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Board (PERB)

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3-26-1982

## State of New York Public Employment Relations Board Decisions from March 26, 1982

New York State Public Employment Relations Board

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## State of New York Public Employment Relations Board Decisions from March 26, 1982

### Keywords

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

### Comments

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STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of	:	#2A-3/26/82
CITY OF BUFFALO,	:	
	:	<u>BOARD DECISION AND ORDER</u>
Respondent,	:	
-and-	:	
BUFFALO POLICE BENEVOLENT ASSOCIATION,	:	<u>CASE NO. U-5310</u>
Charging Party.	:	

JOSEPH P. McNAMARA, ESQ. (ANTHONY C. VACCARO, ESQ., of Counsel), for Respondent

SARGENT & REPKA, P.C. (NICHOLAS J. SARGENT, ESQ., of Counsel), for Charging Party

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) took improper unilateral action by changing the hatband worn by police officers from black plastic to silver metallic. The record shows that until January 18, 1981, the uniform worn by police officers employed by the City included a black plastic hatband which was attached to the front of the eight-pointed police hat by two buttons. On that date the City issued a general order to all police personnel, effective immediately, which changed the black plastic hatband to one which is silver metallic. This change was made unilaterally.

Although not specified in the charge, the cost of a hatband, which is approximately \$2.00, is borne by the individual police officer. This was revealed at the hearing which was held on September 3, 1981. The hearing also revealed that PBA's agreement

with the City provides for an annual uniform allowance of \$300.00 out of which employees are obligated to maintain and replace all items of clothing.

In dismissing the charge, the hearing officer concluded that the function of a hatband, like that of a badge, is to better identify the police officers. He further concluded that the choice of hatband did not impact upon employee comfort. Thus, he distinguished the City's action from those imposing grooming standards, which involve terms and conditions of employment, and applied the Board's reasoning in County of Onondaga, 14 PERB ¶3029 (1981), which held that the change of a badge is a management prerogative.

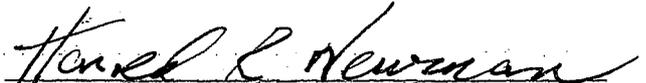
In dealing with the question whether the change in the hatband constituted improper unilateral action by reason of the \$2.00 cost, the hearing officer noted that the charge did not allege any such impropriety. He further concluded that the record did not establish that the change was improper in that, by agreeing upon a clothing allowance, the parties might have contemplated such expenses.

We affirm the decision of the hearing officer for the reasons stated therein. We also note that the alleged unilateral action was taken by the City on January 18, 1981, and that no complaint was made about the additional cost until, at least, September 3, 1981. A complaint regarding that additional cost cannot now be considered because more than four months elapsed between the unilateral action and the earliest date at which we might interpret the complaint as having been made. In City of Mount Vernon, 14 PERB ¶3037 (1981), we stated that no violation could be found

if it were not alleged in the charge and could not be alleged in a timely amendment of the charge.

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

DATED: March 25, 1982  
Albany, New York

  
Harold R. Newman, Chairman

  
Ida, Klaus, Member

  
David C. Randles, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of	:	#2B-3/26/82
CITY OF WHITE PLAINS,	:	
Respondent,	:	
-and-	:	<u>BOARD DECISION AND</u>
PROFESSIONAL FIRE FIGHTERS ASSOCIATION,	:	<u>ORDER</u>
LOCAL 274, IAFF and WILLIAM C. HARMON,	:	<u>CASE NO. U-5369</u>
Charging Parties.	:	

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RAINS & POGREBIN, ESQS., (PAUL J. SCHREIBER,  
of Counsel), for Respondent

