12-29-1980

State of New York Public Employment Relations Board Decisions from December 29, 1980

New York State Public Employment Relations Board

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

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of BELLMORE UNION FREE SCHOOL DISTRICT, Respondent, - and - BELLMORE ADMINISTRATIVE COUNCIL, Charging Party.	BOARD DECISION AND ORDER CASE NO. U-4435

COOPER and ENGLANDER (WILLIAM H. ENGLANDER, ESQ., of Counsel), for Respondent

ROBERT SAPERSTEIN, ESQ., for Charging Party

This matter comes to us on the exceptions of the Bellmore Administrative Council (Council) to a hearing officer's decision dismissing that part of its charge which alleged that the Bellmore Union Free School District (District) violated §209-a.1(a), (b) and (d) of the Taylor Law by unilaterally imposing a requirement that the principals represented by the Council attend evening parent-teacher conferences - conferences which had always been held in the daytime during normal school hours.

The facts, as set forth in the hearing officer's decision, show that the principals have always attended, without extra renumeration, evening functions at which teaching staff is present. On these facts, the hearing officer found that the Council failed to establish that the District changed any practice. Treating specifically with the central claim of the Council, i.e., that

attendance at evening parent-teacher conferences increased the hours of work of the principals, the hearing officer found that the principals' hours had always been flexible, depending on the number of evening activities scheduled during the year.

On the basis of his findings, the hearing officer concluded that the District did not refuse to negotiate in good faith in violation of §209-a.1(d). He also concluded that the record contained no evidence that the District's action was taken for the improper purposes to which §209-a.1(a) and (b) are directed.

In its exceptions, the Council argues that the facts show that the District increased the hours of work of the principals without first negotiating, thereby violating §209-a.1(d). The Council further argues that because the District negotiated the subject and reached an agreement with the teachers' union before instituting evening parent-teacher conference hours, but did not do so with it, the District "belittled this bargaining unit by ignoring its duty to negotiate while at the same time acknowledging its duty to negotiate with the teachers' union." The Council urges that this constitutes a violation of §209-a.1(a) and (b).

We sustain the decision of the hearing officer. As the record shows, and the hearing officer found, the existing term and condition of employment for principals with respect to hours of work was that their hours were flexible, varying from year to year, depending on the number of evening activities. Therefore, the District did not, by requiring the principals to attend the evening parent-teacher conferences, change this term and condition of employment.

With respect to the Council's claim that the District violated §209-a.1(a) and (b), the only record evidence is that the District did negotiate and include the subject in an agreement with the teachers' union covering the period July 1, 1979 through June 30, 1982, but did not negotiate the subject with the Council, with which it had an agreement in effect in November 1979, when it acted.[1/] These bare facts cannot support a finding that the District acted for the purpose of interfering with rights protected by §209-a.1(a) of the Act.[2/]

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

DATED: Albany, New York
December 29, 1980

Harold R. Newman

Harold R. Newman, Chairman

David C. Randles

David C. Randles, Member

1/ The record does not show the expiration date of the agreement but does show that negotiations for a successor agreement were not scheduled to commence until May 22, 1980.

2/ The conduct described is not of the type that could violate §209-a.1(b) of the Act. Board of Education, City School District of Albany, 6 PERB ¶3012.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of TOWN OF OYSTER BAY, Respondent, -and- NASSAU CHAPTER, CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., Charging Party.	BOARD DECISION AND ORDER CASE NO. U-4493

JOHN F. BOGART (WALLACE L. FLACK, Esq. and MICHAEL BOYCE, Esq., of Counsel), for Respondent

ROEMER & FEATHERSTONHAUGH (MARJORIE KAROWE, 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 alleged that the Town of Oyster Bay (Town) violated subdivisions (a), (b), (c) and (d) of §209-a.1 of the Taylor Law in that it withdrew benefits that had been enjoyed by Pasquale D'Alessio "as a direct result of D'Alessio's activities on behalf of CSEA." D'Alessio, who is president of CSEA, had been assigned a Town-owned vehicle on a 24-hour-a-day basis. He had also been excused from regular assignments so that he could devote his full attention to the administration of the agreement between the Town and CSEA. These benefits of D'Alessio were withdrawn two days after an election in which the incumbent Town Supervisor was returned to office, but in which D'Alessio had supported the challenger.

