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State of New York Public Employment Relations Board Decisions from December 4, 1981

New York State Public Employment Relations Board

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In the Matter of
CITY OF ONEIDA,
Respondent,
-and-

ONEIDA POLICE BENEVOLENT ASSOCIATION,
Charging Party.

FREDERICK N. RANN, ESQ., for Respondent
JAMES E. BARNES, II, ESQ., for Charging Party

The matter comes to the Board on the exceptions of the City of Oneida to a hearing officer's decision finding it in violation of §209-a.1(d) of the Taylor Law in that it unilaterally changed the conditions under which employees represented by the Oneida PBA could exchange their assigned shifts.

Oneida has a small police department of 21 officers, all of whom are represented by PBA. There are 14 patrolmen and 7 supervisors (4 sergeants, 2 lieutenants, and 1 captain). Until January 26, 1981, unit employees were permitted to trade their assigned shifts with one another regardless of rank. On occasion this left shifts without a supervisor. To overcome this, the City unilaterally restricted the right of unit employees to trade shifts but only to the extent that the shift-for-shift trades would leave a tour without a supervisor. Thus, where only a single supervisor was assigned to a tour, he could not exchange shifts with a patrolman.
The hearing officer determined that this was a violation of the City's duty to negotiate in good faith. In reaching this determination, he concluded that the City had the right to determine the supervisory complement of each tour, but balanced this management prerogative against the employees' right to negotiate concerning the trading of shifts. He concluded that there must be some accommodation between these competing interests in that there may be ways other than the curtailment of the employees' opportunity to trade shifts which would satisfy the City's right to have a supervisor on each tour. According to the hearing officer, the Taylor Law intends the parties to consider such alternatives in collective negotiations. This conclusion is based upon this Board's decisions in White Plains, 5 PERB ¶3008 (1972) and Buffalo, 14 PERB ¶3053 (1981). In these cases, we held that the employers were free to decide the number of employees they required to work at any given time, but that they violated their duty to negotiate in good faith when they unilaterally established schedules to accomplish this purpose because alternative schedules could have been devised through negotiations to satisfy the employers' manpower needs.

The hearing officer ruled that by acting unilaterally, the City precluded the parties from working together to find an alternative means of assuring the presence of a supervisor on each tour. This, he concluded, was a violation of its duty to negotiate in good faith.
We reject the hearing officer's conclusion, finding that it misapplies White Plains and Buffalo. In the instant situation, the employer did not impose any schedule unilaterally. It merely prohibited employees from making schedule switches among themselves which would upset its manpower needs. All other schedule switches were permitted. By prohibiting shift switches that would leave tours without supervision, the City did no more than to exercise its management prerogative. The City's right to require the presence of a supervisor on all shifts supercedes the employee's right to continue to switch shifts when a switch would leave a shift without a supervisor.¹/

NOW, THEREFORE, WE REVERSE the hearing officer's decision, and
WE ORDER that the charge herein be, and it hereby is, DISMISSED.

DATED: December 3, 1981
Albany, New York

Harold R. Newman, Chairman
Ida Klaus, Member
David C. Randles, Member

¹/ See Amherst, 12 PERB 13071 (1979).
In the Matter of

TEAMSTERS LOCAL 317, an affiliate of the
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF
AMERICA,

Respondent,

upon the Charge of Violation of Section 210.1
of the Civil Service Law.

On April 13, 1981, Martin L. Barr, Counsel to this Board, filed a charge alleging that Teamsters Local 317, an affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Local 317), had violated Civil Service Law §210.1 in that it caused, instigated, encouraged, condoned and engaged in a strike against the Onondaga County Water Authority (Authority) on February 20, 21, and 22, 1981.

The charge further alleges that on Friday, February 20, 56 of the 69 employees in the negotiating unit represented by Local 317 who were scheduled to work, absented themselves. On Saturday, February 21, all three scheduled employees were absent. On Sunday, February 22, two of the three scheduled employees were absent.

The matter then came to this Board on the charge unanswered when Local 317 withdrew its answer upon its understanding that the charging-party would recommend an agreed-upon penalty. The charging party recommended that the dues and agency shop fee deduction privileges of Local 317 be suspended for an indefinite
period of time, with permission to be granted to Local 317 to apply to this Board for the restoration of those privileges one year after the date of this Board's decision, provided that certain conditions were met. We determined that the recommended penalty was consistent with the policies of the Taylor Law and we imposed it by our order issued on July 23, 1981.

