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New York State Public Employment Relations  
Board (PERB)

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8-7-1980

## State of New York Public Employment Relations Board Decisions from August 7, 1980

New York State Public Employment Relations Board

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## State of New York Public Employment Relations Board Decisions from August 7, 1980

### 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

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In the Matter of :  
RENSSELAER CITY SCHOOL DISTRICT, : #2A-8/7/80  
Respondent, : BOARD DECISION  
-and- : AND ORDER  
 : CASE NO. U-4145  
~~RENSSELAER CITY SCHOOL DISTRICT UNIT,~~ :  
RENSSELAER COUNTY EDUCATIONAL LOCAL, :  
CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., :  
LOCAL 1000, AFSCME, AFL-CIO, :  
Charging Party. :

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ROEMER AND FEATHERSTONHAUGH, ESQS., (RICHARD L. BURSTEIN, ESQ., of Counsel) Attorneys for Charging Party.

ANTHONY P. Di ROCCO, for THEALAN ASSOCIATES, representing Respondent.

On July 20, 1979, the Rensselaer City School District Unit, Rensselaer County Educational Local, Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) filed an improper practice charge against the Rensselaer City School District (District) alleging that the District violated §209-a.1(d) of the Act by refusing to negotiate the imposition of a resolution making residency a factor in appointments to new or vacant positions.

The District adopted without prior negotiations a resolution providing for a residency preference for initial appointment and for subsequent promotional appointments, applicable only to Civil Service positions. The resolution does not apply to

employees hired before the date of the resolution so long as they remain in the position they then occupied. Thus, current employees are affected by the resolution with regard to subsequent appointments to positions by promotion. The resolution establishes a three-level residency preference. Assuming candidates are otherwise qualified, first preference is given to residents of the City of Rensselaer, second preference to residents of Rensselaer County, and non-residents receive no preference.

The hearing officer dismissed the charge in its entirety. Relying on prior decisions of this Board,<sup>1/</sup> he held that the criteria for appointment or promotions are a managerial prerogative if applicable only to prospective employees or the future promotion of current employees. He saw no basis in this regard to distinguish a residency preference from a residency requirement.

CSEA has filed exceptions. Its exceptions appear to concern that portion of the resolution establishing a residency preference for promotional appointments for current employees. It argues (1) that residency should not be recognized as a "qualification" for promotion and (2) that imposing the residency preference on promotions has a serious impact on terms and conditions of employment of current employees.

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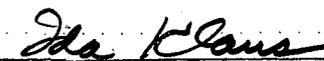
<sup>1/</sup> West Irondequoit Teachers Association, 4 PERB ¶3070 (1971); City of Buffalo, 9 PERB ¶3015 (1976); City of Auburn, 9 PERB ¶3085 (1976); City of Salamanca, 12 PERB ¶3079 (1979); Fairview Fire District, 12 PERB ¶3083 (1979).

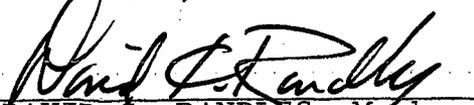
We affirm the decision of the hearing officer. We agree that the use of residency as a criterion for appointment or promotion is a managerial prerogative beyond the scope of mandatory negotiation, if applicable only to prospective employees or to future promotion of current employees.<sup>2/</sup> Contrary to CSEA's contention, the employer is free to establish new criteria for future incumbents of new or vacant positions to which employees may be promoted. New incumbents by promotion are in no different position in this regard than new employees. According preference for promotion on the basis of residency is all the more permissible, as it does not necessarily, as in the case of an absolute residency requirement, preclude the ultimate possibility of promotion.

NOW, THEREFORE, WE ORDER that the charge be, and it hereby is, dismissed in all respects.

DATED: New York, New York  
August 5, 1980

  
HAROLD R. NEWMAN, Chairman

  
IDA KLAUS, Member

  
DAVID C. RANGLES, Member

<sup>2/</sup> A hearing officer reached this conclusion in Board of Education of the City School District of the City of New York, 12 PERB ¶4553 (1979). There was no exception to this part of the hearing officer's decision. Other aspects of that decision were challenged and affirmed, 13 PERB ¶3006 (1980)

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of	:	#2B-8/7/80
COUNTY OF SUFFOLK,	:	
Respondent,	:	BOARD DECISION
-and-	:	AND ORDER
SUFFOLK COUNTY CHAPTER, CIVIL SERVICE	:	
EMPLOYEES ASSOCIATION, INC.,	:	Case No. U-4045
Charging Party.	:	

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LESTER B. LIPKIND, ESQ., (STUART LIPKIND, ESQ.,  
of Counsel), Attorneys for Charging Party.

LEONARD KIMMELL, ESQ., Attorney for Respondent

Suffolk County Chapter, Civil Service Employees Association, Inc. (CSEA) filed a charge alleging that the County of Suffolk (County) violated §209-a.1(d) of the Act when it unilaterally discontinued the practice of assigning a county vehicle to Herman W. Hahn, a detective investigator in the Office of the Suffolk County District Attorney. The County's answer denied the allegations of the charge and asked PERB to defer jurisdiction to the parties' contractual grievance procedure.

