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Board Decisions - NYS PERB

New York State Public Employment Relations  
Board (PERB)

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12-14-1979

## State of New York Public Employment Relations Board Decisions from December 14, 1979

New York State Public Employment Relations Board

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## State of New York Public Employment Relations Board Decisions from December 14, 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 : #2A - 12/14/79  
: :  
FAIRVIEW PROFESSIONAL FIREFIGHTERS : SUPPLEMENTAL  
ASSOCIATION, INC., Local 1586, IAFF, : BOARD DECISION AND ORDER  
: :  
Respondent, : :  
-and- : CASE NO. U-4015  
: :  
FAIRVIEW FIRE DISTRICT, : :  
: :  
Charging Party. : :

KENNETH PELUSO, for Respondent

RAINS & POGREBIN (TERENCE M. O'NEIL, ESQ.,  
of Counsel) for Charging Party

The charge herein was brought by the Fairview Fire District (District) against the Fairview Professional Firefighters Association, Inc., Local 1586, I.A.F.F. (Local 1586). It alleges that Local 1586 violated its duty to negotiate in good faith by submitting a demand involving a nonmandatory subject of negotiation to an interest arbitration panel.<sup>1</sup> The demand is:

"Vacation rights of supervisory personnel should not prevail on vacation rights of firefighters and, in turn, vacation rights of firefighters should not prevail on supervisory personnel."

In support of its charge, the District argues that the demand is not a mandatory subject of negotiation because it would inter-

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<sup>1</sup> As originally submitted, the charge alleged that Local 1586 had improperly submitted several nonmandatory subjects of negotiation to an interest arbitration panel. We processed it under §204.4 of our Rules without any report or recommendation from a hearing officer because it is one that primarily involves the scope of negotiations under the Taylor Law. In 12 PERB ¶3083, we dealt with eight of the demands of Local 1586 that had been challenged by the District, but we overlooked one demand. The District made a motion for the reopening of the case and Local 1586 did not object. This supplemental Decision and Order deals with the remaining demand.

fere with the District's managerial prerogative of determining its staffing needs. It also argues that the demand is vague and can be construed to cover non-unit employees.

We determine that the demand is a mandatory subject of negotiation. This demand would change the method by which rank and file firefighters and their supervisors bid for available vacation time, and does not affect the number of firefighters and fire officers who must be on duty at any time. It is a management prerogative for a public employer to determine the number of firefighters and fire officers who must be on duty at any given time. Subject to its staffing requirements, however, a public employer is required to negotiate as to the manner in which available vacation time may be enjoyed by individuals and groups of firemen. In City of Yonkers, 10 PERB ¶3056 (1977), we ruled (at p. 3099) that a public employer

"may determine the number of unit employees that it must have on duty during each of the vacation periods. Within that framework, it is obligated to negotiate over the order in which vacation preferences may be granted."

That ruling is applicable here.

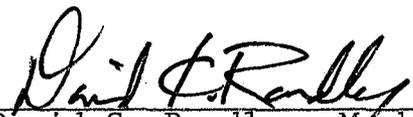
We also reject the District's argument that the demand is vague and can be construed to cover non-unit employees. The negotiating unit represented by Local 1586 includes fire officers up to and including the rank of captain. Local 1586 contends that the "supervisory personnel" referred to in the demand are the captains and lieutenants included in the unit. In view of the presence of such supervisory personnel in the unit, it would be a forced and unreasonable interpretation of the demand to hold that it applies as well to non-unit personnel.

NOW, THEREFORE, WE ORDER that the charge that Local 1586  
improperly insisted upon its vacation  
schedule demand be, and it hereby is,  
DISMISSED.

DATED: Albany, New York  
December 13, 1979

  
Harold R. Newman, Chairman

  
Ida Klaus, Member

  
David C. Randles, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of  
CITY OF YONKERS,

Employer,

-and-

MUTUAL AID ASSOCIATION OF THE PAID FIRE  
DEPARTMENT OF THE CITY OF YONKERS, NEW YORK,  
INC., LOCAL 628, IAFF, AFL-CIO,

Petitioner,

-and-

UNIFORMED FIRE OFFICERS' ASSOCIATION OF THE  
PAID FIRE DEPARTMENT OF THE CITY OF YONKERS,  
NEW YORK,

Intervenor.

#2B-12/14/79

BOARD DECISION

AND ORDER

CASE NO. C-1823

IRVING T. BERGMAN, ESQ., for Employer

BELSON, CONNOLLY & BELSON, for Petitioner

WEINGARD & BROUDNY, ESQS. for Intervenor

This matter comes to us on the exceptions of the Mutual Aid Association of the Paid Fire Department of the City of Yonkers, New York, Inc., Local 628 (Local 628) petitioner herein, to a decision of the Acting Director of Public Employment Practices and Representation (Director) dismissing its objections to conduct affecting the results of an election. In the election, which was held on February 1, 1979, 27 of 101 valid votes were cast for Local 628, while 74 valid votes were cast for the Uniformed Fire Officers' Association of the Paid Fire Department of the City of Yonkers, New York (UFOA). UFOA had been the representative of the unit members at the time when the petition was filed and it had inter-

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vened in the proceeding.