GRAE & ROSE, ESQS., for Charging Parties

This matter comes to us on the exceptions of the Professional Fire Fighters Association, Local 274, IAFF (Local 274) and William C. Harmon (Harmon) (Charging Parties) to a hearing officer's dismissal of their charge that the City of White Plains (City) did not pay Harmon for two of the days that he spent at the hearing in a prior case that was also brought by the Charging Parties against the City. In that case we affirmed a hearing officer's decision dismissing the charge which had alleged that Harmon was discriminatorily passed over for promotion. City of White Plains, 14 PERB ¶3097 (1981). Harmon attended all six days of the hearing pursuant to a subpoena by the attorney who represented him. Of the six days, he had been scheduled for regular duty on four, and he was paid his salary for two of those days. He and Local 274 now assert that he should have

been paid his salary on the other two days for which he was scheduled for work. They base this assertion on the City's alleged past practice of always paying fire fighters for time spent at a judicial or administrative proceeding when the fire fighter's attendance had been compelled by subpoena.<sup>1/</sup> Six other unit employees were subpoenaed to testify in Charging Parties' prior case and all were paid.

In dismissing the charge, the hearing officer determined that the City's refusal to pay Harmon for his attendance at the hearing was not a per se violation and that there was no evidence of improper motivation. As to the first point, he cited City of New York Environmental Protection Administration, 10 PERB #13009 (1977). In that case the employer had refused to grant an employee paid leave to attend a proceeding on a charge brought by him and by his union even though the employer had granted paid leave to nonparty-witnesses. We dismissed the charge saying that the employer had a right to make a distinction "between a party-witness who had a personal interest in the case and all other witnesses." The hearing officer found the circumstances in the two cases to be similar and he concluded that our decision in the prior case was applicable here.

In determining that there was no improper motivation, the hearing officer noted that the record was devoid of evidence that the City had ever paid a party-witness for his attendance

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<sup>1/</sup> In the prior case Harmon was instructed by the attorney who had subpoenaed him to continue to attend the hearing after he had completed his testimony because he might be called as a rebuttal witness.

at a judicial or administrative hearing except for the two days on which Harmon was paid.<sup>2/</sup> According to the hearing officer, that one exception, which he noted may have been occasioned by an administrative error on the part of the City, did not create a precedent on which Harmon could rely. The hearing officer also noted that the City's action was consistent with an ordinance that had been enacted in 1947, 20 years before the enactment of the Taylor Law, which provides:

On proof of the necessity of jury service or attending court for other than personal matters, leave of absence shall be granted with pay to all employees, less amount received for jury or witness fees. (emphasis supplied)

Thus, according to the hearing officer, the City was merely applying its long-standing policy when it did not pay Harmon.

In their exceptions, the Charging Parties assert that the hearing officer erred both in finding the absence of a per se violation and the absence of an improper motivation. As to the first, it would distinguish New York City Environmental Protection Administration on the ground that the procedure in that case had been negotiated, while the terms of the ordinance in the instant case were not. This distinction has no relevance to the questions of coercion, interference and discrimination that are raised by the charge herein. Moreover, there is no indication that the union in the instant case ever sought to negotiate the subject.

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<sup>2/</sup> Except for Harmon, there is no indication in the record of a person with a personal interest in a case ever seeking his salary for a day on which he attended a judicial or administrative proceeding.

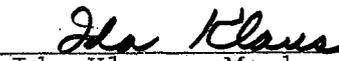
Charging Parties also argue that Harmon's interest in the prior case is irrelevant to his right to be paid because the improper practice procedure is designed to protect public rather than private interests. In effect, this argument calls for the overruling of New York City Environmental Protection Administration. We see no reason to do so. While the primary purpose of the improper practice procedure is to protect the public interest, it protects private interest as well. Indeed, under the Taylor Law, a charging party must prove its own charge or have it dismissed.

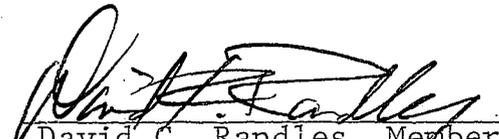
As to the issue of improper motivation, Charging Parties cite record pages and exhibits which do not establish its position. They merely show that witnesses at judicial and administrative proceedings who were not also parties were paid their salaries for time spent at the proceedings.

