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State of New York Public Employment Relations Board Decisions from July 16, 1980

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from July 16, 1980

Keywords

NY, NYS, New York State, PERB, Public Employee 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	:	
DEER PARK TEACHERS ASSOCIATION,	:	BOARD DECISION
	:	<u>AND ORDER</u>
Respondent,	:	
-and-	:	Case No. U-4321
DEER PARK UNION FREE SCHOOL DISTRICT,	:	
	:	
Charging Party.	:	

COOPER & ENGLANDER, ESQS. (by Robert E. Sapir, Esq., of Counsel) for Charging Party

PAUL E. KLEIN, ESQ. (by Deborah Watarz, Esq., of Counsel) for Respondent

This matter comes to us on the exceptions of the Deer Park Union Free School District (District) to the hearing officer's decision dismissing its charge against the Deer Park Teachers Association (Association) on the ground that this Board lacks jurisdiction to resolve the dispute. The charge, filed October 25, 1979, alleges that the Association violated §209-a.2(b) of the Act in that it has refused to reduce to writing the agreement reached between the parties during negotiations for their current contract covering 1979-1982. The hearing officer concluded that the disagreement between the parties is one over a claimed breach of agreement, which is beyond this Board's jurisdiction to

enforce.¹ We conclude, however, that the undisputed facts establish a violation of §209-a.2(b) by the Association in that it has refused to execute a written agreement incorporating the agreement of the parties, as required by §204.3 of the Act.

FACTS

Although no hearing has been held, the documents submitted by the parties reveal the following undisputed facts. After protracted negotiations, including a three-day strike, the parties, on October 4, 1979, signed a multi-page memorandum of agreement in which it was agreed that "all terms and conditions of the Collective Bargaining Agreement which expired on June 30, 1979 shall remain in full force and effect up to and including June 30, 1982, except as to its provisions which are herein contained:". The memorandum of agreement specifically refers to various articles and sections of the prior collective bargaining agreement, indicating the changes agreed upon. Included are numerous changes to Article VII - Salaries and Additional Benefits. The memorandum of agreement contains the following language, which is the source of the instant dispute:

"Article VII-Section 1,d--New service steps shall be incorporated into the salary schedule as follows:

Beginning July 1, 1979	20th year	\$1,000
Beginning July 1, 1981	add 24th year	\$1,000"

Article VII-Section 1 of the prior agreement is entitled "Salary Schedule". The "d" is a reference to the Association's bargaining proposals. Eighteen-step salary schedules for each of the three

¹ See: St. Lawrence County, 10 PERB ¶3058 (1977).

years of the contract are attached as appendices to the memorandum of agreement.

The memorandum of agreement was signed on behalf of both parties and was approved by the Board of the District and ratified by the members of the Association. The parties' practice has been to prepare a final written contract from such a memorandum of agreement. The Association is willing to sign a final written contract incorporating all unchanged terms and conditions of the prior contract and all changes agreed upon in the memorandum of agreement.

The parties disagree, however, as to how the agreement with regard to the above quoted "Article VII-Section 1,d" shall be incorporated in the final contract. The Association takes the position that it will not sign a final contract that amends the salary schedules to add the two agreed-upon service steps. It will only sign a final contract that incorporates, as written, the actual language of the memorandum of agreement. The District contends that this position of the Association constitutes a refusal to execute a written agreement incorporating the agreement reached by the parties, and is, therefore, a refusal to negotiate in good faith, in violation of §209-a.2(b) of the Act.

This dispute as to the form of the final contract is seen by the parties as affecting the substantive dispute between them. That dispute is as to whether the new "service steps" are subject to a previously negotiated two-year wage freeze in the prior contract applicable to the prior salary schedule. The Association claims that the earlier wage freeze does not affect eligibility

for the new service steps and teachers are entitled to the additional salary specified when they start their 20th and 24th year of teaching, respectively. It insists that these two steps should not be placed in the contract as two additional steps of the regular salary schedule. The District, on the other hand, contends that it was the intention of the parties that the new service steps would be treated in a like manner with all other steps in the salary schedule. Thus, under this view, a teacher would have to teach 22 years to be eligible for the "20th year" service increment, and 26 years to receive the "24th year" payment.

As part of its charge, the District claims that the Association agreed to the District's position during negotiations and demands that the Association be required to execute a final contract incorporating language to the effect that the new service steps be treated in a like manner with all other steps in the salary schedule. No such express language appears in the memorandum of agreement, nor is this issue directly alluded to in that document.

The Association has demanded arbitration of its grievance that the District has failed to pay teachers in accordance with its interpretation of "Article VII-Section 1,d" of the memorandum of agreement. On April 12, 1980, Mr. Justice Gowan of Supreme Court, Suffolk County, denied the District's petition to stay this arbitration.

