3-14-1980

State of New York Public Employment Relations Board Decisions from March 14, 1980

New York State Public Employment Relations Board

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Keywords

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

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of	:	
LEVITTOWN UNION FREE SCHOOL DISTRICT,	:	#2A - 3/14/80
Respondent,	:	CASE NO. U-3540
-and	:	BOARD DECISION AND ORDER
NASSAU EDUCATIONAL CHAPTER, CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,	:	
Charging Party.	:	

COOPER AND ENGLANDER (LEONARD COOPER, ESQ., of Counsel) for Respondent

RICHARD M. GABA (BARRY J. PEEK, ESQ., of Counsel) for Charging Party

By a charge docketed on September 25, 1978, the Nassau Educational Chapter, Civil Service Employees Association, Inc. (CSEA) alleged that the Levittown Union Free School District (District) had violated §209-a.1(d) of the Act by refusing to negotiate in good faith with respect to agency shop. The District did not file an answer. Based upon the provisions of §204.3(e) of this Board's Rules of Procedure,[1/] the hearing officer deemed such failure to file an answer to constitute an

1/ Admission by Failure to Answer. If the respondent fails to file a timely answer, such failure may be deemed by the hearing officer to constitute an admission of the material facts alleged in the charge and a waiver by the respondent of a hearing.

admission of the material facts alleged in the charge. The hearing officer scheduled a hearing. Subsequently, upon notice to the parties, and without objection on their part, the hearing was cancelled. The District did file a "motion to dismiss" in which it argued (1) that the charge was not timely and (2) that the facts did not establish an improper practice. The District argued that the facts of the charge establish, at most, that the District may have violated provisions of an agreement between the parties and not the District's statutory duty to negotiate in good faith.

The hearing officer ruled that the defense of timeliness could not be considered because the District's failure to file an answer constituted a waiver of that affirmative defense. The hearing officer further ruled that, in any event, the charge was timely. The hearing officer also rejected the District's argument on the merits and held that the statutory right of the CSEA to negotiate agency shop had not been waived by CSEA. In its exceptions, the District renews its arguments with regard to timeliness and the jurisdiction of this Board.

FACTS

Since the District filed no answer, and no hearing was held, the material facts alleged in the charge must be accepted. The charge states that CSEA is the exclusive agent for employees of the District as set forth in the collective bargaining agreement between the District and CSEA for the period of July 1, 1977 through and including December 31, 1979. The agreement was reached on or about January 27, 1978. Article IX of the agreement states:

> The parties agree that CSEA representatives shall be afforded an opportunity to meet with the Board of Education or with members

> of the Board designated by the Board for the purpose of discussing agency shop. Said meeting is to take place within 90 days of ratification.

The agreement was ratified by CSEA. By a letter to Robert Neidich, Superintendent of Schools, dated January 13, 1978, Phil Trzcinski, President of CSEA Levittown Unit #5, requested a meeting with the Board of Education pursuant to Article IX. Dr. Neidich, on April 28, 1978, refused the request for a meeting between the CSEA and the Board of Education on the matter of agency shop. On May 19, 1978, Trzcinski again requested a meeting with the Board in accordance with Article IX of the agreement. On May 22, 1978, Dr. Neidich again refused the request.

DISCUSSION

We reverse the hearing officer and dismiss the charge.

Although we agree that the District waived its defense of timeliness by its failure to file an answer,[2/] we conclude that the facts do not establish the improper practice of a refusal to negotiate in good faith in violation of §209-a.1(d) of the Act.

CSEA's position is a simple one: since the contract has been breached, a violation of §209-a.1(d) has occurred. That argument may have had some merit under the rationale of Town of Orangetown, 8 PERB ¶3042 (1975) and the earlier cases cited therein. We have, however, since our decision in St. Lawrence County, 10 PERB ¶3058 (1977) (See also CSL §205.5[d]), adopted the view that where the employer refuses to implement an express provision in a contract, what is involved is solely a question of the meaning and enforcement of the contract, and, thus, outside the jurisdiction of this

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2/ See Sections 204.3(c)(2) and 204.7(1) of our Rules of Procedure.