The basis for the objections was certain statements made by the president of UFOA before the election that the City of Yonkers (City) would withdraw benefits that had been tentatively agreed upon by the City and UFOA before the petition was filed if Local 628 won the election. As late as the day before the election, the president of UFOA attributed such a posture to the City.

After a hearing, the Director determined that the attribution of this posture to the City was incorrect and that the City had maintained a consistent position of neutrality between the two unions. He further determined that there had been a sufficient opportunity before the election for Local 628 to respond to the UFOA's misrepresentation and that it had, in fact, availed itself of this opportunity. He therefore dismissed the objections. In its exceptions, Local 628 argues that there could not have been an effective rebuttal of the misrepresentation without the explicit corroboration of the City and that the City's refusal to say anything other than that it would bargain in good faith with any chosen representative of the employees was not sufficient to corroborate the rebuttal.

Having reviewed the record, we affirm the determination of the Director. The evidence shows that the president of Local 628 had sufficient opportunity before the election to inform unit employees that there was no truth to UFOA's statements and that the City's treatment of the tentative agreements would be the same whether the election were won by petitioner or by the UFOA, and that, in fact, he did avail himself of that opportunity. The evidence further shows that the vice president of UFOA acknowledged at pre-election meetings attended by two-thirds of the unit employees, that the

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City would not change the tentative agreement by reason of the outcome of the election. On these facts, we conclude that the misrepresentation made by the president of UFOA regarding the position of the City on the tentative agreements did not adversely affect Local 628's interest and it does not, therefore, require the holding of a new election.<sup>1</sup>

NOW, THEREFORE, WE DETERMINE that UFOA should be certified as the negotiating agent of the employees in the unit.

Dated, Albany, New York  
December 14, 1979

  
Harold R. Newman, Chairman

  
Ida Klaus, Member

  
David C. Randles, Member

<sup>1</sup> In view of this decision, we do not reach cross-exceptions of UFOA in which it asserts that the Director should have dismissed the petition on unrelated grounds.

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of : #2C - 12/14/79  
: :  
NORTHPORT-EAST NORTHPORT UNION FREE : BOARD DECISION AND  
SCHOOL DISTRICT : :  
: :  
Upon the application for designation : :  
of persons as Managerial or Confidential. : CASE NO. E-0457  
: :  
:

INGERMAN, SMITH, GREENBERG & GROSS (JOHN H. GROSS, ESQ.,  
of Counsel) for Employer

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

This matter comes to us on the exceptions of the Northport Administrators and Supervisors Association (Association), the intervenor herein, to a decision of the Director of Public Employment Practices and Representation (Director) that six employees of the Northport-East Northport Union Free School District (District) are managerial employees.<sup>1</sup> The six employees have been in a negotiating unit represented by the intervenor.

In support of its exceptions, the Association contends that the Director erred in determining that the six employees are managerial because they formulate policy. The exceptions simply raise

1 The six employees are:

Larry McNally	-	Director, Pupil Personnel Services, Research and Evaluation
Peter Michel	-	Director, Physical Education and Athletics
Robert Kruger	-	Director of Music
Irene Taylor	-	Director, Continuing Education and Recreation
David Jackier	-	Director of Art and Multi-media
Robert Silverman	-	Director of Industrial Arts and Home Economics

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a question of fact. Citing our decision in State of New York, 5 PERB ¶3001 (1972), the Association states that a person formulates policy if he "participates with regularity in the essential process which results in a policy procedure." It argues, however, that the record is barren of evidence that any of the six employees does so. According to the Association, they are resource personnel who function in a technical, rather than in a managerial, capacity.

Having reviewed the record, we affirm the conclusion of the Director that each of the six employees does participate regularly in the process which results in the adoption of educational policy. Each of the employees is a director of district-wide programs concerned with the staff teaching of elective courses.<sup>2</sup> The directors formulate policy proposals involving curriculum and other educational matters in the areas in which they function. Their proposals are routinely accepted. These activities fall within the statutory standard in §201.7(a) of the Taylor Law for the designation of persons who formulate policy as managerial employees. Accordingly,

WE AFFIRM the decision of the Director, and

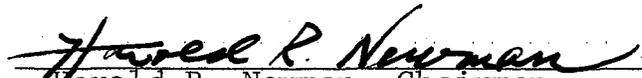
WE ORDER that the following individuals be, and they hereby are, designated managerial:

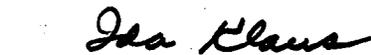
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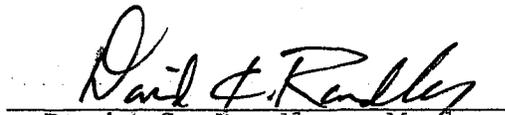
<sup>2</sup> The District's Assistant Superintendent for Instruction is responsible for the teaching of the core courses. In this responsibility, he is assisted by department chairpersons.

- Larry McNally - Director, Pupil Personnel Services,  
Research and Evaluation
- Peter Michel - Director, Physical Education and  
Athletics
- Robert Kruger - Director of Music
- Irene Taylor - Director, Continuing Education and  
Recreation
- David Jackier - Director of Art and Multi-media
- Robert Silverman - Director of Industrial Arts and  
Home Economics.