FACTS

At the hearing, Hahn testified that he was employed as a detective investigator in 1967, that he was assured during employment interviews that he would be provided with transportation to and from work, that he was given access to a County vehicle and that he continued to have such access until February 5, 1979. At that time, the vehicle used by Hahn was assigned to another

detective investigator in the same office, whose own assigned County vehicle had been disabled and retired from use. To resolve a grievance filed by the other detective investigator, the District Attorney and the Chief Investigator agreed to provide him with the car used by Hahn. The senior investigator and the other investigator in the office to which Hahn is assigned currently have County vehicles assigned to them. Hahn filed a grievance complaining that he had no assigned vehicle. It has been submitted to arbitration, but no hearing has been held.

The hearing officer dismissed the charge. Relying on a County standard operating procedure for assignment of motor vehicles, apparently codified on May 25, 1978, she found that the County's practice is to provide "transportation" through use of County motor pools, assignment of vehicles or reimbursement for the use of personal vehicles while on County business. She found no change in that practice. She further found that Hahn's benefit of an assigned vehicle was in excess of the procedure and that CSEA is not entitled to negotiate any change in a benefit that is the result of an individual "contract" or "agreement" between Hahn and the County.

In its exceptions, CSEA argues that the only relevant "practice" is that applicable to the District Court Bureau of the Office of the District Attorney of Suffolk County, the Bureau to which Hahn is assigned. It asserts that the record establishes that the "practice" applicable to the detective investigators of the Bureau was to use County vehicles. It urges that the hearing officer improperly relied on a so-called County-wide practice

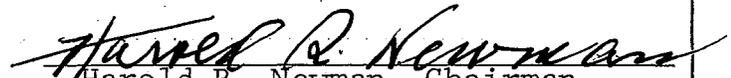
on the basis of a "standard operating procedure" manual which should not, in any event, have been received in evidence and was not established by testimony as being the County-wide practice. The County did not file any response to CSEA's exceptions.

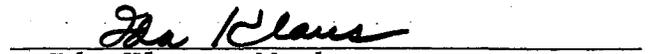
#### DISCUSSION

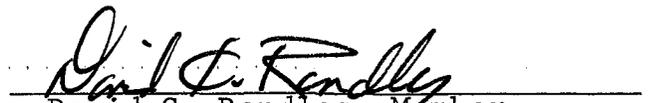
On the basis of the record, the hearing officer concluded that there was a relevant County-wide transportation practice which did not obligate the County to continue assignment of County vehicles to employees who previously received such benefit. We need not accept that conclusion. Even if we were to accept CSEA's contention that the only relevant "practice" is that applicable to the District Court Bureau of the Office of the District Attorney of Suffolk County, we cannot find that that practice has been unilaterally terminated. The record shows that detective investigators, other than Hahn, continue to have County vehicles assigned to them. Thus, CSEA's argument amounts to a claim that the withdrawal of the benefit of the general practice from a single individual constitutes a unilateral change in the practice itself and, hence, in terms and conditions of employment of all the employees in violation of §209-a.1(d) of the Act. We do not agree. A single instance of this kind does not constitute a violation of a public employer's duty to negotiate in good faith. Rather, this matter is appropriately one to be determined in accordance with the parties' grievance procedure.

NOW, THEREFORE, WE ORDER that the charge be, and it hereby is, dismissed in all respects.

Dated, New York, New York  
August 5, 1980

  
Harold R. Newman, Chairman

  
Ida Klaus, Member

  
David C. Randles, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of :  
CIVIL SERVICE EMPLOYEES' ASSOCIATION, : #2C-8/7/80  
INC., :  
Respondent, : BOARD DECISION AND  
-and- : ORDER  
SAUL KANDEL, : Case No. U-3938  
Charging Party. :

ROEMER AND FEATHERSTONHAUGH, ESQS.  
(Pauline F. Rogers, Esq. of Counsel),  
for Respondent

BENJAMIN M. ZELMAN, ESQ., for Charging  
Party

On April 3, 1979, Saul Kandel (Kandel) filed an improper practice charge against the Civil Service Employees' Association, Inc. and its field representative, Edward Scherker (CSEA), alleging that CSEA violated §209-a.2(a) of the Act by failing to properly represent him in a grievance filed against the State of New York (State). After a hearing, the hearing officer issued his decision on December 5, 1979 in which he dismissed the charge. Kandel has filed exceptions. CSEA has responded to those exceptions. We hereby affirm the hearing officer's decision and dismiss the charge.

DISCUSSION

Kandel's grievance asserts his right to a hearing. His charge challenges CSEA's withdrawal of the grievance from arbitration prior to his termination.

After reviewing the record, we adopt in full the findings of

fact of the hearing officer. It would unduly lengthen this decision to repeat them.

In his exceptions, Kandel urges that CSEA ignored his most forceful argument during its consideration of the merits of his grievance. He argues that, even if the letter of appointment does not estop the State from asserting that he was a probationary employee, his claim to permanent status is not necessarily defeated. This point has particular relevance, in our view, to the time prior to May 10, 1978, when an Article 78 proceeding might have been brought to directly challenge the State's position that Kandel was hired as a probationary employee by the Department of Social Services. The State's reliance on the circumstances relating to the activities of the Continuity of Employment Committee and the consequent determination that Kandel was not hired "off" the preferred list, may well be correct, but Kandel apparently could only have challenged that determination in an Article 78 proceeding.

