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State of New York Public Employment Relations Board Decisions from September 17, 1981

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from September 17, 1981

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

#2A-9/17/81

NISKAYUNA POLICE BENEVOLENT
ASSOCIATION, INC.,

BOARD DECISION AND ORDER

Respondent,

CASE NO. U-5403

-and-

TOWN OF NISKAYUNA,

Charging Party.

MARTIN CIRINCIONE, ESQ., for Respondent

PAUL L. RYAN, ESQ., for Charging Party

This matter comes to us on the exceptions of the Town of Niskayuna (Town) to a hearing officer's decision dismissing its charge that the Niskayuna Police Benevolent Association, Inc. (PBA) included a nonmandatory subject of negotiation in its petition for interest arbitration. Essentially, the demand would grant unit employees the right to bid for tour of duty assignments on the basis of seniority and the Town complained that the demand would interfere with its right to deploy unit employees. The hearing officer permitted PBA to amend its demand at the pre-hearing conference on the improper practice charge. He then determined that the demand was a mandatory subject of negotiation both in its original form and as amended.^{1/} In its exceptions, the Town argues that:

1. The demand as originally submitted to interest arbitration interferes with the Town's responsibility to deploy its policemen and is, therefore, not a mandatory subject of negotiation.

^{1/} The demand is set forth in the Appendix to this decision. The language added by the amendment is underscored.

2. The hearing officer erred in that he permitted PBA to amend the demand after it was submitted to arbitration.
3. Even as amended, the demand is a nonmandatory subject of negotiation.

We affirm the decision of the hearing officer. The demand as originally worded is reasonably understood to have been for seniority in bidding for assignments. It did not interfere with the Town's right to determine the number of unit employees who should be assigned to each tour of duty. PBA did not, by its amendment of the wording of the demand, change its substance; it merely gave emphasis to the Town's right to determine the number of employees who would be assigned to each tour of duty.^{2/} The hearing officer committed no error in permitting PBA to clarify its demand in this manner.

We also agree with the hearing officer that the demand, both as originally worded and as amended, is a mandatory subject of negotiation. The Town argues that the demand would interfere with its right to deploy unit employees because it would limit its ability to assign employees on the basis of their compatibility or incompatibility. A similar argument was made by the employer in City of White Plains, 9 PERB ¶3007. Rejecting this proposition, this Board stated:


"We are not unsympathetic to this argument of the City, but we find that it goes to the merits of the proposal, rather than to its negotiability. Seniority clauses in contracts always inhibit the flexibility of employers, but they do involve terms and conditions of employment. It


^{2/} We have permitted the amendment of a demand after the filing of an improper practice charge in Town of Amherst, 12 PERB ¶3071 (1979).

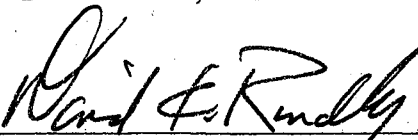
may be that there is, on the merits, a particularly persuasive case for restricting the use of seniority in police contracts. Whether or not this is so should be resolved by the parties during the negotiations process." (at 3009)

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

DATED: New York, New York
September 16, 1981


Harold R. Newman, Chairman


Ida Klaus, Member


David C. Randles, Member

APPENDIX

5. Uniform Police Officer (excluding Detectives & Probationary/Temporary Police Officers) shall have the right of choosing permanent tours of duty within rank, by order of seniority as outlined in Article XIV of this agreement, and with the explicit understanding that it is hereby recognized that the Town of Niskayuna has the exclusive right, whenever it may deem it necessary to change the work schedule in order to determine the number of police officers it must have on duty at any time or to replace absent police officers in order to maintain the desired complement to provide public service to the Town.

a. The Chief of Police shall be responsible to prepare and post the Department work schedule and/or any revised work schedule for uniform police officers in a manner that he deems appropriate to provide public service to the community. These work schedules shall include manning positions (tours of duty) with scheduled days off and days worked for each manning position (tour of duty).