DISCUSSION

As noted above, the hearing officer found that the Association's negotiating responsibility was completed when the parties

signed and ratified the memorandum of agreement and the Association agreed to include the actual language of the disputed item in the basic contract. He concluded that there is here present only a dispute as to the meaning and application of the language agreed upon. Since such a question would not be within our jurisdiction to resolve, he dismissed the charge in its entirety. We disagree.

This Board has long recognized that the duty to bargain in good faith includes the obligation of each party, when requested to do so by the other party, to execute a written contract after they have reached agreement concerning the terms and conditions of employment of the employees involved.² Since 1977, that duty has been specifically incorporated in the Act in subdivision 3 of §204, which reads as follows:

"3. For the purpose of this article, to negotiate collectively is the performance of the mutual obligations of the public employer and a recognized or certified employee organization to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession."
(emphasis supplied)

The duty to execute a written agreement is in no way affected by any limitation on this Board's power to enforce collective bargaining agreements or to dispose of claims of alleged violations

² Somers Faculty Association, 3 PERB ¶3084 (1970); Yonkers Federation of Teachers, 8 PERB ¶3020 (1975).

of such agreements. A refusal to execute a written agreement, upon request, incorporating the agreement reached, is a refusal to bargain in good faith; it is an improper practice, distinct from questions of the enforcement of the executed written agreement. In most cases involving a charge of refusal to execute a written agreement, the dispute is as to whether there was a meeting of the minds concerning a particular term or condition of employment. If the Board determines that the parties did in fact reach agreement as to the disputed item, the Board will direct the parties to execute a written agreement containing provisions which reflect the substance of that agreement.³

The question of first impression presented by this case is whether the Association's duty to bargain in good faith was fulfilled when the memorandum of agreement was signed and ratified. We conclude that it was not. We look to the intent of the parties, as determined by their established custom or by the reasonable implications of the language they have used to memorialize the agreement they reached in negotiations.

In this case, there is no dispute that the practice of the parties in the past has been to prepare and execute a basic contract in a single document in accordance with the terms of a memorandum of agreement such as that involved here, and to execute that document. There is no dispute that the parties intended this time, as they had done in the past, to execute a final formal single written contract as the ultimate step of their negotiations.

³ Yonkers Federation of Teachers, supra.

While the Association is ready to execute a written contract in a single document, it is not willing to do so in the final form necessary to implement the language of the memorandum. In these circumstances, we find that the Association is required to execute such a single instrument, if the evidence shows that there has been a complete meeting of the minds as to how the particular item should be placed in that document. In so finding, we do not hold that the Taylor Law prescribes the particular method, form or style to be used for incorporating final agreements in all situations.

While the use of the memorandum of agreement as a device to memorialize agreements reached -- often at a late hour after protracted negotiations -- is to be encouraged, nevertheless, it cannot be recognized in all instances as the end of the parties' negotiating responsibility. Where, as here, the parties contemplated incorporating all unchanged terms of the prior contract and all changes as specified in the memorandum of agreement into a final single agreement, the duty to negotiate in good faith requires the execution of such a document. In our view, the basic policy of the Act -- to promote harmonious and cooperative relations between public employers and public employees -- is best served by such a requirement.⁴

We now turn to the question of whether the parties have agreed as to the form in which their agreement concerning new

⁴ In so holding, we do not question the enforceability of the contractual commitments contained in the memorandum of agreement for purposes other than those prescribed by §204.3 of the Taylor Law, nor do we intend any change in the "contract bar" requirements of the Act and our Rules. NY State Thruway Authority, 10 PERB ¶4019 (1977).

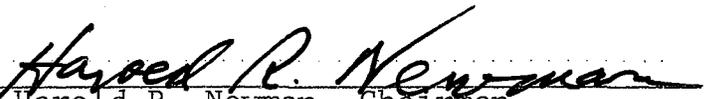
service steps would be incorporated in the final single instrument and, if so, what that agreement was. The answer to that question is in the parties' memorandum of agreement. That document is clear and unambiguous. Indeed, no clearer language could be adopted to evidence the parties' agreement that the new service steps would actually be added to the salary schedules: "new service steps shall be incorporated into the salary schedule...". The Association's position that all it is required to do is to execute a final agreement containing the language of the memorandum of agreement, in haec verba, must be rejected. This position distorts the purpose and intent of the memorandum of agreement -- which is basically a list of instructions for the preparation of the final contract -- and is inconsistent with the plain meaning of the words of the memorandum of agreement. The Association should be directed to execute a final contract which adds the new service steps to the salary schedule.