DATED: Albany, New York  
December 14, 1979

  
Harold R. Newman, Chairman

  
Ida Klaus, Member

  
David C. Randles, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of :  
UNITED UNIVERSITY PROFESSIONS, INC., : #2D - 12/14/79  
Respondent, : BOARD DECISION  
- and - : AND ORDER  
MORRIS ESON, : Case No. U-3740  
Charging Party. :

---

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

MORRIS ESON, pro se

The charge herein was filed by Morris Eson on December 18, 1978. It alleges that United University Professions, Inc. (UUP) violated Section 209-a.2(a) of the Taylor Law by interfering with his right not to join UUP and by coercing him into doing so. The basis of the charge is that UUP is providing insurance benefits solely to its members out of agency shop fee payments collected from him.

FACTS

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 UUP, the exclusive representative of the employees in that unit. As authorized by Section 208.3 of the Taylor Law, UUP is collecting an agency shop fee from Eson. That section of the Taylor Law, which was enacted in 1977, provides

that agency shop fee payments may be collected from a non-member in an amount equivalent to that levied by the employee organization as "dues", provided that the employee organization has established and is maintaining a proper refund procedure.<sup>1/</sup> Such a refund procedure must provide for the return to an employee who seeks it, the "pro rata share of expenditures by the organization in aid of activities or causes of a political or ideological nature only incidentally related to terms and conditions of employment."

The statutory authorization of agency shop fees is a departure from the general provisions of the Taylor Law as specified in Section 202. Ever since the enactment of the Taylor Law in 1967, that section has provided that a public employee has a right "to refrain from forming, joining or participating in, any employee organization . . .".

UUP set its dues as a percentage of salary, with a maximum annual fee of \$250.00. Part of the dues and agency shop fee income goes into the general fund of UUP, the balance going to UUP's state and national affiliates. UUP provides various insurance policies to its members, but not to employees who make agency shop fee payments.<sup>2/</sup> The premiums for these policies are paid

<sup>1/</sup> In a related case, we found that the refund procedure established by UUP was defective in certain particulars and we required certain changes (11 PERB ¶3068). An amended refund procedure was approved (11 PERB ¶3074), but we have since determined that the refund procedure is not being maintained properly because its appellate steps are not being accomplished in an expeditious manner. UUP has until January 31, 1980 to complete all steps relating to Eson's application for a refund (12 PERB ¶3093).

<sup>2/</sup> With respect to a group life insurance policy, UUP has been advised by the State Insurance Department that it cannot provide this policy to non-members. The same may be true with respect to the major medical and accidental death or dismemberment policies.

from monies in the general fund. Thus, some of the money collected from Eson as an agency shop fee goes to purchase insurance policies for UUP members for which he is not eligible.

#### The Hearing Officer's Decision

The hearing officer dismissed the charge. He determined that the money collected from Eson as an agency shop fee was equivalent to dues and that the amount of the fee was, therefore, sanctioned by statute. He found no basis for excluding monies collected by UUP for deposit in its general fund from the term "dues" even though some of it would be used to purchase insurance policies for members only.

The hearing officer also addressed the question of the right of UUP to require Eson to pay, in part, for the insurance policies of its members, and he concluded that it could not do so. In support of this, he cited the opinion of the Supreme Court in Abood v. Detroit Board of Education, 431 U.S. 209, 95 LRRM 2411 (1977), for the proposition that agency shop fee payments are constitutional only insofar as they are used to "finance expenditures by the union for the purpose of collective bargaining, contract administration, and grievance adjustment."<sup>3/</sup>

The hearing officer concluded that UUP is required to refund to Eson his pro rata share of the money paid into the general fund that was used to purchase insurance policies for members, and that the refund appeals procedure established by UUP is the only remedy available to Eson for that purpose.

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<sup>3/</sup> See the Abood decision at 431 US at pp. 226-7, 95 LRRM at p. 2417.

Exceptions

Both Eson and UUP have filed exceptions to the hearing officer's decision. Eson argues that the hearing officer erred in dismissing his charge of coercion because he interpreted the term "dues" too broadly. According to Eson, the insurance policies provided to UUP members constituted a partial rebate of their dues, thus in fact reducing the amount of dues that they paid. Consequently, the refusal of UUP to provide an equivalent rebate to non-members means that their agency shop fee exceeded the dues paid by members.

For its part, UUP takes exception to the dictum of the hearing officer that, at some future time, it will have to refund to Eson a pro rata share of the monies spent on insurance policies for members. It argues that Section 208.3 of the Taylor Law requires a refund which represents only "the employee's pro rata share of expenditures by the organization in aid of activities or causes of a political or ideological nature only incidentally related to terms and conditions of employment" (emphasis supplied). As the money spent on insurance policies is neither of a political nor ideological nature, it is not covered by the statutory refund procedure.

