Cornell University ILR School

Cornell University ILR School
DigitalCommons@ILR

Board Decisions - NYS PERB

New York State Public Employment Relations Board (PERB)

12-15-1980

State of New York Public Employment Relations Board Decisions from December 15, 1980

New York State Public Employment Relations Board

Follow this and additional works at: https://digitalcommons.ilr.cornell.edu/perbdecisions

Thank you for downloading an article from DigitalCommons@ILR.

Support this valuable resource today!

This Article is brought to you for free and open access by the New York State Public Employment Relations Board (PERB) at DigitalCommons@ILR. It has been accepted for inclusion in Board Decisions - NYS PERB by an authorized administrator of DigitalCommons@ILR. For more information, please contact catherwood-dig@cornell.edu.

If you have a disability and are having trouble accessing information on this website or need materials in an alternate format, contact web-accessibility@cornell.edu for assistance.

State of New York Public Employment Relations Board Decisions from December 15, 1980

Keywords

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

Comments

This contract is part of a digital collection provided by the Martin P. Catherwood Library, ILR School, Cornell University. The information provided is for noncommercial educational use only.

This article is available at DigitalCommons@ILR: https://digitalcommons.ilr.cornell.edu/perbdecisions/98

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of WINDSOR CENTRAL SCHOOL DISTRICT, Respondent, -and- WINDSOR TEACHERS ASSOCIATION, Charging Party.	BOARD DECISION AND ORDER CASE NO. U-4684

WILLIAM FINGER, for Charging Party

On May 5, 1980, the Windsor Teachers Association (Association) filed a charge which alleges the following facts.

The Windsor Central School District (District) and the Association are parties to a collectively negotiated contract which specifies the terms and conditions of employment of unit employees from December 7, 1978 through June 30, 1981. That contract contains a grievance procedure which culminates in arbitration. Three days prior to a scheduled arbitration, representatives of the District and the Association entered into an agreement resolving the grievance. Thereafter, the District failed to implement the agreement settling the grievance.

The charge herein is that, by its failure to implement the agreement settling the grievance, the District violated §209-a.1 (a), (b), (c) and (d) of the Taylor Law.

6635

Without requiring an answer from the District, the Acting Director of Public Employment Practices and Representation issued a decision dismissing the charge because the facts, as alleged, do not indicate a violation of any of the paragraphs of §209-a.1

of the Taylor Law. He determined that the basis of the charge was merely that the District had violated its agreement with the Association and, citing CSL §205.5(d), he ruled that this Board may not exercise jurisdiction over alleged contract violations that would not otherwise constitute an improper practice.

The matter now comes to us on the exceptions which the Association filed to this decision of the Acting Director. In support of those exceptions, it contends that there is a distinction between the enforcement of an agreement, a matter which it concedes to be beyond this Board's jurisdiction, and the implementation of an agreement, a matter that it asserts is within our jurisdiction. The Association argues in its exceptions: "You simply cannot interpret or enforce that which has not been implemented."

We affirm the decision of the Acting Director. The distinction that the Association makes between the enforcement and the implementation of an agreement is not persuasive. The parties herein negotiated an agreement in settlement of a grievance. The Association alleges that the District has refused to implement the agreement and, in its charge, it has asked this Board to order the District to do so. In other words, it is asking this Board to enforce the agreement.

NOW, THEREFORE, WE ORDER that the charge herein be, and

it hereby is, dismissed.

DATED: Albany, New York
December 15, 1980

Harold R. Newman

Harold R. Newman, Chairman

David C. Randles

David C. Randles, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of HALF HOLLOW HILLS COMMUNITY LIBRARY DISTRICT, Employer, -and- HALF HOLLOW HILLS LIBRARY EMPLOYEES ASSOCIATION, Petitioner, -and- HALF HOLLOW HILLS COMMUNITY PUBLIC LIBRARY UNIT, SUFFOLK COUNTY CHAPTER, CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., Intervenor.	BOARD DECISION AND ORDER CASE NO. C-2037