Local 317 thereafter moved this Board to withdraw the penalty on the ground that it was not one to which it had agreed. It asserted that it withdrew its answer upon the condition that its dues deduction privileges would be suspended for the period of time specified in the order, but that it did not agree to any suspension of its agency shop fee deductions.

Upon review of the correspondence between Local 317 and the charging party, we concluded that there may have been a misunderstanding between them regarding the penalty that would be recommended by the charging party. Accordingly, by decision issued on September 10, 1981, we withdrew our decision of July 23, 1981, ordered reinstatement of the answer of Local 317 and remanded the matter to the hearing officer for further proceedings.

By letter dated October 30, 1981, Local 317 withdrew its answer upon the understanding that the charging party would recommend, and this Board would impose, the same penalty imposed by our order dated July 23, 1981. The charging party has recommended this penalty.
On the basis of the unanswered charge, we find that Local 317 violated CSL §210.1 in that it engaged in a strike as charged.

This is the second strike by Local 317, the first being a three-day one in 1979 for which a five month penalty was imposed. We therefore determine that the recommended penalty is a reasonable one and furthers the policies of the Act:

WE ORDER that the dues deduction and agency shop fee privileges, if any, of Teamster Local 317, an affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, be suspended indefinitely, commencing on the first practicable date, provided that it may apply to this Board after the expiration of one year from the date of this order for the full restoration of such privileges. Such application shall be on notice to all interested parties and supported by proof of good faith compliance with subdivision 1 of CSL §210 since the violation herein found, such proof to include, for example, the successful negotiation, without a violation of said subdivision, of a contract covering the employees in the unit affected by the violation and accompanied by an affirmation that it
no longer asserts the right to strike against any
government as required by the provisions of
CSL §210.3(g).

DATED: December 3, 1981
Albany, New York

Harold R. Newman, Chairman

Ida Klaus, Member

David C. Randies, Member
STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of
CITY OF WHITE PLAINS,

Respondent,

-and-

PROFESSIONAL FIRE FIGHTERS ASSOCIATION OF WHITE PLAINS, NEW YORK, INC., LOCAL 274, IAFF, AFL-CIO, CLC and WILLIAM C. HARMON,

Charging Parties.

RAINS & POCREBIN, ESOS., (PAUL J. SCHREIBER, of Counsel), for Respondent

DUNCAN MACRAE, PRESIDENT, for Charging Parties

This matter comes to us on the exceptions of the Professional Fire Fighters Association of White Plains, N.Y., Inc.; Local 274, I.A.F.F., AFL-CIO, CLC (Association) and William C. Harmon, charging parties herein, to a hearing officer's decision dismissing their charge that the City of White Plains (City) denied a promotion to Harmon because he filed a grievance, thus violating §209-a.1(a), (b) and (c) of the Taylor Law.

FACTS

Harmon has been employed by the City as a firefighter since October 1968 and has generally enjoyed very high performance evaluations. He took and passed the promotional examination in 1975, but was not reachable for promotion until August 1977. That was six months after the grievance referred to in
the charge arose. He was passed over at that time and again passed over in September 1977 and January 1978. Thereafter, in February 1980 he was passed over on two additional occasions. The charge herein, which was filed shortly after the February 1980 promotions, complains that Harmon was passed over at that time because he had filed a grievance in February 1977. Harmon was then Sergeant-at-Arms of the Association. The alleged grievance arose out of headquarters' denial of Harmon's call requesting a snow plow to clear parking spaces on the street on February 4, 1977. Lt. Quinn, a unit employee and a friend of Harmon's, answered the call and told him the plow was not available because it was being used for other purposes. This led to a dispute between Quinn and Harmon who said he was going to file a grievance. No formal grievance was ever filed, but the parties refer to Harmon's complaint as a grievance. The complaint angered Quinn, as it did Deputy Chief Daman, also a unit employee and a friend of Harmon. Both warned Harmon that he was making "trouble" for himself by filing a grievance. When, on February 8, Harmon told Quinn and Daman that he had not intended his grievance to be a threat and that he would not pursue it, Daman responded that the "damage" had already been done and that Harmon's chances for promotion had already been hurt.

Harmon spoke about "the grievance" to the Association President, Koop, who told him the availability of the snow plow was going to be raised at an upcoming labor-management meeting. It was raised at a labor-management meeting held on February 25,
1977 and it appears to have been resolved satisfactorily. The discussion did not deal with the problem in terms of Harmon's "grievance" as the Association had expressed dissatisfaction with the priorities for the use of the snow plow even before February 4, 1977.