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

DATED: Albany, New York  
March 25, 1982

  
Harold R. Newman, Chairman

  
Ida Klaus, Member

  
David C. Randles, Member

7417

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of	:	#2C-3/26/82
TOWN OF KORTRIGHT,	:	
	:	
Respondent,	:	<u>BOARD DECISION</u>
	:	
-and-	:	<u>AND ORDER</u>
	:	
AMALGAMATED INDUSTRIAL UNION, LOCAL 76-B	:	
AND ITS DIVISIONS, LOCAL 92-76 OF THE	:	<u>CASE NO. U-5325</u>
UNITED FURNITURE WORKERS OF AMERICA,	:	
AFL-CIO,	:	
	:	
Charging Party.	:	

GOVERN, McDOWELL & BECKER, ESQS. (ROBERT H.  
McDOWELL, ESQ., of Counsel), for Respondent

HAROLD CHETRICK, ESQ., for Charging Party

This matter comes to us on the exceptions of the Town of Kortright to a hearing officer's determination that there was merit in the charge of Amalgamated Industrial Union, Local 76-B and Its Divisions, Local 92-76 of the United Furniture Workers of America, AFL-CIO (Local 76-B) that it discharged Burnett Burnside from its Highway Department because he organized the employees of the Highway Department on behalf of Local 76-B. The hearing officer decided that the Town's action violated §209-a.1(a) and (c) of the Taylor Law, and his remedial order included a direction to the Town to reinstate Burnside and to reimburse him for pecuniary losses suffered by reason of the layoff.

Kortright is a small town which had five employees in its Highway Department in early 1981. With Burnside taking a leadership role, the employees decided to affiliate with Local 76-B, and in January 1981, Local 76-B wrote to the Town asking for

recognition. Town Supervisor Robertson telephoned each of the employees and ascertained that four of the five of them desired representation by the union.<sup>1/</sup> He advised the Town Board of the results of his telephone poll and, on February 14, the Town Clerk wrote Local 76-B acknowledging that a majority of the Highway Department's employees wished to be represented by it. Recognition was granted on March 4, 1981.

On March 2, 1981, however, the Town Board voted to lay off one Highway Department employee, allegedly in order to conserve the funds of the Highway Department. The effective date of the layoff was to be March 20, 1981. Burnside, who was the least senior employee, was the employee who was laid off.

In County of Suffolk, 11 PERB ¶3105 (1978), we determined that a discriminatory discharge was established when the public employer knew of the union activity of the employee who was discharged and the reason given by the employer to explain the discharge is not convincing. Applying that test here, we must determine whether the Town knew that Burnside had played an active role in organizing the employees on behalf of Local 76-B and whether the Town's stated reason for discharging Burnside was pretextual. The hearing officer concluded in the affirmative as to both points.

We affirm his conclusions. In doing so, we note that the Town has raised a serious question as to whether Burnside's testimony should be credited. That testimony indicated that the Town knew that he had taken a leadership role in organizing his fellow employees on behalf of Local 76-B and that it discharged him because of these activities. We credit this testimony of Burnside because

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<sup>1/</sup> The charge does not complain about the taking of this poll and we, therefore, do not discuss the propriety of Robertson's action in taking it.

the testimony of Highway Superintendent Craft establishes these same facts.

At the hearing Craft was asked whether he noticed a different attitude on Mr. Burnside's part at a time when he, Craft, knew that the employees were thinking of joining a union. He answered:

"Yeah, Bernie was always having his little meetings off in the corner and it got back to me that he was after my hide . . . every time I'd come in, he'd be over in the corner talking to a group of men. Never anything anybody could understand. I knew something was on his mind, I didn't know what . . . It was quite obvious there was something going on, but I didn't know what it was."

On this testimony, it was reasonable for the hearing officer to conclude that Craft associated Burnside's meetings with this organizing activity.