The hearing officer determined that the facts alleged in the charge could not establish a violation of subdivisions (a), (b) or (c) of §209-a.1 of the Taylor Law. She noted that an element of each of these violations is that the action complained of must relate to activities of D'Alessio that are protected by the Taylor Law,[1] but that the withdrawal of benefits from him were merely related to his political activities.[2]

The hearing officer also dismissed so much of the charge as alleges a violation of §209-a.1(d).[3] The basis for this part of her decision is that the collectively negotiated agreement

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1 The statute provides:

> "209-a.1. Improper employer practices. It shall be an improper practice for a public employer or its agents deliberately (a) to interfere with, restrain or coerce public employees in the exercise of their rights guaranteed in section two hundred two for the purpose of depriving them of such rights; (b) to dominate or interfere with the formation or administration of any employee organization for the purpose of depriving them of such rights; (c) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any employee organization;..." (emphasis supplied)

2. See Town of Lake Luzerne, 11 PERB ¶3094 (1978) and Lawrence N. Van Pelt, 1 PERB ¶399.91 (1968).

3. CSL §209-a.1.(d) provides:

> "to refuse to negotiate in good faith with the duly recognized or certified representatives of its public employees."

between the Town and CSEA directly addresses the right of D'Alessio, as president of CSEA, to be relieved of all regular duties without any loss of benefits.[4] The hearing officer interpreted this part of the charge as a demand that the collectively negotiated agreement be enforced, and she ruled that this Board cannot do so.[5]

We affirm the hearing officer's decision to the extent that she ruled that this Board cannot preclude the reassignment of duties to D'Alessio because it would require us to enforce the parties' agreement. CSEA contends, however, that the hearing officer did not deal with a part of its charge. Indeed, she did not deal with the allegation that the Town violated its duty to negotiate in good faith in that it withdrew D'Alessio's use of a Town vehicle on a 24-hour basis.

The record shows that D'Alessio was first given the use of a Town vehicle on a 24-hour basis in 1973 when he became a Supervisor I in the Highway Department. He was permitted to use the vehicle for job-connected travel, including commuting to and from work. During the evening, he was permitted to use the vehicle only if called to work by the Town because of some job-related emergency. During the regular workday, he was also permitted to use the vehicle in connection with his administration

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[4] Article 3-1.8 of the contract provides, in pertinent part:

> "The President of the Town of Oyster Bay Unit of the Civil Service Employee's Association shall be permitted to perform his duties on a full-time basis without loss in pay or other benefits."

[5] See CSL §205.5(d) which provides:

> "...the 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. ..."

of the collectively negotiated agreement on behalf of CSEA. The Town vehicle continued to be made available to him when, in 1978, he was promoted to a position of Supervisor II and was assigned to the Department of Parks. When D'Alessio's right to devote his full time to administration of the collectively negotiated agreement on behalf of CSEA was withdrawn, he was also told that he could no longer take the Town vehicle home. Instead, he was permitted to use a Town vehicle during work hours only, and was required to provide his own transportation to and from work. He was also told that he could not use the Town vehicle when traveling in connection with the administration of the collectively negotiated agreement. There is uncontested evidence that this loss of a Town vehicle required D'Alessio to spend $15.00 a week more than he had been spending.

In defense of its action, the Town introduced evidence showing that only 5 of 8 Supervisors II in the Department of Parks are permitted to take Town vehicles home. They further introduced evidence that, over a period of time, the Town reviews the granting of this benefit to particular Supervisors II. Thus, according to the Town, its past practice does not establish a basis for any expectation that D'Alessio had a continuing right to use the Town vehicle for commuting to and from work.

The Town did review the assignment of Town vehicles to Supervisors II in the Department of Parks from time to time and vehicles were reassigned based upon Town needs. A major factor in the reassignment of Town vehicles has been the likelihood of a particular Supervisor being called in for emergency work during evening hours and the need for some Town vehicles to be kept

available at central locations for emergency work. The record indicates, however, that the withdrawal of D'Alessio's vehicle was not related to any application of this past practice. The Town's attempt to justify withdrawal of the vehicle from D'Alessio on the basis of its standards would appear to be pretextual. The vehicle taken from D'Alessio was not reassigned to another Supervisor. Rather, it was left at a central location where two other Town vehicles were already available. The Town attempts to explain its need for this particular vehicle on the basis of its having a special radio. According to the Town, that radio, which was put in the vehicle for D'Alessio's convenience in connection with his contract adminstration work, made it particularly useful for assignment in the event of snow emergencies. However, when asked whether the withdrawal of the vehicle from D'Alessio on November 8 was related to the Town's snow removal needs, D'Alessio's supervisor gave an evasive answer.[6]

On the basis of our reading of the record, we find that the Town withdrew D'Alessio's use of the Town vehicle for commuting to and from work for reasons not related to its past practice of granting and withdrawing such a benefit to other Supervisors II in the Department of Parks. The benefit of having a Town vehicle to commute to and from work is a term and condition of

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[6] The record shows, at page 37:

"Q. But you took away the truck in November, ... Is that the snow season?