LEONARD T. SHORE, ESQ., for Petitioner

ROEMER & FEATHERSTONHAUGH (MARJORIE E. KAROWE, ESQ., of Counsel) for Intervenor

The petition herein was filed by the Half Hollow Hills Library Employees Association (Association). It seeks certification as a representative of a unit of full-time and part-time library employees of the Half Hollow Hills Community Library District (Employer). That unit is presently represented by the Half Hollow Hills Community Public Library Unit, Suffolk County Chapter, Civil Service Employees Association, Inc. (CSEA). CSEA intervened in the proceeding and moved to dismiss the petition on the grounds that it was not timely because it was barred by a contract and that the Association is not an employee organization

within the meaning of the Taylor Law.[1]

A hearing was held on the question whether the Association is an employee organization, but not on the question whether the petition was barred by a contract. The hearing officer found that there was no issue of fact regarding this question as it was acknowledged that there was no written agreement between the Employer and CSEA. During the course of that hearing, CSEA attempted to introduce evidence that there was an oral contract which had been implemented. Such a contract, according to CSEA, would bar the petition. The hearing officer excluded this evidence and her ruling was affirmed by the Director of Public Employment Practices and Representation (Director). The matter now comes to us on the exceptions of CSEA to a decision of the Director that the petition was timely and that the Association is a qualified employee organization.

CSEA's first argument in support of its exceptions is that the hearing officer erred in excluding evidence that might have established that the petition was barred by a contract between it and the Employer. Given the agreement that there was no written contract, we find no error in the exclusion of this evidence because proof of an oral contract between CSEA and the Employer would not bar the petition herein even if that contract has been implemented. In Appalachian Shale Products Co., 121 NLRB 1160 (1958), 42 LRRM 1506, the National Labor Relations

---

1 The law defines the term, employee organization, to mean "an organization of any kind having as its primary purpose the improvement of terms and conditions of employment of public employees...."

Board adopted the rule that

> "a contract to constitute a bar must be signed by all the parties before a petition is filed and that unless a contract signed by all the parties precedes a petition, it will not bar a petition even though the parties consider it properly concluded and put into effect some or all of its provisions."

Its reason for adopting this rule was that to conduct an investigation as to whether or not there is an oral contract would "render unduly complex a field that should not [be] so involved." In Farmingdale UFSD, 7 PERB ¶3073 (1974), we adopted the holding of the NLRB in Appalachian Shale. In doing so, we affirmed the reasoning of the Director that "there should not be a need to resort to extraneous facts to determine whether a particular document is a finalized contract that can serve as a bar."[2]

CSEA argues further that the Association should not be permitted to rely upon the absence of a written contract because the failure to reach a contract was brought about by the subversive action of Paul Elsener. Elsener, now the president of the Association, had been the president of the CSEA unit and, in that capacity, was responsible for the negotiations. CSEA argues that, but for the negotiating tactics of Elsener, CSEA and the Employer would have executed a contract before the petition was filed.

This argument of CSEA relates to alleged disloyalty of a CSEA officer. In CSEA and Bogack, 9 PERB ¶3064 (1976), CSEA was charged with disciplining another officer of its Suffolk

---

2 Farmingdale UFSD, 7 PERB ¶4041 (1974).

Chapter because of disloyalty. In that case, CSEA argued successfully that this Board is not a proper forum to regulate the internal affairs of an employee organization. We held that problems of member disloyalty may be dealt with by a union so long as the union does not deprive the member of his right to be represented in negotiations and contract administration. Here, it is CSEA, rather than a member, that is asking this Board to look into its internal conduct, but the answer must be the same. This Board is not a proper forum to deal with the complaint.

The allegation of Elsener's disloyal activities is also raised by CSEA in support of the proposition that the Association is not an employee organization. This issue was dealt with by us directly in Buffalo Sewer Authority, 13 PERB ¶3052 (1980). In that case, as in the present, the leader of the petitioner had been an officer of the incumbent employee organization. The incumbent complained that its former officer had violated his fiduciary obligation to it in order to enhance the status of the petitioner. It argued that by reason of this conduct, the petitioner should have been disqualified for certification. Relying, in part, upon our decision in CSEA and Bogack, supra, we rejected this argument. We do so again.