Shortly after he said he was going to file a grievance, Harmon was involuntarily transferred from Station 1 to Station 7. Harmon testified that he viewed Station 7 as a "punishment house". The record shows that some time before "the grievance" incident the officer in charge of Station 7, an active Association member, had asked for Harmon's transfer, but that Harmon's objections to the transfer had prevailed before "the grievance" incident.

On several occasions Harmon spoke to Fire Chief McMahon about the pass-overs. At first McMahon was angry with Harmon about the snow plow request because he misunderstood why Harmon had asked for it. He also told Harmon that he was passed over because he had made "bad decisions".

Firefighter promotions are made by Commissioner of Public Safety Dolce upon the recommendation of Deputy Commissioner of Public Safety Motto, who consults with Fire Chief McMahon. Motto interviewed Harmon for promotion on two occasions. He testified that Harmon appeared to be giving the answers to questions that he thought would please him rather than expressing his own

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1/ Koop testified that he mentioned Harmon's name in passing. Both Commissioner Dolce and Chief McMahon, who attended the meeting on behalf of management, testified that they had no recollection of any mention of Harmon's name.

2/ He had thought that Harmon had disobeyed an order to shovel the station's walks and ramps.
judgment. This persuaded him that Harmon lacked the leadership qualities required of a lieutenant even though he was a good firefighter. He further testified that he knew nothing of "the grievance" referred to in the charge.\(^3\) Both McMahon and Motto testified that McMahon's sole role in Motto's consideration of Harmon for promotion was a favorable response to any inquiry as to whether Harmon was a good firefighter. None of this testimony was contradicted and the hearing officer credited it.

The record of promotions and pass-overs in the City shows that other firefighters have been passed over and that officers of the Association and other union activists have been among those promoted.

**DISCUSSION**

On these facts, the hearing officer concluded that there was no causal connection between "the grievance" filed by Harmon and Motto's failure to recommend him for promotion in 1980.

In support of their exceptions, the charging parties argue that the hearing officer erred in concluding that Motto's decision not to recommend Harmon for promotion was uninfluenced by "the grievance". According to charging parties, the importance of the snow plow "grievance" to the City is reflected by the anger of Quinn and Daman, the transfer of Harmon to Station 7, and Chief McMahon's reference to Harmon's "bad decisions", which they interpret as meaning his statement that he was going to bring a grievance. Thus, according to charging parties, Motto

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\(^3\)Motto had not attended the labor-management meeting of February 25, 1977.
must have known about "the grievance" and his decision must have been influenced by it.

The exceptions raise questions as to the weight of the evidence. Daman and Quinn were in the same negotiating unit as Harmon and their anger cannot be attributed to the City.\(^4\)

Nevertheless, that anger may be indicative of the notoriety of the incident. If so, it may raise a question as to the reliability of Motto's testimony that he was unaware of it. Other known facts also suggest that "the grievance" was of substantial concern within the Fire Department and might, therefore, have caught the attention of Motto. Harmon's transfer in 1977 to Station 7 might have been benign, but it raises a suspicion of antagonism towards him. Finally, McMahon's reference to "bad decisions" could refer to "the grievance", but it is far from clear that it does. While some of the facts might lead us to suspect that Harmon was passed over for promotion because of his "grievance", other facts indicate otherwise. Harmon never did file a formal grievance and the underlying problem, which antedates "the grievance" incident, appears to have been resolved satisfactorily. Moreover, other officers and activists of the Association have been promoted.

The suspicions raised by the record cannot overcome Motto's critical testimony that he did not know of "the grievance" when he made the decision not to recommend Harmon for promotion. The hearing officer who heard this testimony believed Motto. There

is no basis for reversing her conclusion.\footnote{Charging parties' exceptions complain about some aspects of the hearing officer's conduct of the hearing. We find no prejudicial error by the hearing officer. Nothing done by the hearing officer interfered with the charging parties' opportunity to prove that Motto's action was influenced by the grievance.}

NOW, THEREFORE, WE AFFIRM the findings of fact and conclusions of law of the hearing officer and we determine that she committed no prejudicial error in the conduct of the hearing and we order that the charge herein be, and it hereby is, dismissed.