Craft further testified that the Department could not be run properly with only four employees but asserted that if that were all the money that was available then the Department would have to get along. This would indicate that Burnside was needed by the Department, but that the Department had a higher priority need for the money that would have paid Burnside's wages. However, this implication is not supported by the record. There was testimony by Town employees that Craft had told them that Burnside was laid off both because of unanticipated expenses in blacktopping roads and because the union was starting up. The Town only acknowledges giving the first reason, which presumably accounts for the higher priority need for Highway Department funds. The record shows, however, that the higher priority need was the resurfacing of a road which, as of the date of the close of the record, the Town had not yet decided whether to resurface.

7420

Finally, Superintendent Craft acknowledged that concern over unionization was a factor in the Town's decision to reduce the number of employees in the Highway Department. He said,

"Well, he [Burnside] had spoken to me. He asked me if the union had anything to do with it. I says, really, I said, 'I think yes, 'cause the union is going to expect more money for the men and our budget and the town set up, the way it is, which is strictly rural, that they will only go for four men in the town highway crew.' That was all the conversation right there."

The hearing officer properly found it significant that Superintendent Craft made the statement before bargaining had begun and before demands were even exchanged. Thus, a decision to lay off an employee, merely for the anticipated effects of bargaining, would have been premature.

The Town contends further that there is no evidence in the record of animus against Local 76-B. On the record, Craft asserted that he was not fighting Burnside's union but was only unhappy about his tactics. In Freeport UFSD, 12 PERB ¶3038 (1979) we said, "animus against an employee organization is not an essential element of a violation of §209-a.1(a) and (c) of the Act." The facts in that case were similar to those in the matter before us. An employee was transferred because he engaged in activities that were protected by the Taylor Law. The employee's supervisor was disturbed by the activities even though the record contained no evidence

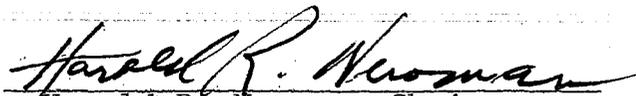
that he felt animus towards the union itself. The transfer was found to have been made for the purpose of interfering with the employee's activities and, therefore, violated §209-a.1(a) and (c) of the Taylor Law. The same conclusion must be reached with regard to the Town's discharge of Burnside.

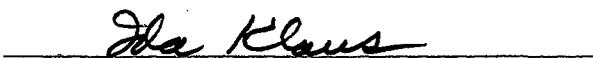
NOW, THEREFORE, WE ORDER the Town of Kortright:

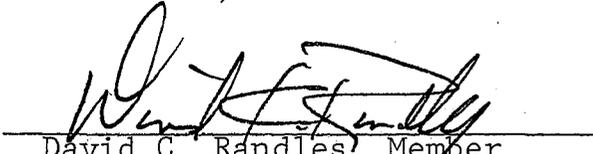
1. to offer Burnett A. Burnside reinstatement to his former position forthwith;
2. to make Burnett A. Burnside whole for any loss of pay and benefits suffered by reason of his layoff from the date thereof to the date of offer of reinstatement, less any earnings derived from other employment obtained as a result of the layoff, with interest on this sum computed from the date of the layoff at the rate of three percent per annum;
3. to cease and desist from interfering with, restraining, coercing, or discriminating against its employees for the exercise of rights protected by the Act;
4. to conspicuously post a notice in the form attached at all locations throughout the Town ordinarily used to communicate

information to unitsemployees.

DATED: March 25, 1982  
Albany, New York

  
Harold R. Newman, Chairman

  
Ida Klaus, Member

  
David C. Randles, Member

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 Highway Department employees that

(1) The Town of Kortright forthwith will offer Burnett A. Burnside reinstatement to his former position.

(2) The Town of Kortright will make Burnett A. Burnside whole for any loss of pay and benefits suffered by reason of his layoff from the date thereof to the date of reinstatement, less any earnings derived from other employment obtained as a result of the layoff with interest on this sum computed from the date of the layoff at the rate of three percent per annum.

(3) The Town of Kortright will not interfere, with, restrain, coerce, or discriminate against its employees for the exercise of rights protected by the Act.