Notwithstanding evidence that the Association's purposes are to improve employee working conditions and better their salaries, CSEA asserts that the Association is not an employee organization. It bases this assertion upon a suggestion that all members of the Association may not be permitted to vote. The factual basis for the suggestion, however, is too frail to support it.

A member of the Association was asked by CSEA whether there was any restriction upon membership or voting rights. She said that she did not know of any, but acknowledged that she was late for one meeting. This testimony is not sufficient to raise a serious doubt about the matter. Moreover, there is other record evidence showing votes taken at meetings without any indication of restrictions.

In part, the other record evidence derives from Association Exhibit 1. It is the minutes of the Association meeting held on January 16, 1980, and was prepared by Elsener. CSEA argues that the exhibit should have been excluded because Elsener typed the minutes from longhand notes of the Association's secretary which were destroyed. But Elsener was present at the meeting of January 16, 1980, and he testified that the minutes were an accurate record of what occurred. Moreover, the minutes were approved by the members at a subsequent meeting. Accordingly, we affirm the ruling of the hearing officer, adopted by the Director, admitting the minutes.

WE AFFIRM the decision of the Director that the Association is an employee organization within the meaning of the Taylor Law and that its petition was timely filed.

NOW, THEREFORE, WE ORDER that an election by secret ballot be held under the supervision of the Director among the employees of the Employer in the stipulated unit who were employed on the payroll date immediately preceding the date of this decision.

IT IS FURTHER ORDERED that the employer shall submit to

the Director, as well as to Half Hollow Hills Library Employees Association and the Half Hollow Hills Community Public Library Unit, Suffolk County Chapter, Civil Service Employees Association, Inc., within seven days from the receipt of this decision, an alphabetized list of all employees in the stipulated unit who were employed on the payroll date immediately preceding the date of this decision.

DATED: Albany, New York
December 16, 1980

Harold R. Newman

Harold R. Newman, Chairman

David C. Randles

David C. Randles, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of FAIRVIEW FIRE DISTRICT, Charging Party, -and- FAIRVIEW PROFESSIONAL FIREFIGHTERS ASSOCIATION, INC., Respondent.	BOARD DECISION AND ORDER CASE NO. U-4682

RAINS & POGREBIN, for Charging Party

THOMAS FLYNN, for Respondent

The charge herein was filed by the Fairview Fire District (District). It alleges that the Fairview Professional Firefighters Association, Inc. (Association) violated its duty to negotiate in good faith in that the president of the Association, who was not a panel member, communicated privately with the impartial chairman of an interest arbitration panel appointed pursuant to §209.4 of the Taylor Law and attempted to influence him regarding an award that he was preparing. The Director of Public Employment Practices and Representation (Director) dismissed the charge on the ground that it did not set forth a Taylor Law cause of action. He ruled that proceedings before an interest arbitration panel are not part of the negotiation process and, therefore, a party's conduct during interest arbitration proceedings could not constitute a violation of its duty to negotiate in good faith.

The matter comes to us on the exceptions of the District. It argues that the duty to negotiate in good faith requires a party to conform to acceptable norms of behavior while partici-

pating in all the negotiation and conciliation procedures prescribed by §209 of the Taylor Law, entitled "Resolution of Disputes in the Course of Collective Negotiations."

We affirm the decision of the Director.

The Taylor Law recognizes a distinction between interest arbitration and other prescribed procedures designed to resolve disputes in the course of collective negotiations. For example, §209.4(c)(iv), dealing with interest arbitration, indicates a distinction between interest arbitration and other dispute resolution procedures. It provides, "The Panel, prior to a vote on any issue in dispute before it, shall, upon the joint request of its two members representing the public employer and the employee organization respectively, refer the issues back to the parties for further negotiations;" (emphasis supplied). In other words, issues that are still susceptible of resolution through some means by the parties themselves are not properly within the ambit of the arbitration process.

Section 210.3(f), dealing with the criteria for fixing the duration of the forfeiture of dues deduction privileges of unions that strike, also indicates a distinction between interest arbitration and other dispute resolution procedures. One of the factors to be considered in assessing the duration of the forfeiture is "the refusal of the employee organization or the appropriate public employer or the representative thereof, to submit to the mediation and fact-finding procedures provided in section two hundred nine...".