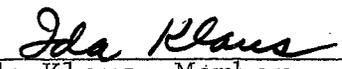
We do not, however, agree with the District that the Association's duty includes execution of an agreement specifying the effect of the prior wage freeze on the new service steps to be incorporated in the salary schedule. The memorandum of agreement is silent on this matter. Nor is there any indication that the parties agreed during their negotiations prior to the execution of the memorandum of agreement to include such language in their contract. This question does involve a matter of interpretation and application of the memorandum of agreement over which this Board does not have jurisdiction. We in no way intend by our decision to indicate any position with regard to the intent of the

parties concerning the effect of the wage freeze on their agreement to incorporate the new service steps in the salary schedule.

NOW, THEREFORE, WE ORDER (1) the Deer Park Teachers Association to negotiate in good faith by executing a final contract for the years 1979 through 1982 which adds the new service steps to the salary schedule in a manner consistent with the parties' agreement as described herein, and
(2) that the charge of the Deer Park Union Free School District be, and it hereby is, dismissed in all other respects.

DATED: July 16, 1980
Albany, New York


Harold R. Newman, Chairman


Ida Klaus, Member


David C. Randles, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of : #2B-7/16/80
: CAYUGA-ONONDAGA BOCES TEACHERS
ASSOCIATION, :
Respondent, : BOARD DECISION AND ORDER
-and- : CASE NO. U-3849
BOARD OF COOPERATIVE EDUCATIONAL :
SERVICES for CAYUGA-ONONDAGA :
COUNTIES, :
Charging Party.:

HARRY SLYWIAK, for Respondent

GARRY A. LUKE, for Charging Party

On February 15, 1979, the Board of Cooperative Educational Services for Cayuga-Onondaga Counties (BOCES) filed a charge alleging that the Cayuga-Onondaga BOCES Teachers Association (Association) refused to negotiate in good faith in violation of §209-a.2(b) of the Public Employees' Fair Employment Act. The essence of the charge was that the Association sought to bypass the duly appointed BOCES negotiating committee and negotiate directly with the BOCES Board of Education.

After a hearing, the hearing officer issued a decision in which he dismissed the charge. In his decision, the hearing officer noted that this is a case of first impression, prior decisions of this Board having dealt only with an employer bypassing an employee organization and negotiating directly with its employees. In that type of situation, PERB has found such conduct

to interfere with employee rights in violation of §209-a.1(a) of the Act. Buffalo Board of Education, 6 PERB ¶3051 (1973). The hearing officer reasoned that a similar bypass by an employee organization should likewise be a violation. Upon analyzing the facts, the hearing officer concluded that after the parties had been at impasse for some time, the Association sought to pressure the Board to modify its negotiating position and to more actively involve its members in the negotiations, but that it did not evidence an intent to deal with the Board rather than its team. He therefore dismissed the charge.

We agree with the hearing officer's decision to dismiss the charge and, therefore, reject the exceptions to that decision filed by the BOCES.

In our view, the Association simply appealed to the Board to modify the position of its designated negotiating team, but without refusing to deal with that team. Thus, the Association did not attempt to dictate to the employer the choice of its representative or to reject the authority of that representative. Having reviewed the entire record, we find, as did the hearing officer, that the Association did not refuse to negotiate with the BOCES team. Such conduct, particularly as it occurred when the parties had long been at impasse, was not an unreasonable or improper effort to resolve a stalemate.

In addition to asserting in its exceptions that the hearing officer's decision is incorrect on the merits, the BOCES claims that certain conduct of the hearing officer demonstrated bias on his part. We find no valid basis for sustaining that claim.

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

DATED: Albany, New York
July 16, 1980

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 :
 PENN YAN CENTRAL SCHOOL DISTRICT BOARD : BOARD DECISION & ORDER
 OF EDUCATION, :
 Respondent, : Case Nos.
 : U-3816/U-3924
 -and- :
 PENN YAN TEACHERS ASSOCIATION, :
 Charging Party. :

HARRIS, BEACH, WILCOX, RUBIN AND
LEVY (Susan S. Robfogel, Esq., of
Counsel), for Respondent

PAUL E. KLEIN, ESQ. (Robert D.
Clearfield, Esq., of Counsel) for
Charging Party

HENRY F. SABOTA, ESQ. for New York
State School Boards Association,
amicus curiae

The Penn Yan Teachers Association (PYTA) duly filed charges alleging that the Penn Yan Central School District Board of Education (District) violated §§209-a.1(a) and (d) of the Public Employees' Fair Employment Act. In substance, the charges alleged that the District unilaterally changed the terms and conditions of employment of its teachers when it refused to accept their resignations from extracurricular activities, submitted en masse by

most of the teachers of the District; refused to negotiate, upon demand, the impact of this unilateral change in terms and conditions of employment; and interfered with the rights of the teachers to be represented by the charging party by refusing to accept their resignations and writing to them individually to advise them that their resignations were not accepted and that they were expected to continue to perform the duties of their extracurricular assignments.