Board.

The hearing officer, nevertheless, concluded that the District's failure to meet with CSEA in accordance with Article IX was a violation of the District's statutory duty to negotiate concerning agency shop, finding that CSEA did not waive its right to negotiate agency shop by agreeing to Article IX. We disagree.

We are not here confronted with a question of waiver. Ordinarily, if a subject is dealt with in a collective agreement, both parties, by virtue of that agreement, are foreclosed from further negotiation on that subject for the life of the agreement. If they intend otherwise, they are free to so state in their agreement. The subject of agency shop is dealt with in Article IX. Whether or not Article IX reflects an intention by the parties to have further negotiations regarding agency shop is solely a question of contract interpretation. It is not a proper question for this Board to consider in this proceeding.

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

DATED: March 14, 1980
Albany, New York

Harold R. Newman
HAROLD R. NEWMAN, Chairman

Ida Klaus
IDA KLAUS, Member

David C. Randles
DAVID C. RANDLES, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of	
ONONDAGA-MADISON BOARD OF COOPERATIVE EDUCATIONAL SERVICES,	#2B - 3/14/80
Respondent,	BOARD DECISION
-and-	AND
ONONDAGA-MADISON EMPLOYEES GENERAL ASSOCIATION,	ORDER
Charging Party.	CASE NO. U-3813
	AND
In the Matter of	CASE NO. U-3815
ONONDAGA-MADISON BOARD OF COOPERATIVE EDUCATIONAL SERVICES,	
Respondent,	
-and-	
ONONDAGA-MADISON BOCES FEDERATION OF TEACHERS,	
Charging Party.	

ALAN D. POLE, for Respondent

MARY K. KASSMAN, Field Representative
for Charging Parties

On January 29, 1979, the Onondaga-Madison Employees General Association (Association) and the Onondaga-Madison BOCES Federation of Teachers filed identical charges (Case U-3813 and Case U-3815, respectively) against the Onondaga-Madison Board of Cooperative Educational Services (BOCES) alleging that BOCES violated §209-a.1(d) of the Act by changing unilaterally the existing practice regarding

employees' physical examinations. The hearing officer found merit in the charge and ordered BOCES 1) to reinstate the former practice, 2) to reimburse all employees covered by the practice for the cost of physical examinations in accordance with the former practice, 3) to negotiate in good faith regarding terms and conditions of employment and 4) to post an appropriate notice.

FACTS

The Association represents non-instructional employees and has a contract covering the period from July 1, 1978 to June 30, 1980. The Federation represents the teaching staff and has a contract covering the period from July 1, 1978 to June 30, 1980.

In July 1973, shortly after an amendment to Education Law §913 empowered BOCES to require its employees to take physical examinations, BOCES adopted the following policy (designated as Numbers 4114 and 4214) applicable "to all BOCES personnel":

1. Non-Tenure personnel would have medical examinations every two years;
2. Tenure personnel would have medical examinations every three years;
3. All personnel would have annual chest x-rays;
4. Bus drivers and food-service personnel would have annual medical examinations;
5. The required medical examinations would be conducted at BOCES expense by physicians designated by BOCES. If a teacher so desired, he would be examined by his own physician at the teacher's expense.

It appears that this policy was never effectuated in that periodic examinations were never required and none was performed by BOCES-designated physicians. However, beginning during the 1977-78 school year employees began to submit to BOCES their bills for medical examinations conducted by their own physicians and BOCES began to reimburse the employees for the cost of such examinations. During the 1977-78 and 1978-79 school years, until BOCES unilaterally suspended its practice on November 30, 1978, BOCES reimbursed in whole or in part at least 21 employees for the cost of examinations conducted by the employees' physicians. Both charging parties sought to negotiate this suspension. BOCES refused and, on January 18, 1979, adopted a new policy relating to physical examinations. This policy applied only to custodial-maintenance staff, food-service staff, drivers-messengers and "employees having a long history of health related problems." All such employees were to have medical examinations prior to appointment and custodial-maintenance staff, food-service staff and drivers-messengers were to have annual examinations. These examinations would be conducted at BOCES expense by physicians designated by BOCES. If an employee so desired, he or she would be examined by his or her own physician at the employee's expense. Despite the charging parties' request, BOCES did not negotiate this change.