The distinction between mediation and factfinding on the one hand and interest arbitration on the other is logical. By

refusing to participate in mediation or factfinding, a party can thwart third party efforts to facilitate agreement by the parties themselves through collective bargaining. The party that refuses to participate in interest arbitration, however, thwarts nothing. It exercises no control over the outcome of the arbitration process because the process may proceed without it and it may be bound by the award. City of Albany v. PERB, 86 Misc.2d 476, 9 PERB ¶7009 (1976).

Improper conduct during resolution of disputes by procedures designed to foster collective bargaining by the parties is, in the first instance, subject to the scrutiny of this Board under provisions of law that mandate good faith negotiations.[1] The interest arbitration process, however, is "subject to review by a court of competent jurisdiction in the manner prescribed by law." CSL §209.4(c)(vii). The conduct of the employee organization complained of herein may, of course, not give rise to a cause of action for the review of the determination of an interest arbitration panel because there is no allegation here of any impropriety on the part of the interest arbitration panel. Rather, the allegation is that the employee organization, through its president, acted improperly. The absence of a remedy under §209.4(c)(vii) would not, however, bring the conduct within the improper practice jurisdiction of this Board. The conduct complained about must be redressed, if at all, in some other forum

---

1 Uniformed Fire Fighters Association, Mount Vernon, New York Local 107, IAFF, 11 PERB ¶3095 (1978); Schenectady Community College Faculty Association, 6 PERB ¶3027 (1973).

under general laws of the State, to the extent that they are relevant.

In support of its exceptions, the District argues that this Board has asserted improper practice jurisdiction over conduct involved in the interest arbitration process in that it has ruled improper the submission of nonmandatory subjects of negotiation to interest arbitration. To be sure, under §205.6 of our Rules, we do permit the filing of improper practice charges alleging that matters have been improperly submitted to interest arbitration for diverse reasons. Such charges, however, may not involve conduct during the course of interest arbitration proceedings. Our jurisdiction over charges alleging a refusal to negotiate ceases after a negotiation deadlock is properly before an interest arbitration panel. It extends only to the commencement of interest arbitration so that it may preclude use of that process when it is not properly available. In Town of Haverstraw, 9 PERB ¶3063 (1976), for example, we held that an employee organization had improperly invoked the interest arbitration process in that it had not exhausted the negotiation process that must precede such arbitration. In that decision we wrote:

> "Interest arbitration is not, and was not, intended as an alternative to, or substitute for, good faith negotiations. Rather, it is a procedure of last resort in police and fire department impasse situations when efforts of the parties themselves to reach agreement through true negotiations and conciliation procedures have actually been exhausted."

The improper practice provisions of the Taylor Law effectuate the collective negotiation policies of the law. They apply to all phases of the negotiation process and to procedures designed to effectuate that process. They extend to the threshold of the interest arbitration process, but not beyond.

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

DATED: Albany, New York
December 15, 1980

Harold R. Newman, Chairman

David C. Randles, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

COUNTY OF ERIE,

Employer,

-and-

ERIE COUNTY RANK & FILE ASSOCIATION,

Petitioner,

-and-

LOCAL NO. 815, ERIE COUNTY CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,

Intervenor.

BOARD DECISION AND ORDER

CASE NO. C-2074

In the Matter of

COUNTY OF ERIE,

Respondent,

-and -

ERIE COUNTY RANK AND FILE ASSOCIATION,

Charging Party,

-and-

LOCAL NO. 815, ERIE COUNTY CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,

Intervenor.

CASE NO. U-4650

MICHAEL A. CONNORS, ESQ., for Employer/Respondent
SARGENT & REPKA, P.C. (NICHOLAS J. SARGENT, ESQ., of Counsel) for Petitioner/Charging Party
ROEMER & FEATHERSTONHAUGH (STEPHEN J. WILEY, ESQ., of Counsel) for Intervenor

On May 29, 1980, the Erie County Rank and File Association (Association) filed a petition to represent a unit of approximately 4,000 white collar employees of the County of Erie (County) currently represented by Local 815, Erie County Civil Service Employees Association (CSEA).[1] The Director of Public Employment Practices and Representation determined that the showing of interest was insufficient. However, he did not dismiss the petition because of facts elicited in an improper practice case involving the same parties.