After a hearing, the hearing officer issued a decision in which she found that the District had not changed its practice of dealing with resignations from extracurricular assignments. The evidence before her showed that in past years there had been virtually no resignations during the period of the assignments and that during the period of the mass resignations (January through March 1979), one proffered resignation was accepted by the District because of the particular "unique circumstances" involved. Accordingly, she dismissed that part of the charge alleging unilateral change in a term and condition of employment in violation of §209-a.1(d). She also dismissed that portion of the charge which alleged that the District, in refusing to accept the resignations and in sending individual letters to the teachers, violated §209-a.1(a) of the Act by interfering with their protected rights. In this regard, the hearing officer noted that the District was merely reacting to a threatened strike.¹ The

¹ The mass resignations were part of various concerted activities to protest the status of negotiations which had begun in February, 1978, for a successor agreement to one that expired on June 30, 1978.

hearing officer found, however, that the District, which concededly refused to negotiate the alleged impact of its refusal to accept the resignations, violated §209-a.1(d) by such refusal.

The District filed exceptions to the hearing officer's decision, but the PYTA did not.²

After reviewing the exceptions of the District, the response of PYTA, and the entire record, we reverse that portion of the hearing officer's decision which holds that the District refused to negotiate in good faith by refusing to negotiate the impact of its rejection of the resignations. The hearing officer, after specifically finding that the PYTA did not establish that the District dealt with these resignations any differently than it had dealt with any other attempted resignations in the past, properly concluded that there had been no unilateral change in terms and conditions of employment. The basis for this finding seems to be not so much that there was an established practice which was not changed, but rather, that there was no clear practice. From this premise, however, the hearing officer reasoned that the District's rejection of the resignations made the PYTA aware for the first time that the District's position regarding extracurricular assignments was different than its own, the District's position being that the teachers could not resign at will and the PYTA's position being that they could. She therefore concluded that the PYTA had the right to negotiate its claim

² The PYTA filed a document which it labeled "cross-exceptions", which only constituted a response to the District's exceptions. In its brief in support of its "cross-exceptions", the PYTA specifically accepts the hearing officer's decision.

of impact on terms and conditions of employment of the District's action. The record does not show what kind of "impact" PYTA sought to negotiate. It would appear, however, that it wished to resolve this difference of positions.

We view the matter differently. There having been virtually no resignations from extracurricular assignments in past years, it is clear to us that the PYTA as well as the District knew that the expectation of the teachers and the District was that the assignments, when made, would have to be completed. That was, in our view of the evidence, the past practice. Since the District's rejection of the mass resignations was not a change in a past practice, there was no reason for prior negotiations, and, in any event, no basis for any impact negotiations.

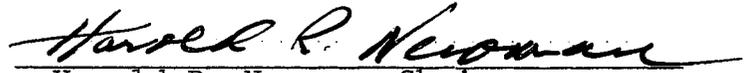
More fundamentally, there are substantial policy reasons implicit in the statutory prohibition against strikes which require that we not find an obligation on the part of the employer to negotiate under these circumstances. The District's action in rejecting the mass resignations was nothing more than a reasonable effort to prevent what the hearing officer properly found would be a strike.³ Even if it were shown that at times individuals were permitted to proffer resignations which were accepted, this would not, in any way, excuse the refusal of all employees en masse to perform the assignment which they were expected to perform. Such mass resignation would be tantamount to a strike. To rule that the

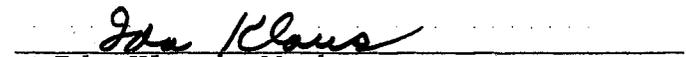
³ Plainedge Federation of Teachers, 11 PERB ¶3060 (1978).

employer's refusal to accept the mass resignations imposed an obligation on its part to negotiate, as the PYTA apparently urges, would impede employers from taking reasonable action to avert threatened strikes, a result inconsistent with the policies of the Act.

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

DATED: Albany, New York
July 16, 1980


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 NEW ROCHELLE,	:	
Respondent,	:	<u>BOARD DECISION</u>
	:	<u>& ORDER</u>
-and-	:	
POLICE ASSOCIATION OF NEW ROCHELLE, NEW YORK, INC.,	:	Case No. U-3509
Charging Party	:	

RAINS AND POGREBIN, ESQS. (PAUL J. SCHREIBER, ESQ., of Counsel), for Respondent

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

The charge herein was filed by the Police Association of New Rochelle, New York, Inc. (Association) on September 8, 1978. It alleges that the City of New Rochelle (City) violated Section 209-a.1 of the Act by reassigning to civilians certain duties previously assigned to police officers.