b. The Department work schedule for uniformed police officers shall become effective on the 1st day of the calendar year and remain in effect until the last day of the calendar year or until such time during that period that the Chief of Police deems it necessary to change the work schedule, whichever occurs first, so as to alter the number of police officers that would be on duty at any time or to replace absent police officers in order to maintain the desired complement to provide public service to the community in a manner that he deems appropriate.

c. After the Department work schedule or any revised work schedule thereafter is prepared and posted by the Chief of Police, each uniformed Police Officer (excluding Detectives and Probationary/Temporary Police Officers) shall then examine said schedule and sign their names, within rank, by order of seniority to the manning position (tours of duty) of their choice.

d. In cases of emergency conditions as defined by this agreement, the Chief of Police may suspend the work schedule for the duration of the emergency and assign police officers at his discretion to any tour of duty that he deems appropriate to maintain the desired complement to provide public service to the community during the emergency.

e. Any police officer whose status is temporary or probationary shall not be covered by the seniority mandates of this section and the Chief of Police may assign this police officer to any manning position (tour of duty) that he deems appropriate. However, upon attaining permanent status the police officer shall then fall under the mandates of this section.

f. Whenever a manning position (tour of duty) becomes vacant for a temporary duration due to uniform police officers attending in-service training, schools, seminars or being ill or injured for a period of thirty (30) days or less, or who are on authorized vacations, compensatory days off or personal days off, the Chief of Police whichever he deems appropriate may:

(1) revise the work schedule as outlined in Section 5b above, or

(2) leave the manning position (tour of duty) vacant until the police officer who vacated it returns, or

(3) without revising the work schedule, take from the other tours of duty that police officer within rank with the least amount of seniority and assign that police officer to fill the temporary vacated manning position (tour of duty) until such time as the police officer who vacated the manning position returns, or

(4) utilize the overtime procedures as outlined in Article VI, paragraph 9 of this agreement.

g. The purpose of each of these subparagraphs is not to limit or restrict in any way the power or the freedom of the Town or chief, but to provide a number of alternatives for utilization in maintaining the desired complement of officers in order to provide public service to the community.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

_____ : #2B-9/17/81
In the Matter of :
STATE OF NEW YORK (STATE UNIVERSITY : BOARD DECISION
OF NEW YORK), : AND ORDER
Respondent, :
-and- : Case No. U-4743
UNITED UNIVERSITY PROFESSIONS, INC., :
Charging Party. :

JOSEPH M. BRESS, ESQ. (CAROL M. HOFFMAN,
ESQ., of Counsel), for Respondent

FREDERICK C. WOOLEY, for Charging Party

On June 2, 1980, the United University Professions, Inc. (UUP) filed a charge alleging that the State University of New York (State) unilaterally increased the maximum "student contact hour"^{1/} teaching load of the employees of the English department of Morrisville College from twelve to fifteen student contact hours each week contrary to established practice, in violation of Section 209-a.1(d) of the Taylor Law. The hearing officer determined that no past practice existed and he dismissed the charge. The matter now comes to us on the exceptions of UUP.

1/ Student contact hours were defined in this proceeding as time spent by an instructor in actual classroom teaching.

FACTS

Paul Mockovak, the charging party's principal witness, had been employed at Morrisville for twenty-eight years, ten of which were as chairperson of the English Department. He testified that the English professors regularly had fifteen student contact hours per semester until the 1966-67 school year. At that time, according to Mockovak, the instructors reached an agreement with college President Whipple and Vice-President Stewart reducing student contact hours in the English Department to twelve hours beginning in the fall of 1967.^{2/} He further testified that, with the exception of two circumstances, the twelve student contact hour limit was then maintained for the following thirteen years. Some English instructors had fewer than twelve student contact hours because they had other responsibilities, while others taught more than twelve hours on a voluntary basis.^{3/}

Dr. Butcher, the State's principal witness, is the current president of Morrisville, where he has been employed since September 1, 1978. He testified that he had been able to find no written documentation of the alleged agreement between the English faculty and Whipple in 1967. He further testified that, while assignments of hours in excess of twelve had been made to volunteers, he believed that the administration could have made such assignments to non-volunteers. He acknowledged, however, that Dr. Mockovak

^{2/} Similar testimony was given by Professor Doris Knudsen.