DISCUSSION

We reverse the hearing officer and sustain the charge. We find that UUP, by using Eson's agency shop fee payments to secure insurance benefits solely for members of UUP, has acted in a manner which interferes with, restrains, and coerces him in the exercise of his right not to join or participate in UUP, in

violation of CSL §209-a.2(a).<sup>4/</sup>

The general principle established by the Taylor Law (§202) is that a public employee has the right "to refrain from forming, joining, or participating in any employee organization . . .". Civil Service Law §208.3, added in 1977, states that "notwithstanding" such principle, agency fee payments may be required. This section of the Taylor Law compels employees to make payments to the employee organization that represents them. Their payment of the agency shop fee is an act of participation in the organization. To that extent only, the statute requires participation in the employee organization. Civil Service Law §208.3 does not authorize other pressure or participation otherwise prohibited by CSL §§202 and 209-a.2(a). Other separate and independent acts of coercion are not authorized by the agency shop legislation. By placing the non-member in the position of having to join the union or forego the substantial economic benefit for which he is paying, UUP commits a separate and independent act of coercion.

Furthermore, the duties of an employee organization which is the exclusive representative of a negotiating unit of employees ". . . extend beyond the mere representation of the interest of its own group members. By its selection as bargaining representative, it has become the agent of all of the employees, charged with the responsibility of representing their interests fairly

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<sup>4/</sup>In so holding, it is not necessary to determine what the Legislature intended by the term "dues" as used in CSL §208.3. Nor are we required to interpret the phrase "political or ideological" found in the same section. For the purposes of this improper practice charge it is sufficient that the availability of the refund procedure mandated by that section does not permit UUP to continue to expend its funds in the coercive and discriminatory manner disclosed in this case.

and impartially."<sup>5/</sup> A union may breach this duty of fair representation "by arbitrary or irrational conduct even in the absence of bad faith or hostility ...".<sup>6/</sup> We have long held that this duty exists under the Taylor Law and a violation of that duty is an improper practice within the meaning of §209-a.2(a) of the Act.<sup>7/</sup> We conclude that a parallel duty exists under the Taylor Law to protect the agency fee payer from discriminatory use of his funds by his collective bargaining representative. That duty requires that so long as a union is the beneficiary of agency shop fee payments in amounts equal to dues paid by members, the union must use the funds so obtained in a manner that will accord to both members and agency shop fee payers an equal opportunity to share in substantial economic benefits furnished by the union with such funds. A violation of that duty is an improper practice within the meaning of CSL §209-a.2(a).

UUP's conduct is clearly inconsistent with the limited purpose of the agency shop legislation. That purpose is to achieve an equitable sharing of the union's cost of collective bargaining activities among all the employees who may benefit therefrom; in short, to eliminate the so-called "free rider". Since the monies paid by members and non-members to UUP are equal in amount, the result of diverting sums from the general fund for the furnishing of insurance benefits only to members and using the remaining

<sup>5/</sup> The Wallace Corp. v. NLRB, 323 US 248, 255, 15 LRRM 697 (1944).

<sup>6/</sup> Ryan v. New York Newspaper Printing Pressmen Union, Local No. 2, 590 F2d 451, 100 LRRM 2428, 2430 (CA 2, 1979).

<sup>7/</sup> See, e.g., Plainview-Old Bethpage CSD, 7 PERB ¶3058 (1974); Nassau Ed. Chapter of Syosset CSD Unit, CSEA, 11 PERB ¶3010 (1978); Social Service Employees Union, Local 371, 11 PERB ¶3004 (1978).

funds for collective bargaining purposes is that non-members pay more for the collective bargaining services of the organization than members. A union cannot be permitted to make "free riders" of its members at the expense of non-members.

Rights protected by statute may not be impaired by the exercise of what might otherwise be legitimate internal union interests. Although the Taylor Law leaves employee organizations free to take action which reflects a legitimate union interest, it does not permit acts which invade or frustrate the overriding policies of the Taylor Law.<sup>8/</sup>

#### REMEDY

In view of the nature of the violation found herein, a remedial order should be issued now. UUP's refund procedure is not an appropriate remedial mechanism for such violation. In order to effectuate the policies of the Taylor Law, UUP cannot be permitted to continue to expend its funds in the coercive and discriminatory manner found herein. Therefore, we shall direct UUP to cease and desist from the coercive practice of providing insurance benefits through its dues payments solely to its members while not providing equivalent coverage and benefits to non-members who pay the agency shop fee in an amount equivalent to dues.

This direction shall, however, be subject to the proviso that if UUP, for any reason, determines to continue to make such

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<sup>8/</sup> To the same effect in the private sector, see, e.g., Automobile Workers (General Electric), 197 NLRB 608, 80 LRRM 1411 (1972); Carpenters' Local 22 (Graziano Construction Co.), 195 NLRB 1, 79 LRRM 1194 (1972).

benefits available only to its members through dues payments, then it shall be directed to cease and desist from collecting from each non-member that portion of its agency shop fee which is equal to the per member cost of the insurance benefits. UUP shall furnish the State Comptroller with appropriate notice to effectuate the reduction in agency fee collections. The option thus afforded UUP must be exercised by it no later than thirty (30) days after the date of this decision.