DATED: Albany, New York
December 4, 1981

Harold R. Newman, Chairman
Ida Klaus, Member
David C. Randels, Member
This matter comes to us on the exceptions of the Buffalo Police Benevolent Association (PBA) to a hearing officer's decision dismissing its charge that the City of Buffalo (City) improperly transferred two of its officers to different job assignments. Lydon, the PBA Vice President, and Pascale, a member of the PBA's Board of Directors, were involuntarily transferred from the Radar and Point Control Units of the Traffic Division respectively to precincts in October 1980. In its charge, PBA alleges that they were transferred in retaliation for preparing statistical data which PBA used to defend its conduct in a court action in which the City charged PBA with a concerted work slowdown. The hearing officer concluded that the evidence did not support the charge.
Point Control Unit was cut from 20 to 6, but thereafter one of the police officers, Williams, was returned to the unit. The record does not show the extent of the force reduction in the Radar Unit, but there too one of the officers, Dux, was returned after the cut.

Cunningham, the Police Commissioner, explained why he returned Williams and Dux instead of Pascale and Lydon. Cunningham testified that when a female officer who had been in the Point Control Unit was granted a leave of absence, he returned Williams, also a female, because he wanted a woman in the unit. He indicated, however, that there was no reason why a female employee was needed in the unit. He testified further that it was a random choice which led to the return of Dux rather than Lydon. In this connection, he denied considering the fact that Lydon was a PBA officer while Dux was not. He also testified that he did not consider their relative seniority or their comparative effectiveness as policemen.

PBA contends that the prior Police Commissioner had made an oral commitment not to transfer union officers involuntarily. Cunningham testified that he did not know whether his predecessor had actually made such a commitment, but that he was aware that there had been discussion about the alleged commitment. He asserted that he had not agreed to follow that commitment; that he could not do so because there were so many PBA officers that such a commitment would interfere with his ability to deploy his staff. Nevertheless, it is undisputed that some years earlier he
FACTS

A consultant recommended to the Police Commissioner that the Traffic Division be eliminated and its complement transferred to the precincts. The record does not show when this recommendation was first made, but it was known as early as 1978. The Police Commissioner rejected the recommendation, but he considered an alternative recommendation to reduce the size of the Traffic Division. Such action was taken on October 24, 1980.

In September 1980, an interest arbitration award had been issued to resolve a negotiation dispute between PBA and the City. The award displeased PBA. According to the City, PBA reacted by engaging in a slowdown. The City sought to enjoin the alleged slowdown. At the trial, the Police Commissioner tried to prove that there was a slowdown in the Traffic Division by testifying as to its productivity in both September 1979 and September 1980. Throughout the trial, which lasted six days, Lydon and Pascale sat in the courtroom. They also prepared materials for PBA's attorney which were used to contradict the Commissioner. The record does not show where in the courtroom they sat or whether the materials they prepared were given to the PBA attorney in the courtroom or at some other public place. Neither does it show whether other PBA officers or unit employees attended the court proceedings.

Shortly after the conclusion of the court proceeding, the Commissioner cut the size of the Traffic Division. Lydon and Pascale were among the first group of about 11 police officers to be transferred to precincts. Other transfers followed.
had transferred Pascale involuntarily and then reversed the transfer when told of his predecessor's oral commitment. The Commissioner offered no explanation for his decision to reverse the earlier transfer of Pascale which might contradict PBA's allegation that he returned Pascale out of respect for the practice introduced by the past Commissioner.

DISCUSSION

The record evidence raises suspicion as to the propriety of Commissioner Cunningham's decision to transfer Lydon and Pascale from the Traffic Division to precincts. The record as a whole, however, does not support the charge because it lacks convincing evidence relating the transfers to Lydon's and Pascale's preparation of statistical data for PBA's lawsuit. This is because there is no reasonable basis in the record for concluding that Cunningham knew that Lydon and Pascale were providing the information used to contradict his testimony in the lawsuit. Hence, PBA has failed to prove that the transfers were unlawfully motivated.

The timing of the transfers, one month after the trial, rather than shortly after the recommendation of the consultant, might indicate that the lawsuit was a factor Cunningham considered in deciding to make the transfers. That decision might be subject to question in view of the fact that he had cancelled a transfer of Pascale some years before when told that his predecessor had made an oral commitment not to transfer union officers involuntarily and the further fact that Cunningham gave no other reason for the recall of Pascale at that time. His explanation
that he did not follow the past practice in the case of Lydon and Pascale because there were too many PBA officers for him to be able to deploy his staff effectively if he were not free to transfer union officers is not convincing in view of his return to the Division of Dux and Williams rather than Lydon and Pascale.