In this context, Scherker's letter of April 10, 1978, concerns us since it states that an Article 78 proceeding "is unnecessary . . . at this time", and that "your case can properly be adjudicated at the arbitration hearing". Nevertheless, we agree with the hearing officer that CSEA cannot be found to have handled this matter in a grossly negligent or irresponsible manner.<sup>1/</sup>

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<sup>1/</sup> Nassau Educational Chapter of the Syosset Central School District Unit, CSEA, Inc., 11 PERB ¶3010 (1978)

While there is reason to question whether reliance on the appointment letter was warranted after the third-step hearing, it is apparent that Scherker was misled as to the issue by the contents of the appointment letter. It appears that Kandel's own insistence that he was hired "off" the list could have lulled Scherker into believing that he had a meritorious grievance.

Scherker is not an attorney and his testimony suggests that he did not fully understand the function of an Article 78 proceeding. It further appears that the substantial backlog of arbitration cases delayed careful examination of Kandel's grievance by CSEA's attorneys until after May 10, 1978. Finally, we note that both Scherker and Kahn did make it clear to Kandel that he could institute his own Article 78 proceeding even though CSEA's attorneys did not do so. On balance, we conclude that there may have been an error of judgment, but not gross negligence or irresponsibility.

We agree with the hearing officer that CSEA's decision ultimately to withdraw the grievance from arbitration was based on a subsequent thorough investigation of its factual and legal aspects. It is true that CSEA could have made it clearer to Kandel that it reserved the right to withdraw the appeal, but we cannot find that CSEA deliberately misled Kandel in any way or that it acted from any improper motive.

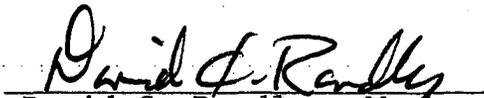
Kandel's exceptions relating to the rulings of the hearing officer during the hearing have been considered and we conclude that they are without merit.

NOW, THEREFORE, WE ORDER that the charge be, and it hereby is, dismissed in all respects.

Dated: New York, New York  
August 5, 1980

  
Harold R. Newman, Chairman

  
Ida Klaus, Member

  
David C. Randles, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of	:	#2D-8/7/80
QUEENS BOROUGH PUBLIC LIBRARY,	:	
Respondent,	:	<u>BOARD DECISION AND</u>
-and-	:	<u>ORDER</u>
QUEENS BOROUGH PUBLIC LIBRARY GUILD	:	<u>CASE NO. U-3908</u>
LOCAL 1321, D.C. 37, AFSCME, AFL-CIO,	:	
Charging Party.	:	

JACKSON, LEWIS, SCHNITZLER & KRUPMAN  
(ANTHONY H. ATLAS, ESQ., of Counsel)  
for Respondent

BEVERLY GROSS, ESQ. (IRVING H. GLASGOW,  
ESQ., of Counsel) for Charging Party

This matter comes to us on the exceptions of the Queens Borough Public Library Guild, Local 1321, District Council 37, AFSCME, AFL-CIO (Guild) to the decision of a hearing officer dismissing its charge against the Queens Borough Public Library (Queens Borough). The charge alleges that Queens Borough violated its duty to negotiate in good faith in that it made unilateral changes in terms and conditions of employment during negotiations. Without considering the merits of the charge, the hearing officer granted a motion of Queens Borough to dismiss the charge on the ground that the Board lacked jurisdiction over it because Queens Borough is not a public employer within the meaning of the Taylor Law. In its exceptions, the Guild challenges this conclusion.

A library, as such, may or may not be a public employer. A

"public library" is an institution "established for free public purposes by official action of a municipality or district or the legislature where the whole interests belong to the public;". Education Law §253.2. Such an institution is clearly a public employer within the meaning of the Taylor Law. On the other hand, an "association library" is an institution "established and controlled, in whole or in part, by a group of private individuals operating as an association, close corporation or as trustees under the provision of a will or deed of trust;". Education Law §253.2. Such a library is not a public employer.

Queens Borough does not fit neatly into either of these categories. It was created by a special act of incorporation, Chapter 164 of the Laws of 1907, to succeed another library created by Chapter 580 of the Laws of 1901. Both the original and subsequent statutes were enacted to effectuate agreements between Andrew Carnegie, a private benefactor, and the City of New York whereby they would jointly fund a library system that would serve the people of the Borough of Queens. In this it is like the New York Public Library. There is only one significant difference between Queens Borough and the New York Public Library. The governance of the New York Public Library is in the hands of a self-perpetuating board of trustees<sup>1</sup>, while Queens Borough is run by a board of trustees, all the members of which are appointed by the Mayor

<sup>1</sup> The record of proceedings in the New York Public Library case shows that the agreement establishing that library specified the appointment of 21 named trustees, one of whom, the Comptroller of the City of New York, was ex officio. The named trustees were charged with managing the new corporation for the first year and with the adoption of bylaws which would "provide for the manner of election of new trustees after the expiration of the first year, their respective terms of office and the manner of filling vacancies in the Board...".