Eson, the sole charging party in this case, should be granted affirmative relief. He should be recompensed to the extent of the discrimination. UUP should be directed to return immediately to Eson that portion of his agency shop fees paid to the UUP since the commencement of the insurance program or the commencement of the collection of agency shop fees from Eson, whichever was later, which is equal to the per member cost of the insurance benefits.

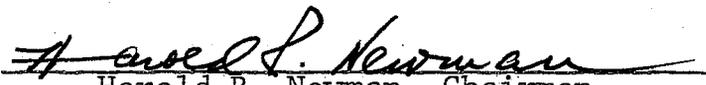
WE, THEREFORE, ORDER THE United University Professions, Inc.

1. to cease and desist from providing insurance benefits through its dues and agency shop fee payments solely to its members while not providing equivalent coverage and benefits to non-members who pay the agency shop fee in an amount equivalent to dues, provided, however, that if United University Professions, Inc., for any reason, determines to continue to make such benefits available only to its members through dues and agency shop fee payments, then United University Professions, Inc. shall cease and desist from collecting from each non-member that

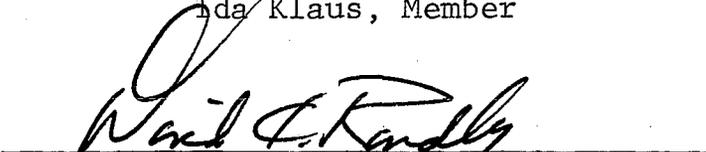
portion of its agency shop fee which is equal to the per member cost of the insurance benefits and shall furnish the State Comptroller with appropriate notice to effectuate the reduction in agency fee collections; this paragraph to be complied with by UUP no later than thirty (30) days after the date of this order;

2. to return immediately to Eson that portion of his agency shop fees paid to the United University Professions, Inc. since the commencement of the insurance program or the commencement of the collection of agency shop fees from Eson, whichever is later, which is equal to the per member cost of the insurance benefits incurred during such period.

DATED: Albany, New York  
December 13, 1979

  
Harold R. Newman, Chairman

  
Ida Klaus, Member

  
David C. Randles, Member

Supreme Court—Appellate Division  
Third Judicial Department

December 6, 1979.

36389

In the Matter of HERBERT B. EVANS,  
as Chief Administrative Judge of  
the Unified Court System of the  
State of New York, Respondent,

v.

HAROLD R. NEWMAN et al., Individually  
and as Members of the PUBLIC EMPLOYMENT  
RELATIONS BOARD OF THE STATE OF NEW YORK,  
et al., Appellants.

NEW YORK STATE COURT OFFICERS ASSOCIATION  
et al., Intervenors-Appellants.

Judgment affirmed, without costs.

Opinion Per Curiam.

SWEENEY, J. P., KANE, STALEY, JR., MIKOLL and HERLIHY, JJ.,  
concur.

N.Y.S. PUBLIC EMPLOYMENT  
RELATIONS BOARD  
RECEIVED  
DEC 13 1979

COUNSEL

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**DECISION**

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**STATE OF NEW YORK**

**Supreme Court**

**Appellate Division**

**Third Judicial Department**

**JUSTICE BUILDING**

**ALBANY**

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**HON. A. FRANKLIN MAHONEY**

Presiding Justice

**HON. LOUIS M. GREENBLOTT**

**HON. MICHAEL E. SWEENEY**

**HON. T. PAUL KANE**

**HON. ELLIS J. STALEY, JR.**

**HON. ROBERT G. MAIN**

**HON. ANN T. MIKOLL**

**HON. J. CLARENCE HERLIHY**

Associate Justices

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**JOHN J. O'BRIEN**

**CLERK**

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1809

STATE OF NEW YORK SUPREME COURT  
APPELLATE DIVISION THIRD DEPARTMENT

In the Matter of HERBERT B. EVANS,  
as Chief Administrative Judge of  
the Unified Court System of the  
State of New York,

Respondent,

-against-

HAROLD R. NEWMAN et al.,  
Individually and as Members of  
the PUBLIC EMPLOYMENT RELATIONS  
BOARD OF THE STATE OF NEW YORK,  
et al.,

Appellants.

NEW YORK STATE COURT OFFICERS  
ASSOCIATION et al.,  
Intervenors-Appellants.

Argued, October 15, 1979.

Before:

HON. MICHAEL E. SWEENEY,  
Justice Presiding,  
HON. T. PAUL KANE,  
HON. ELLIS J. STALEY, JR.,  
HON. ANN T. MIKOLL,  
HON. J. CLARENCE HERLIHY,  
Associate Justices.

6082

APPEALS from a judgment of the Supreme Court at Special Term (Robert C. Williams, J.), entered September 14, 1979 in Albany County, which, inter alia, (1) granted petitioner's application, in a proceeding pursuant to CPLR article 78, to vacate that portion of a determination of appellant Public Employment Relations Board which required petitioner to negotiate allocation of positions of State-paid nonjudicial employees of the courts to State salary grades, and (2) dismissed the affirmative defenses asserted by appellants and intervenors-appellants.

MARTIN L. BARR (Anthony Cagliostro of counsel), for appellants,  
50 Wolf Road, Albany, New York 12205.