Notwithstanding these questionable circumstances, we cannot conclude that Cunningham transferred Lydon and Pascale in retaliation for their preparation of statistical data which were used to contradict his testimony in the lawsuit. The basic fact is that there is no substantial evidence to show that Cunningham knew of the role of Lydon or Pascale in preparation of the statistical data used in the lawsuit.

Accordingly, we dismiss the exceptions, and

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

DISMISSED.

DATED: December 3, 1981
Albany, New York

Harold R. Newman, Chairman

Ida Klaus, Member

David C. Randles, Member
In the Matter of
WEST HEMPSTEAD UNION FREE SCHOOL DISTRICT,
Respondent,
-and-
WEST HEMPSTEAD AIDES ASSOCIATION,
Charging Party.

HENRY A. WEINSTEIN, ESQ., for Respondent
KAPLOWITZ & GALINSON, ESQS. (BARBARA J.
JOHNSON, ESQ., of Counsel), for Charging
Party

This matter comes to us on the exceptions of the West Hempstead Aides Association (Association) to a hearing officer's decision dismissing its charge that the West Hempstead Union Free School District (District) acted improperly when, effective July 1, 1979, it transferred the duties and functions involved in the supervision of the student cafeteria from teacher aides to teachers. 1/ Teacher aides, who are represented by the Association, had performed these duties and functions since 1967. In 1979, however, the District determined that the teacher aides were not performing this work effectively and that the task was beyond their capability.

In the preceding several years there had been an increasing number of incidents in the student cafeteria involving the

1/ In a prior decision, 14 PERB ¶3024 (March 31, 1981), we remanded this matter to the hearing officer to obtain additional evidence...
throwing of food, individual fights and gang fights, incursions by nonstudents, thefts, vandalism and fires started in trash baskets. Concluding that teachers would be better able to maintain discipline in the student cafeteria, the District unilaterally transferred to teachers the work of the aides. The immediate effect of the transfer was that some teacher aides lost their jobs with the District. Thereupon, the Association brought the charge herein contesting the District's conduct on the ground that the transfer of the work of the aides is a mandatory subject of negotiation and that the District had not been free to take that action unilaterally. The Association did not seek to negotiate the impact of the District's action.

We have found the transfer of work performed by unit employees to nonunit employees is a mandatory subject of negotiation which a public employer may not effect unilaterally. Northport Union Free School District, 9 PERB ¶3003 (1976), aff'd 54 App. Div. 2d 935 (2d Dept., 1976), 9 PERB ¶7021. This is because such a transfer may lead to the loss of jobs by unit employees and thus affects the terms and conditions of their employment.

2/ The Northport School District was found to have violated its duty to negotiate in good faith when it assigned an administrator to do work that had been performed by teachers. See also East Ramapo Central School District, 10 PERB ¶3064 (1977).
We have also found that a public employer is under no duty to negotiate the nature or extent of the services that it chooses to provide to its constituency. New Rochelle City School District, 4 PERB 113060 (1971). Where, as here, the decision of a public employer to transfer work from unit employees is related to its decision to alter the level of service it provides to its constituency, we must apply a balancing test which considers the interests of both the unit employees and the public employer.

On the facts before us, we recognize the presence of significant competing interests. There has been an actual loss of jobs by unit employees. This has also affected the Association's status as bargaining representative. On the other hand, the District must provide a sanitary and safe environment in the cafeteria for the benefit of the students and it must protect its own property. The deterioration of conditions confronted the District with a compelling need to upgrade the quality of its supervision of the cafeteria. The District's belief that teachers may be better able to supervise the cafeteria than teacher aides is a reasonable one. Within the school, teachers are generally recognized as exercising greater authority over students than teacher aides. For these reasons, we conclude that, under the circumstances herein, the District's interest in transferring the supervision of the student cafeteria from teacher aides to teachers was undertaken in the
performance of its basic mission and was a management preroga-
tive.\(^3\)  

ACCORDINGLY, WE AFFIRM the decision of the hearing officer, and  
WE ORDER the charge herein be, and it hereby  
is, DISMISSED.

DATED: December 4, 1981  
Albany, New York

\[\text{Signature}\]  
Harold R. Newman, Chairman

\[\text{Signature}\]  
Ida Klaus, Member

\[\text{Signature}\]  
David C. Randles, Member

\(^3\) We note that there is no indication in the record that the  
transfer of duties was undertaken to undermine the Association's  
status as negotiating representative of the unit employees or that the transfers would nullify the collective bargaining agreement.