Board - U-3908  
 of the City of New York except for the Mayor himself, the City Comptroller and the President of the City Council, who are ex officio members of the Board.<sup>2</sup>

On August 31, 1972, by a vote of 2 to 1, this Board determined that the New York Public Library was a public employer. Matter of New York Public Library, 5 PERB ¶3045. In reaching this conclusion, the Board majority was influenced, in part, by the extent to which the activities of the New York Public Library were financed by the City of New York; more, by the extent to which the City of New York controlled the expenditures of funds by the New York Public Library; and most of all, by the extensive integration of the New York Public Library's employee relations program into the employee relations program of the City. The dissenting board member disagreed with his colleagues' emphasis upon the activities of the New York Public Library and asserted that the critical factor was its governance. He wrote:

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2 The original act of incorporation of Queens Borough (L. 1907, ch. 164) provided that the Mayor, the Comptroller and the president of the Board of Aldermen of the City of New York would be ex officio members of the board of trustees and that the selection of other trustees would be subject to the approval of the Mayor. This was amended six years later (L. 1913, ch. 541) to provide that the non-ex officio members of the board of trustees would be appointed by the Mayor. The incorporating statute was not amended again until Chapter 695 of the Laws of 1979. As amended, it now provides:

"The board of trustees of the Queens Borough Public Library shall consist of nineteen members chosen in the following manner. The mayor of the city of New York shall select at least one trustee from among the residents of each geographical area constituting a community board district in the borough of Queens...They shall serve until July first, nineteen hundred eighty-three. Trustees shall serve thereafter for terms of four years."

(at 5 PERB pages 3081 and 3082):

"The primary attribute of the New York Public Library which it has in common with free association libraries -- i.e., governance by a self-perpetuating board of trustees -- is more consistent with private sector status than with the conclusion that it is an instrumentality of government. The most significant attribute of a government is its political responsibility to the community. This responsibility may be a direct one, as in the case of elected public officials and their employees; it may also be an indirect one, as in the case of public corporations. The people who run public corporations are appointed by one or more state or local officials." (emphasis supplied)

The Appellate Division reversed the decision of the majority of this Board and ruled that the New York Public Library is not a public employer. New York Public Library v. PERB, 45 AD2d 271 (First Dept., 1974). At least in part, the Appellate Division appears to have been influenced by the analysis of the dissenting board member that the governance of the New York Public Library by a self-perpetuating board of trustees was indicative of its status as a private, rather than a public, employer. Justice Tilzer's opinion noted, at page 278, that the:

"hire, discharge and promotion of the employees [of the library] as well as the supervision of their daily and over-all duties are vested in the Library through its self-perpetuating Board of Trustees."

and again, at page 283:

"The Library, as noted earlier, is a private, separate legal entity controlled by an independent Board of Trustees."

The Appellate Division decision was affirmed by the Court of Appeals, New York Public Library v. PERB, 37 NY2d 752 (1978)

in a memorandum decision which stated (at p. 753):

"The short of it is that the instant public library employment satisfies in some respects the character of public employment and in other substantial respects does not, and that the Taylor Law applies only to employment that is unequivocally or substantially public. As Mr. Justice Tilzer's opinion demonstrates, the non-public aspect of library employment is sufficiently substantial to exclude it from regulation under the Taylor Law, as it now reads."

As the only significant difference between Queens Borough and the New York Public Library is in the governance of the two institutions, the issue before us is whether that factor is sufficient to establish a different status for the two libraries. The hearing officer ruled that it is not. We believe that it does make a sufficient difference.

As is apparent from the memorandum decision of the Court of Appeals, the New York Public Library is close to the line between public and private status, but the court did not furnish a precise guide to help us find that line. Such a line, however, may be drawn from the language of other courts in other decisions. The earliest and most important is the language of Dartmouth College v. Woodward, 17 US 518 (1819). In that case, the court held that the State of New Hampshire could not alter the charter of Dartmouth College without its consent because the College was a private, rather than a public corporation. Much of the discussion involved consideration of the nature of public and private corporations. In a concurring opinion, Justice Story noted (at page 671) that private corporations no less than public corpora-

tions may be devoted to public services, but that they could be distinguished because,

"when the corporation is said at the bar to be public, it is not merely meant that the whole community may be the proper objects of the bounties, but that the government have the sole right, as trustees of the public interest, to regulate, control and direct the corporation, and its funds and its franchises, at its own good will and pleasure."

By way of contrast, Mr. Justice Marshall spoke of a private corporation (at page 657):

"A corporation is defined by Mr. Justice Blackstone to be a franchise. 'It is,' says he, 'a franchise for a body politic, with a power to maintain perpetual succession, and to do corporate acts. ...'"

This distinction between public and private corporations has been embraced by the courts of New York State. The furnishing of public services, the receipt of public funds and tax exemption status may characterize a not-for-profit corporation as well as a public corporation, but public corporations alone are governed by managers who derive their authority from government. Van Campen v. Olean General Hospital, 210 App Div 204 (Fourth Dept., 1924), aff'd 239 NY 615 (1925). Such is the situation here. The Queens Borough is governed by trustees who derive their authority from government.

In the New York Public Library case, the courts ruled that the Taylor Law definition of public employer did not encompass that library. Although much of the opinion of the Appellate Division focused on the language of that definition, it would appear

that the decisive fact was the governance of the library, which made it a private, not-for-profit corporation. Thus, Queens Borough, a public corporation fits within the Taylor Law definition.

The Taylor Law enumerates six categories of public employers, §201.6(a). The last category of public employer specified in the Taylor Law is "any other public corporation, agency or instrumentality or unit of government which exercises governmental powers under the laws of the state."<sup>3</sup> On the record before us, we find that Queens Borough meets this definition.