The matter was submitted to the hearing officer upon a stipulated set of facts which his decision sets forth in material detail. Briefly, in October, 1976, the City commenced using twelve civilian Community Service Workers (CSWs) for purposes of traffic control, taking minor property and theft reports, aiding

the sick and injured, and responding to calls regarding possible violation of certain minor general ordinances - duties previously performed by police officers. Use of the civilians enabled the reassignment of three police officers from traffic control duties to squad work. No improper practice charge was filed in response to the City's action.

On August 1, 1978, the City Police Commissioner promulgated "General Order No. 13" which established geographical posts to be covered by the CSWs and enumerated their duties. The latter were of the same nature as those that had been performed by CSWs since 1976.

In addition to the duties listed in the General Order, CSWs have been assigned in place of police officers to station-house desk duty, making visual observation of the cellblock "bullpen" area. Assignment of CSWs to desk duty freed five police officers for other police duties.

The utilization of CSWs by the City has not resulted in a layoff of police officers. Nor has it had any adverse impact on the wages, hours or working conditions of police officers, although it has resulted in the deployment of some officers from station-house desk work and traffic control to other police duties.

The hearing officer dismissed the charge. He found that since the assignments contained in General Order No. 13 had been performed by CSWs since 1976, well over four months prior to the Association's filing of the instant charge, the only issue to be

decided was the propriety of the assignment of stationhouse desk duties to CSWs. As regards the latter assignment, he found that its principal and predominant effect was not upon terms and conditions of employment of the police officers, but rather upon matters concerning government policy.

DISCUSSION

We affirm the decision of the hearing officer. The parties' stipulation that General Order No. 13 simply listed duties of a type which had been performed by civilians since 1976 renders untimely that aspect of the charge as challenges the assignments contained therein,^{1/} and thus permits consideration only of such aspect of the charge as protests the assignment of CSWs to stationhouse duties.

Recently, in both County of Suffolk, 12 PERB ¶13123, and City of Albany, 13 PERB ¶13011, we held, under factual circumstances materially identical to those presented here, that a public employer's assignment to civilians of duties previously performed by police officers is not, in itself, a mandatory subject of negotiation. In those cases, we deemed it significant that no police

^{1/} Even were this aspect of the charge timely, we would dismiss it on the merits for the reasons stated in this decision on the merits of the remaining charge.

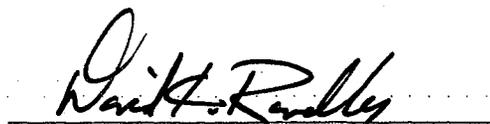
officers were laid off or otherwise adversely affected by the employer's conduct,^{2/} and thus found that the action complained of primarily involved not terms and conditions of employment, but rather the fundamental management right to determine the necessary employment qualifications of personnel performing the tasks at issue. Since the reassignment of duties here contested simply caused five police officers to be deployed to other law enforcement duties, the instant case presents no distinguishing circumstances.

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

Dated, Albany, New York
July 16, 1980


Harold R. Newman, Chairman


Ida Klaus, Member


David C. Randles, Member

^{2/} In its exceptions, petitioner claims that some layoffs resulted from the use of CSWs. Such a claim, however, is directly contradicted by the stipulation of facts, which states that "no police officers have been laid off as a result of the use of CSWs." While it was also stipulated that ten officers were laid off in January 1976, this was some ten months prior to the institution of the CSW force, and it was further stipulated that all ten were rehired by the end of 1976. In any event, those layoffs would relate to an aspect of the charge which has been found to be untimely.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

STATE OF NEW YORK (STATE UNIVERSITY
OF NEW YORK AT ALBANY),

Respondent,

-and-

THE CIVIL SERVICE EMPLOYEES ASSOCIATION,
INC.,

Charging Party,

-and-

PUBLIC EMPLOYEES FEDERATION,

Intervenor.