PHILLIPS, NIZER, BENJAMIN, KRIM & BALLON (Albert H. Blumenthal  
of counsel), for New York State Court Officers Association,  
intervenor-appellant, 40 West 57th Street, New York, New York 10019.

DRETZIN & KAUFF, P.C. (Adam Blumenstein of counsel), for  
James R. Hannon, intervenor-appellant, 123 East 62nd Street, New  
York, New York 10021.

STEPHEN G. CRANE (Michael Colodner of counsel), for respondent,  
Office of Court Administration, 270 Broadway, New York, New York  
10007.

6083

Per Curiam.

Petitioner is the Chief Administrative Judge of the Unified Court System of the State of New York. Appellant Public Employment Relations Board (PERB) is a State Agency created pursuant to article 14 of the Civil Service Law. Intervenors-appellants New York State Supreme Court Officers Association, New York State Court Clerks Association, and the Court Clerks Benevolent Association (Unions) are the jointly certified collective bargaining representatives for approximately 2,500 court clerks and court officers employed by the Unified Court System within the City of New York. Intervenor-appellant James R. Hannon has appeared individually and as President of the New York State Supreme Court Officers Association.

On December 1, 1978, the Unions filed an improper practice charge, pursuant to section 209-a of the Civil Service Law and Part 204 of PERB's Rules of Procedure (4 NYCRR Part 204), charging that petitioner's predecessor and the Director of Employee Relations of the State Office of Court Administration (hereinafter jointly OCA) had violated their duty to negotiate in good faith with respect to various association demands.

OCA responded that the Union's demands were not mandatorily negotiable and, on January 3, 1979, it filed its own improper practice charge, alleging that the Unions failed to negotiate in good faith by insisting upon the negotiation of non-mandatory subjects.

On August 16, 1979, after proceedings were duly had before PERB, PERB rendered a decision holding that classification is primarily the exercise of a governmental mission and not a mandatory subject of negotiation. Nevertheless, it also ruled that the allocation of positions to salary grades was a mandatory subject of negotiation. PERB further directed that both sides negotiate in good faith.

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On August 20, 1978, petitioner commenced the subject article 78 proceeding, seeking to vacate that portion of PERB's determination which ruled that allocation to State-paid salary grades was a mandatory subject of negotiation. Special Term sustained the petition concluding that "[a]llocation of job classifications to salary grades is a matter which the Legislature has specifically entrusted to the Administrative Board of the Judicial Conference." In arriving at this result, Special Term reasoned that section 39 (subd. 8) of the Judiciary Law was clear and unambiguous; that the process of collective negotiation would tend to undermine the goals sought to be attained by

unification of the court system; and that unilateral allocation of salary grades would not deprive the unions of their rights under the Taylor Law (Civil Service Law, art. 14) since individual salaries within the salary grades will remain a subject of negotiation along with other terms and conditions of employment. In its decision Special Term also dismissed as premature certain counterclaims asserted by the Unions.

Article 14 of the Civil Service Law (Taylor Law) applies to non-judicial employees in the Unified Court System (McCoy v. Helsby, 34 A D 2d 252, affd. 28 N Y 2d 790). Pursuant to article 14, an employer is required to negotiate terms and conditions of employment (Civil Service Law, § 204, subd. 2; Bd. of Educ. of Union Free School Dist. No. 3 of Town of Huntington v. Associated Teachers of Huntington, 30 N Y 2d 122, 127). The phrase "terms and conditions of employment" means salaries, wages, hours, agency shop fee deduction and other terms and conditions of employment \* \* \*, less certain topics not germane to this appeal (Civil Service Law, § 201, subd. 4). It is an improper labor practice for a public employer or employee organization to refuse to negotiate in good faith (Civil Service Law, § 209-a, subds. 1, 2).

PERB has been granted the authority to resolve disputes arising out of negotiations (Civil Service Law, § 209). "Inherent in this delegation is the power to interpret and construe the statutory scheme. Such construction given by the agency charged with administering the statute is to be accepted if not unreasonable \* \* \* [citations omitted]." (Matter of West Irondequoit Teachers Assn. v. Helsby, 35 N Y 2d 46, 51.)

Unless we find legislative authority for PERB's determination that the allocation of positions to State salary grades relates primarily to terms and conditions of employment and not to the formulation or management of public policy, we must affirm Special Term. In resolving this question, an examination of the relevant statutes, legislative reports and memoranda is necessary.

We have reviewed section 39 (subd. 6, par. [a]; subds. 7, 8) of the Judiciary Law, and conclude that, on its face, section 39 is not dispositive of the issue. We, therefore, go further.

Historically, management in the executive branch unilaterally determined the allocation of positions to salary grades prior to the enactment of the Taylor Law (see Matter of Corrigan v. Joseph, 304 N.Y. 172, 180-183, where the Court of Appeals noted the close relationship between classification and allocation).