A. I have no idea what date it was taken away. I know it was taken away.

Q. But you say you ordered it?

A. But I have no idea what the date was."

employment and a mandatory subject of negotiation.[7] The Town's unilateral alteration of the standards inherent in its past practice, and its action pursuant to its new, undisclosed, standard, is a violation of its duty to negotiate in good faith. Accordingly,

WE ORDER the Town of Oyster Bay:

1. To restore a Town-owned vehicle to D'Alessio for commuting to and from work;
2. To cease and desist from denying a Town-owned vehicle to D'Alessio for commuting to and from work for reasons not related to its past practice of granting and withdrawing such a benefit to other Supervisors II in the Department of Parks;
3. To reimburse D'Alessio $15.00 a week for each week in which he was denied the use of a Town-owned vehicle to commute to and from work; and
4. To post conspicuously a notice in the form attached, at locations normally used for communication with its employees.

Dated, Albany, New York
December 29, 1980

Harold R. Newman, Chairman

David C. Randles, Member

[7] See County of Onondaga, 12 PERB ¶3035 (1979), aff'd Town of Onondaga v. PERB, 77 AD2d 783 (4th Dept., 1980), 13 PERB ¶7011.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify our employees that: the Town of Oyster Bay:

1. Will restore a Town-owned vehicle to Pasquale D'Alessio to be used by him in commuting to and from his home to his place of employment;

2. Will not deny a Town-owned vehicle to D'Alessio for commuting to and from work for reasons not related to its past practice of granting and withdrawing such a benefit to other Supervisors II in the Department of Parks;

3. Will reimburse Pasquale D'Alessio for expenses incurred in commuting to and from his home and his place of employment at the rate of $15.00 a week ($3.00 per day) for each work week or part thereof, during which he was denied the use of a Town-owned vehicle for this purpose.

.....Town of Oyster Bay.....
Employer

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

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

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of	
HARPURSVILLE CENTRAL SCHOOL DISTRICT, Respondent,	BOARD DECISION AND ORDER
-and-	CASE NO. U-4654
HARPURSVILLE TEACHERS ASSOCIATION, Charging Party.	

BALL & McDONOUGH, P.C. (KEVIN F. McDONOUGH, ESQ., of Counsel), for Respondent

WILLIAM FINGER, for Charging Party

This matter comes to us on the exceptions of the Harpursville Central School District (District) and the cross-exceptions of the Harpursville Teachers Association (Association) to a decision of a hearing officer which found that the District had violated its duty to bargain in good faith, but imposed no remedy.

FACTS

On April 11, 1980, the Association filed a charge against the District alleging a violation of §209-a.1(d) of the Civil Service Law (CSL). The charge contained many specifications, including the claim that two members of the school board, who were part of the District's negotiating team, failed to recommend approval or to vote in favor or an agreement concerning a retirement incentive plan.

top of it, the chief negotiator for the District had hand-written "separate from tentative agreement". The District's negotiator had also hand-written above his signature the statement, "This renewal will be recommended to the Harpursville Board of Education by the administration." Attached to the memorandum was a letter of recommendation from the district superintendent urging renewal of the plan.

The Association approved both documents on February 7, 1980. The school board approved the main contract on that day, but delayed action on the retirement incentive plan. On March 18, 1980, the parties signed a final contract for the period July 1, 1979 to July 1, 1982, which included the provisions of the "tentative agreement" but did not include the provisions of the retirement incentive plan. On March 27, the school board considered the retirement incentive plan, voting six to one against its acceptance. Both the members who served on the District's negotiating team voted against the proposal.