The improper practice case was brought by a charge of the Association alleging that the County had denied it appropriate access to unit employees during the period proximate to the time when a petition and showing of interest could have been filed. The hearing officer determined that during the course of a meeting held March 18, 1980, the County improperly denied four requests of the Association relating to access to unit employees.[2] In each instance the request was that an opportunity or privilege be made available to it that was already available to CSEA.[3] The general approach of the County was that opportunities or privileges which were afforded to CSEA

---

1 Although the parties all agreed upon the definition of the negotiating unit, there was some disagreement concerning the application of the definition to some newly created jobs.

2 The Association alleged other instances of improper denial of access but these were rejected by the hearing officer. The Association has filed no exceptions.

3 In several instances the requests were presented in vague terms and without reference to the privileges enjoyed by CSEA.

pursuant to the collective agreement between CSEA and the County would not be extended to the Association.

One of CSEA's rights under the contract was to receive a list of the names and home addresses of all unit employees. The contract provided that the list would be updated quarterly but, in fact, an updated list was furnished every two months. Although no restrictions were placed on CSEA's use of the list for campaign purposes, there is no evidence that CSEA used the list for any such purpose. There is evidence that the Association faced difficulties in reaching unit employees by telephone or mail because it was difficult to obtain addresses and phone numbers,[4] but there is no evidence that it told this to the County.

CSEA also enjoyed a contractual right to meeting room space on County property. While the contractual right was for executive committee meetings, the evidence discloses that other meetings were held on County property. The evidence does not disclose the purposes of any particular meeting but it shows that the County imposed no restrictions upon CSEA.

The third contractual right enjoyed by CSEA was for release time for designated representatives to engage in "union business." Among other things, CSEA representatives had the right to use the release time opportunities to explain CSEA membership benefits to unit employees.

Although not authorized by the contract, CSEA had long distributed its newsletter, The Civil Tongue, on County property and some County officers were aware of this. The newsletter

---

4 A high percentage of the unit employees were women whose addresses and phone numbers were listed in the telephone book under a first name other than their own.

contained campaign materials. The Association, after being denied permission to distribute its campaign materials on County property, nevertheless, did so. This distribution was surreptitious and much more limited than CSEA's distribution of The Civil Tongue.

On these facts the hearing officer determined that the Association was not given appropriate access to employees. He ruled that during the period proximate to the time when a petition may be filed, a challenging employee organization is entitled to reasonable access to employees on the premises of the employer. He further ruled that if the incumbent employee organization enjoys access rights that by an objective standard are more than would be reasonably required, it would, nevertheless, be unreasonable to deny the challenging organization equal access. Applying this test the hearing officer ruled that the County denied the Association reasonable access to employees when it denied the Association a list of the names and addresses of the unit employees, space to meet, release time for organizational purposes and the right to distribute campaign literature, all of which were enjoyed by CSEA. As a remedy for this violation, he determined that the Association should be given a 45-day extension of time during which to file a showing of interest and he directed the County to grant the Association access to County facilities, property and information to the same extent and under the same conditions granted to CSEA during that 45-day period.

The Director issued his decision in the representation case the same day as the hearing officer issued his decision in the improper practice case. He adopted the findings of fact of the hearing officer but not his conclusion of law. Like the hearing

officer, he ruled that the Association was entitled to reasonable access to the premises and information of the County but he declined to rule that the access that it was entitled to must be, at least, equal to the access enjoyed by CSEA. Instead, he concluded that the extension of an opportunity or privilege to CSEA created a rebuttable presumption that it would be unreasonable to deny the same opportunity or privilege to the Association. Applying this test, he determined that the County did not rebut the presumption that the inequality of treatment between the two organizations was unreasonable. Accordingly, he, too, ruled that the Association's time to file a showing of interest should be extended 45 days.