^{3/} According to Mockovak, this happened only three times.

had been recommended for extra compensation when he "had taken on the responsibility for extra teaching."

The State also relied on the preface to a negotiating proposal submitted by UUP which apparently admitted to variations in contact hours. The proposal stated: ^{4/}

6.3 Employee Assignments

- A. Teaching assignments and workload historically have allowed the greatest flexibility in permitting the individual to fulfill his professional responsibilities. Since considerable variations in the type of instruction required and the demands of that instruction, any system of teaching assignments shall reflect those variations in the number of preparations, preparation time, credit hours, contact hours, student load, student advisement, research and professional conferences as well as any other instructional requirement.

DISCUSSION

Past Practice

Having reviewed the record, we find merit in UUP's position that twelve student contact hours was the maximum number that the State could assign to English teachers at Morrisville. This conclusion flows from Dr. Mockovak's testimony concerning the 1967 understanding and his plausible explanation of the few exceptions, coupled with the substantial and longstanding adherence to the twelve contact hour pattern. Dr. Butcher's testimony cannot persuasively serve to refute that of Dr. Mockovak. Dr. Butcher was not privy to discussions held thirteen years earlier, and he was not able to refute UUP's position that increases in student contact

^{4/} This proposal was submitted by UUP some years ago in its contract negotiations for its state-wide bargaining unit.

hours were assumed only on a voluntary basis. Furthermore, his statement regarding discretionary pay for "extra work" performed by Dr. Mockovak is a tacit admission that twelve hours was the usual maximum assignment.

The State's reliance on the negotiating proposal is not persuasive. The proposal made by UUP is not clearly inconsistent with the evidence it produced that a prior agreement and a past practice did exist.

Mandatory Subject of Negotiation

Having found a prior agreement and a past practice of twelve student contact hours in the English Department, this Board must now determine whether student contact hours, at the university level, is a mandatory subject of negotiation. In the elementary and secondary school setting, we have found that hours of student instruction is not a mandatory subject of negotiation but that the working time of teachers is.^{5/} The number of a teacher's actual teaching periods, however, is a mandatory subject because it determines both the extent of his working time and his free time during any day of the week.

The State argues that the precedents involving elementary and secondary schools are not applicable to colleges. It contends that the duties of college faculty members include the performance of a variety of services to the college. Thus, it says, an increase in student contact hours does not, per se, represent an increase in the teacher's total workload because other services performed by the teachers may be decreased or eliminated.

^{5/} Cohoes City School District, 12 PERB ¶3113 (1979); Yorktown Central School District, 7 PERB ¶3030 (1974):

This may be true of professors at university centers which place a great emphasis upon activities other than classroom teaching. The record indicates, however, that at Morrisville, student contact time, in the sense of actual time spent instructing students, is the major part of the workload of the English Department faculty, with all other responsibilities being merely ancillary in nature. Thus, the evidence shows that the non-teaching assignments of faculty at Morrisville, as specified by the State, consist of participation on committees, student advising, job placement and community service. They do not include research or publication. Relevant to the narrow question now before us is the Board's determination in Hudson Valley Community College that a negotiating proposal limiting the teaching assignments of a community college faculty to "18 contact hours" is a mandatory subject of negotiation.^{6/} Citing Yorktown, involving elementary and secondary schools, we held that the demand was essentially one of workload and, as such, a mandatory subject of negotiation.

We hold that the student contact hours of the faculty of the English Department at Morrisville is a mandatory subject of negotiation and we find that the State unilaterally changed them. By doing so, it violated §209-a.1(d) of the Taylor Law.

NOW, THEREFORE, WE ORDER the State University of New York to:

1. Cease and desist from unilaterally changing the terms and conditions of employment of members of

^{6/} Hudson Valley Community College, 12 PERB ¶3030 (1979)

the English Department at the State University
College at Morrisville; and

2. Restore the student contact hour teaching load
of the members of the English Department at
Morrisville to the twelve hour maximum.

Dated, New York, New York
September 17, 1981


Harold R. Newman, Chairman


Ida Klaus, Member


David C. Randles, Member