In deciding that Queens Borough was not such a public corporation, the hearing officer relied upon language in our decision in North Country Library System, 1 PERB ¶399.48 (1968). In that decision, written in the first year of this agency, this Board said that to be a public corporation, the corporation must exercise powers

"which may be exercised only by the state... or by a lesser governmental body to which such powers have been delegated by the state. By way of example, they would include the power to tax, to enact general legislation which is judicially enforceable, to take by eminent domain, and to exercise police powers."  
(emphasis in original)

In stressing the examples given by this Board in North Country, the hearing officer did not recognize that the main line of reasoning in that case supports our decision here. Our reasoning followed the analysis of the Supreme Court in Dartmouth College

<sup>3</sup> Queens Borough may also be a public benefit corporation as it operates a facility for the use of the public at large. (See General Corporation Law, §3.4, and General City Law, §20-e.2[b]).

and the State courts in Van Campen. Mr. Justice Tilzer's opinion noted this Board's main line of reasoning (at page 283):

"In the North Country Library System case, supra, PERB noted that the Library therein was not an agency of government since its board of trustees was not appointed by any government and the Library existed separate and apart from any governmental agency."

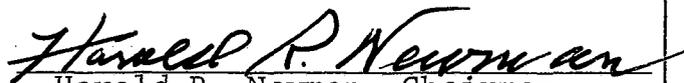
We now realize that the examples of governmental powers which were given by this Board in North Country Library System are too narrow and do not encompass the operative characteristics of "government". Governmental powers, of course, include the performance of functions that may also be performed by private institutions. Governments provide educational services, but so do private institutions. Governments provide transportation services, but so do private institutions. Governments provide sanitation services, but so do private institutions. The powers referred to in the sixth category of the definition in §201.6(a) of the Taylor Law are merely the authority of the public corporation to conduct its day-to-day affairs in the course of furnishing the services that it provides pursuant to law.

Queens Borough is controlled by a board of trustees, all the members of which derive their authority from the Mayor of the City of New York, except for the ex officio members, who are themselves elected officials of the City of New York. This distinguishes Queens Borough from the New York Public Library and is

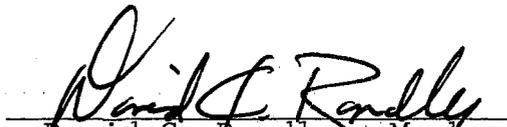
sufficient to constitute Queens Borough as a public employer within the meaning of the Taylor Law.

NOW, THEREFORE, WE REMAND this matter to the Director of Public Employment Practices and Representation for consideration of the merits of the charge.

Dated, New York, New York  
August 7, 1980

  
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 : #2E-8/7/80  
BOARD OF EDUCATION, CITY SCHOOL DISTRICT :  
OF THE CITY OF NEW YORK, : BOARD DECISION AND  
 : ORDER OF REMAND  
Respondent, :  
-and- : Case No. U-4695  
UNITED FEDERATION OF TEACHERS, LOCAL #2, :  
AFT, NYSUT, AFL-CIO, :  
Charging Party. :  
:

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THOMAS P. RYAN, for Respondent

DAVID N. STEIN, ESQ., for Charging Party

On May 9, 1980, United Federation of Teachers, Local #2, AFT, NYSUT, AFL-CIO (Local #2) filed a charge alleging that the Board of Education of the City of New York (Employer) discriminated against unit employees because Local #2 invoked arbitration and that it negotiated in bad faith.

On two occasions, Local #2 failed to appear and failed to notify the hearing officer that it would not appear at a scheduled conference, and on July 10, 1980, the hearing officer dismissed the charge for lack of prosecution.

On July 15, 1980, Local #2 filed exceptions to the decision of the hearing officer. In support of those exceptions, it offered a reasonable explanation as to why it failed to appear at the conference and why it failed to appear or notify the Board or hearing officer that it would not appear at the conference.

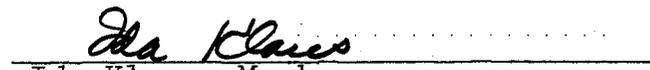
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The employer's representative has indicated that he does not object to the rescheduling of this matter.

NOW, THEREFORE, WE ORDER that this matter be remanded to the Director of Public Employment Practices and Representation for a proceeding on the merits.

DATED: August 7, 1980  
New York, 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 : #2F-8/7/80  
: :  
BUFFALO SEWER AUTHORITY, : BOARD DECISION AND ORDER  
: :  
Employer, : :  
: :  
-and- : :  
: :  
UNITED ENVIRONMENTAL WORKERS, : CASE NO. C-1978

: :  
Petitioner, : :  
: :  
-and- : :  
: :  
LOCAL 1047, AFSCME, AFL-CIO, : :  
: :  
Intervenor. : :

In the Matter of : :  
: :  
UNITED ENVIRONMENTAL WORKERS, : :  
: :  
Respondent, : :  
: :  
-and- : :  
: :  
LOCAL 1047, AMERICAN FEDERATION : :  
OF STATE, COUNTY AND MUNICIPAL : :  
EMPLOYEES, AFL-CIO, : :  
: :  
Charging Party. : :

RAUL FIGORUA, ESQ., for Employer

SARGEANT & REPKA, P.C. (NICHOLAS J.  
SARGEANT, ESQ., of Counsel) for  
Petitioner/Respondent

