.3 of the Taylor Law conditions the certification of an employee organization upon its affirmation "that it does not assert the right to strike against any government, to assist or participate in such a strike..."

Hospital Corp. (Corp.), a public employer, on January 17, 1979.

CIR filed exceptions to the decision of the Director. While conceding that it was responsible for a job action against the Corp. on January 17, 1979, it argued that the job action did not constitute a strike because it was neither for the purpose of improving any employee terms and conditions of employment nor related to any other matters pertaining to the Taylor Law. We considered this argument² and in a decision dated August 15, 1979, we determined, "[t]he job action conducted by CIR on January 20, 1979 constituted a violation of §210 of the Taylor Law." (12 PERB ¶13073 [1979]).

In that decision, we recognized that the strike might indicate that the affirmation was not sincere when given or that, thereafter, CIR abandoned the posture represented by its affirmation. We ruled that in either case, the decision to dismiss the petition would have to be affirmed. On the other hand, we also recognized that CIR might be able to explain the job action in a manner that would persuade us that its "no-strike affirmation" was and continued to be the sincere position of the organization. Accordingly, we invited CIR to submit to us affidavits and other documents in support of the proposition that its "no-strike affirmation" was and continued to be bona fide. We also permitted the employer to submit a response.

Of the materials before us, the most significant are the minutes of a CIR Strike Committee Meeting of January 3, 1979, which is part of the record originally made before the hearing officer, and the comments of the parties upon them. Those minutes repeatedly refer to a strike. In its brief, CIR argues that the strike referred to was not understood by it to mean a strike within the meaning of the Taylor Law. It asserts that it had in mind a "political strike" which it understood to be an expression that is remote from

² CIR and the employer both submitted briefs and participated in oral argument.

the labor relations issues contemplated by the Taylor Law. Thus, it would have us conclude that it had a good faith belief that its action was consistent with its "no-strike affirmation."

The minutes of the January 3 Strike Committee Meeting belie this assertion. Item IX of those minutes states:

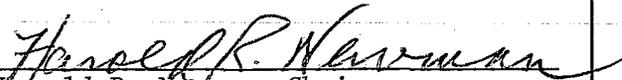
"The implications of our action vis-a-vis the Taylor Law were discussed. It was pointed out:
1. If invoked any identified doc could lose 2.3 days pay for every day out. 2. Very rarely invoked but possible is the union's loss of dues check-off privileges usually for a very limited of time."

CIR contends that these minutes reflect a judgment that the Taylor Law was inapplicable to its conduct and that the indication that it was not likely that the Law would be invoked merely corroborates that judgment. In support of this, it argues that the use of the word "invoked" merely reflects the "notetaker's" lack of understanding of the legal implications of the word. We are not persuaded by this argument. These minutes are compelling evidence that CIR was aware that its conduct would be violative of the Taylor Law and that it was placing its hopes upon what it had deemed to be a probability that Taylor Law penalties would not be invoked.

On the record, we conclude that CIR either did not sincerely intend its "no-strike affirmation" or that it abandoned the posture represented by that affirmation when it struck on January 17, 1979. In either case, the petition herein should be dismissed.

WE ORDER that the petition herein be and it hereby is DISMISSED.

DATED: New York, New York
October 12, 1979


Harold R. Newman, Chairmen


David C. Randles, Member

Member Klaus did not participate.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of	:	#2G-10/12/79
	:	
CITY OF BINGHAMTON	:	<u>BOARD DECISION AND ORDER</u>
	:	
Upon the Application for Designation of Persons as Managerial or Confidential.	:	<u>CASE NO. E-0481</u>
	:	

JOHN W. PARK, ESQ., (BARBARA J. DELGROSS, ESQ.,
of Counsel) for the City

CONTE & HELISEK, ESQS., for the Union

In a decision dated March 10, 1979, the Acting Director of Public Employment Practices and Representation (Director) determined that the Assistant City Engineer of the City of Binghamton (City), William J. Virgilio, is not a managerial employee, and that the Data Processing Manager of the City, Dean Grimes, is a confidential employee as those terms are defined by §201.7(a) of the Taylor Law.¹ The City has filed an exception to the determination that Virgilio is not a managerial employee, while the Binghamton Civil Service Forum (Forum), which represents Grimes, has filed an exception to the determination that he is a confidential employee.