These cases now come to us on the exceptions of CSEA to the decisions of both the hearing officer and the Director. The parties have addressed them, each in a single brief, and we do so in a consolidated decision.

In its exceptions, CSEA contests the conclusion of the hearing officer that the Association was entitled to not less than the access rights enjoyed by CSEA. It asserts that:

> "In determining whether the access enjoyed by the Association was reasonable, it is necessary to consider the totality of circumstances, including the access which was requested, that which was granted, and that which was utilized by both the incumbent and challenger."

Applying its own test, it argues that the Association was not denied reasonable access to a list of names and addresses because the lists that were provided to CSEA were not used for campaign purposes. Thus, according to CSEA, the denial of the list did not place the Association at a disadvantage vis a vis CSEA. In response, the Association contends that the utilization

of the list by CSEA is not an appropriate test; it is sufficient that the County afforded CSEA opportunities for campaign that were not available to the Association. According to the Association, the test proposed by CSEA would require this Board to inquire into the reasons why an incumbent organization chooses to utilize some, but not other campaign opportunities. Such an inquiry, the Association argues, would be impractical.

The dispute regarding the denial of meeting space is similar to the dispute regarding address lists. CSEA argues that the Association was not denied reasonable access to meeting space because the record does not show that the meeting space that it used were utilized for campaign purposes.

With respect to release time, CSEA argues that the demand made by the Association was so general that it did not put the County on notice as to what was requested of it. The position of the hearing officer was that the request, although not specific, was sufficient to put the County on notice that it wanted release time for campaign purposes. Moreover, the hearing officer concluded that the response of the County to the Association on March 18 makes it clear that a more explicit request for time off would have also been denied. The County indicated that it would deny the Association any request for an opportunity or privilege that was enjoyed by CSEA pursuant to the collective negotiated agreement and release time was such a privilege.

6654

Finally, CSEA argues that the hearing officer erred in his determination that the Association was denied appropriate opportunities to distribute campaign literature. First, it argues that the request was too general to have imposed any obligation upon the County; second, it argues that, notwithstanding

the denial of the request, the Association did distribute campaign literature on the County's premises; third it argues that the County had no knowledge that CSEA was distributing similar materials on the County's premises. On these three points the hearing officer found first, that the Association's demand was sufficient to put the County on notice that it wanted an opportunity to distribute campaign literature on the County's premises;[5] second, that the surreptitious distribution of campaign materials by the Association was too limited to be reasonable when contrasted with the extensive distribution of campaign materials by CSEA; and third, that CSEA's distribution was sufficiently extensive for the County to have had constructive, if not actual, knowledge of that distribution.

In support of its exceptions, CSEA also argues that the hearing officer erred in his interpretation of the County's position on March 18. According to CSEA, the County did not categorically deny the request of the Association on that day; rather it withheld judgment on the request pending legal justification which the Association might furnish in support of its request. By not furnishing such report, the Association,

---

5 The Association made no explicit request for release time or distribution privileges. After it raised the issue of access generally, the County invited it to a meeting. At the meeting the County announced its position which, among other things, denied these privileges even before the Association asked for them. The discussion at the meeting was sufficient to put the County on notice that the Association wanted this campaign opportunity.

according to CSEA, waived its right to the access sought.[6]

Having reviewed the record, we affirm the findings of fact of the hearing officer, which, in turn, were relied upon by the Director. We also find that the response of the County to the Association on March 18 did not constitute an invitation to resubmit its request for access with legal justifications. The County promised the Association to consider new requests, but it rejected the requests that were already made.

We apply the legal standard proposed by the hearing officer. During the period proximate to the time when a petition may be filed, a challenging employee organization is entitled to no less than the access afforded to the recognized or certified employee organization.[7] By denying such access to the Association, the County acted improperly.

CSEA argues that even if the County's conduct were unreasonable, the Association's time to file a sufficient showing of interest could not be extended. It relies upon §210.3 of our Rules which specifies the time when a showing of interest must be filed and contends that this Board may not depart from its Rules.