ROWLEY & FORREST (RICHARD R. ROWLEY, ESQ.,  
of Counsel) for Intervenor/Charging Party

On November 28, 1979, United Environmental Workers (UEW)  
filed a timely petition (Case C-1978) to decertify Local 1047,  
AFSCME, AFL-CIO (Local 1047), as the representative of a unit of  
full-time blue-collar employees of the Buffalo Sewer Authority

(employer). Although the petition did not explicitly so state, UEW also seeks to represent those employees in the existing negotiating unit, as indicated by the showing of interest that accompanied the petition.<sup>1</sup> The Director of Public Employment Practices and Representation (Director) determined that UEW was an employee organization and that it was seeking to represent public employees in an uncontested negotiating unit. Accordingly, he directed that there be an election.

Local 1047 has filed exceptions to the decision of the Director. In its exceptions, it argues that UEW is not an employee organization and that its petition is defective. It also

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<sup>1</sup> The petition form contains three boxes and the petitioner is instructed to check those boxes that are appropriate.

The petitioner did not check Box A. The text accompanying Box A is:

"Certification of negotiating representative - A substantial number of employees wish to be represented for purposes of collective negotiations by Petitioner and Petitioner desires to be certified as representative of the employees for purposes of collective negotiations pursuant to Section 207 of the Act."

The petitioner did not check Box B, which is appropriate only when the petition is signed by an employer. The petitioner checked Box C. The text accompanying Box C is:

"Decertification - a substantial number of employees assert that the currently recognized or certified negotiating representative should be deprived of representation status as defined in Section 207 of the Act."

The showing of interest accompanying the petition states:

"We, the undersigned, designate the United Environmental Workers as an employee organization, as our sole and exclusive representative for the purpose of negotiating collectively with our public employer...We, the undersigned understand that this authorization is for the purpose of obtaining a sufficient showing of interest in order that a representation election may be conducted by the Public Employment Relations Board."

argues that UEW should be disqualified from representing the unit employees because its leaders had violated a fiduciary obligation to Local 1047. In this connection, it argues that the hearing officer and the Director erred in that they failed to disqualify the attorney for UEW, asserting that the attorney, too, had violated a fiduciary obligation to Local 1047. Finally, Local 1047 urges that, even if UEW is an employee organization and should not be disqualified from representing unit employees, the election should be postponed at least a year because the alleged improper conduct of UEW's leaders had so interfered with maintenance of laboratory conditions under which elections should be held that a current election could not fairly reflect the true preference of unit employees.

On April 4, 1980, Local 1047 also filed an improper practice charge against UEW (Case U-4643). In it, as in its exceptions in the representation case, Local 1047 alleges that UEW's leadership violated a fiduciary obligation which it owed to Local 1047. The Director dismissed the charge on the ground that it does not allege facts which would constitute a violation of §209-a of the Taylor Law. Local 1047 has filed exceptions to this determination too. In support of its exceptions, it advances the same arguments that have been made in support of some of its exceptions in the representation case. Accordingly, we consolidate both cases for decision.

FACTS

There are about 250 full-time blue-collar workers in the negotiating unit. Since 1948, Local 1047 has represented these employees. Robert Reinig has been an officer of that union for almost twenty years and has been president of it for about half that time. He called a meeting of Local 1047 for October 10, 1979 to consider the formation of a new union. Approximately 75% of the membership of Local 1047 attended the meeting and the members in attendance unanimously decided to seek the decertification of Local 1047 and to replace it with a new organization to be known as United Environmental Workers. The law firm which has represented Local 1047 had already been asked to assist the executive board of Local 1047 in the preparation of bylaws for the new organization, and those bylaws were presented to and adopted by the unit employees in attendance at the meeting. Two hundred twenty unit employees then executed the documents which were filed as the showing of interest in support of the UEW petition.

Thereafter, Reinig, who was designated the acting president of UEW, withdrew sums on deposit in a Local 1047 operating fund account and in a Local 1047 flower fund account and he deposited that money in two similar accounts in the name of UEW. AFSCME, the parent organization, then placed Local 1047 in trusteeship, suspended its officers, and appointed Anthony Corbo as the administrator of the Local. In this capacity, Corbo received the dues of unit employees which were being deducted by the Buffalo Sewer Authority and which amounted to approximately \$2,750.00

a month. He also took control of approximately \$10,000 of Local 1047's operating funds and \$250,000 of its Health and Welfare fund. Reinig then obtained a preliminary injunction from the Supreme Court restraining Corbo from spending any of the funds of Local 1047 which were in his possession; and there is now pending a lawsuit to determine whether the moneys belong to Local 1047 or to the unit employees.

In the Supreme Court proceedings, Local 1047 sought to disqualify UEW's attorney from appearing on UEW's behalf because he had previously represented the Local. The court declined to do so, saying that:

"The attorney has at all times represented the membership and when the membership desired a change, he is justified in pursuing ways to effectuate the change."

#### DISCUSSION

Having reviewed the record of the proceedings, including the materials relating to the lawsuit which was submitted by Local 1047, we affirm the findings of fact and conclusions of law of the Director in both the representation and improper practice cases.