BOCES objects to the hearing officer's decision on several grounds:

1. The subject of physical examinations is not a mandatory

subject of negotiation because the policy relating thereto was instituted pursuant to §913 of the Education Law.

2. There has been no past practice of regular physical examinations.

3. The unions' right, if any, to negotiate the change in policy and practice was waived because

   a) several other unilateral changes in terms and conditions of employment were made by BOCES in the past to which the charging parties offered no objection and about which no demands were made to negotiate,

   b) management rights clauses in the unions' respective contracts reserved to BOCES the right to alter its own policy, and

   c) a"zipper"clause in the Association's contract precludes any negotiation of the change.

4. The remedial order recommended by the hearing officer is excessive and inappropriate under the circumstances disclosed in the record.

DISCUSSION

We affirm the hearing officer's decision.

The policy promulgated by BOCES in 1973 contemplated that BOCES would provide periodic physical examinations to all its personnel at BOCES expense. Although that policy appears not to

have been effectuated, a practice was established thereunder pursuant to which BOCES undertook to reimburse, in whole or in part, all employees who submitted bills for the cost of physical examinations conducted by the employees' own physicians. The institution of free physical examinations constituted a substantial fringe benefit to the affected employees. A free physical examination provided or reimbursed by the employer is an economic benefit to the employee no different than other types of economic fringe benefits such as free tuition,[1] free parking[2] or free transportation[3] -- all recognized to be mandatory subjects of negotiation. Thus a practice had been established by BOCES concerning a mandatory subject of negotiation when, upon request, it routinely reimbursed employees for the cost of physical examinations. BOCES' unilateral abolition of that general practice and the substitution of a policy of paid physical examinations for only some of the personnel previously covered, must be found to constitute a refusal to negotiate in violation of §209-a.1(d) of the Act, unless there is merit to any of its defenses. We find none of its defenses to be valid.

BOCES' reliance upon §913 of the Education Law is misplaced. That section merely empowers BOCES to require a physical examination of any employee "in order to determine the physical or mental capacity of such person to perform his duties". Neither the plan contemplated by its policy nor the practice actually

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1 E.g., City of Kingston, 9 PERB ¶3069 (1976).

2 State of New York, 6 PERB ¶3005 (1975).

3 City of New York, 9 PERB ¶3076 (1976).

followed by BOCES is mandated by §913 or duplicative of that section.

BOCES' argument that the unions waived their right to negotiate this change because they had not sought in the past to negotiate unilateral changes in other terms and conditions of employment, must be rejected. We stated in County of Tompkins, 10 PERB at p. 3117:

> "The failure of an employee organization to make a demand relating to a term and condition of employment at one point in time does not constitute a waiver of its right to negotiate over that subject in the future. Neither does it constitute a waiver of its right to object to unilateral action by the public employer regarding such term and condition of employment."

There is reason, all the more, to conclude that no waiver can be found where, as here, the prior failure to object related to other terms and conditions of employment.

We agree with, and adopt, the hearing officer's reasoning and disposition with respect to BOCES' defenses of waiver as they relate to the management rights and "zipper" clauses of the existing contracts. We agree that an employer may not unilaterally reserve to itself the right to change "policies" which involve mandatory subjects of negotiation. Nothing in the record before us evidences an explicit waiver by the charging parties of the right to negotiate a change in the practice found here to exist. Neither the management rights clause nor the "zipper" clause agreed to by the parties constitutes a waiver of the right of the unions to negotiate over a change in a past practice involving a mandatory subject of negotiation in effect at the time the contract was negotiated.

REMEDY

The employer, in its brief, states that more employees have received the benefit of free physical examinations under its new policy than under the old policy. It argues, therefore, that the hearing officer's recommended remedial order, which directs the reinstatement of the former practice, should not be adopted. It further argues that since the record shows that only 21 employees received reimbursement under the former practice, the hearing officer's recommended order directing reimbursement to all unit employees "in accordance with the prevailing practice before November 30, 1978", is excessive.