VIRGILIO

In support of its position that Virgilio is a managerial employee, the City argues that he has a sufficient role in the formulation of policy to satisfy the statutory standard. It contends that the Director erred in applying

¹ On May 31, 1978, the City of Binghamton filed an application seeking the designation of 14 positions as managerial or confidential. In his decision, the Director determined that only two of the employees were confidential and that none was managerial. The exceptions of the parties only deal with the determinations relating to Virgilio and Grimes.

too narrow a standard when, in reliance upon a prior Director's decision, (Beacon, 4 PERB ¶4024), he wrote, "only those employees who have a 'direct and powerful influence on policy formulation' at the highest level will be determined managerial under the policy criteria." The City asserts that the appropriate test was stated by this Board in State of New York, 5 PERB ¶3001, when we ruled:

"The term 'formulate' would appear to include not only a person who has the authority to select among options and to put a proposed policy into effect, but also a person who participates with regularity in the essential process which results in policy formulation and the decision to put such a proposal into effect."

The record evidence is accurately summarized by the Director. It shows that Virgilio has supervisory responsibilities with respect to 23 employees within the City's Engineering Department.² It also shows that Virgilio was in charge of the City's 1978 curb and street reconstruction/resurfacing program and that he participates in department staff meetings at which decisions are made as to which streets should be repaired. He may issue construction permits and assists in the preparation of the department budget. The record also shows that suggestions that he has made concerning internal operating procedures of the department have been adopted.

We affirm the determination of the Director that the responsibilities of Virgilio do not constitute formulation of policy within the meaning of §201.7(a) of the Taylor Law. This conclusion follows the application of the standard we articulated in State of New York, supra, no less than the application of the test in Beacon, supra. At issue is the meaning of the phrase, "to formulate policy". To formulate policy is to participate with regularity in the essential process involving the determination of the goals and objectives of the government involved, and of the methods for accomplishing those goals

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² His determination that these supervisory responsibilities are not sufficient to constitute supervisory or managerial employees is not contested by the City of Binghamton.

and objectives that have a substantial impact upon the affairs and the constituency of the government. The formulation of policy does not extend to the determination of methods of operation that are merely of a technical nature.

The record does not indicate that Virgilio participates in the determination of the goals and objectives of the City. Neither does it show his participation in the determination of the methods of operation of the engineering department to be more than merely of a technical nature. As the City has not produced sufficient evidence to establish the status of Virgilio as a managerial employee, its application that he be so designated must be dismissed.

GRIMES

We determine that the evidence does not support the conclusion of the Director that Grimes is a confidential employee. The record shows that, as the operating head of the City's Data Processing Department, Grimes could reasonably be required to produce confidential data relating to its negotiating posture. However, his supervisor computes the necessary data manually, because Grimes is an officer of the Forum and a member of its negotiating team. Accordingly, the City is unwilling to entrust him with such data. The Director was properly concerned about the predicament of the City. It has not assigned Grimes a duty that may reasonably be required of him, because of his position in the Forum and it cannot preclude his activities on behalf of the Forum unless he is designated confidential.³ However, §201.7(a) of the Taylor Law conditions Grimes' being designated as confidential upon his actually performing confidential functions. In holding that Grimes

³ Grimes would also be precluded from participating in the affairs of the Forum if he were designated managerial, but there is no allegation before us that he is a managerial employee. The Director determined that he is not managerial and the Forum has not filed exceptions to that determination.

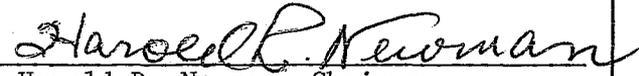
is confidential, the Director said:

"To hold otherwise would effectively prevent the City from ever requiring Grimes to perform duties which he should reasonably be expected to perform."