For the reasons set forth in his decision, we agree with the Director that UEW is an employee organization within the meaning of §201.5 of the Taylor Law. We also agree with the Director that the technical deficiency in the petition is not a basis for rejecting it. The hearing officer and the Director committed no error when they determined that the dispute between the two organizations concerning the disposition of the funds of

Local 1047 raised no Taylor Law issues and, therefore, could not be a basis for disqualification of UEW in any proceedings before this Board.

In the private sector, the fiduciary obligations of union officers to their organization and its members are set forth in Title V of the Labor-Management Reporting and Disclosure Act of 1959. In part the provisions of that law are enforceable by the U.S. Department of Labor and in part by civil suit. They are not within the purview of the authority of the National Labor Relations Board. New York State, too, has enacted laws specifying the fiduciary obligations of officers and agents of a union (Labor Law Article 20-a, L. '59, c.451). Although originally the State Industrial Commissioner was given the major enforcement responsibilities, those responsibilities were diminished by L.'71, c.329, and enforcement is now left primarily to civil and criminal proceedings (Labor Law §725).<sup>2</sup> Like the NLRB in the private sector, PERB is given no enforcement responsibility where a ~~complaint charges financial improprieties in the internal affairs of a union.~~<sup>3</sup>

<sup>2</sup> But see §727 for remaining enforcement responsibilities of the Industrial Commissioner.

<sup>3</sup> See CSEA and Bogack, 9 PERB ¶3064 (1976) in which we held that this Board may not entertain complaints that deal with the internal affairs of a union unless they directly affect employees' terms and conditions of employment.

The remaining argument made by Local 1047 is that no election should be held now because the dispute over financial resources has prevented the achievement of the laboratory conditions necessary for an election to determine the true preference of the employees as between the two organizations. In particular, it argues that by obtaining a preliminary injunction which prevents Local 1047 from using its funds, Reinig and the other leaders of UEW have "sabotaged" Local 1047's ability to present itself to the employees or to represent them. We do not find this argument persuasive. We conclude that both Local 1047 and its past officers who are now leaders of UEW are capable at this time of contending as distinct and identifiable rivals for the support of the unit members and that the unit members are capable of evaluating them as such and making an informed choice between them.<sup>4</sup> An expeditious election should be held to resolve the dispute so that orderly collective bargaining may proceed.

<sup>4</sup> With respect to the intervenor's contention based on the dispute as to the funds involved, we find a somewhat parallel situation in Hershey Chocolate Corporation, 121 NLRB 901 (1958). In that case, the NLRB directed that an election be held between a union holding a contract and a competing union which was supported by 42 of 43 members of the executive board of the first union and most of its members. Like the case before us, there was a dispute concerning the disposition of the assets of the first union. In Hershey, a current contract between the first union and the employer would have barred an election at that time under ordinary circumstances. Thus, rather than being a justification for delaying an election following a timely petition, the defections from the first union, and the dispute over the union's funds were seen as justification for an immediate election that would not have otherwise been timely.

NOW, THEREFORE, WE AFFIRM the decisions of the Director,  
and WE ORDER THAT,

1. In Case No. C-1978:

(a) An election be held by secret ballot under the supervision of the Director among the employees of the Buffalo Sewer Authority in the stipulated unit, who were employed on the payroll date immediately preceding the date of this decision, and

(b) The Buffalo Sewer Authority submitted to the Director as well as to the petitioner and the intervenor, within seven days from the date of receipt of this decision, an alphabetized list of employees in the negotiating unit set forth above who were employed on the payroll date immediately preceding the date of this decision; and

2. In Case No. U-4643, the charge herein be, and it hereby is, dismissed.

Dated, New York, New York  
August 6, 1980

  
Harold R. Newman, Chairman

  
Ida Klaus, Member

  
David C. Randles, Member

6416

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of	:	#2G-8/7/80
RENSSELAER CITY SCHOOL DISTRICT,	:	
	:	
Respondent,	:	<u>BOARD DECISION AND</u>
	:	
-and-	:	<u>ORDER</u>
	:	
RENSSELAER CITY SCHOOL DISTRICT UNIT OF	:	
RENSSELAER COUNTY EDUCATIONAL CHAPTER	:	
OF CIVIL SERVICE EMPLOYEES ASSOCIATION,	:	<u>CASE NO. U-3504</u>
INC.,	:	
	:	
Charging Party.	:	

ROEMER AND FEATHERSTONHAUGH (STEPHEN J.  
WILEY, ESQ., of Counsel) for Charging Party

THEALAN ASSOCIATES, INC. (ANTHONY P. DI  
ROCCO) for Respondent

This matter comes to us on the exceptions of the Rensselaer City School District Unit of Rensselaer County Educational Chapter of Civil Service Employees Association, Inc. (CSEA) to the decision of a hearing officer dismissing its charge. In that charge, CSEA had alleged that the Rensselaer City School District (District) had committed an improper practice when, in June 1978, it unilaterally issued notices to unit employees continuing their services for the school year following the 1978 school recess. The hearing officer determined that in all material respects the action taken by the District was identical to that held to be permissible in Spencerport Central School District, 12 PERB ¶3074 (1979), in which the majority of this Board held that,

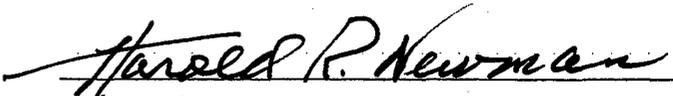
"[t]he employer's conduct in unilaterally offering employees continued employment, a non-mandatory subject of negotiation, is not in itself, wrongful...."