After enactment of the Taylor Law, allocation remained outside the terms and conditions of employment in the executive branch. Section 24 of chapter 158 of the Laws of 1970 provides:

Upon the report of the Select Joint Legislative Committee to conduct the hearing in the matter of the dispute between Council 82, A.F.S.C.M.E., and the State of New York and the public hearings held on the report of the fact-finding board, the legislature finds and declares that allocations and reallocations to salary grades of positions in the classified service of the state are not terms and conditions of employment under article fourteen of the civil service law. The legislature further finds and declares that such allocations and reallocations are not within the scope of a fact-finding board but are to be accomplished exclusively pursuant to the provisions of article eight of the civil service law.

Appellants and intervenors argue that the legislative finding in section 24 applies only to the executive branch of government since the second sentence of the section makes reference to article 8 of the Civil Service Law and article 8 does not apply to the judicial branch of government. We disagree. The Legislature indicated that the two conclusions are not dependent on each other when it employed the language "[t]he legislature further finds \* \* \*" in the second sentence above (emphasis added). The quoted language should be given meaning and we conclude, therefore, that the first stated finding is separate and independent from the second finding.

The Report of the Select Joint Legislative Committee, upon which section 24 of chapter 158 is based, is supportive of the above conclusion. This report\*, insofar as pertinent, states:

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\* Unpublished.

On the major issue of whether salary grade allocation is negotiable under article 14 of the Civil Service Law, we are persuaded that this matter was not intended to be and should not be within the scope of collective negotiations, nor within the purview of factfinders' considerations, but rather is exclusively controlled by Article 8 of the Civil Service Law which establishes the administrative procedures for determining such allocations.

Article 8 of the Civil Service Law sets out carefully the detailed procedure for insuring that job titles in the Civil Service system are allocated appropriately to salary grade positions, taking into consideration all relevant circumstances which bear upon job evaluation. This system is intended to be administered by the Director of Classifications and Compensation impartially and without undue pressures of competing interests, in order to insure that such job title-salary relationships shall be fair and equitable. In our view, it was not the intention of the Legislature in adopting Article 14 of the Civil Service Law to abrogate in any fashion the exclusive responsibility of the Director in this area or to disrupt the delicate relationships among the thousands of job titles in the system. In essence, the Article 8 policy of establishing equal pay for equal work was not intended to be subject to the vicissitudes of the collective negotiations process.

While the quoted report makes it clear that the Legislature was interested in maintaining the independent duties of the Director of Classifications and Compensation, it also reveals that it was interested to a significant degree in avoiding the disruptions of the delicate relationships existing among job titles which would result from fluctuations inherent in collective bargaining.

The Legislature, in its statement of Legislative Findings and Purposes in enacting section 39 of the Judiciary Law makes clear that, in addition to eliminating the burden upon local governments of financing the courts, its goal in establishing the unified court system was to "enable the allocation of money and manpower when needed\* \* \*" and to "ensure that the limited resources available for courts are allocated according to need and utilized effectively \* \* \*" (L. 1976, ch. 966, § 1).

While this legislative statement is largely devoted to fiscal considerations, it also is concerned with allocation of manpower as the need arises, a goal that would be significantly hampered if negotiation over allocation to salary grades was mandatory. A construction inconsistent with the purposes of the statutory scheme should be avoided.

We note that pursuant to section 37 (subd. 2) of the Judiciary Law (formerly Judiciary Law, § 219), the Administrative Board unilaterally determined the salary grade allocation for each State-paid nonjudicial position in the court system in 1972. This fact is further evidence that the Legislature did not intend allocation to be negotiable. "Where the practical construction of a statute is well-known, the Legislature is charged with knowledge and its failure to interfere indicates acquiescence (Engle v. Talanico, 33 N Y 2d 237, 242)" (Matter of Hellerstein v. Assessor of Town of Islip, 37 N Y 2d 1, 9, mod. on other grounds 39 N Y 2d 920).

Moreover, the Legislature has indicated that standards and policies concerning title structure, job definition, et cetera, and personnel practices relating to non-judicial personnel are to be consistent with the Civil Service Law (Judiciary Law, § 211, subd. 1, par. [d], as added by L. 1978, ch. 156, § 7; former § 212, subd. 1, repealed by L. 1978, ch. 156, § 6; Matter of Goldstein v. Lang, 23 A D 2d 483, 485-486 [dissent], rev'd. upon dissenting opn. 16 N Y 2d 735). Thus, a legislative intent to apply the policy finding contained in the Report of the Select Joint Legislative Committee (supra) to non-judicial employees is evident. Based on the findings of that report and on section 24 of chapter 158 of the Laws of 1970, PERB's argument that collective negotiation over allocation is not inconsistent with the Civil Service Law is without merit. While article 8 of the Civil Service Law does not apply to non-judicial employees, these employees are to be treated consistently with the Civil Service Law (Matter of Goldstein v. Lang, supra).

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Finally, PERB's contention that application of section 24 of chapter 158 of the Laws of 1970 would amount to a windfall to OCA since OCA is not subject to article 8 of the Civil Service Law is rejected. OCA has set up an appeal procedure which obviates the threat of a windfall to OCA. The employer or employee organization dissatisfied with his or its members' job allocation to salary grade may appeal to a classification review board consisting of three members appointed independently by government agencies outside the court system. Adverse review board decisions may then be challenged in an article 78 judicial proceeding (see Corkum v. Bartlett, 46 N Y 2d 424, 431).