---

6 CSEA also argues in support of its exceptions that the Director is in error in proposing to hold an election because a negotiating unit has not been agreed upon. The record supports the Director's determination that there was agreement upon a negotiating unit. There is only a disagreement as to whether certain individual positions fit within the definition of the negotiating unit. That disagreement can be resolved by challenges to individual voters.

7 The hearing officer correctly noted a qualification not relevant on the facts before us. Opportunities and benefits that are extended to an incumbent employee organization need not be extended to another employee organization if they were designed to facilitate the exercise of the incumbent organization's responsibilities as the recognized or certified representative of the unit employees.

In dealing with this proposition, the hearing officer stated that CSEA has no standing to make this argument because the showing of interest rule is not designed to protect an incumbent employee organization. We agree.[8] We also conclude that we may waive our Rules concerning the timeliness of the filing of a representation petition when this is an appropriate remedy in an improper practice case.[9] Such is the case here because the improper practice interfered with the petitioner's opportunity to file a valid petition.

NOW, THEREFORE, WE ORDER[10] that:

1. An election be held in the unit described by the Director; and

---

8 See CSEA v. Newman, 66 App.Div.2d 38, 12 PERB ¶7001 (3rd Dept. 1979), reversed in part 46 NY2d 1005, 12 PERB ¶7005 (1979).

9 cf. Marjac Poultry, Inc., 136 NLRB 785 (1962); IBEW Local 233 v. NLRB, 499 F.2d 542 (D.C. Cir., 1974).

10 The concern of all the parties is to ascertain whether an election is required and, if so, to hold it as soon as possible. With this in mind, they agreed that the County would give to the Association the access opportunities and benefits directed by the hearing officer while this appeal was being processed. The parties have stipulated that the County did so and the Association has filed a new showing of interest. That showing of interest was found by the Director to be sufficient. Accordingly, parts of the remedy proposed by the hearing officer and the Director are academic and we do not include them in this Order.

2. The County cease and desist from denying to the Association access rights to which it is entitled by law.

DATED: Albany, New York
December 16, 1980

Harold R. Newman

Harold R. Newman, Chairman

David C. Randles

David C. Randles, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of STATE OF NEW YORK, OFFICE OF EMPLOYEE RELATIONS, Respondent, -and- POLICE BENEVOLENT ASSOCIATION OF THE NEW YORK STATE TROOPERS, INC., BUREAU OF CRIMINAL INVESTIGATION NEGOTIATING UNIT, Charging Party.	BOARD DECISION AND ORDER CASE NO. U-4600

JOSEPH M. BRESS, ESQ., (FLORENCE T. FRASER, ESQ., of Counsel), for Respondent

DeANGELIS, KAPLOWITZ, RICE & MURPHY (DONALD D. DeANGELIS, ESQ., of Counsel), for Charging Party

This matter comes to us on the exceptions of the Police Benevolent Association of the New York State Troopers, Inc., Bureau of Criminal Investigation Negotiating Unit (PBA) to a hearing officer's decision dismissing its charge that the State of New York, Office of Employee Relations (State) violated C.S.L §209-a.1(a), (b), (c) and (d). The circumstance underlying the charge is a wage reopener in a contract between the State and PBA. The reopener provides:

> "10.6 The State and the PBA agree that both parties will reopen negotiations regarding increases to base salary immediately upon execution of this Agreement to seek to amend this Agreement effective no earlier than April 1, 1980 regarding increases to base salary." (emphasis supplied)

Following PBA's demand to reopen negotiations, the parties met on March 6, 1980 to exchange positions. They met again, in formal negotiating sessions, on March 10 and March 11, 1980. At these meetings, PBA proposed to negotiate salary-related items including increments, geographical differentials, pension credits, holiday compensation, professional development incentive pay, overtime pay and standby pay. The State, based upon its reading of the contract, agreed to negotiate only the subject of base salary increases. With respect to base salaries, it proposed that there be no increase.

In its charge, PBA asserts that the refusal of the State to negotiate the demands, other than base pay, is a repudiation of the contract. As such, according to PBA, it not only violated the duty to negotiate in good faith, but it also interfered with both individual and union rights.