We share the concern of the Director, but conclude that the City must seek its relief from the Legislature. As presently written, the statute clearly distinguishes between employees who may be designated as managerial if they "may reasonably be required..." to perform certain managerial functions, and employees who "may be designated as confidential only if they are persons who assist or act in a confidential capacity...." The explicit language of the statute precludes our designating Grimes as a confidential employee because he has not been assigned any confidential duties.⁴

NOW, THEREFORE, WE ORDER reversed so much of the decision of the Director as designated Dean Grimes as a confidential employee. In all other respects, the decision of the Director is affirmed.

DATED: New York, New York
October 12, 1979


Harold R. Newman, Chairman


David C. Randles, Member

Member Klaus did not participate.

⁴ See East Ramapo Central School District, 11 PERB ¶13075 (1978), in which we stated in a representation case that (at p. 3116): "the Board will look to the duties actually required and performed, and not to those duties merely listed in a statement of job duties."

NEW YORK STATE PUBLIC EMPLOYMENT RELATIONS BOARD

#2H-10/12/79

In the Matter of

TEAMSTERS LOCAL 317, an affiliate of the
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF
AMERICA,

:
:
: BOARD DECISION
: AND ORDER

:
:
: CASE NO. D-0181

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

:
:
:

On August 23, 1979, Martin L. Barr, Counsel to this Board, filed a charge alleging that Teamsters Local 317, an affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Local 317), had violated Civil Service Law (CSL) §210.1 in that it caused, instigated, encouraged, condoned and engaged in a strike against the Onondaga County Water Authority (Authority) on June 12, 13 and 14, 1979.

The charge further alleged that out of a negotiating unit of 65 employees, the number of those who participated in the strike ranged from 52 to 54.

Local 317 did not file an answer, thus admitting 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 from the Authority for a period of five months. The charging party has recommended a five month suspension of deduction privileges.

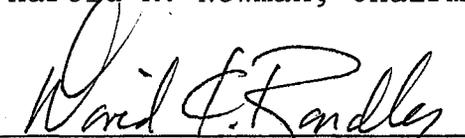
On the basis of the unanswered charge, we find that Local 317 violated CSL §210.1 in that it engaged in a strike as charged, and we determine that the recommended penalty is a reasonable one.

WE ORDER that the deduction privileges of Local 317 from the Authority be suspended for a period of five months, commencing as soon as practicable. Thereafter, no dues and agency shop fees shall be deducted on its behalf by the Onondaga County Water Authority until Local 317 affirms that it no longer asserts the right to strike against any government as required by the provisions of CSL §210.3(g).

DATED: New York, New York
October 11, 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 :
BRENTWOOD UNION FREE SCHOOL DISTRICT, : #3A-10/12/79
Employer, :
-and- :
BRENTWOOD CLERICAL SOCIAL EDUCATION AND : Case No. C-1783
WELFARE ASSOCIATION, INDEPENDENT :
EMPLOYEES ASSOCIATION, :
Petitioner, :
-and- :
CIVIL SERVICE EMPLOYEES ASSOCIATION, :
BRENTWOOD CHAPTER, :
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,

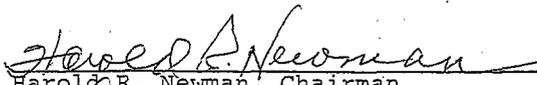
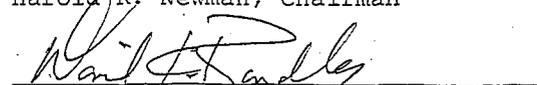
IT IS HEREBY CERTIFIED that the Brentwood Clerical Social Education and Welfare Association, Independent Employees Association has been designated and selected by a majority of the employees of the above named public employer, in the unit described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: All full-time and part-time clericals in the titles of Senior Clerk Typists; Senior Account Clerks; Clerk Typists; Senior Clerks; Clerks; Special Education Aides; Principal Clerks; Key Punch Operators; School Attendance Aides; Computer Programmers; Account Clerks; Duplicating Machine Operators II; Principal Account Clerks; and Graphics and Material Designers.

Excluded: All other employees of the Brentwood Union Free School District.

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with the Brentwood Clerical Social Education and Welfare Association, Independent Employees Association 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 11th day of October, 19 79
Albany, New York


Harold R. Newman, Chairman

David C. Randles, Member

Member Klaus did not participate.

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