..... TOWN OF KORTRIGHT .....

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.*

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of :  
JAMESTOWN CITY SCHOOL DISTRICT, : #3A-3/26/82  
Employer, :  
-and- :  
JAMESTOWN EDUCATIONAL SUPPORT PERSONNEL : Case No. C-2357  
ASSOCIATION, NYEA, NEA, :  
Petitioner, :  
-and- :  
JAMESTOWN CITY SCHOOLS CLERICAL UNIT #6317, :  
CHAUTAUQUA COUNTY LOCAL #807; CSEA, :  
Intervenor. :

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that

Jamestown Educational Support Personnel Association, NYEA, NEA has been designated and selected by a majority of the employees of the above named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: All clerical and office employees.

Excluded: Senior Stenographer, Administrative Assistant for Instruction; Account Clerk Typist I, Food Service; Account Clerk Typist I, Treasurer's Office; Principal Clerk, Business Office; Senior Stenographer, Superintendent's Office; Stenographer, Superintendent's Office; Personnel Clerk; Clerk of the Board; Typist, Personnel; Personnel Assistant.

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with

Jamestown Educational Support Personnel Association, NYEA, NEA and enter into a written agreement with such employee organization with regard to terms and conditions of employment, and shall negotiate collectively with such employee organization in the determination of, and administration of, grievances.

Signed on the 25th day of March , 1982  
Albany, New York

*Harold R. Newman*  
Harold R. Newman, Chairman

*Ida Klaus*  
Ida Klaus, Member

*David C. Randles*  
David C. Randles, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of : #3B-3/26/82  
:   
NIAGARA COUNTY SEWER DISTRICT NO. 1, :   
:   
Employer, : Case No. C-2418  
-and- :   
:   
TEAMSTERS, LOCAL 264, :   
:   
Petitioner. :   
:

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that

Teamsters, Local 264

has been designated and selected by a majority of the employees of the above named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: Sewage Treatment Plant Operator, Sewage Treatment Plant Operator Trainee, Sewer Maintenance Man, Sewer Maintenance Man II, Senior Sewer Maintenance Man.

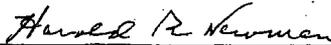
Excluded: All other employees.

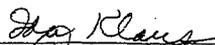
Further, IT IS ORDERED that the above named public employer shall negotiate collectively with

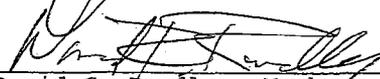
Teamsters, Local 264

and enter into a written agreement with such employee organization with regard to terms and conditions of employment, and shall negotiate collectively with such employee organization in the determination of, and administration of, grievances.

Signed on the 25th day of March , 1982  
Albany, New York

  
Harold R. Newman, Chairman

  
Ida Klaus, Member

  
David C. Randles, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of :  
EAST NORTHPORT FIRE DISTRICT, : #3C-3/26/82  
Employer, :  
-and- : Case No. C-2272  
LOCAL 144, DIVISION 100, NURSING HOME & :  
ALLIED HEALTH SERVICE UNION, SERVICE :  
EMPLOYEE'S INTERNATIONAL UNION, :  
Petitioner. :

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that

LOCAL 144, DIVISION 100, NURSING HOME & ALLIED HEALTH  
SERVICE UNION, SERVICE EMPLOYEE'S INTERNATIONAL UNION

has been designated and selected by a majority of the employees of the above named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: Full-time Custodial Worker I

Excluded: All other employees.

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with

LOCAL 144, DIVISION 100, NURSING HOME & ALLIED HEALTH  
SERVICE UNION, SERVICE EMPLOYEE'S INTERNATIONAL UNION

and enter into a written agreement with such employee organization with regard to terms and conditions of employment, and shall negotiate collectively with such employee organization in the determination of, and administration of, grievances.

Signed on the 25th day of March , 1982  
Albany, New York

Harold R. Newman  
Harold R. Newman, Chairman

Ida Klaus  
Ida Klaus, Member

David C. Randles  
David C. Randles, Member