The hearing officer determined that the facts as alleged did not set forth violations of paragraphs (a), (b) or (c) of § 209-a.1 of the Taylor Law.[1] She also determined that the sole question raised by the specification of the charge alleging a violation of §209-a.1(d) was whether the State was contractually obligated to negotiate the salary-related demands. She ruled that this issue involved a question of contract interpretation which is not within the jurisdiction of this Board. Accordingly, she granted a motion of the State to dismiss the charge.

---

1 The precise words of the hearing officer are that PBA "does not even make an offer of proof of the deliberateness necessary to sustain such violations." This wording occasioned an exception. PBA argues that it is not required to make an offer of proof. This exception is not directed to the merits of the decision and is of no consequence.

The matter now comes to us on the exceptions of PBA. In support of its exceptions, it argues that this Board has jurisdiction over the charge because the contractual obligation of the State to reopen negotiations is merely incidental to its statutory duty to negotiate in good faith. It further argues that, even if the State were justified in refusing to negotiate the salary-related demands, its conduct with respect to the demand for an increase in the base salary was a violation of its duty to negotiate in good faith.[2]

We affirm the findings of fact and conclusions of law of the hearing officer. In Levittown, 13 PERB ¶3014 (1980), we said:

> "Ordinarily, if a subject is dealt with in a collective agreement, both parties, by virtue of that agreement, are foreclosed from further negotiation on that subject for the life of the agreement."

The Levittown decision goes on to hold that a contrary intent will be honored if it is expressed in the parties' agreement.

---

2 PBA makes two other inconsequential exceptions. It states that the issue before the hearing officer was one involving scope of negotiation and, therefore, the hearing officer erred by refusing to process the matter under the special procedures of Rule 204.4. It also states that the hearing officer should not have granted the motion to dismiss the charge because the Rules of this Board do not specify any such procedure.

Rule 204 provides for the expedited processing, within the discretion of this Board, of cases involving "a dispute as to the scope of negotiations under the Act." The charge herein does not raise such a question. Rather, it raises the question whether, by reason of the terms of the parties' contract, some of the demands must be renegotiated during the life of that contract. Thus, it is not within the ambit of Rule 204.4 which, in any event, is discretionary.

Rule 204.7(h) contemplates the making of motions and rulings upon such motions by a hearing officer. A motion to dismiss a charge is one of the motions contemplated by Rule 204.7(h), as indicated by Rule 204.7(l), which limits the time of filing of a motion to dismiss a stale charge.

Thus, during the life of an agreement, the obligation of the parties to negotiate a matter that is dealt with in the agreement derives from the agreement and not from the Taylor Law.

The primary question raised by the charge is whether the State is under a contractual obligation to negotiate matters that would ordinarily be foreclosed from further negotiation during the life of the contract because they are covered by the contract. The contract covers salaries and salary related benefits, but it provides that the parties will "reopen negotiations regarding increases to base salary...." Based upon its interpretation of this clause, PBA is asserting a contractual right to negotiate increments, geographical differentials, pension credits, holiday compensation, professional development incentive pay, overtime pay and standby pay. It has charged that the State's refusal to negotiate these matters is a violation of its duty to negotiate in good faith.

It is not for this Board to interpret the parties' contract to determine whether the parties intended base salary to include the various forms of compensation that are included in PBA's demand.[3] We are limited to considering whether the parties have negotiated in good faith as to matters that have been indisputably reopened for negotiations by the parties' agreement.

As a secondary position, PBA's charge alleges that the State has not negotiated in good faith with respect to a matter

---

3 Section 205.5(d) of the Taylor Law provides: "[T]he board shall not have authority to enforce an agreement between an employer and an employee organization and shall not exercise jurisdiction over an alleged violation of such an agreement that would not otherwise constitute an improper employer or employee organization practice."

that, beyond dispute, is encompassed by the term, base salary. This aspect of the charge is within our jurisdiction. The facts as alleged, however, do not support PBA's charge in this regard.

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

DATED: Albany, New York
December 16, 1980

Harold R. Newman

Harold R. Newman, Chairman

David C. Randles

David C. Randles, Member