#2E-7/16/80

BOARD DECISION

AND ORDER

CASE NOS. U-2462/U-3221/
U-3777

JOSEPH BRESS, ESQ. (WILLIAM F. COLLINS,
ESQ., of Counsel), for Respondent

ROEMER & FEATHERSTONHAUGH (MARJORIE KAROWE,
ESQ., of Counsel), for Charging Party

JAMES R. SANDNER, ESQ. (SUSAN BLOOM JONES,
ESQ., of Counsel), for Intervenor

BACKGROUND

On October 25, 1975, the State of New York (State) issued an instruction to the presidents of its colleges, including the State University of New York at Albany, which directed the absence of employees who were not needed on November 28, 1975, the day following Thanksgiving Day. It further provided: "Employees who are directed not to report to work may charge this absence to accumulated leave credits. Employees who have exhausted all leave credits or who opt not to charge leave credits for this absence should be placed on leave without pay for the day." The reason given by the State for directing the absence of the employees was

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that they were not needed because the University was not in session on the day following Thanksgiving Day and that, by their not reporting for work, the University would conserve energy.

The Civil Service Employees Association, Inc. (CSEA), then the representative of the employees who were directed to absent themselves, protested the direction by filing a grievance alleging a violation of their collective bargaining agreement. It filed no improper practice charge. At that time, the State and CSEA were in negotiations for an agreement to succeed one that was due to expire on March 31, 1976. In November 1975, during those negotiations, CSEA proposed an amendment of Article 10.12 of the prior agreement which is entitled "Absence - Extraordinary Circumstances." The proposal was to add the following language:

"When an agency or department is closed and an employee is directed not to report for duty or the employee reports for work and is directed to leave his or her work station there shall be no time charged to accruals."

The State did not at that time respond to this proposal of CSEA, as the parties' discussions focused on other aspects of the negotiations. In fact, no negotiations were held on the proposal and when, in March 1976, outstanding issues were submitted to conciliation, this proposal was not included among them. When, in June 1976, the State and CSEA reached an agreement, their agreement did not include the proposal and contained no reference to the subject matter of the proposal.

CSEA did press its grievance concerning the 1975 directed absences of the employees, and, on May 7, 1976, an arbitrator

determined that the State's conduct had not violated the parties' agreement.^{1/}

Charge U-2462

In September 1976, the State once again directed that non-essential employees not report for work on the day following Thanksgiving Day, which, in 1976, fell on November 26. This time CSEA filed a charge alleging that the State violated its duty to negotiate in good faith in that it unilaterally changed a term and condition of employment (Case No. U-2462).^{2/} In response to the charge and before any hearing, the State moved to dismiss the charge on the ground that its action was authorized by the parties' contract as interpreted by the arbitrator. Indicating that the arbitrator's decision did not resolve the issue as to whether CSEA had waived its right to negotiate the matter and that that issue could not be resolved without a hearing on the facts, we denied the motion.^{3/}

^{1/} When, in subsequent years, the State again directed the absence of employees on the day following Thanksgiving Day, other grievances were brought and other arbitrators concluded that the State's conduct was not inconsistent with its contractual obligations.

^{2/} The Public Employees Federation intervened in this and the two subsequent proceedings after its displacement of CSEA as the representative of the Professional, Scientific and Technical Services Unit, which includes some of the employees whose non-attendance was directed.

^{3/} 11 PERB ¶3026.

Charge U-3221

In 1977, the State again directed that nonessential employees be absent on the day following Thanksgiving Day (November 25, 1977) and CSEA, again, filed an improper practice charge (Case No. U-3221). The charges in U-2462 and U-3221 were consolidated for decision by the hearing officer. On November 13, 1979, he determined that the State's conduct constituted a violation of its duty to negotiate in good faith. He ordered the State to cease and desist from continuing to direct its employees not to report to work on the day following Thanksgiving Day and from continuing to charge such absences to leave without pay or to accrued leave credits.⁴

Charge U-3777

In 1978, the State once again directed that nonessential employees of the University not report to work on the day following Thanksgiving Day (November 24, 1978) and, once again, CSEA filed an improper practice charge (Case No. U-3777). Little more than two weeks after he issued his consolidated decision in Cases U-2462 and U-3221, the hearing officer issued his decision in this case. Finding the issues of fact and law to be identical with those earlier cases, he reached the same conclusions.

⁴ The hearing officer did not propose any remedy that would make the employees whole for any losses they might have suffered by reason of the directed absences in 1976 and 1977, relying on record evidence that in the past a majority of the employees who had been scheduled to work on the day following Thanksgiving Day had chosen to take leave on that day. He reasoned that a make-whole remedy was inappropriate because it would have to be based upon speculation as to which employees would have chosen to work on the days in question were it not for the State's directive. CSEA and the intervenor have filed exceptions in which they argue that the hearing officer has not proposed an adequate remedy. In view of our decision, we have not considered these exceptions.

The State has filed exceptions in all three cases, in support of which it argues that the hearing officer was in error when he determined that its conduct constituted a violation of its duty to negotiate in good faith. We have consolidated all three for decision.