Allocation of positions to salary grade is primarily related to a "mission" of an employer and not to terms and conditions of employment. PERB was in error when it determined otherwise.

The Unions' contention, raised in a counterclaim, that petitioner violated section 39 of the Judiciary Law in allocating union members to salary grades is without merit. The Unions alleged that at least 60% of their members have been "maxed out" of increments to which they had become entitled by virtue of their existing contracts. An employee would have been "maxed out" when he was slotted to a salary grade, the maximum of which was below his existing salary when he had not already achieved the maximum salary range before allocation. Thus, the Unions argue, the employees are "maxed out" when they cannot attain the salaries to which they were entitled pursuant to contracts in effect on March 31, 1977.

We do not construe section 39 (subd. 6, par. [a]) of the Judiciary Law to entitle the employees who are in "maxed out" situations to additional increments above their allocated salary grade. To do so would substantially hamper effective reorganization of the court system by increasing overpayment disparities among employees and by continuing the salary anomalies which arose out of the local government units' inability to finance court operations. The result would be inconsistent with legislative purposes.

We have examined the Unions' remaining contentions and find no reason to disturb the ruling of Special Term as to those matters.

The judgment should be affirmed, without costs.

APPELLATE DIVISION  
SECOND DEPARTMENT

**MATTER OF POLICE BENEVOLENT ASS'N. OF CITY OF YONKERS, INC.**, pet. (N.Y.S. Public Employment Relations Bd. et al., res) — Proceeding pursuant to CPLR article 78 to review a determination of respondent Public Employment Relations Board (PERB) dated Dec. 8, 1978, which, inter alia, held that petitioner had violated section 210 (subd 1) of the Civil Service Law. Petition granted, determination annulled, on the law, with costs, and charges dismissed.

Police officers of the City of Yonkers conducted two "sick-outs," one in April, 1977, the other in June, 1977. Apparently, no charges were brought against individual officers but petitioner Police Benevolent Association of the City of Yonkers, Inc. (PBA) was charged with violation of section 210 (subd 1) of the Civil Service Law by counsel to PERB pursuant to section 210 (subd 3, par [c]) of the Civil Service Law. The City of Yonkers took no part in these actions.

A hearing was held at which certain testimony was given and exhibits were introduced. Police Deputy Chief Sardo testified that he went to PBA headquarters during the June "sick-outs" to see how efforts by PBA officers and trustees to get the men back to work were proceeding. Former Police Officer Cipollini, a former PBA officer and member of the executive board, testified to his telephone efforts in both April and June to get the men to return.

A letter written by Cipollini to The Herald Statesman, in which he laid out the grievances of the police and asked for public support, was admitted into evidence. The letter was written by Cipollini as an individual; his official title was added to the letter by the newspaper and was then printed in that form. Cipollini testified that the PBA had not approved the letter.

The other relevant evidence consisted of two articles published in The Herald Statesman. They quoted certain remarks allegedly made by PBA president Portanova. In his testimony Officer Por-

tanova denied making the statements. The articles were admitted into evidence as past recollection recorded when the reporter who wrote them was unable to refresh his recollection.

The hearing officer recommended dismissal of the charges. PERB did not go along with this recommendation. We reverse on the ground that the finding of a violation of section 210 (subd 1) of the Civil Service Law was not supported by substantial evidence. Subdivision 1 of section 210, inter alia, prohibits a public employee organization from causing, instigating, encouraging or condoning a strike. The only evidence on which the finding of PBA involvement could be based was the letter and the newspaper articles. The letter was written by Cipollini as an individual. He was not an officer who would normally be entrusted with official correspondence. There was no reason why rank and file PBA members would assume official approbation.

As to the newspaper articles, there was a direct denial of the accuracy of the quotations by the person quoted. The articles were admitted as evidence, but the reporter conceded that his work was subject to editing which included additions and deletions from his articles.

This is not sufficient to constitute substantial evidence.

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STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of :  
CITY OF YONKERS, :  
Employer, : #3A - 12/14/79  
-and- :  
MUTUAL AID ASSOCIATION OF THE PAID FIRE :  
DEPARTMENT OF THE CITY OF YONKERS, NEW : Case No. C-1823  
YORK, INC., LOCAL 628, IAFF, AFL-CIO, :  
Petitioner, :  
-and- :  
UNIFORMED FIRE OFFICERS' ASSOCIATION OF :  
THE PAID FIRE DEPARTMENT OF THE CITY OF :  
THE CITY OF YONKERS, NEW YORK, :  
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 Uniformed Fire Officers' Association of the Paid Fire Department of the City of Yonkers, New York 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: Lieutenants, Captains and Assistant Chiefs

Excluded: Chief of the Fire Department and Deputy Chiefs

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with the Uniformed Fire Officers' Association of the Paid Fire Department of the City of Yonkers, New York, 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 14th day of December, 1979  
Albany, New York

*Harold R. Newman*  
Harold R. Newman, Chairman

*Ida Klaus*  
Ida Klaus, Member

*David C. Randles*  
David C. Randles, Member