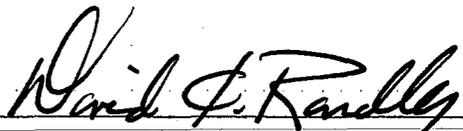
In support of its exceptions, CSEA contends that the majority decision in Spencerport was wrong. It presents no new arguments in support of that contention, but relies upon the dissenting opinion in Spencerport.

For the reasons stated in Spencerport, we affirm the decision of the hearing officer, and

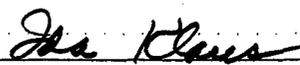
WE ORDER that the charge herein be, and it hereby is, dismissed.

DATED: New York, New York  
August 7, 1980

  
Harold R. Newman, Chairman

  
David C. Randles, Member

Member Klaus dissents for the reasons stated in her dissenting opinion in Spencerport.

  
Ida Klaus, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of : #2H-8/7/80  
COUNTY OF NASSAU, : BOARD DECISION  
Respondent, : AND ORDER

-and- :  
NASSAU CHAPTER CIVIL SERVICE EMPLOYEES : Case No. U-3117  
ASSOCIATION, INC., :  
Charging Party. :

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JACK OLCHIN, ESQ., for Respondent

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

This matter comes to us on the exceptions of the Nassau Chapter, Civil Service Employees Association, Inc., (CSEA) to a hearing officer's decision dismissing its charge. The charge alleges that the County of Nassau (County) violated its duty to negotiate in good faith by refusing to negotiate both the imposition and the impact of a revised work schedule for employees in the Personal Health Services Unit of the Department of Health. Until January 3, 1978, the employees worked 33-3/4 hours a week as follows: 6-3/4 hours a day, Monday through Friday. For Saturday and Sunday work and other overtime, the contract provided that the employees could choose to be compensated at premium pay or be given compensatory time off at a premium rate. After Janu-

ary 3, 1978, with the changed schedule, the employees continued to work five days a week, 6-3/4 hours a day, but the five work days could include Saturdays and Sundays. For overtime work the employees were given premium pay, but denied the opportunity to elect compensatory time off at a premium rate.

The hearing officer dismissed so much of the charge as alleged a refusal to negotiate the imposition of the new schedule. He did so on the basis of contract language which stated that the County had the right "to regulate work schedules". He noted that in two prior cases involving Health Department employees of the County of Nassau, this Board has held that this language constituted a waiver of CSEA's right, if any, to negotiate as to work schedules.<sup>1</sup>

The hearing officer also dismissed so much of the charge as alleged a refusal to negotiate as to impact because, he determined, it did do so. The record shows that CSEA made a demand "to negotiate both the change in the work week and the impact of said change" and that the demand was refused. Nevertheless, three meetings were held between CSEA and representatives of the County at which this matter was discussed, but no agreement resulted. The hearing officer concluded that those meetings were for the purpose of negotiating impact and that, when no agreement was reached, CSEA did not press the matter. With respect to the

<sup>1</sup> In the Matter of County of Nassau (Nassau County Medical Center), 12 PERB ¶3049 (1979), and In the Matter of County of Nassau, 12 PERB ¶3105 (1979).

County's elimination of the employees' option to take overtime in compensatory time off at a premium rate, the hearing officer said, "the allegation raises only a claimed breach of agreement, outside PERB's jurisdictional grant."

Having considered CSEA's arguments in support of its exceptions and reviewed the record, we affirm the findings of fact and conclusions of law of the hearing officer for the reasons set forth in his decision.

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

Dated, New York, New York  
August 7, 1980

  
Harold R. Newman, Chairman

  
Ida Klaus, Member

  
David C. Randles, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of :  
BEACON ENLARGED CITY SCHOOL DISTRICT, : #3A-8/7/80  
Employer, :  
- and - : Case No. C-2062  
BEACON CLASSROOM SUPPORT STAFF ASSOCIATION, :  
NYEA, NEA, :  
Petitioner. :

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 Beacon Classroom Support Staff Association, NYEA, NEA

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: Teaching Assistants

Excluded: All others.

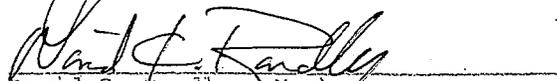
Further, IT IS ORDERED that the above named public employer shall negotiate collectively with the Beacon Classroom Support Staff Association, NYEA, NEA

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 5th day of August, 1980  
New York, New York

  
Harold R. Newman, Chairman

  
Ida Klaus, Member

  
David C. Randles, Member

Conciliation - 4

M E M O R A N D U M

August 12, 1980

Re: Grievance Arbitration Panel

Persons who are candidates for membership on the grievance arbitration panel must demonstrate that they have substantial experience in the conduct of arbitration hearings and the writing of arbitration awards. Experience as advocates before arbitration tribunals or individual arbitrators may not be substituted. The Director of Conciliation should review the grievance arbitration panel needs based on caseload and recommend to the Board such persons as he determines meet the necessary criteria. At the time of submission of candidates names to the Board, each vita must be accompanied by five recent arbitration awards, written by the applicant.

Applicants having been former professional employees of this agency for at least five years, and who have demonstrated appropriate skills, may be given special consideration for admission to the arbitration panel.