DISCUSSION

In our interim decision in Case No. U-2462 (11 PERB ¶3026), we referred to the subject matter involved in this dispute as "unpaid furloughs" and, as such, recognized it to be a mandatory subject of negotiation. For the purposes of this final decision, based on a full evidentiary hearing, it is necessary to define the subject more precisely. The State did two things when it directed employees not to report to work on the day after Thanksgiving. First, it directed their absence, and second, it directed them to charge the absence to accumulated leave credits or, for those who may have exhausted all leave credits, it directed that they be placed on leave without pay for the day. As to the first, the power to direct absences from work is, by itself, not a mandatory subject of negotiation. The record shows that the State has directed absences from work in other instances, for reasons other than that for the day after Thanksgiving absences. CSEA has not, in this proceeding, presented any evidence that it seriously challenges the right of the State to direct absences, as such.

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The second aspect of the State's action is, however, a proper subject for negotiation since it involves the impact of the directed absence on terms and conditions of employment of the affected employees. Whether the affected employees will be paid

for the day or not, whether they must charge the day to leave credits or not, clearly must be negotiated upon proper demand. Indeed, the evidence in the record demonstrates that CSEA's concern is not whether the State, for good business reasons, can direct an employee not to come to work, but whether it can do so without paying the employee. Thus, CSEA here seeks the right to negotiate the impact of the State's decision to direct absences on the day after Thanksgiving.

As we indicated in our interim decision, the critical issue is whether, in the light of the history of negotiations, CSEA has waived its right to such negotiations. On the particular facts before us, we disagree with the conclusions of the hearing officer in this regard and find that the totality of CSEA's conduct in 1975, 1976 and 1977 constituted a waiver of its right to negotiate the impact of the State's directed absences in 1976, 1977 and 1978. Accordingly, the improper practice charges in these proceedings must be dismissed.

At the outset, it should be emphasized that the alleged violation by the State is that it took unilateral action with respect to a mandatory subject of negotiations and not that it refused a demand to negotiate the proposal. It should also be emphasized that the State first took the action complained of in October 1975, but CSEA did not file an improper practice charge with regard to that unilateral action. CSEA had clear and explicit notice during the month preceding Thanksgiving Day in 1975 of the State's intention to direct absences without pay that year. It

had an opportunity to protest to the employer or to seek to negotiate with it as to the matter. During the course of negotiations in 1975 for an agreement to take effect on April 1, 1976, CSEA proposed a clause that would have prohibited charges to accruals when an employee is directed not to report to work. However, CSEA did not pursue that impact demand either in negotiations or in any aspect of conciliation. Later, after failing to prevail in arbitration, it entered into an agreement containing no restriction on the State's powers even though it knew that the arbitrator had sustained the State's position that it had the right under the earlier agreement to direct the absences and presumably to charge the time to accrual leave or to leave without pay. If CSEA believed that its earlier agreement barred the State from taking such action, it is inexplicable that CSEA failed to pursue the matter in negotiations for subsequent agreements including a failure to pursue its position in negotiations for the agreement to take effect on April 1, 1977.

Under these circumstances, CSEA may not be heard to complain that the State's actions were taken without prior negotiations with it. County of Rensselaer, 8 PERB ¶3039 (1975). By failing to file an improper practice charge relating to the State's 1975 action and by failing to pursue its negotiation proposal in 1975 and 1976 even after the ruling of the arbitrator, CSEA must be deemed to have acquiesced in the employer's position that it had a right to act unilaterally thereafter during the term of the 1976 agreement. Thus CSEA waived its right to protest the State's action as to the day after Thanksgiving Day in the year covered by the 1976 contract. When, with the State's position and claim

of right even more clear by further notice to it of similar proposed action, it did not pursue the matter during the negotiations for the 1977 contract, it waived its right to protest the State's action in the two years covered by that contract. These are the three years covered by the charges. Accordingly, the State did not by its actions in 1976, 1977, and 1978 violate its duty to negotiate in good faith.^{5/}

We do not agree with the hearing officer that the facts of this case are governed by our decision in County of Orange, 12 PERB ¶3114 (1979) or that the decision of the NLRB in The Press Co., Inc., 121 NLRB 976 (1958), which we cited with approval in County of Orange, requires that we find that CSEA did not waive its right to negotiate the matter of the use of accrued leave or leave without pay for directed absences during the term of the contract.

^{5/} Although we hold that CSEA's failure to pursue its negotiation proposal after the State's conduct in 1975 and, especially, after the arbitrator's award in 1976, while negotiations were still in progress, constituted a waiver of its right to negotiate as to the subject, we do not intend any implication that the action taken by the State in 1975, when committed, was itself consistent with its Taylor Law obligations. That question is not before us because CSEA filed no charge regarding the 1975 action.