The number of employees who have actually received benefits under the new policy is not part of the evidentiary record before us. In any event, however, it is clear that the new policy covers substantially fewer employees than did the former policy and thus would deny benefits to those who could have enjoyed them previously. A comparison of the actual number who have received physical examinations under the respective policies is irrelevant.

It appears that the practice actually followed by BOCES did not involve, in all cases, full reimbursement. The record does not disclose, however, on what basis the employer did reimburse some employees in full and others only in part. We believe that the hearing officer's direction to reimburse "in accordance with the prevailing practice before November 30, 1978" is appropriate with the understanding that the same standards for reimbursement formerly used should be followed. Furthermore, we do not direct the employer to pay employees for examinations which have not been made. But those employees, formerly covered by the employer's

past practice, should be appropriately reimbursed, upon request, for any physical examinations that may have been conducted.

Accordingly, we find that BOCES has violated §209-a.1(d) of the Act, and

WE THEREFORE ORDER that Onondaga-Madison Board of Cooperative Educational Services

1. Reinstate, as of November 30, 1978, the practice with respect to the reimbursement for physical examinations as it existed before November 30, 1978 under policies numbered 4114 and 4214;
2. Reimburse, upon request, all unit employees covered under policies numbered 4114 and 4214 for the cost actually incurred by them for their physical examinations, in accordance with the prevailing practice before November 30, 1978;
3. Negotiate in good faith with the Association and Federation with respect to terms and conditions of employment of unit employees, and
4. Post notice in the form attached in locations throughout the BOCES district in places ordinarily used to communicate information to unit employees.

DATED: Albany, New York
March 13, 1980

Harold R. Newman, Chairman

Ida Klaus, Member

David C. Randles, Member

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify our employees that: the Onondaga and Madison Board of Cooperative Educational Services will:

1. Reinstate, as of November 30, 1978, the practice with respect to the reimbursement for physical examinations as it existed before November 30, 1978 under policies numbered 4114 and 4214.

2. Reimburse, upon request, employees in the negotiating units represented by the Onondaga-Madison Employees General Association (Association) and the Onondaga-Madison BOCES Federation of Teachers (Federation) and covered under policies numbered 4114 and 4214 for the cost actually incurred by them for their physical examinations, in accordance with the prevailing practice before November 30, 1978.

3. Negotiate in good faith with the Association and Federation with respect to terms and conditions of employment of unit employees.

.....
Employer

Dated..... **By**.....
(Representative) (Title)

6202

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of the Application of the	:	#2C - 3/14/80
COUNTY OF SUFFOLK	:	Docket No. S-0006
for a determination pursuant to Section 212 of the Civil Service Law.	:	
	:	

At a meeting of the Public Employment Relations Board held on the 14th day of March, 1980, and after consideration of the application of the County of Suffolk made pursuant to Section 212 of the Civil Service Law for a determination that its Local Law No. 4-1978 as last amended by Local Law No. 1-1980 is substantially equivalent to the provisions and procedures set forth in Article 14 of the Civil Service Law with respect to the State and to the Rules of Procedure of the Public Employment Relations Board, it is

ORDERED, that said application be and the same hereby is approved upon the determination of the Board that the Local Law aforementioned, as amended, is substantially equivalent to the provisions and procedures set forth in Article 14 of the Civil Service Law with respect to the State and to the Rules of Procedure of the Public Employment Relations Board.