The hearing officer concluded that the failure of the two school board members to vote for the Memorandum of Understanding, at what he called a ratification vote, violated the District's duty to negotiate in good faith. However, he determined that the only remedy would have been to order execution of the contract, and since it had already been executed by the Superintendent of the District, no order directing its execution was necessary. He further concluded that the Memorandum constituted a "binding contract" unless legislative approval pursuant to CSL §201.12 was

text, the duty to negotiate in good faith merely forbids negotiators to mislead the other party. It does not prevent negotiators from filing a dissenting report regarding an agreement, or a part of an agreement, which they oppose so long as the other party is not misled. Here, we cannot find that the school board members of the negotiating team misled the Association.

In any event, the hearing officer's decision is based upon the hypothesis that the action by the school board members of the negotiating team constituted executive rather than legislative action.[2] He stated that the school board members of the negotiating team would be obligated to support an agreement only in a ratification vote, but not in a vote on legislative approval. But the record is not clear as to whether the submission of the Memorandum of Understanding to the school board was for the purpose of ratification or for the purpose of legislative approval. We do not conclude that it was a ratification vote.[3] As the record does not establish that the school board members of the negotiating team misled the Association or that the conduct of those members complained about constituted executive, rather than legis-

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[2] See Board of Trustees of the Ulster County Community College and the Ulster County Legislature, 4 PERB ¶3088 (1971).

[3] Even if there were a ratification vote and the board members' conduct were, therefore, improper, we could not direct the District to implement the Memorandum of Understanding. Section 201.12 governs the approval of the Memorandum and, as the hearing officer stated, the matter lies outside our jurisdiction.

The parties entered negotiations for a successor agreement to one expiring in June 1979. The initial proposal presented by the Association consisted of modifications of the then current agreement (hereinafter, main contract) including continuation of a retirement incentive plan which had been negotiated in midterm of the main contract. The record discloses that the District made clear that the continuation of the retirement incentive plan would have to be considered as a separate matter to be embodied in a separate document, and that most of the negotiating sessions dealt with the modification of the main contract. The Association was advised of the concern of the District's negotiating team that inclusion of the retirement incentive plan in the same document as the modification of the main contract would jeopardize its acceptance by the school board, and it agreed to the separation. The record also discloses that the members of the school board who were part of the District's negotiating team did not participate in any negotiations concerning the retirement incentive plan.

On February 5, 1980, the chief negotiators for the parties signed two documents. The main contract was labeled a "tentative agreement" for 1979-82 containing the legend: "subject to the approval by the Association and the Board of Education". The record does not indicate whether the "approval" of the District was a ratification or the statutory approval required by §§201.12 and 204-a.1 of the Taylor Law. The hearing officer notes that the parties used the terms "ratification" and "approval" imprecisely and interchangeably. The second document was labeled a "Memorandum of Understanding", and concerned the retirement incentive plan for the term January 1, 1980 through June 30, 1982. At the

required. Whether such approval is required, the conduct of the local legislature in voting such approval was, according to the hearing officer, beyond the jurisdiction of this Board.

The District filed exceptions to the hearing officer's decision alleging, in substance, that the decision was not supported by substantial evidence and the hearing officer had committed error in his conclusions of law. The Association filed cross-exceptions in which it requested that the District be ordered to implement the Memorandum of Understanding. We deem that request to be an exception to the hearing officer's remedy recommendation.

DISCUSSION

The hearing officer decided that the school board members of the negotiating team were obligated to recommend approval and to vote in favor or the Memorandum of Understanding, and their failure to do so constitutes an improper practice.[1] We do not agree with the hearing officer that every member of a negotiating team is obligated to support every part of an agreement. In this con-

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1 Relying upon Union Springs Central School District Teachers Association, 6 PERB ¶3074 (1973), the hearing officer wrote:

> "However, even assuming that it was told directly that [the school board members of the negotiating team] would vote against the plan - which it was not - that does not excuse their actions, which were clearly in dereliction of their responsibilities under the Act. As voluntary members of the District's negotiating team, they were bound to speak and act only in support of the agreement signed by the chief negotiator regardless of their personal feelings and whether or not they personally participated in any negotiations on this subject."

lative action, we do not sustain the finding of a violation.[4]

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

DATED: Albany, New York
December 29, 1980

Harold R. Newman, Chairman

David C. Randles, Member

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4 We do not reach the question here whether legislative action that is ultra vires the authority of the local legislative body might constitute an improper practice. Cf. Jefferson County Board of Supervisors, 6 PERB ¶3031 (1973), rev. on other grounds 44 AD2d 893 (1974), affd. 36 NY2d 534 (1975).