The State did not, as did the employer in County of Orange, merely indicate in vague terms that it contemplated action; here the State clearly announced the action that it proposed to take and did in fact take. In County of Orange, we agreed that mere discussion of contemplated action during negotiations did not constitute a waiver of the right to negotiate during the term of the subsequent contract otherwise silent on the subject. Here, however, in response to the State's announced action, the CSEA submitted a proposal in negotiations for the subsequent contract that would have covered the matter. Furthermore, CSEA did not file an improper practice charge protesting the unilateral action in 1975. This is clearly not the same factual pattern presented to us in County of Orange, nor to the NLRB in The Press Co. Inc.

Our decision in this case does not "permit an employer to avoid its duty to negotiate certain matters by raising them in casual discussions during negotiations." (County of Orange, p. 3207) Nor does it require an employee organization "to press the negotiation of any subject thus raised or be deemed to have waived its right to negotiate the subject later" (ibid, p. 3207). The circumstances here are far different. The employer's unilateral action under a claim of contractual right that was upheld by an arbitrator should have persuaded CSEA that the matter of the use of accrued leave or leave without pay for directed absences could not be overlooked during subsequent negotiations for a new contract if it was serious about the matter. Nothing said in

The Press Co., Inc. is inconsistent with our holding on the particular circumstances of this case.

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

DATED: Albany, New York
July 15, 1980


HAROLD R. NEWMAN, Chairman


IDA KLAUS, Member


DAVID C. RANGLES, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of :

WAYNE-FINGER LAKES BOARD OF COOPERATIVE
EDUCATIONAL SERVICES, :

Employer, :

- and - :

WAYNE-FINGER LAKES ASSOCIATION OF
SCHOOL SUPPORT PERSONNEL, :

Petitioner. :

#3A-7/16/80

Case No. C-2014

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 Wayne-Finger Lakes Association of School Support Personnel

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.

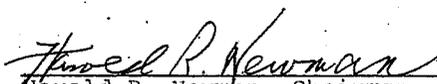
Unit: Included: All regularly employed non-instructional personnel including stenographers, secretaries, teaching assistants, teacher aides, couriers, typists, computer operators, computer programmers, keypunch operators, clerks, repair assistants, head custodians, custodians and cleaners.

Excluded: [see attached]

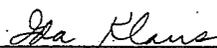
Further, IT IS ORDERED that the above named public employer shall negotiate collectively with the Wayne-Finger Lakes Association of School Support Personnel

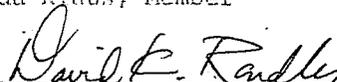
and enter into a written agreement with such employee organization with regard to terms and conditions of employment, and shall negotiate collectively with such employee organization in the determination of, and administration of, grievances.

Signed on the 15th day of July, 1980
Albany, New York


Harold R. Newman, Chairman

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Ida Klaus, Member


David C. Randles, Member

[C-2014 Wayne-Finger Lakes BOCES]

Excluded: District Superintendent of Schools, Assistant Superintendent, Business Administrator, Administrative Assistants, Directors, Assistant Directors, Public Relations Person, Principals, all certificated persons except teaching assistants, non-teaching coordinators, supervisor of buildings and grounds, supervisor of operations of the regional computer center, clerk of the board of education, treasurer, secretary to the District Superintendent, secretaries to the Assistant Superintendent, secretary to the Business Administrator and secretary to the Administrative Assistant to the District Superintendent.



#4E-7/16/80

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD
50 WOLF ROAD
ALBANY, NEW YORK 12205

COUNSEL
MARTIN L. BARR

July 16, 1980

Ms. Vera Diane Stein
346 East 76th Street
New York, New York 10021

Re: Case No. U-4375--NYC Board
of Education

Dear Ms. Stein:

Your letter of June 24, 1980, addressed to Mr. Milowe, in which you request an extension of time in which to file exceptions to the Hearing Officer's Decision dated January 28, 1980 in the above designated proceeding was referred to the Board for their consideration. The Board has directed me to advise you that, under the Rules of this Board, your request for an extension of time to file exceptions cannot now be granted.

Very truly yours,

Martin L. Barr
Counsel

MLB:gmc

cc: Hugh Haughey, Esq., NYC Board of Education, Office of Labor
Relations, 110 Livingston Street, Brooklyn, New York 11201
Attn: Jack Schloss, Esq.

James R. Sandner, Esq., NYSUT, 260 Park Avenue South,
New York, New York 10010 Attn: Elizabeth Truly, Esq.

BCC: Mr Newman
Harvey milow

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