Dated: Albany, New York
March 14, 1980

Harold R. Newman, Chairman

Ida Klaus, Member

David C. Randles, Member

6203

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of	#2D - 3/14/80
SUFFOLK COUNTY WATER AUTHORITY, Respondent, -and- UTILITY WORKERS UNION OF AMERICA, AFL-CIO, LOCAL NO. 393, Charging Party.	BOARD DECISION AND ORDER CASE NO. U-3857

PUTNEY, TWOMBLY, HALL & HIRSON, ESQS. (EDWARD F. CALLEN AND BRIAN J. TUNNEY, ESQS., OF COUNSEL), for Respondent

HARTMAN & LERNER, ESQS. (HARRY D. HERSH, ESQ., OF COUNSEL), for Charging Party

This matter comes to us on the exceptions of the Utility Workers Union of America, AFL-CIO, Local No. 393, to a hearing officer decision dismissing its charge. The charge alleges that the Suffolk County Water Authority committed an improper practice by refusing to compensate charging party's president for the time he spent at a pre-hearing conference that was held in connection with another improper practice charge while compensating its own representatives for the time that they spent at the conference. The charge in that case was also filed by this charging party. Charging party argues that a past practice of compensating both its representatives and those of the employer for time spent at grievance meetings and grievance arbitrations obligates respondent

to compensate them for attendance at an improper practice charge conference. It finds support for this position in our decision in Vestal, 4 PERB ¶3037 (1971).

The hearing officer rejected these arguments. She determined that the past practice of compensating the union president for time spent at grievance meetings and arbitrations was not material to the charge. She also distinguished Vestal on two grounds --

1. The disparate treatment in Vestal was between unit employees. Here, the disparate treatment is between the union president, a unit employee, and the management representatives who, the hearing officer presumes, are not unit employees.
2. The disparate treatment in Vestal involved persons who appeared as witnesses and depended on whether or not they testified in favor of the employer. Here, the disparate treatment was between the advocates on both sides.

In its exceptions, the charging party reargues the positions that were considered by the hearing officer and rejected by her.

We affirm the decision of the hearing officer for the reasons stated in her opinion.

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

DATED: Albany, New York
March 13, 1980

Harold R. Newman

Harold R. Newman, Chairman

Ida Klaus

Ida Klaus, Member

David C. Randles

David C. Randles, Member

6206

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIO BOARD

In the Matter of	:	
SUSQUEHANNA VALLEY CENTRAL SCHOOL DISTRICT, Employer,	:	#3A - 3/14/80
-and-	:	
SUSQUEHANNA VALLEY EDUCATIONAL SUPPORT PERSONNEL - NYEA/NEA, Petitioner,	:	Case No. C-1981
-and-	:	
CSEA, LOCAL 1000, AFSCME, AFL-CIO, 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 CSEA, Local 1000, AFSCME, AFL-CIO

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

Unit: Included: All of the classified employees of the District in the following titles: Accountant, Account Clerk Typist, Bus Attendant, Bus Driver, Bus Driver Mechanic, Cook, Cook Manager, Custodian, District Maintenance Man, Food Service Helper, Groundsman, Head Bus Driver, Head Custodian, Head Groundsman, Registered Professional Nurse, School Matron, Sr. Library Clerk, Sr. Typist, Stenographer, Telephone Operator, Typist.

Excluded: See attached sheet.

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with the CSEA, Local 1000, AFSCME, AFL-CIO

and enter into a written agreement with such employee organization with regard to terms and conditions of employment, and shall negotiate collectively with such employee organization in the determination of, and administration of, grievances.

Signed on the 13th day of March, 1980
Albany, New York

Harold R. Newman
Harold R. Newman, Chairman

Ida Klaus
Ida Klaus, Member

David C. Randles
David C. Randles, Member

6207

Excluded: Supervisory personnel, who employ or dismiss employees, and the following titles: Secretary to the Superintendent, Secretary to the Assistant to the Superintendent, Business Manager, School Lunch Manager, School Attorney, Supervisor of Transportation, School District Clerk, School District Treasurer, School Tax Collector, all substitute employees, the three federally funded positions of Attendance Officer, Suspension Room Supervisor and Typist.

Excluded: Supervisory personnel, who employ or dismiss employees, and the following titles: Secretary to the Superintendent, Secretary to the Assistant to the Superintendent, Business Manager, School Lunch Manager, School Attorney, Supervisor of Transportation, School District Clerk, School District Treasurer, School Tax Collector, all substitute employees, the three federally funded positions of Attendance Officer, Suspension Room Supervisor and Typist.